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Mehrdad Alipour

**Negotiating Homosexuality
in Islam**

*A Legal-Hermeneutical Examination
of Modern Shi'i Discourse*

BRILL

Negotiating Homosexuality in Islam

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By

Mehrdad Alipour



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Notes on Transliteration, Translation, and Dates

Transliteration in this study follows the standard Arabic conventions for both Arabic and Persian. The four extra Persian letters will be transliterated as follows:

p	پ
ch	چ
zh	ژ
g	گ

In Arabic passages, the *tā' marbūṭa* is recorded as an *-a* (with one exception in an *idāfa* form, which is recorded as *-at* before a *hamzat al-waṣl*). In Persian passages, the *tā' marbūṭa* is also recorded as *-a* (except where it has been converted to a *tā'* in the course of its transplantation into Persian when it is written *-at*). The Persian *idāfa* is recorded as *-i* or *-yi* as appropriate.

The terms *ḥadīth* and *khavar* are used interchangeably to denote “tradition.” The terms *aḥādīth* and *ḥadīths* are used interchangeably as the plural form of *ḥadīth*. And the terms *akhbār* and *khavars* are used interchangeably as the plural form of *khavar*. Furthermore, it will be used Shi'i, not Shī'i, and Sunni, not Sunnī.

As far as translations of the Qur'ānic verses are concerned, I have generally used *The Study Quran* of Nasr et al, except for a few sections which are highlighted. *Aḥādīth* and other Arabic and Farsi texts have been translated by the author unless explicitly stated otherwise.

Throughout this work, dates are given as the following format: Common Era and Hijrī Qamarī dates without qualification, and 'Sh' is added to Hijrī Shamsī dates. In the Bibliography, however, 'H' is added to Hijrī Qamarī dates.

Regarding individuals whose research has been cited here in Arabic and Persian, their names are written as follows: with 'al' when their works in Arabic are cited and without 'al' when their studies in Persian are mentioned.

Abbreviations

APA	The American Psychological Association
GCS	gender confirmation surgery
GLQ	<i>A Journal of Lesbian and Gay Studies</i>
Ḥ	ḥadīth
H	Hijrī Qamarī
Q.	Qurʾān
Sh	Hijrī Shamsī
HS	<i>The History of Sexuality</i> , Michel Foucault
HS1	<i>The History of Sexuality</i> , Volume 1, Michel Foucault

Introduction

The present book is a study of the discursive spaces on homosexuality in modern Shi'i or, more precisely, Twelver Imāmi legal scholarship.¹ While sexual diversity such as homosexuality is increasingly accepted in Western societies, many Muslim societies, including Shi'i communities, are reluctant to accept or tolerate it and often mete out harsh punishments to sanction non-heterosexual individuals. Today, both in Muslim-majority and in (Western) Muslim-minority contexts, traditional scholars of Islam and grassroots communities alike often oppose sexual diversity based on arguments that are fuelled by patriarchal interpretations of the received tradition. To explain this contrast, many cultural, social, historical, and political factors have been adduced,² not least Islamic patriarchal theology and leadership.³ However, despite such patriarchal understandings of Islam, contemporary grassroots-level activists and a few Muslim reformist scholars advocate for a more tolerant attitude and speak of Islam's inbuilt tolerance of sexual diversity, including homosexuality.

Whereas in the last five decades Sunni reformist scholars have discussed and presented several alternative legal and theological interpretations for or against homosexuality,⁴ Shi'i and Persian scholars have often preferred not to engage in this scholarship from within Shi'i legal and theological sources. However, since the discussion on gender and sexuality in Imāmi discourse

-
- 1 Although in this study, the term Shi'i Islam will generally be used, the work addresses homosexuality in Twelver Imāmi school, which means other branches of (sometimes called) Shi'i Islam, such as Zaydiyya or Ismā'īliyya, are beyond the scope of this project. In addition, I will be using the terms 'Shi'i', 'Imāmi Shi'i', 'Twelver Imāmi', 'Imāmi', and 'Imāmiyya' interchangeably in this work.
 - 2 See, for example, Afary, *Sexual Politics in Modern Iran*; Habib, *Islam and Homosexuality*; El-Rouayheb, *Before Homosexuality*; Geissinger, "Islam and Discourses of Same-Sex Desire"; Murray and Roscoe, *Islamic Homosexualities*; Najmabadi, *Women with Mustaches and Professing Selves*; Omar, "In Search of Authenticity"; Rahman, *Homosexualities, Muslim Cultures and Modernity*; Rowson, "The Categorization of Gender and Sexual Irregularity" and "Two Homoerotic Narratives from Mamlūk Literature."
 - 3 See, for example, Adamczyk and Pitt, "Shaping attitudes about homosexuality": Jahangir and Abdullatif, *Islamic Law and Muslim Same-Sex Unions*; Kugle and Hunt, "Masculinity, homosexuality and the defence of Islam"; Kugle, *Homosexuality in Islam*.
 - 4 See, for example, Abdul-Ra'uf, *The Islamic View of Women and the Family and Marriage in Islam*; Ali, *Sexual Ethics and Islam*; Bouhdiba, *Sexuality in Islam*; Duran, "Homosexuality in Islam"; Habib, *Female homosexuality*; Jahangir and Abdullatif, *Islamic Law and Muslim Same-Sex Unions*; Hamzic, *Sexual and Gender Diversity*; Jamal, "The Story of Lut"; Kugle, "Sexual diversity in Islam" and *Homosexuality in Islam*; Nahas, *Islam en homoseksualiteit* and *Homo en moslim—hoe gaat dat samen?*

was initiated through Āyatallāh Khumaynī's *fatwās* (Islamic juristic opinions) in the 1960s and 1980s legalising gender confirmation surgery (GCS) for transgender people, this silence cannot conveniently be justified. Although most Shi'i reformist and (neo-)traditional scholars (*'ulamā'*) are usually wary of discussing the topic of homosexuality, a very small group of scholars, such as Arash Naraghi and Muḥsin Kadīwar,⁵ have dared to open up the debate from a Shi'i perspective. However, their discussions are either in the form of public debates⁶ or issuing Islamic *fatwās*, without mentioning the logic behind the *fatwās*, as it is common among Imāmī jurists.⁷

To enrich the existing scholarship on the legal ethics of sexual diversity in Islam, this study, thus, investigates homosexuality in modern Imāmī law. It offers a scholarly assessment of the Shi'i legal-hermeneutical vectors demarcating the space between the two poles of prohibition and acceptance of homosexuality. The present research was undertaken on the premise that modern Imāmī legal tradition on homosexuality is in fact more flexible and dynamic than one might expect. To address this essential issue, the study is built around the following constructive question: *what are the discursive spaces on homosexuality in contemporary reflections within modern Shi'i legal scholarship?*

Responding to this central question, the study is premised on the notion that Imāmī legal sources consist of a tradition of sacred (textual) sources, intellectual reasoning, a vast stockpile of (often contrasting) interpretations of these sources, and a distinguished methodological repertoire called *ijtihād*. Following the same methodology, these textual-exegetical and intellectual-rational aspects will be described, analysed, and critiqued in this work. By contributing to this line of research, the study aims (1) to understand from a new perspective how Shi'i jurists have debated, and continue to debate, the topic of homosexuality, and thereby to identify the potential discursive spaces on this topic in modern Imāmī context; and (2) to integrate the study of Imāmī law on gender and sexuality into the broader field of Islamic legal studies.

5 Abū l-Qāsim Fanā'ī and Akbar Ganjī might be added to this very short list of Iranian scholars who have discussed homosexuality (see Fanā'ī, *Akhlāq-i dīn-shīnāsī*; Ganjī, "Rawshan-fikri-yi dīnī wa mas'ala-yi hamjinsgarā'ī"). However, it is important to remember that Ganjī, in fact, has not investigated the topic from an Islamic perspective. Moreover, although Fanā'ī briefly advocated for tolerance towards homosexual people from an ethical point of view, he did not attempt to investigate the problem of (in)compatibility between Islamic law and same-sex sexual relationships.

6 See, for example, Naraghi, "The Qur'ān and Human Rights of Sexual Minorities."

7 See, for example, Kadīwar, "Ḥuqūq-i aqalliyyat-i jinsi" and "Aḥkām-i taklifi wa waq'ī-yi hamjinsgarā'ī."

1 Conceptual Framework

To explain where my research on homosexuality in Islam stands, it is important to clarify the conceptual framework of this study. There are, at least, two major topics to be covered in terms of the conceptual framework: the conceptualisation of homosexuality and the problem of essentialism or social constructionism concerning homosexual orientation. However, to consider the concept of modern homosexuality in sufficient depth, I found it more practical to dedicate a chapter (Chapter 3) to investigating the notion of homosexuality and its discrepancies with pre-homosexual categories. Nevertheless, it would be useful to briefly indicate the notion of homosexuality here, too.

Scholars such as Foucault, McIntosh, Weeks, and Halperin, as shall be discussed, uphold that homosexuality is essentially grounded on *sexuality*, not gender hierarchies, economic class, social status, or power relations. The concept of sexuality is the main characteristic of our modern time, which allows individuals to identify and orient their whole life based on their sexuality. This is why various sexuality categories, such as homosexuality, heterosexuality, bisexuality, and asexuality, have appeared. Thus, this approach is mainly viewed as a new way of identification of a group of people based on their sexuality, sexual orientation, sexual object-choice, and sexual behaviour. This current study, concurring with the aforementioned scholars, counts homosexuality as an egalitarian way of life between same-sex peers which presumes sameness and mutuality in terms of social status, sexual desire, and choice between mates. Such a category is not based on power relations or on hierarchy in gender, sexual role, or age differences. Thus, it may categorically happen between two adults (two males or two females) who have a mutual sexual attraction to same-sex mates, choose to consensually practise same-sex sexual relationships, and identify themselves as homosexual men or women.

It is, however, true that not all individuals who identify as *homosexual* and even contribute to LGBTQI+ activities practise or wish to practise same-sex sexuality. It is also true that not all people who at some point in their life practised homosexual behaviours or intend to do so in the future consider themselves to be *homosexual*. The former group, made up of individuals who identify as *homosexual* but do not act upon their sexual desire, is not formally excluded from this study, though it is not central to the discussion. This is because although the arguments presented in this research directly apply to the stronger case (namely, to the group of individuals who identify as *homosexual* and practise their same-sex sexual desire and orientation), if those arguments are successful, they can readily be applied to the weaker case (namely to the group of individuals who identify as *homosexual* but do not practise their

same-sex sexual desire and orientation) as an *a fortiori* argument. This means that, if one can successfully show that homosexuality, as the consensual egalitarian same-sex sexual desires, orientations, and practices of those individuals who identify as *homosexual*, is not prohibited in Islam, an *a fortiori* argument can show that same-sex sexual desire and orientation per se are not prohibited in Islam, too. Moreover, as I have argued elsewhere, according to Muslim jurists, desiring (and even an intention to perform) a sinful act (without taking actions to perform it) is not deemed prohibited in itself according to various traditional Muslim scholars.⁸

However, those people who at some point in their life have practised or will practise homosexual behaviours while not considering themselves *homosexual* are excluded from the scope of this study. Such individuals might practise same-sex sexuality with minors (a group which might be categorised as paedophiles, or pederasts in case of male same-sex sexual behaviour), or practise it in certain circumstances (say, in prison, as there is no access to the opposite sex), or they might be categorised as bisexual people who are attracted to both same-sex and opposite-sex sexual relationships; a group which is categorically considered different from homosexuality.⁹ The logic for not debating these three groups in the current study, which is devoted to the topic of homosexuality, is clear. However, there seemingly exist individuals who desire same-sex sexuality and practise consensual egalitarian sexual relationships with same-sex mates, but, for whatever reasons, do not identify as *homosexual*. This group of people is also excluded from this study. This is because, in line with Weeks, identification with homosexuality became a necessary political choice for gays and lesbians in the modern world to achieve their rights and articulate their responsibilities simultaneously.¹⁰ Moreover, in accordance with the methodology of this study, namely the modern Shi'i paradigm of *ijtihad*, when a given topic is investigated from an Imāmi legal perspective, it is necessary to carefully conceptualise the topic first. Then one can explore the Islamic legal ruling on the topic at the second stage. Therefore, if a group of people practise homosexuality but do not identify as *homosexuals*, they would not categorically be associated with the subject under study, namely homosexuality. Thus, the derived legal ruling on the topic of homosexuality would not include them.

However, one might argue that the application of the term homosexuality is not strictly relevant to the admission of the individuals themselves. Instead, once given individuals' sexual practices fit into the category of homosexuality,

8 Alipour, "Essentialism and Islamic Theology of Homosexuality."

9 Galupo, "Bisexuality"; Gooß, "Concept of Bisexuality."

10 Weeks, *Against Nature*, 83–85.

society would consider and identify them as *homosexuals*. Given this note, it might suffice to hold that homosexuality applies to these individuals, too. Therefore, any legal ruling on homosexuality would include them as well. In this case, such individuals can be located within the scope of the study in hand.

Scott Kugle also develops a notion of homosexuality which conceives of it as a modern sexual identity grounded in mutual and consensual same-sex sexual orientation.¹¹ However, he reconciles homosexuality in Islam from an essentialist approach. Thus, homosexual orientation, in his view, is an inherent or dispositional desire, not socially constructed. Moreover, Kugle employs the theory of Islamic liberation theology to interpret Islamic scriptural texts concerning same-sex sexual behaviours. Later in this chapter, I will discuss Kugle's view further and argue that his approach is neither inclusive nor applicable to this study, which is principally based on the modern Shi'i paradigm of *ijtihād*.

Unlike the current study, Murray and Roscoe, concurring with John Boswell, correlate modern homosexuality with same-sex sexual behaviours that existed in early and medieval Muslim societies.¹² Samar Habib also connects modern female homosexuality or lesbian relationships with the early and medieval female same-sex sexual practices called *siḥāq*.¹³ However, in Chapter 3, I shall argue that this approach is not supported by historical evidence. Following the genealogy of homosexuality, I will further demonstrate that the pre-homosexual categories practised by early and medieval Muslim societies are different from modern homosexuality.

Geissinger, on the other hand, carefully pinpoints the distinctions between modern (Western) phenomena of gay and lesbian relationships and those various same-sex sexual behaviours that existed in the past or in other cultures.¹⁴ Geissinger also emphasises the limitations of using 'same-sex desires or acts' to address these pre-gay and lesbian behaviours. This is because the concept of *same-sex* assumes that there exists only *opposite sex*.¹⁵ Given this assumption, the rhetoric of gender binary, which has commonly been debated in contemporary Western scholarship, should be seen as a universal norm regardless of variations in time, place, and culture.

11 Kugle, *Homosexuality in Islam*, 9 and 44–45. Arno Schmitt also presents a similar notion of homosexuality and provides an in-depth analysis of *liwāt* and its differences with homosexuality in present time (Schmitt, "Liwāt im Fiqh," 49–110).

12 See, for example, Murray and Roscoe, *Islamic Homosexualities*; Boswell, *Christianity, Social Tolerance, and Homosexuality*.

13 See Habib, *Female Homosexuality*, in particular, chap. 4.

14 See Geissinger, "Islam and Discourses of Same-Sex Desire."

15 *Ibid.*, 71.

However, as Geissinger further demonstrates, it is not accurate to equate medieval debates on gender and same-sex sexual behaviours to modern discourses.¹⁶ Gender and sex in modern discourses are often perceived as a dichotomous oppositional norm of male and female. However, according to medical views presented by classical Greeks, medieval Christians, and pre-modern Muslims, humans were categorised as entities who existed on a span of humankind. In this range, as Geissinger remarks, free males were physically, intellectually, and spiritually considered as the complete and full manifestation of humanness, which was followed by lower and imperfect degrees of humanity, including females. Thus, in this context the bodies of females and males were regarded as different in degree, but not in kind.

Classical Muslim jurists, Geissinger adds, employed a similar perception of gender in their legal debates because the specification of a person's status in their hierarchical society was based on the person's gender. Therefore, in cases of ambiguous individuals (when the ambiguity pertained to their biological appearance and genitalia) jurists believed that the gender-ambiguous persons, if possible, must be categorised either as female or male. Nevertheless, these jurists recognised other gender categories such as effeminate (*mukhannath*) people, too; people who were not complete males, but contained a degree of humanity.

This classification was possible because the medieval jurists, as Geissinger notes, viewed gender as a spectrum spanning from being male to various degrees of not-being male; a classification which does not fit into the contemporary binary conceptions of male and female. Geissinger argues that there are controversies over natural sexual relationships in modern discourses. Therefore, people (men or women) often speak of their attraction to opposite sexes because it is widely assumed that sexual desire naturally exists between opposite sexes. However, according to Geissinger, in the medieval Muslim discourses, this debate was not significant. This is because, given the aforementioned notion of gender categories, premodern sources do not consider same-sex desires as unusual on various occasions. According to these scholars, Geissinger states, "while the desire of an adult man to be penetrated is usually presented in pathological terms, men's desire or passionate love for male youths is understood to be only 'natural', at least for those men with refined sensibilities."¹⁷ I shall pursue this last issue and raise a similar point on male active pederasty in Chapter 3.

16 Ibid., 72–73.

17 Ibid., 73.

There is yet a group of scholars who acknowledge that the modern concepts of gay, lesbian, and homosexuality are indeed different from the classical Muslim jurists' terminologies concerning male and female same-sex sexual relationships, namely *liwāṭ* and *siḥāq*.¹⁸ The discussion on *liwāṭ* and *siḥāq*, according to these scholars, focuses on sexual practice, while the modern discourse of homosexuality often revolves around sexual orientation, desire, and identity.¹⁹ Among others, Christian Lange dedicates his debate on *liwāṭ* and *siḥāq* to the Sunni legal tradition of the *Saljūq* period (between the eleventh and thirteenth centuries). He carefully draws his discussion on the classical legal notions of *liwāṭ* and *siḥāq* as sinful and punishable acts in Islam. He demonstrates that how the Sunni legal schools have shaped different views on these categories and grounded their understandings in various revelatory texts of the Qur'ān and *sunna*, legal principles, such as the legal analogy (*qiyās*) between *liwāṭ*, *siḥāq*, and *zinā* (fornication or adultery), and moral proofs.²⁰

Sara Omar, similarly, though more broadly, examines the legal treatment of the acts of *liwāṭ* and *siḥāq* in classical Sunni law.²¹ She elaborates on a complex set of elements that classical jurists applied to form specific legal treatments for those who practise same-sex sexual behaviours. The first element, according to her, relates to the jurists' different applications of legal analogy (*qiyās*) to argue for the similarities or differences between *liwāṭ*, *siḥāq*, and *zinā* which resulted in similar or different punishments for practising each of these acts. The second factor, as she notes, deals with the jurists' cultural conceptions of sexual intercourse which were shaped based on the exclusive male act of anal penetration, and thus resulted in different punishments for *liwāṭ* and *siḥāq* in some occasions.²² Finally, according to Omar, the third element concerns the individuals' legal status as it is articulated by the social hierarchy in classical legal discourse. This element considers the partners of the acts of *liwāṭ* and *siḥāq* in the sense of whether they are both adults or one partner is minor boy or girl, and whether both partners are free or one is a slave (boy or girl).²³

Although this last point shall be discussed in Chapter 5, I will not construct the research in hand around these two juristic concepts exclusively. Instead,

18 Lange, *Justice, Punishment and the Medieval Muslim Imagination*, chap. 5; Omar, "From Semantics to Normative Law" and "In Search of Authenticity."

19 Omar, "In Search of Authenticity," 340.

20 Lange, *Justice, Punishment and the Medieval Muslim Imagination*, 183–214.

21 Omar, "From Semantics to Normative Law," 224.

22 *Ibid.*, 227–54.

23 As shall be noted in Chapter 5, Sara Omar demonstrates that the classical Sunni legal texts have addressed nine different possibilities in *liwāṭ* and *siḥāq* along with determination of punishments for each penetrated and penetrating person.

the current study will employ a genealogical approach towards homosexuality within early and medieval Muslim societies. It shall distinguish various pre-homosexual categories and compare and contrast them with modern homosexuality.

2 Epistemology of Homosexuality: Essentialism versus Social Constructionism

Before the 1970s, scholars largely believed that sexualities or sexual orientations were inherent dispositions that entail universal categories and discourses.²⁴ The influential works of Mary McIntosh and Michel Foucault on sexuality, however, inspired scholars of the 1980s and 1990s to articulate group identities, including sexualities, as socially constructed phenomena.²⁵ As Berg-Sørensen, Holtug, and Lippert-Rasmussen stated, in the current context of social sciences and humanities, “it has become common to distinguish between essentialist and constructivist understandings of group identities, such as gender, race, and culture.”²⁶ This discursive space is still problematic in the social sciences, and this is also the case for homosexuality. Thus, there is also the controversial question of whether homosexuality is inborn or socially constructed. Some scholars in the West, such as Ball and Halwani, defend homosexuality from an essentialist approach.²⁷ However, it seems that gender and sexuality studies in the West have been dominated by queer theory, under the influence of postmodernism; therefore, all these group identities are conceived of mostly as socially constructed. In contrast, Muslim reformist scholars who study homosexuality in Islam have used essentialist epistemology to explain a more tolerant Islamic approach towards homosexuality.²⁸ It seems that, according to these scholars, the Western “academic debate has moved far away from the practical concerns of activists, legal experts, and religious leaders.”²⁹ Essentialism, however, has different meanings for different scholars.³⁰ For Muslim scholars, an essentialist

24 Ball, “Essentialism and universalism,” 272; and Weeks, *The Languages of Sexuality*, 204.

25 See, for example, Bersani, *Homos*; Butler, *Gender Trouble*; Halperin, *One Hundred Years of Homosexuality*; Plummer, “Building a Sociology of Homosexuality,” “Homosexual Categories” and *Modern Homosexualities*; Rubin, “Thinking sex”; Weeks, *Sex, Politics and Society and Sexuality and its Discontents*.

26 Berg-Sørensen, Holtug, and Lippert-Rasmussen, “Essentialism vs. constructivism,” 39.

27 Ball, “Essentialism and universalism”; Halwani, “Essentialism, social constructionism.”

28 See, for example, Habib, *Female homosexuality*; Kugle, *Homosexuality in Islam*; Naraghi, “The Qur’an and Human Rights.”

29 Kugle and Hunt, “Masculinity, homosexuality and the defence of Islam,” 261.

30 See Phillips, “What’s wrong with essentialism?”

approach to homosexuality leads to interpretations ranging from “God’s creation,” to “biological variation,” and “early childhood experiences.”³¹ The point all these interpretations share in common is that homosexuality does not occur through rational choice.

Although one cannot ignore the political, cultural, and social context that influenced the Muslim scholars choice of an essentialist approach to homosexuality, as I argued elsewhere the driving force is theological-ethical reasoning from some verses of the Qur’ān.³² Following modern commentators of the Qur’ān, these verses show that diversity among human beings is part of the world that God created.³³ Relying on this interpretation, Kugle has argued that since the Qur’ān accepts diversity as part of God’s creative will, therefore, if homosexuality is part of that diversity, it is, indeed, accepted by the Qur’ān. In his view, homosexuality exists either because it is created by God or because it is a “biological variation” or a “childhood experience,” all of which are based on God’s divine will and not a person’s rational choice. Therefore, as he concludes, homosexuality is certainly included in the kind of diversity accepted by the Qur’ān. Moreover, if homosexual desire or orientation is inherent or inborn, according to these scholars, creating individuals with innate desires and, at the same time, prohibiting them from practising these desires is inconsistent with divine justice.³⁴

Elsewhere, I have argued that an essentialist approach is not suitable to defend all manifestations of homosexuality, not only because it is very narrow (as it excludes homosexual Muslims who believe that their sexual orientation is socially constructed) but also because it cannot even defend the view of homosexuality as an innate or natural disposition.³⁵ Briefly explained, although homosexuality as desire might be perceived as God’s creation or as inborn, it seems that solely having the desire to perform sinful acts without (the intention of) performing them is not prohibited, and is thus not punishable in Islam. This is because committing sinful acts by choice and free will is apparently the subject of prohibition and punishment within Islam. Moreover, regarding the issue of divine justice, it seems that the same argument can be applied to everything that might be desired but may not be practised in Islam. Given (neo-)traditional Muslim scholarship, one could assert that *desires* for *zinā* (sexual activities between a man and a woman outside

31 Kugle, *Homosexuality in Islam*, 2.

32 See, for example, Q. 49:13, 42:8, 11:118–119, and 30:22 (Alipour, “Essentialism and Islamic Theology of Homosexuality”).

33 See, for example, Abou El Fadl, *The place of tolerance in Islam*.

34 Kugle, *Homosexuality in Islam*, 2–3.

35 Alipour, “Essentialism and Islamic Theology of Homosexuality,” 1934–37.

marriage: fornication/adultery), pederasty, and sexual assault are all innate. Therefore, prohibiting individuals who have these desires from practising their desires—namely, practising pederasty, fornication, or sexual assault—should be inconsistent with divine justice. I seriously doubt that this consequence, namely the inconsistency of prohibiting the aforementioned acts for those who desire them with divine justice, would be accepted by scholars such as Kugle. In addition, one could also respond to the proof of divine justice that for God to create individuals with innate desires and, at the same time, prohibit them from practising their desires is not inconsistent with divine justice. This response fits well with the famous Islamic theological theory of *divine trials*, which implies that God is testing individuals who desire same-sex relationships, and he will provide them with more rewards in return if they adhere to his law and take no action.³⁶ In this sense, it is the same as when God examines individuals with other desires that may not be practised in Islam, such as desires for fornication or pederasty.

Although I tend to advocate the social constructionist epistemology to interpret homosexuality, the methodology and sorts of arguments that this study relies on are not essentially based on social constructionism. In fact, given Islamic law, a subject or phenomenon being essential/inherent, socially constructed, or scientifically invented per se is not included among the criteria of prohibition or permissibility of the subject or phenomenon in Islam. To expound, as indicated earlier, according to the majority of Muslim scholars, desires are innate. However, this does not mean that acting upon every desire is permissible in Islam. For example, the *desire* for fornication or *desire* for pederasty is often considered inherent by Muslim jurists. However, these jurists unanimously hold that practising fornication or pederasty is forbidden in Islam. By contrast, there are several socially constructed phenomena or scientifically invented subjects which are generally considered permissible, meaning that a phenomenon being socially constructed or scientifically invented does not make this phenomenon prohibited in Islam. For example, the concepts of money, currency, banking, and insurance are all socially or scientifically constructed or invented, yet Muslim jurists consider these invented phenomena permissible, and thus Muslims are allowed to use them in their daily lives.

Conversely, one might argue that, following Islamic teachings, it is not possible to distil Islamic laws from sources if these oppose the rights of God (*ḥuqūq Allāh*) or the rights of other individuals (*ḥuqūq al-'ibād*) explicitly addressed

36 See al-Ḥusaynī, “al-Ibtilā’ sunna ilāhiyya.”

in the Qur'ān or authentic *sunna*.³⁷ Therefore, practising a desire or intention is prohibited if and only if it violates the rights of God (such as blasphemy, rejecting or lying about God's prophets) or the rights of other individuals (such as practising rape, having sexual relationships with partners, such as children and beasts, who cannot choose to do it by free will, or sexually assaulting other humans). From this perspective, if one cannot justifiably demonstrate that homosexuality, whether it is essential, socially constructed, or a combination of the two, violates the rights of God or other individuals, any interpretation from Islamic sources that discriminates against homosexual Muslims and allows unjust behaviours towards them will not have authenticity, and thus should not be followed by other Muslims.

With this last point in mind, I am not going to fall into the trap of ongoing and fruitless debates on the epistemology of homosexuality in terms of essentialism or social constructionism. Instead, it would be a wise strategy to emphasise a methodology whereby one can explore whether a given topic such as homosexuality fulfils the general criteria mentioned earlier, namely to investigate whether this topic violates the rights of Allāh or the rights of other humans established in Islamic sources. For this purpose, I picked the modern Shi'i paradigm of *ijtihād* which, in my view, has the repertoires to explore the (in)compatibility between Islamic law and homosexuality. In fact, *ijtihād* is dynamic, as both opponents and defenders of homosexuality are able to use it in favour of their approaches. However, this dynamism, which is an essential characteristic of Imāmi *ijtihād*, should not be considered a flaw in *ijtihād* as it demonstrates the openness and flexibility of *ijtihād* which provide potential tools to be used for or against a given topic. Nevertheless, this clearly does not mean that both groups' claims should be taken as valid according to *ijtihād*. The (in)validity of any given outputs depends on how accurately each group has applied the methodology of *ijtihād* to a given topic and how strong the indicators or evidence which each group has ultimately provided are. In the

37 Muslim jurists often address this point in their debates on capital/divinely ordained and discretionary punishments (*al-ḥudūd wa-l-ta'zīrāt*) or in the appendix to *kitāb al-shahādāt* ('the book of testimonies') [see, for example, al-Sarakhsī, *al-Mabsūt*, 9: 36; al-Ḥillī (Muḥaqqiq), *Sharā'ī' al-islām*, 4: 125; al-Jubā'ī al-ʿĀmilī, *Masālik al-afḥām*, 14: 245]. It is a common taxonomy to divide rights into God's rights, humans' rights, and combinations of God-human rights. Following this taxonomy, lying (*kidhb*) is counted as a violation of the right of God; insulting another individual (*shatm*) is regarded as defying the right of humans, and making an offence against righteous deceased people by insulting them (*al-janaya 'alā ṣūlahā' al-mawtā bi-l-shatm*) is deemed as violating the rights of God and humans (see al-ʿĀmilī, *al-Qawā'id*, 2: 144).

following section, I will explicate the rationale for choosing this methodology over others such as reformist or feminist approaches.

3 Methodology of the Study

Scholars have been discussing homosexuality in Islam for around five decades. Inspired by Muslim feminist scholarship and its successful observation on the patriarchal reading of Islam, researchers who have conducted studies on homosexuality have mostly based their research on feminist critical epistemology and modern hermeneutical discourses.³⁸ Moreover, these studies, following the Muslim reformists, are also partly grounded in several other theological and scientific principles.

One such principle is Islamic liberation theology. The essence of liberation theology, in general, is to support oppressed groups and to stand against all kinds of injustice, violence, and discrimination. Islamic liberation theology, in particular, of which Farid Esack is one of the important representatives, assumes that any understanding of the Qurʾān or of other Islamic scriptures that allows or permits discrimination or unjust behaviour against any other Muslim individuals or groups is not authentic and reliable for Muslims.³⁹

Islamic diversity is another important principle that reformist Muslim scholars deploy to support homosexuality. According to reformist commentators of the Qurʾān, such as Abou El Fadl, the Qurʾān can be used by Muslims to easily defend an ethic of diversity and tolerance as a primary purpose of creation, one that has remained underdeveloped in Islamic theology.⁴⁰

There is still another principle, which can be categorised as the cohesion between Islam and scientific achievements. This is a significant principle that some reformist Muslims apply to interpret the Qurʾān, according to which Qurʾānic verses should cohere with scientific observations and explanations.⁴¹

Among others, Kugle, in his project on homosexuality in Islam, makes use of all these three approaches. Kugle holds that any understanding of Islam must be compatible with scientific achievements. Considering this principle essential for a progressive attitude towards the interpretation of the Qurʾān, Kugle states, “The Qurʾān must be understood in the light of observed experience,

38 See, for example, Ali, *Sexual Ethics and Islam*; Kugle, “Sexual diversity in Islam” and *Homosexuality in Islam*.

39 See Esack, *Qurʾān, Liberation and Pluralism*.

40 Abou El Fadl, *The Place of Tolerance in Islam*, 13–22 and *Reasoning with God*, in particular, chap. 12, 391–414.

41 Taqvi, *Tafsīr al-Qurʾān*.

scientific exploration, and reasoned argument about human nature.”⁴² Inspired by Esack, he also remarks that any understanding of the Qur’ān that allows discrimination or unjust behaviour to other Muslim individuals or minority groups, including homosexual people, is not authentic.⁴³ Kugle is also influenced by Abou El Fadl’s theory of Islamic ethic of diversity and attempts to extend it to an Islamic sexual diversity.⁴⁴

Although examining Islamic approaches to new arising issues, including homosexuality, through the lenses of modern disciplines, such as epistemology, hermeneutics, scientific outputs, and feminist critical theory, might result in more tolerant or accepting approaches, these frameworks are not necessarily more practical or successful in fostering a constructive dialogue between reformists and (neo-)traditional scholars (*‘ulamā’*) on modern topics. Therefore, despite the fact that I truly admire the works of scholars who have investigated homosexuality in Islam from such modern perspectives, I do not follow their path. This is because the studies which advocate the idea of cohesion between Islam and homosexuality, as Ali correctly pointed out,⁴⁵ too often discuss this issue solely from the Qur’ānic perspective and barely touch on the *sunna* (sayings, deeds, and endorsements of Muḥammad in Sunni Islam and of Muḥammad, his daughter Fāṭima, and the Twelve Imāms in Shi‘i Islam).⁴⁶ In addition, these studies do not seem to be fond of debating the rational and ethical proofs that (neo-)traditional Muslims provide against homosexuality. More importantly, such approaches appear to be inappropriate or inapplicable for the purpose of this research: to explore the discursive spaces for negotiating homosexuality in the Shi‘i legal-hermeneutical system. As indicated, there are essential principles applied by Muslim reformists to reconcile homosexuality and Islam, such as Islamic liberation theology and that the Qur’ān is required to be adapted to scientific observations and explorations. These principles can hardly be placed in the (neo-)traditional paradigm of understanding Islam, a methodology that this study aims to pursue.

Broadly speaking, it seems that the main purpose of the scholars who engage with the sensitive topic of homosexuality is to ultimately support homosexual minority groups and homosexual individuals living in Muslim-majority societies or Muslim-minority communities in the West. To achieve this goal, it is, I believe, essential to utilise the repertoires of Muslim (neo-)traditional scholars

42 Kugle, *Homosexuality in Islam*, 41.

43 *Ibid.*, 37–39.

44 *Ibid.*, 4.

45 Ali, *Sexual Ethics and Islam*, 81.

46 However, Scott Kugle’s scholarship on this matter is an exception. He has extensively investigated the *sunna* on homosexuality from the Sunni *ḥadīth* heritage.

in support of this agenda. This might happen first and foremost through constantly open dialogues between reformist and (neo-)traditional scholars. However, Muslim reformists' approach to the topic of homosexuality, in my view, not only does not facilitate such a dialogue but also blocks potential paths for such collaboration between reformist and (neo-)traditional scholars by generating a number of barriers. I shall outline three such barriers.

The first barrier can be called the *language problem*. Modern attitudes to sexual diversity, including homosexuality, in Islam generally use technical languages to this discourse which have been produced and adapted by activists and scholars of gender and sexuality studies in the West. These languages are far from the (neo-)traditional scholars' terminology. Therefore, using the modern technical terminologies might prevent any potential dialogues between reformist and (neo-)traditional scholars. Thus, it is necessary for reformist scholars to seek a shared language with (neo-)traditional Muslims on this issue to provide common ground for understanding modern homosexuality and its differentiations from pre-homosexual categories, such as *liwāṭ* and *siḥāq*. As expressed earlier, one should not forget that this scholarship, after all, is being conducted to support homosexual individuals living in Muslim societies. This goal would less likely be achieved without positive collaborations between reformist scholars and (neo-)traditional jurists.

Secondly, as mentioned, the reformists' methodology used to discuss the topic of sexual diversity, including homosexuality, in Islam is commonly based on modern scientific tools, modern philosophical hermeneutics, and feminist critical approaches, all of which are apparently unknown to (neo-)traditional scholars. Therefore, the reliability of the reformists' whole project on sexual diversity in Islam can easily be suspected by these scholars, as they do not find modern methodologies authentic for understanding or deriving Islamic laws. In (neo-)traditional scholars' views, there are traditionally valid methodologies which should be employed. For example, according to Shi'ī (neo-)traditional scholars, *ijtihād* is the authentic method to interpret Islamic text and derive Islamic laws from the original sources. Any scholarship not using this methodology, in their view, does not have validity. Therefore, the use of modern methodologies supplies the (neo-)traditional jurists with a firm ground to believe that reformists' understanding of Islam is unreliable, as it is not grounded in the methodology of *ijtihād*.

Finally, it seems that reformist scholars mostly undermine the potentiality of applying (neo-)traditional discourse (its language and methodology) to understanding Islamic traditions, teachings, and laws in a non-patriarchal form. However, regardless of the drawbacks that (neo-)traditional methodology might have, there are, I believe, pathways or repertoires in this methodology

whereby one can foster different discourses and thus advocate alternative non-patriarchal Islamic views to modern phenomena, such as homosexuality. For example, Āyatallāh Khumaynī's *fatwā* on the topic of transgender gender confirmation surgery (GCS) in the 1960s is a good illustration of such a repertoire. This *fatwā* will be discussed in Chapter 2. Inspired by Khumaynī's *fatwā*, this study investigates the potential, non-patriarchal discursive spaces on legalisation of homosexuality existing in the modern Shi'ī paradigm of *ijtihād*.

Overall, these barriers to collaboration have resulted in several drawbacks. First, (neo-)traditional scholars and a majority of ordinary Muslims have not yet engaged in the current discussions on sexual diversity in Islam, including homosexuality. Moreover, no productive dialogues between Muslim reformists and (neo-)traditional scholars on these topics have yet to be held. In addition, ordinary Muslims have not been granted an opportunity to understandably hear the alternative voices of Islam on homosexuality which are more acceptant or tolerant.

To avoid the above negative outcomes, I suggest the pursuit of an alternative approach in my study: to follow a non-patriarchal reading of Islamic legal tradition through the modern Shi'ī paradigm of *ijtihād*. I am confident that exercising this paradigm of *ijtihād* is a more plausible or effective way to foster a successful dialogue between the majority of Imāmī jurists, who are (neo-)traditional, and the reformist scholars. As indicated, academic studies on new topics concerning sexual diversity such as homosexuality aim, after all, to support Muslim LGBTQI+ activists in their lobbying for more Islamic acceptance towards Muslim individuals who identify as members of gender or sexual minority groups. This goal can more likely be fulfilled via a language and a methodology which are known to the (neo-)traditional scholars (*'ulamā'*). Whether we like it or not, *'ulamā'* have authority within Muslim societies and among grassroots Muslims. They are respected by ordinary Muslims who follow Islamic laws, as well as within the state authorities of Muslim societies. Therefore, they are most likely to be heard, listened to, and followed. If this is the case, then reformists or feminists who conduct research in the field of Islam and sexual diversity inevitably must initiate dialogues with them. The study in hand is principally an academic endeavour to pursue such a dialogue by exploring the discursive spaces for debating homosexuality in the modern Imāmī legal and hermeneutical context. Thus, gay and lesbian individuals or activists might not be fond of the nuanced information or technical debates on Shi'ī legal discourses on same-sex sexuality presented or examined in this research. However, the results of this study, I believe, may empower Muslim gays and lesbians who choose to be faithful to both their sexuality and their religious beliefs. The outcomes of the present study can also be employed by

the Muslim individuals who are engaged in gay and lesbian activism to negotiate Islamic acceptance towards homosexual individuals within *‘ulamā’*.

It is also worth noting that it has recently become fashionable to emphatically allude to decolonising or decolonisation of Islamic and Middle Eastern Studies: a program which advocates for the alteration of knowledge production by conducting decolonial research and pedagogy in academia.⁴⁷ It might be intriguing to introduce the present study as moving in that direction. I am however cautious in subscribing to this assertion. I am still ambivalent about the very nature and agenda of the whole decolonising project. Nevertheless, I wish to take it at face value that the decolonising program should partly concern the methodological framework of Islamic studies. One way to carry out this task is to investigate Islamic-related topics through the lens of those who were historically the substantial players in this arena, namely *‘ulamā’*. Therefore, it is, I hold, unavoidable for Islamic studies scholars to master the methodologies, such as *ijtihād*, that are often used by the *‘ulamā’* to examine various religious legal and ethical matters throughout the history of Islam. The study in hand has been undertaken from this approach. Hence, it puts forth insights which may contribute to an alternative attitude to the field of Islamic studies. I am aware that my overall approach is experimental, and this indeed makes it a unique piece of scholarship which still requires further examination by other intellectuals of the field.

Regarding these points, one might now wonder what the modern Shi‘i paradigm of *ijtihād* is, and to what extent it can be applied to the modern phenomenon of homosexuality. I will explore the nature of this paradigm in Chapter 2.⁴⁸

4 Structure of This Book

The present study is divided into three parts. Part 1 deals with the conceptual and methodological frameworks. Chapter 1 concerns sexuality, gender, and

47 For some valuable points in this regard, see Lumbard, “Decolonizing Qur’anic Studies”; Rizvi, “Reversing the Gaze?”; Schayegh, “Why Decolonization?”

48 A number of scholars have employed the modern concept of Imāmī *ijtihād* but articulated it based in a Sunni context (see, for example, Bucar and Shirazi, “The ‘Invention’ of Lesbian Acts in Iran”; Gashtili, “Is an ‘Islamic Feminism’ Possible?”, 129, 138). In other words, they have presented the modern Imāmī notion of *ijtihād* as independent reasoning or personal opinion. According to these scholars, therefore, *ijtihād* in Imāmiyya is applicable when a given case has not been addressed by the Qur’an, *sunna*, or consensus (*ijmā’*). However, as will be explained later in Chapter 2, this understanding of Shi‘i *ijtihād* is not accurate.

marriage equality in Islam. Chapter 2 demonstrates the methodological framework of this study: the modern Shi'i paradigm of *ijtihād* as the methodological standpoint of this research will be surveyed in this chapter. The concept of modern homosexuality and its early and medieval counterparts are investigated in Chapter 3. Generally speaking, it is important for readers to review the preliminary chapters of the study before moving on to the main body. Notably, I advise reading Chapter 3 which complicates my detailed understanding of homosexuality as a phenomenon that I have pursued investigating its legal ruling in contemporary Shi'i law in this book. To fully appreciate the logical threads of debates, contestations, and argumentations, I suggest that academic readers in particular scrutinise Chapter 2, which unpacks the legal methodology of *ijtihād*, based on which this research is conducted.

The modern Shi'i paradigm of *ijtihād* has two successive levels. Level one deals with the primary Islamic sources which, according to Shi'i legal theory (*uṣūl al-fiqh*), consist of the Qur'ān, *sunna* (tradition, often ascribed to the Prophet Muḥammad and the Twelve Imāms), 'aql (reason), and *ijmā'* (consensus). Based on this level, Imāmī jurists attempt to derive the actual legal ruling on any given case from the aforementioned sources. Part 2 is structured to discuss homosexuality within these primary sources. Chapter 4 extensively examines the topic of homosexuality in the first primary Islamic source, namely the Qur'ān. Chapter 5 is devoted to engaging with homosexuality in the *sunna*. Finally, Chapter 6 investigates the topic of homosexuality in the other two primary sources: reason and consensus.

Level two of the modern Shi'i *ijtihād* investigates those cases whose legal rulings cannot be found through the *ijtihād*ic process at the first level. As Imāmī scholars articulate, there exist general principles called 'procedural principles' (*uṣūl 'amaliyya*) and 'legal maxims' (*qawā'id fiqhīyya*) by which the legal rulings on such cases can be determined *in practice*, though their actual legal rulings cannot be derived. Part 3 addresses this issue. Chapter 7 examines the topic of homosexuality and its legal ruling at the second level of *ijtihād* by investigating various procedural principles and legal maxims that could be enlisted to argue for homosexuality. Relying on the relevant procedural principles and legal maxims in modern Shi'i *ijtihād*, Chapter 8 suggests a proposal illustrating a viable picture of same-sex marriage within Imāmī law.

PART 1

Preliminaries



Sexuality, Gender, and Marriage in Islam

1 Sexuality and Gender Equality in Islam

The discussion over Islam and homosexuality concerns the wider discourse on gender and sexuality in Islam. Muslim feminists and reformists have established various debates on gender and sexuality in Islamic cultures and laws. These critics observed that the Islamic laws concerning sexuality, gender, and women's issues are unjust and discriminatory towards women. Amongst other reasons, feminist scholars have accurately distinguished socio-cultural and religious patriarchies as the main causes of injustice concerning women.¹ A number of scholars even claim that the Islamic sacred texts contain androcentric themes on some occasions.²

Yet other scholars further argue that such patriarchal systems not only oppress women and often exclude them from being involved in the public affairs of Muslim societies, but also keep out all other gender or sexual minority groups, including gay, lesbian, transgender, and intersex people, such that these communities are prevented from being actively engaged in social, cultural, economic, and religious matters of Islamic societies.³ Consequently, Muslim men were exclusively entitled to lead their societies. In fact, the male patriarchal system throughout the history of Islam has seemingly ignored the power and rights of women and other gender and sexual minority individuals and has not considered them as an equal part of society. Those in power could do so partly because they have had the privilege and unique position of interpreting and teaching Islamic revelatory sources for the rest of the society.

Muslim feminists and reformists, however, have argued against such male patriarchy. Scholars such as Amina Wadud, Fatima Mernissi, Farid Esack, Leila Ahmed, Ziba Mir-Hosseini, Khaled Abou El Fadl, Asma Barlas, and Kecia Ali, although in different ways, all uphold that Islam and Islamic primary sources are open to reinterpretations which enable Muslim individuals to find various discursive spaces on women's issues and women's role in forming Muslim

1 See, for example, Ahmed, *Women and Gender in Islam*; Barlas, *Believing Women in Islam*; Mernissi, *Women's Rebellion and Islamic Memory*.

2 See, for example, Ali, *Marriage and Slavery; Sexual Ethics and Islam*; Esack, "Islam and Gender Justice."

3 See, for example, Esack, *Qur'ān, Liberation and Pluralism*; Kugle, *Homosexuality in Islam*.

societies and cultures. According to these scholars, freeing women from injustice and inequality requires freeing Islamic revelatory sources from an exclusively male-dominated understanding. For example, in the case of marriage law and gender (in)equality, they have presented various different approaches to dealing with the Islamic sacred texts through the lenses of feminist or reformist Muslims' views, developing arguments which are grounded in equality and non-oppressive relationships. I shall return to this point later in this chapter.

2 Sexuality and Gender Equality in Modern Iran

Since the present study concerns Imāmi legal-hermeneutical discourses on homosexuality, it is suitable to briefly review feminists' discussions about sexuality and gender (in)equalities in contemporary Iran as an example of Shi'i majority country. Concurring with Muslim feminist movements, several feminists who work mainly in the Iranian-Shi'i context of gender and sexuality have joined this scholarship, from both inside and outside post-revolutionary Iran, demanding equality between women and men often based on the existing possibilities within Imāmiyya and the Islamic Republic of Iran. These scholars discuss women, gender, and sexuality in Iran from national, historical, cultural, and social perspectives. However, they also pinpoint the vital role of Islam in forming modern Iranian culture and state law and the way in which they have been regulated by the state authorities' moves to manage the public and private behaviours of citizens. When it comes to religious matters, Iranian feminists, in line with the common approach of Muslim feminists, view androcentric attitudes to Islam as the key problem causing injustice and inequality between men and women. Therefore, they argue that Islamic revelatory sources must be revisited and reinterpreted through the lenses of feminist approaches in order to enhance justice and equality between men and women. These scholars note, on the one hand, that Islam does not consist of various rigid and non-malleable legal codes; and, on the other hand, that there is no reason to hold that Islam should exclusively be interpreted by male authorities. In contrast, they conceive of Islamic texts on various topics, including women's issues, as potentially subject to different interpretations.

Afsaneh Najmabadi provides a nuanced account of post-revolutionary Iranian feminists' works and their 'bargaining-chip' strategy to gain equal rights from within the Islamic Republic of Iran.⁴ Najmabadi admits that the

4 Najmabadi, "Feminism in an Islamic Republic." There are several other scholars who also admire Iranian women's resistance and achievements in post-revolutionary Iran (see, for

post-revolutionary Islamic authorities imposed several discriminatory laws on women which furthered inequalities between men and women in the new Islamic regime. Yet she holds that within the new revolutionary system, Iranian women are still actively engaged in producing knowledge, culture, arts, and wealth.⁵ She writes:

the past decade has also witnessed an incredible flourishing of women's intellectual and cultural production in Iran. Almost two decades after the 1979 Islamic Revolution in Iran, against the deepest fears of many of the secular feminist activists of that revolution, not only have women not disappeared from public life, but they have an unmistakably active presence in practically every field of artistic creation, professional achievement, educational and industrial institutions, and even in sports activities.⁶

Given Najmabadi's report, the early years of women's activism against the androcentric or even misogynistic understandings of Islamic concepts of gender norms imposed by the new Islamic Republic made it possible for these women to radically reflect on issues related to gender and women by addressing the Islamic primary sources and teachings. Therefore, several women's institutes and journals were established for the sake of justice and equality between men and women. As Najmabadi states, "these journals are distinct in their respective constructions of womanhood, ranging from *Nida'*, a rather ideologically rigid organ of a quasigovernmental organization, to *Zanan*, a journal that explicitly defines itself as feminist."⁷

Amongst the journals, *Zanān* (Women) founded by Shahlā Shirkat in 1992, soon played a substantial role for reform in gender and women's issues. In fact, Shirkat and her colleagues in *Zanān* upheld that Islamic primary textual

example, Mir-Hosseini, *Islam and Gender* and "The Quest for Gender Justice"; Tohidi, "The International Connections of the Women's Movement in Iran"; Afshar, "Women and Politics in Iran". For instance, Afshar elaborates on how women in modern Iran could reconstruct "an ideological framework that enables them to make political demands, framed in the language of Islam" (Afshar, "Women and Politics in Iran," 188).

5 Secular feminists argue that Iranian women have gained all such achievements against the Islamic Republic and even contrary to Islam as the dominant discourse in post-revolutionary Iran (see, for example, Moghissi, *Feminism and Islamic Fundamentalism*; Afkhami, "Women in Post-Revolutionary Iran"; Shahidian, *Women in Iran*). Najmabadi, however, considers the reduction of the creative outburst and the active flourishing of women in Iran as merely oppositional and reactionary moves insufficient to justify this fact (Najmabadi, "Feminism in an Islamic Republic," 59–60).

6 Najmabadi, "Feminism in an Islamic Republic," 59.

7 *Ibid.*, 62.

sources promote gender equality, and thus that patriarchal interpretation of Islamic teachings is based on androcentric attitudes towards reading Islamic texts. Their endeavours were based on the belief that injustice towards women is rooted in the cultural practices of Muslim Iranian society, not in Islamic teachings per se. Therefore, according to them there was an urgent need to free Islamic texts from male-dominant and oppressive manners of interpretation. To do so, they believed that it was their right to read and reinterpret the texts concerning women's issues directly. Mihrangīz Kār, one of the contributors to the journal, clearly states that “[i]t is time for *ijtihād*.”⁸ Several authors have since published articles in this journal which directly deal with Islamic sources. They have turned to the Qur’ān and *sunna* trying to understand the texts independently in favour of equality between men and women. Najmabadi is optimistic about this activism and scholarship, which mainly negotiates or bargains for equality and justice from within the Islamic Republic.

As indicated, there are several feminist scholars such as Nayyereh Tohidi, Shahla Haeri, Ziba Mir-Hosseini, and Afsaneh Najmabadi who have developed this internal discourse about women's status in the post-revolutionary Iran outside the country. Let me briefly review some studies by these scholars.

Tohidi was initially a critic of the Iranian Muslim women's approach.⁹ However, she later supported their work and also devoted herself to developing the strategy of negotiating for gender equality from within the Islamic tradition. In her view, this is possible because Islam, like other religions such as Christianity, can be adjusted to issues arising in the modern world as Islam in itself “is neither ahistoric nor monolithic, reified, and static.”¹⁰ From this perspective, Tohidi demonstrates how women from within Islamic societies, including Iran, were able to successfully negotiate gender justice and equality since the middle of the last century.¹¹ In the case of the Islamic Republic of Iran, despite some attempts by radical Islamists, women were never absent in public and moreover could also creatively bargain with the patriarchal approach of Islamic Republic in order to gain more equality on various gender related issues from family law to an increased women's share in state power. Tohidi also explains how in some cases Iranian women shifted patriarchal ruling to fit their own interests as in the case of compulsory *hijāb* (veil) which has been transformed into fashionable styles.¹²

8 Kār, “Jāygāh-i zan,” 16.

9 See Tohidi, “Gender, Fundamentalism and Feminist Politics in Iran” and “Modernization, Islamization, and Gender in Iran.”

10 Tohidi, “Islamic Feminism,” 140.

11 Tohidi, “The Women's Movement and Feminism in Iran.”

12 Tohidi, “The International Connections.”

Shahla Haeri also advocates the Iranian Muslim feminists' approach. She is a cultural anthropologist and feminist scholar who has studied women, gender, and sexuality issues in the Middle East, in particular Iran and Pakistan. In her monograph entitled *Law of Desire: Temporary Marriage in Shi'i Iran*, she opens a lengthy discussion on the nature of the temporary marriage (*mut'a*) and female sexuality in Imāmī law and debates various contested or contradicted issues that this form of marriage might contain. She interviews Iranian women and men who were engaged in this type of relationship, and also closely examines the Imāmī law concerning temporary marriage. Haeri argues that the very nature of *mut'a* is not only highly contested between Shi'i and Sunni legal schools, but also contains negative implications for many lay Iranians. It is common amongst grassroots communities in Iran to compare *mut'a* to prostitution.

It is also not unusual for many women and men in Iran to believe that the patriarchal religious society of Iran established temporary marriage to fulfil men's extreme sexual desires beyond permanent marriage. However, Haeri, while she carefully draws such contestations, remarks that she is careful not to fall into the fallacy of "simplifications of a complex and dynamic social institution."¹³ Moreover, she asserts that she is not in a position to categorically condemn this phenomenon. Instead, she tries to elaborate on various aspects of this marriage and provides a nuanced scholarship for feminist scholars to better understand issues related to gender and sexuality in Iran. In her other works, Haeri advances her scholarship on various women's issues ranging from (female) sexuality and love, to political agency and religious patriarchy in Iran and Pakistan.¹⁴

Ziba Mir-Hosseini is another Iranian feminist scholar based outside Iran who supports the endeavours of the Iranian Muslim feminists living in the country. She has extensively debated gender equality in Islamic law since the 1980s. Mir-Hosseini has strong critical reflections on family law in the Islamic legal context, which is heavily based on a patriarchal understanding of Islamic texts; a family law which has unjustly been imposed on women and has harmful effects on them. As a scholar of Islamic law and a feminist, Mir-Hosseini upholds that thinkers should distinguish between two essential elements in the Islamic legal system: Shari'a law, which is represented by the Qur'an and *sunna*, and Muslim law, which jurists present in the field of jurisprudence (*fiqh*) or substantive law (*furū' al-fiqh*) through their efforts to derive legal

13 Haeri, *Law of Desire*, x.

14 See, for example, Haeri and McSweeney, "Patriarchy, Power, & Paradox," "Sacred Canopy"; Haeri, "Women, Religion, and Political Agency in Iran."

rulings from the aforementioned sources.¹⁵ This distinction is highly significant for Mir-Hosseini, as for Muslim feminist scholarship in general, and it is used to argue that Muslim patriarchal laws are not the same as Shari‘a law pictured in the Islamic revelatory texts. Thus, as Mir-Hosseini remarks, the former is a man-made law and is subject to interpretation. Therefore, Muslim feminists can reinterpret the sacred texts utilising a feminist critical approach and a modern human rights framework to establish an egalitarian family law. As a Muslim, it seems that Mir-Hosseini, in line with many Iranian women, does not see an inherent opposition between believing in Islam and holding an account of Islam which guarantees equality between women and men.

Although impressed by Iranian women’s fights and achievements in post-revolutionary Iran, Mir-Hosseini constantly insists on women’s equality and gender justice in Islam by engaging with Islamic texts directly.¹⁶ Precisely speaking, she constantly returns to the following themes in her works: marriage, divorce, polygamy, child custody, family court, sexuality, and gender equality. By applying a feminist approach and the framework of modern human rights, she examines the Islamic primary texts to provide an egalitarian account of Islam on family law.¹⁷ Of relevance to the present study, one of her fascinating pieces of scholarship on equal marriage in Islam will be further discussed later in this chapter.

Among other scholars whose major works on gender and sexuality pertain to Iranian society and culture, Najmabadi, I believe, has a unique position as she has expanded the scope of her study from merely topics concerning women to a broader discourse of gender and sexuality to cover sexual and gender minority groups, too. In her historiography of gender and homoerotic desire entitled *Women with Mustaches and Men without beards: Gender and Sexual Anxieties of Iranian Modernity*, published in 2005, Najmabadi gives an extensive account of homoeroticism under the Iranian cultural and artistic sensibilities (particularly within social elites) from the eighteenth century to the early twentieth century, covering the Qajar Dynasty in Iran. However, what is more significant regarding my study is her other fascinating research entitled *Professing Selves: Transsexuality and Same-Sex Desire in Contemporary Iran*, published in 2014. In this work, she provides a nuanced historical, social, cultural, and religious analyses of transgenderism and same-sex desire in the context of Iran from the early Pahlavi to the Islamic Republic periods.

15 Mir-Hosseini, “Muslim Legal Tradition” and “Muslim Family Law.”

16 See, for example, Mir-Hosseini, *Islam and Gender* and “The Quest for Gender Justice.”

17 See, for example, Mir-Hosseini, “Sexuality and inequality”, “Human Rights and Islamic Legal Tradition,” and “Islam, Gender and Democracy in Iran.”

Najmabadi interviews several self-identified transgender people and listens to their lived experiences. She also debates this topic with medical and psychiatric experts who have been engaged in the process of gender confirmation surgery (GCS). These interviews and discussions helped Najmabadi to better understand the ambiguous and flexible nature of gender and sexuality in the context of Iran. Therefore, she successfully provides a rather complex image which can demonstrate the dynamic relationships between transgender people, cultural or societal beliefs, Islamic law, psychiatric, and medical discourses. Although in a constructive dialogue between Islamic law, medical/scientific discourse, and state legality, transgender people could ultimately earn the right to GCS, the social and cultural situations of Iranian society still face challenges in keeping an open mind towards this change and accepting it.

Najmabadi debates the Shi'i-religious attitudes to transgender topic and same-sex desire in this book, too. She devotes a chapter of her book to the Islamic legal approach to transgenderism and GCS. As Najmabadi correctly observes, views on transgender people and gender confirmation surgery are disputed amongst Imāmi jurists. However, due to his political status, Khumayni's *fatwā* on GCS opened the door for the legalisation of GCS in Iran. Therefore, Najmabadi closely examines Khumayni's *fatwā* on the permissibility of GCS.¹⁸ She also travels to the city of Qum in Iran to discuss this issue with the cleric Karīmīniyā, who has studied this subject at the Seminary of Qum. According to Najmabadi, Khumayni's unique position as the supreme leader of post-revolutionary Iran, and not his religious authority, made it possible to translate his *fatwā* on the permissibility of GCS into law in the Islamic Republic, and thus facilitate gender confirmation surgery for transgender people in Iran.¹⁹ However, as Najmabadi states, the law on GCS in Iran was on some occasions seen as being an attempt to disambiguate the sexual identities of homosexual people in heteronormative terms.²⁰ Despite her impressive examination of the *fatwā*, Najmabadi does not investigate the internal legal-hermeneutical process that Khumayni, as a *mujtahid*, pursued in order to issue this *fatwā*. Moreover, given Najmabadi's understanding of the *fatwā*, "Khumayni's overwhelming and exceptional political authority has overruled even his own cautionary 'prima facie'."²¹ Based on her understanding of the term "*zāhīr*" in Khumayni's *fatwā*, and her translation of this as "prima facie,"

18 This *fatwā* will be discussed in Chapter 2.

19 Najmabadi, *Professing Selves*, 174. Najmabadi in her study uses "transsexuality" or "transsexual" to address this group.

20 Ibid., 1.

21 Ibid., 175.

Najmabadi comes to the conclusion that Khumaynī was cautious, or not sure enough, about his idea of the permissibility of GCS in Islam.

However, scholars who are familiar with the Imāmī jurists' style of issuing *fatwās* would realise that Khumaynī's *fatwā* on the permissibility of GCS in Islam has been issued with certainty, and thus, unlike in Najmabadi's understanding, there is no indication of caution (*iḥtiyāt*) in his *fatwā*. In fact, Najmabadi's translation and understanding of Khumaynī's term *zāhir* is not correct. In the context of issuing *fatwā* in Imāmiyya, *zāhir* does not imply caution at all. Whenever a Shi'i jurist uses the technical term *zāhir* in a *fatwā*, it simply means the jurist is issuing the *fatwā* without caution, based on proofs or evidence founded on deep study of the Islamic original sources. In the context of (neo-)traditional Imāmī scholars, if jurists have deeply examined Islamic sources but could not come to a certain conclusion regarding a given case, and thus the case is still doubtful for them, they must use the term *iḥtiyāt* (caution/the cautious course of action) or the term *aḥwaṭ* (the more cautious course of action), etc.²² In this way, these jurists show that they could not find enough proofs from the Islamic legal sources to formulate a legal ruling on that specific case.

Returning to her examination of the *fatwā*, it is crucial for Najmabadi to discuss whether Khumaynī's *fatwā* could implicitly open a door for the permissibility of homosexuality in Islam, too. Therefore, in her discussion with Karīmīniyā, she carefully raises several questions in regard to transgenderism and the implications of the *fatwā* for GCS. She asks Karīmīniyā whether transgender people have the right to live as "the other sex/gender." In response to this question, Karīmīniyā distinguishes between the religious point of view and the active law of the country. Applying the principle of *necessity*, Karīmīniyā adds, "it is permitted to live trans-dressed [*mubaddal-pūshī*], as long as the purpose of such cross-dressing is to cure their condition and get better, and as long as they do not engage in same-sex playing."²³ However, from a legal point of view, Karīmīniyā believes that "the legal certificate is not specific, though some transsexuals have shown me letters giving them permission to trans-dress. The letters are to prevent the police from harassing them. Such permissions are transitional, to enable transsexuals to have a chance to reflect over their situation; the LMOI [Legal Medicine Organization of Iran] cannot give someone a permanent permit."²⁴

22 See Makārim Shīrāzī and 'Aliyān Nizhād, "Ma'ni-yi wāzhi-hā wa iṣṭilāḥāt-i fiqhī."

23 Najmabadi, *Professing Selves*, 180.

24 *Ibid.*, 180–81.

Najmabadi, pursuing Karīmīniyā's logic, then asks: if, based on the principle of necessity, transgender people are permitted to live transgendered lives, why should having sexual activity with someone of their own sex be forbidden? Can one not argue that having same-sex sexual practice is also permitted as a matter of necessity? Karīmīniyā strongly rejects this point and claims that "having sex is not a need, the lack of the satisfaction of which would be life-threatening."²⁵

To advance the discussion, Najmabadi insists on her point and asks a more challenging question: if transgender people can be granted the right to have a transgender lifestyle, why should homosexual individuals be denied permission to have a homosexual lifestyle according to Islamic law? Karīmīniyā does not tolerate this matter at all and believes in a "a Great wall of China" (to use his own phrase) between transgender and homosexual people (or same-sex *players* [*hamjinsbāzhā*] in Karīmīniyā's words).²⁶ According to Karīmīniyā, in Islamic law the former, namely a transgender lifestyle, is not explicitly prohibited and thus is allowed, while the latter, namely a homosexual lifestyle, is against God's commands to avoid *liwāṭ* (male-male intercrural or anal intercourse, according to Imāmī jurists) and *siḥāq* (female same-sex sexual practices by touching each other's genitalia, according to Imāmī jurists). For Najmabadi it was important to point out such similarities and see whether Shi'ī legal discourses could deal with homosexuality in the same way they deal with "transsexuality." However, despite Najmabadi's effort to draw Karīmīniyā's attention to the similarities between transgenderism and homosexuality in some respects, according to sexological and psychological discourses, Karīmīniyā insists on the idea of a "great wall of China" to distinguish between these two categories, and thus "cannot afford to [further] engage in" discussion.²⁷

3 Marriage and Equality in Islam: Three Contemporary Approaches

What Najmabadi has tried to complicate in her discussion with Karīmīniyā, that is, to challenge his imaginary "great wall of China" to distinguish between transgenderism and homosexuality by asserting that the latter is deemed to be prohibited in Islamic law while the former is regarded permissible, is highly essential and, in fact, this is also the principal concern of the present

²⁵ Ibid., 181.

²⁶ Ibid., 185.

²⁷ Ibid., 186.

study. However, for the time being, before advancing the debates on discursive spaces about (im)permissibility of homosexuality in contemporary Shi'i law, let us pause for a while and reflect on the following question which is often amplified by traditional Muslim scholars or preachers. They argue that the mere convincing reconciliation between homosexuality and Islam does not suffice to actually legalise homosexual relationships in Muslim societies. This is because any licit sexual relationship, in line with Imāmi jurists, must be framed and practised within the Islamic marriage contract (*'aqd al-nikāḥ*), whether a permanent marriage or temporary one (*mut'a*). Concerning these scholars' view, sexual relationships outside marriage, whether these happen as a consensual sexual practice or non-consensual sex (namely rape according to modern terminology), are called *zinā* (fornication or adultery).²⁸ Therefore, in order to make homosexual relationships acceptable, one needs to reconstruct the Islamic marriage structure by introducing an institution of marriage which can also accommodate homosexual relationships.

On the other hand, we should recall that the present study regards homosexuality as an egalitarian way of life between same-sex peers which presumes sameness and mutuality in terms of social status, sexual desire, and choice of partner. Thus, such relations may categorically happen between two adults who have a mutual sexual attraction to same-sex partners, who choose to consensually practise same-sex sexual relationships, and who identify as homosexual men or women. According to this conceptualisation, homosexuality is based on equal and consensual sexual relationships. Therefore, any homosexual marital contracts should be framed in an egalitarian mode. If this is the case, one might then wonder how this study can justify an equal or egalitarian homosexual marriage from within Islamic law or primary sources. This question is essential, bearing in mind that, according to the dominant androcentric understanding of Islamic legal sources presented by various Muslim legal schools, marriage is commonly articulated as a non-egalitarian contract between men and women which mainly represents gender inequality in favour of the male partner.

The issue of marriage inequality in Islamic law has been discussed and critiqued by Muslim feminists at great length. Ziba Mir-Hosseini remarks that the conceptualisation of gender and sexuality as proposed by the classical jurists can be seen in legal rulings on marriage and divorce in which "gender inequality is taken for granted."²⁹ Quoting several classical jurists from both Sunni and

28 See Azam, "Competing Approaches to Rape in Islamic Law," 328 and *Sexual Violation in Islamic Law*.

29 Mir-Hosseini, "Islam and Gender Justice," 87.

Shi'i legal schools, Mir-Hosseini demonstrates that the classical legal texts, on the one hand, regard marriage as a sales contract (although just "in form, not in spirit") and see the status of wives as parallel to that of female slaves, and thus subject to the restriction of mobility and of fulfilling the sexual needs of their husbands.³⁰ This categorisation of marriage by classical jurists presents women's sexuality as a *property* or *commodity* for their husband. On the other hand, according to these texts, men are allowed to have up to four wives at one time. Moreover, the classical legal texts presume that the power to divorce is mostly, if not always, in the hands of the man. Given the aforementioned elements established by the classical jurists, Islamic marriage became a matter of domination of males over females in Islam rather than an egalitarian union.

Similar to Mir-Hosseini, Ali argues that gender and sexuality in classical Islamic law are regulated based on inequality between males and females. She demonstrates sexuality and gender inequality in Islamic legal tradition in several respects. According to her, the Islamic legal tradition has framed marriage as a contract for "an exchange of lawful sexual access to dower, and contained sexual availability for support."³¹ She further elaborates on this issue by pinpointing the male's dominion (*milk*) over his wife as the central element of marriage in Islam to the extent that classical jurists have explicitly discussed the similarity between wives and slaves or between marriage and trade exchanges. As Ali states, the classical jurists'

central notion about marriage was that the marriage contract granted a husband, in exchange for payment of dower, a form of authority or dominion (*milk*) over his wife's sexual (and usually reproductive) capacity. The same term, *milk*, was used—though with a somewhat different semantic range—for ownership of a slave. It was the exclusive *milk* over a particular woman—as a slave or as a wife—that rendered sexual access licit.³²

Although marriage in classical legal notion was necessarily based on consent, meaning that both contracting parties have to agree on the marriage contract, this does not mean that it was always based on consent expressed by the bride and groom.³³ On some occasions, if the bride or groom or both were minors,

30 Mir-Hosseini, "Islam and Gender Justice," 88–89 and "Sexuality and inequality," 130–32.

31 Ali, *Sexual Ethics and Islam*, 13.

32 Ali, *Marriage and Slavery*, 6.

33 Ibid., 3. See also Azam, *Sexual Violation in Islamic Law*.

their guardians could give consent for the marriage.³⁴ More broadly, the traditional legal system, as Ali notes, devalues mutual consent as a necessary element of ethical or lawful sexual relationships in Islam.³⁵ Moreover, following classical Islamic law, males were allowed to legally enjoy licit sexual relationships with their female slaves or concubines without marrying them, which further demonstrates that female slaves were considered objects for the sexual desires of their owners, and thus had no choice but to respond to their owner's sexual demands. In addition, divorce is another aspect that explains gender inequality in classical Islamic law. Although there are various forms of divorce in Islam, the authority and power to divorce in its common form, whether revocable (*rajʿ*) or irrevocable (*bāʿin*), is unilaterally given to the husband by the classical legal tradition.³⁶ This means that the wife's consent is not required, to the extent that divorce can even be performed without her receiving prior notification, according to the majority of the classical jurists. In brief, it appears that in Islam, marriage and licit sexual relationships lead to gender inequality and subjugation of females by males, as does a divorce in the sense that classical jurists articulate by giving husbands the power to control and save the marriage contract or dissolve it.

Considering these critical observations, the question now is whether marriage in Islam is *inherently* a non-egalitarian relationship between peers. In another words, one may wonder whether there are no alternative interpretations of Islamic primary sources on marriage which can be susceptible to gender equality. If so, then one might wonder whether Islamic marriage is a non-egalitarian relationship not only in the sense that patriarchal classical jurists have articulated, but also in the sense which marriage has been addressed in the Islamic primary sources, namely the Qurʾān and *sunna*. If one believes that marriage inequality is only one interpretation of Islam which happens to be androcentric, this means that Islamic marriage is not inherently non-egalitarian, and thus that Islamic texts are open to alternative interpretations of marriage based on a notion of equality. However, if one holds that marriage is a non-egalitarian contract according to the Islamic primary sources of the Qurʾān and *sunna* too, then it implies that marriage in Islam is inherently based on inequality.

34 Carolyn Baugh provides a nuanced discussion on the marriage of minors in classical Islamic law and the way in which it shaped the early Muslim societies (see Baugh, *Minor Marriage in Early Islamic Law*).

35 Ali, *Sexual Ethics and Islam*, xxiii.

36 *Ibid.*, 26–27.

This question is highly important and needs to be dealt with before further advancing the discussion on homosexuality in Islam. However, there is no easy response to this issue as various groups of scholars each take different positions on this topic. The various approaches to this issue can be categorised in three different groups as follows.

The first group of scholars, mostly traditional jurists, uphold the idea that marriage in Islam is essentially unequal. This is because, in their view, the Qur'ān and *sunna* do not promote the modern (Western) concept of equality but of justice. According to this approach, justice is thus the core element of Islamic teachings as it posits everyone in their suitable, albeit hierarchically-ordained, position.³⁷ According to this approach, there exist unequal and hierarchical relationships between men and women in various public and individual contexts, including marriage, in Islam. Given this view, Islamic marriage seems to be an *inherently* unequal relationship. Therefore, it is not the androcentric patriarchal jurists' understanding of Islamic sources which articulates marriage as an unequal relationship, but the revelatory sources, too, regard marriage as such.

The second group consists of mainly feminist scholars who argue that gender-related issues in Islam are not primarily based on inequality.³⁸ Thus, Islamic marriage, too, is not inherently an unequal relationship. In this approach, the articulation of marriage as an unequal union by classical legal jurists is only one interpretation of marriage which represents "the world in which their authors lived, a world in which inequality between men and women was the natural order of things, the only way to regulate relations between them."³⁹ According to these scholars, sexuality and gender inequality are not provoked by Islamic revelatory sources. Instead, the 'spirit' of Islamic sacred texts promotes equality between male and female, and thus supports an egalitarian form of marriage too. Therefore, beyond the lenses of the classical androcentric exegetes and jurists, Muslim scholars should revisit the revelatory texts on marriage, gender, and sexuality directly to reinterpret such texts in accordance with equality and egalitarian norms.

Leila Ahmed, in her eloquent historiographical study, argues that most of Islamic law, in particular those parts concerning women and gender topics,

37 Badawi, *Gender Equity in Islam*.

38 See, for example, Barlas, *Believing Women in Islam*; Mir-Hosseini, "Islam and Gender Justice" and "Sexuality and inequality"; Mubarak, "Breaking the Interpretive Monopoly"; Sardar Ali, *Gender and human rights in Islam*; Shaikh, "Exegetical Violence" and "Transforming Feminism."

39 Mir-Hosseini, "Islam and Gender Justice," 87.

was not necessarily Islamic.⁴⁰ In fact, many laws have been taken by Islam and the classical jurists and exegetes from pre-Islamic Arabian or other surrounding cultures. For example, the common notion of marriage in Muslim societies which has been articulated and enforced by various Islamic legal schools is not an invention of Islam, but one form of various kinds of marriage which existed in pre-Islamic Arabia: a type of marriage known as “marriage of dominion” according to which marriage resembled a sales contract, and thus would result in a woman becoming more like the property of her husband.

Yet Ahmed believes that one should not jump to any conclusions about gender injustice or inequality in Islam based on such understandings of Islam. This is because, as she notes, two different oppositional aspects of Islam need to be considered before any evaluation of Islamic teachings on gender (in)equality. On the one hand, there is the aforementioned pragmatic approach represented by Islamic legal traditions which is dominantly androcentric. On the other hand, there exists an ethical approach to Islam which is “stubbornly egalitarian.”⁴¹ Although the tensions between these two approaches can be found even in the Qur’ān, the ethical view which promotes gender equality, as Ahmed suggests, is the essential message of the Qur’ān as it is addressed by several verses of this text, including Q. 2:228, where the Qur’ān calls for equal rights and responsibilities for both men and women.⁴² Therefore, the dominant misogynist legal tradition which pinpoints the subordination of Muslim women in society should not be regarded as the final outcome of the Qur’ānic teachings. According to Ahmed, this also does not represent the Prophetic tradition, meaning that it does not picture the way in which the Prophet structured the early Muslim society of Medina.⁴³ Therefore, Ahmed suggests Muslim feminists should be self-critical, be aware of their historical and political power, resist the unjust Islamic laws imposed by Muslim males and, instead, promote an egalitarian ethical approach to Islam, as it is the spirit of Islam, vis-à-vis the patriarchal legal tradition. She hopes that in this way the androcentric or misogynist Islamic legal tradition will modify itself and adopt more equal gender norms.⁴⁴

40 Ahmed, *Women and Gender in Islam*.

41 Ibid., 63.

42 Ibid., 64–78.

43 Ibid., 56 and 72–73.

44 Ibid., 180–83 and 273–74. Khaled Abou El Fadl also emphasises the ethical aspect of Islam as the core message of this religion. Therefore he offers a similar approach, albeit with a different strategy, and suggests Muslim scholars should have ‘conscientious pause’ about revelational and legal texts concerning gender and sexuality topics, and thus read them with *moral awareness* of Islam (See Abou El Fadl, *Speaking in God’s Name*, chaps. 3 and 7.).

Mir-Hosseini, building on Ahmed's doctrine about Islamic ethical egalitarianism, holds that the Islamic legal tradition contains a number of inconsistent notions of gender. This point represents a clash between Islamic revelatory texts, in particular the Qur'anic "ethical egalitarianism as an essential part of its message," and the androcentric "context in which this message was unfolded and implemented."⁴⁵ Based on this tension, as Mir-Hosseini puts it, each group, whether proponents of gender equality or opponents of this approach, could argue for the accuracy of their understandings by addressing the texts of the Qur'an. Moreover, according to Mir-Hosseini, one should also know that the classical and modern traditional legal constructions of gender norms are not only implausible in modern times but also cannot be legally justified on Islamic grounds which essentially advocate gender egalitarianism.

According to Mir-Hosseini, gender inequality in classical or traditional juristic discourse comes from two different sets of (inaccurate) assumptions. First, from the patriarchal ideology of pre-Islamic Arabia, as discussed by Ahmed—the "marriage of dominion" whereby a woman becomes essentially her husband's property. The second set of assumptions consists of several philosophical, social, and legal postulates which imply that women are inferior and made of, and for, men. These assumptions in fact shaped the classical jurists' understandings of revelatory texts as fixed and non-malleable teachings of Islam.

While the Qur'an's essential goal is to promote gender equality and shift the pre-Islamic patriarchal norms in an egalitarian direction, Mir-Hosseini argues that classical jurists seemingly neglected this central message of the Qur'an, namely equality. Therefore, relying on the patriarchal ideology, they reproduced the pre-Islamic norm of women's subjugation and, by maintaining the above philosophical, social, and legal assumption of the superiority of men, they undermined women's ability to participate in the production of religious knowledge and political activities in societies, and ultimately turned their understanding of the sacred texts into permanent juristic principles and legal rulings.

Given her distinction between Islamic legal tradition and Shari'a law (as represented in the Qur'an and *sunna*), Mir-Hosseini advocates the idea that Islamic primary texts are open to alternative interpretations which can comply with gender equality. Thus, the patriarchal or misogynist understanding of classical jurists is only one interpretation of the Islamic revelatory texts, which happens to be unjustified. Therefore, she urges Muslim scholars to return to the Islamic sacred texts and try to reinterpret them based on the principal aims

45 Mir-Hosseini, "Islam and Gender Justice," 87.

of Islamic teachings, namely justice and equality. For the last few decades, as she indicates, Muslim feminist movements have played a significant role in this matter. They are, according to her, in fact, part of the Muslim reformist movement. Thus, in seeking gender equality in Islamic law, they have built on the studies of the earlier reformists, such as ‘Abduh and Fazlur Rahman. Mir-Hosseini, while endorsing this strategy, advises Muslim feminists to actively engage with current Muslim reformist scholarship. In particular, she refers to Abdulkarim Soroush’s epistemological view on the evolution of religious science as highly relevant to this matter. According to Soroush, religious science is a production of humans, and thus subject to change, expansion, and contraction.⁴⁶ This approach, according to Mir-Hosseini, provides feminist scholars with additional theoretical frameworks to reconcile Islam “with rationality and with contemporary notions of justice and women’s rights.”⁴⁷

In the same line of reasoning, several other feminists who believe in this approach have engaged in the Islamic exegesis scholarship and have gone on to closely read the texts of the Qur’ān independently to provide alternative, non-patriarchal interpretations of those verses that seemingly imply inequality on sexuality and gender-related issues such as marriage, polygamy, and divorce. For example, Barlas strongly argues that the Islamic sacred texts do not accept any kinds of patriarchal or “father-rule” form for sexual or gender inequality.⁴⁸ In contrast, as Barlas puts it, reading the Qur’ān in its context and in a “holistic way” leads us to the fact that the Qur’ānic teachings “are radically egalitarian and even antipatriarchal.”⁴⁹ Therefore, according to Barlas, those verses which apparently imply inequality on issues such as marriage and divorce should be read and reinterpreted in the light of the Qur’ān’s essential message, namely justice and equality.

Let us consider one such verse, namely Q. 4:34, which has commonly been addressed by scholars who argue for gender inequality in Islamic marriage, and see how this second group of Muslim feminists present alternative interpretations for this verse. Verse 4:34 apparently considers the husbands as “managers” (*qawwāmūn*) in family life and gives them permission to “beat” their wives (*wa-ḍribūhunna*) in the case of disobedience or disloyalty (*nushūz*) of a wife to her husband. Traditional exegetists’ and jurists’ readings of this verse suggest that the Qur’ān has given the males superiority over women to manage their lives and women must obey their husbands. However, several Muslim feminists

46 See Soroush, “The Evolution and Devolution of Religious Knowledge.”

47 Mir-Hosseini, “Islam and Gender Justice,” 101.

48 Barlas, *Believing Women in Islam*, chap. 4.

49 *Ibid.*, 93.

hold that the interpretations of the Qur'ānic terms *qawwāmūn* as managers, *nushūz* as disobedience of the wife to her husband, and *wa-ḍribūhunna* as beating or striking the wives are absolutely misleading. For instance, Wadud and Hassan interpret the term *qawwāmūn* as breadwinners which then means that this Qur'ānic statement, addressing males as the *qawwāmūn* over women, should be translated as "males must provide the livelihood and financial support for their families."⁵⁰ Asma Barlas agrees with Wadud's and Hassan's understanding of the concept of *qawwāmūn* and states:

even though the Qur'ān charges the husband with being the breadwinner, it does not designate him head of the household, especially as the term has been understood in Western feudal cultures. Such a designation, I argued earlier, was contingent on traditional patriarchal definitions of the father-as-husband and the husband as-father, to which the Qur'ān does not adhere. And while most Muslims believe that men are the head of their households, the Qur'ān itself does not use this concept or term to speak about either husbands or fathers.⁵¹

Regarding the term *nushūz*, Wadud remarks that the Qur'ān neither commands Muslim women to obey their husbands nor does it suggest that being obedient to the husband makes a Muslim woman a better woman or a better Muslim. Therefore, according to Wadud, interpreting this notion as disloyalty and disobedience of women to their husbands is entirely out of the context and language of the Qur'ān. Instead, the term *nushūz* here addresses a general point concerning marital disorder and the way in which this should be resolved. Finally, regarding the notion of *wa-ḍribūhunna*, Wadud explains that the verse might mean "to strike the wives" but at the same time it implies "to set an example" for this action. This means that the Qur'ān is putting severe restrictions on a commonly practised behaviour of males in a society that husbands would repeatedly and intensely strike their wives. Regarding this context, the verse should be read "as prohibiting unchecked violence against females. Thus, this is not permission, but a severe restriction of existing practices."⁵²

Barlas upholds that the best interpretation of the concept of *wa-ḍribūhunna* is "to prevent the wives from going outside of houses" or "to hold them in

⁵⁰ See Wadud, *Qur'ān and Woman*; Hassan, "An Islamic Perspective."

⁵¹ Barlas, *Believing Women in Islam*, 187.

⁵² Wadud, *Qur'ān and Woman*, 76. Wadud however, in her later scholarship, provides a substantially different critical understanding of this verse which is more similar to the third approach discussed here (see Wadud, *Inside the Gender Jihad*).

confinement.”⁵³ Therefore, she concludes that this verse does not permit “random acts of violence.”⁵⁴ More importantly, according to her, this understanding is consistent with the Qur’ānic advice “to husbands to deal kindly with their wives, even those who are their enemies or whom they hate.”⁵⁵ Mubarak also presents a similar translation for this concept. According to her, *wa-ḍribūhunna* means “to create an effect upon the wives” by “employing the means ordained for conflict resolution: counselling and then sexual abandonment.”⁵⁶ This concept, as Mubarak notes, is an emphasis of the first two prescriptions mentioned earlier in this verse, namely counselling and sexual abandonment. According to her, this understanding of the concept *wa-ḍribūhunna* can accurately reflect the spirit of the Qur’ānic teachings about God’s justice as well as gender equality. Proposing a type of interpretation called “a *tafsīr* of praxis”, Sa’diyya Shaikh, however, instead of proposing an alternative interpretation for the notion of *wa-ḍribūhunna*, in the case of *nushūz*, argues that what is addressed in Q 4:34 is not essentially a prescriptive direction to permit husbands to beat their wives. Rather, it describes the context in which this verse was revealed, namely the seventh century Arab peninsula.⁵⁷

To sum up, this group of scholars upholding justice and equality as the central and spirit of Islam, generally believe that the sacred texts have been misunderstood and misinterpreted in an androcentric manner. Therefore, we need to correct such misunderstandings and provide alternative interpretations of the texts which are compatible with equality.

The third approach belongs to those feminist scholars who (while acknowledging that the classical exegetes’ and jurists’ interpretations of the Islamic revelatory texts are androcentric and, on some occasions, even misogynistic) argue that the classical jurists and exegetes are not the only ones who should be considered culprits in this regard. There are, as this group observes, elements of injustice and inequality in the sacred texts, too, which means that the Qur’ān, for instance, should also be considered responsible for its own exegesis and misreading. According to this view, the second approach, which considers the revelatory texts as non-patriarchal and as advocating gender equality is simplistically apologetic,⁵⁸ uniquely based on the Qur’ānic texts while

53 Barlas, *Believing Women in Islam*, 189. See also Hassan, “An Islamic Perspective,” 111–13; Shahab, *Muslim Women in Political Power*, 231.

54 Barlas, *Believing Women in Islam*, 189.

55 Ibid.

56 Mubarak, “Breaking the Interpretive Monopoly,” 284–85.

57 Shaikh, “A Tafsir of Praxis,” 68–69.

58 Esack, “Islam and Gender Justice.”

ignoring the tradition,⁵⁹ and selective.⁶⁰ On the contrary, the third approach, as Chaudhry elucidates, argues for “a complex relationship with history that neither binds us to it nor rejects it completely.”⁶¹ It also considers the texts, whether revelatory texts or legal-exegetical traditions, in their entirety.

Farid Esack is one such scholar who upholds that the very nature of the Qurʾān is on some occasions androcentric. Thus, Muslim scholars have no choice but to face and concede this fact. Therefore, according to Esack, not only does patriarchy exist in classical interpretations of the Qurʾān but also the Qurʾān itself is androcentric.⁶² Esack agrees with the previous approach in that the relations between the text and its context are significant as they influence our interpretation of the text. However, this relationship should be considered a constant interaction which still exists today. Therefore, regarding the androcentric texts of the Qurʾān, Esack suggests that in such cases, Muslims should consider and prefer the modern context of gender justice and equality and their values over unjust or androcentric texts of the Qurʾān. Thus, they, as Esack suggests, should reject the sacred texts or the literal meaning of the texts in such occasions. For example, in the case of Q. 4:34, which seemingly permits husbands to beat their wives, Esack holds that Muslim individuals should not apologise for this androcentric text, but they must “consciously depart from the letter of the text.”⁶³ This point goes well with Esack’s general approach concerning Islamic liberation theology according to which any revelatory texts which do not cohere with equality and justice need to be dealt with critically through hermeneutical tools. Thus, such texts first need to be contextualised and reinterpreted. If the problem cannot be resolved this way, the validity of such revelatory texts for our time should be rejected by claiming that these texts are abrogated.⁶⁴

Ali, on the one hand, accords with Esack on this point that the sacred texts per se might imply androcentric statements or contents.⁶⁵ On the other hand, she agrees with Moosa and upholds the idea that looking for modern notions of gender egalitarianism in the revelatory texts or in the classical jurists’ discourse might be pointless as the Qurʾān and classical jurists do not share the

59 Ali, *Sexual Ethics and Islam*, xx–xxi.

60 Ali, *Sexual Ethics and Islam*, 153–54; Chaudhry, “The Problems of Conscience and Hermeneutics,” 159.

61 Chaudhry, “The Problems of Conscience and Hermeneutics,” 164.

62 Esack, “Islam and Gender Justice,” 195–96.

63 Esack, “Islam and Gender Justice,” 202.

64 Esack, “What Do Men Owe to Women.”

65 Ali, *Sexual Ethics and Islam*, 131–32.

modern concerns in regard to equality and justice.⁶⁶ Therefore, Ali warns Muslim reformist and feminist scholars to avoid “[s]implistic invocations of justice and equity” as they are not sufficient without observing the changing dynamics of these concepts, their meanings, and their implications for various Muslim societies and cultures in the past and present.⁶⁷ Moreover, Ali suggests that the Qur’ān and *sunna* should not be seen as an Islamic legal manual “to be applied literally in all times and places but as sources of guidance for Muslims in transforming their societies in the direction of fairness and justice.”⁶⁸ In other words, the Qur’ān and *sunna* should be regarded as a revelatory source which “captivates and engages hearts and minds.”⁶⁹ The texts guide Muslim individuals to the right path and they remind them of the existence of God who created the universe and has mercy and generosity.

Building on these points, Ali suggests that in the case of verses or Prophetic traditions implying androcentric meanings—such as the texts in regard to marriage, polygamy, divorce, slavery, and concubinage—feminist scholars should not take egalitarianism as an inherent message of the Qur’ān and *sunna* to interpret these texts. Thus, they need to be cautious to avoid being “as blinded by the commitment to equality, and the presumption that equality is necessary for justice, as classical exegetes were by their assumptions about the naturalness of male superiority and dominance in family and society.”⁷⁰ According to Ali, Muslim scholars do not need to always stick to the literal provisions of the texts. Instead, to establish equality or justice, they would better depart from the texts and reject the texts or the literal meaning of the texts. This is because, in such cases “the only possible response is to suggest that the Qur’anic text itself requires Muslims to sometimes depart from its literal provisions in order to establish justice.”⁷¹

4 Marriage and Equality in Islam: Critical Reflections

The discussion so far attests that the debates on sexuality and gender equality in Islam are contested, and there are no easy solutions to resolve the problem or to unite the various approaches on this matter. However, it seems that,

66 Ali, *Sexual Ethics and Islam*, 132–34 and *Marriage and Slavery*, 190. See also Moosa, “The Debts and Burden of Critical Islam.”

67 Ali, *Sexual Ethics and Islam*, 154–55.

68 Ibid., 156.

69 Ibid., 133.

70 Ibid., 133.

71 Ibid., 55.

unlike the first view, which in any sense may not be accepted according to modern consciousness of equality between humans, the second and third approaches share some similar concerns regarding sexuality and gender equality in Islam. Both believe that the essential message of Islam is the equality of all humans in the sight of Allāh. They also share that those revelatory texts which apparently contain androcentric content should not be taken at face value. However, they deploy different strategies to deal with this point: the third approach suggests bypassing these verses or rejecting the literal meaning of such texts; the second view, however, upholds that these verses should be reinterpreted to adhere with justice and equality as the core message of Islam. Finally, both approaches argue that the relation between the revelatory texts and their context are influential interpretive elements which should be constantly reconsidered by exegetes of the Qurʾān and *sunna* in all periods. However, the third approach conceives of the modern context as the ultimate valid point to be taken into account, and thus a given sacred text, or its literal meaning and its historical background, should be rejected when there is a disagreement between the given text and the modern notion or context concerning a specific topic. On the other hand, the second approach complicates the relation between the text and its context. Therefore, these commentators critically consider the modern implications of a text along with the text and its historical precedent in a holistic manner. They generally do not ignore or reject the texts which are apparently androcentric. Instead, they present alternative interpretations of the sacred texts to adhere to modern implications of justice and equality.

Concurring with the critique made by scholars who advocate for the third approach, the second view treats the sacred texts selectively, not comprehensively, on some occasions. Moreover, proponents of the second view often form their debates on gender issues around the Qurʾān and abandon the *sunna* or the Muslim juristic and exegetical traditions. These limitations might cause the second approach to lose credibility both in the epistemic sense and on the socio-cultural level, namely among Muslim communities and traditional scholars. To avoid these two objections, the study in hand investigates the topic of homosexuality in both the Qurʾān and the *sunna* comprehensively. Moreover, it also deals with Shiʿi legal tradition.

However, it should be noted that there exists a risk of falling into a polemical discussion in the above critique that the second approach does not debate the legal-exegetical traditions, and thus the claim that “scholars who abandon the tradition lose authority within their own communities.”⁷² This is because

72 Chaudhry, “The Ethic of Marital Discipline,” 124.

the second group can polemically argue that, according to the third position, whenever one is of the opinion that a given sacred text does not cohere with the end of justice and equality, one can reject the texts or the literal meaning of sacred texts or claim that the text has been abrogated. In fact, the hermeneutical methodology applied by the third approach allows Muslim individuals to not follow a revelatory text or believe in the abrogation of a given text, presumably without providing any authentic *ḥadīth* report from the Prophet in terms of its abrogation.⁷³ This problem has clearly cost the third approach authority and credibility among Muslim traditional scholars and communities. Bearing this in mind, the following polemical question would then arise: regarding the weaknesses of both positions, which attitude risks losing its credibility among Muslim scholars and communities the most? The third position, which argues for the rejection of the revelatory texts on some occasions and the abrogation of sacred texts on other occasions to live in fidelity with equality and justice? Or the second position, which rejects the androcentric juristic tradition and, instead, deals with the texts directly in order to reinterpret them in accordance with equality and justice?

Yet, there is another—in my view polemical—objection to the second approach made by Farid Esack, namely that the second approach is simplistically apologetic. This point does not sound accurate or even meaningful to me. In fact, it seems naïve to call an academic endeavour, such as the works of Barlas, Mir-Hosseini, and Mubarak, which are generally accepted as academic contributions to modern scholarship, ‘apologetic’ simply because we do not agree with the approach, arguments, or with the methodology used. Moreover, these scholars can simply turn over this objection to the third approach, and argue against it as an apologetic view in a different respect. This is because, they might argue, this position finds excuses to reject a sacred text, and believe in the abrogation of a given text, without providing convincing evidence, and in general, by committing “violence against the texts.”⁷⁴ In other words, the other camp can polemically argue against the third position that this view uses the excuse of defending the core message of Islam, namely equality and justice, but it does not take enough responsibility for reinterpreting the texts. Instead,

73 I am wondering how scholars such as Esack can justify their stance on the abrogation of verses which, in their view, do not serve the end of justice and equality. This is because, in Muslim discourse, abrogation is conditioned to various elements. One such element, as pointed out in Islamic legal theory, is that it should explicitly be addressed by the Qurʾān or the *sunna* (see, for example, al-Samʿānī, *Qawāṭiʿ al-adilla*, 2: 423–26; al-Sharīf al-Murtaḍā, *al-Dharīʿa*, 1: 414–20).

74 See Esack, “What Do Men Owe to Women.”

once these critics believe a given text does not cohere with their understanding of equality and justice, the text then should be rejected.

Nevertheless, I am not in a position to argue for one view over the other in this study. Therefore, I am not going to examine the epistemic or methodological credibility of these two approaches. Nevertheless, as an individual who was born and raised in a Muslim society, as well as someone who has been trained traditionally in Islamic revelatory, exegetical, and legal texts, I venture to express my inclination to the second approach both by my instinct and by virtue of my professional point of view. Therefore, concurring with the second approach, I hold the sacred texts to be in accordance with justice and equality, on the one hand, and believe that the classical or traditional interpretations of the texts are often androcentric or patriarchal. In fact, the basis of my study on homosexuality in Imāmiyya is grounded in this approach, and on the fact that the classical or traditional jurists' androcentric understanding of the texts is only one interpretation of the sacred texts (not of the texts per se). Such an interpretation shows the socio-cultural conditions of the world in which these jurists lived; a world in which the only way to regulate relations between men and women was believed to be to order society based on inequality and the superiority of males.

I agree with Ahmed, on the view that the spirit or core message of the Qur'ān is its ethical values. Therefore, based on the Qur'ānic ethos, equality and justice in the universe and between humans are the most significant purposes of life to the extent that the Qur'ān, as Ahmed notes, is "stubbornly egalitarian."⁷⁵ Thus, all other aspects of Islamic teachings, including Islamic law on gender and sexuality, should be understood in the light of justice and equality or, broadly speaking, of Islamic morality. However, it is the responsibility of interpreters to be aware of their task while engaging with the texts and to read them based on the spirit of Islam, the historical contexts of this revelation, and proper hermeneutical tools, in order to carefully and critically read the text in a holistic approach, as Barlas suggests.

I indeed subscribe to the third approach on this point that any texts, including the sacred texts, are responsible for their misreading. However, as shall be elaborated in the following chapter, it should be noted that a text should be held accountable for being misread unless the text includes guidelines for being understood correctly. In this case, the texts cannot be blamed for being misread, and, instead, the exegetes, who practise the act of interpretation, should be held responsible for any misreading of such texts.

75 Ahmed, *Women and Gender in Islam*, 63.

Concerning the Qur'ānic hermeneutics, as Barlas eloquently elaborates, there are guidelines in the Qur'ān itself which may lead exegetes to the best or most accurate meanings, if they follow the guidelines.⁷⁶ In fact, the Qur'ān (41:40) anticipates the possibility of being misread, whether because of the moral failure (Q. 2: 174) or hermeneutical destruction (Q. 6:91 and 15:90–93), and also condemns such misreading and warns that readers who do not speak of the whole truth and read the texts of the Qur'ān selectively rather than holistically will risk a severe punishment after death. Moreover, according to the Qur'ān (5:41), interpreters must not change the word of God from its right context, namely its time and place. They must not accept the unclear verses over the unambiguous content nor seek to establish disputes and controversy in the Qur'ān (Q. 2:176). Above all, the Qur'ān explicitly divides its texts into two substantial types: those with decisively clear meanings (*muḥkamāt*) and others with allegorical or ambiguous content (*mutashābihāt*). The *muḥkamāt* are the core and substantial message of the Qur'ān, and thus readers, in line with the guidelines offered by the Qur'ān, must understand other verses in the light of the *muḥkamāt* because only those whose hearts are perverse will wish to follow the ambiguous or unclear verses without returning first to the decisive texts of the Qur'ān. Such people do so because, as the Qur'ān presses, they are seeking dissent or, while seeking their own interests, they wish to interpret *mutashābihāt* without considering their complicated textual and contextual indicators. In sum, as Barlas notes, “the Qur'ān not only anticipates the possibility that we will misread it, but it also attempts to avert this possibility by advocating some textual/moral strategies and cautioning against others.”⁷⁷

Given the above principles, in particular the last point addressed by the Qur'ān, namely the decisive and ambiguous texts, it is not hard to consider verses of the Qur'ān containing equality and justice between humans as the core or decisive message of the Qur'ān, and thus reinterpret those verses as apparently implying inequality between women and men (in particular regarding marriage, polygamy, and divorce), as proponents of the second approach have contended. Here we can recall the earlier debates on alternative reinterpretations of Q. 4:34 presented by several feminist scholars.

In the case of slavery and concubinage, it is also a matter of dispute as to whether the revelatory texts are advocating such behaviours or rejecting them entirely. A number of scholars have demonstrated that slavery is not accepted

76 Barlas, *Believing Women in Islam*, 205–06.

77 *Ibid.*, 206.

in Islam as it is unjust towards humanity.⁷⁸ According to them, the Qur'an implicitly addresses the idea that slavery is not permissible, although Muslim individuals and classical jurists simply neglected the issue or did not observe it in the past due to their socio-cultural circumstances. Inspired by this view, Syed further elaborates on the point of concubinage in Islam and notes that sexual relationships between Muslim males and their female slaves were never permissible without marriage according to the Qur'an. Therefore, in his view, the idea that classical jurists gave permission for sex with female slaves was based on an incorrect interpretation of Q. 23:6, which seemingly permits sexual relations between a male slave owner and his female slave.⁷⁹

Given the principles and the guidelines discussed earlier, there are still other strategies for dealing with sexuality and gender inequality in Islam. One such strategy is grounded in the belief that Islamic teachings can be either permanent or time-bound. The essential Islamic teachings such as monotheism, worshipping God, praying, fasting, and universal moral values like justice and equality, should be seen as eternal Islamic rules. Aside from these kinds of teachings, other legal rulings are subject to modification and adaptation to various times and places. This is what Fazlur Rahman calls the role of time and place, or the role of the historical context of the Islamic revelation, in relation to understanding Islam. Relying on this principle, Rahman argues that the aims of God and the Prophet were to entirely abolish both slavery and polygamy due to the harmful nature of these behaviours.⁸⁰ However, it was not possible for the Islamic revelation to eradicate these institutions at once due to the strong patriarchal, misogynist, and slave ownership cultures of the seventh-century Arabian Peninsula. Therefore, the texts of the Qur'an, which were supposedly revealed to be read, understood, and accepted by those people, should be understood in relation to the socio-cultural circumstances of those who lived at the time of revelation. This is why instead of immediately rejecting slavery or polygamy, the Qur'an temporarily regulates the androcentric institutions of polygamy and slavery, albeit in a manner that serves to orient them into more fair behaviour.⁸¹ Such temporary legal rulings, contrary to the dominant classical jurists' opinions, were not supposed to be considered permanent. They

78 See, for example, al-Hibri, "Islam, Law, and Custom"; Mashhour, "Islamic Law and Gender Equality" and Wadud, *Qur'an and Woman*.

79 Syed, *The Position of Women in Islam*, 33–36.

80 See Rahman, *Major Themes of the Qur'an*.

81 As Ali indicates, this is not unprecedented in the Qur'an. There are occasions, such as the prohibition of the consumption of alcohol, where the Qur'an chose to prohibit a given behaviour gradually, although God or the Prophet would rather eradicate or prohibit it at once (Ali, *Sexual Ethics and Islam*, 54).

should ultimately move towards egalitarian rulings. This is why Muslims are strongly encouraged to free slaves as part of worshipping God. According to Islamic teachings, releasing slaves would in turn bring great rewards for an owner's hereafter. Mashhour notes "what is definitely clear in the Quran is that all its texts encourage the release of slaves."⁸² Moreover, according to Islamic law, on various occasions of disobedience towards God, such as not fasting in the month of Ramaḍān with no legal excuses, or perjury, or in the case of unintentional homicide, manumitting slaves can be one option to compensate such acts of disobedience or crimes.

The same line of reasoning can be applied to explain other apparently unjust rulings of Islamic texts such as the ruling concerning females' shares of inheritance—commonly believed to suggest women should receive half of their male siblings' portion—or the rulings which allow husbands to control their wives. For this latter case, Mernissi provides a similar explanation, arguing that this was a temporary ruling derived from the patriarchal culture of the time of the revelation. Muḥammad was compelled to temporarily accept this pre-Islamic ruling for the sake of promoting the essential message of Islam, although this was a distasteful decision for him.⁸³

As will be elaborated in the following, the feminist approach which argues for gender and marriage equalities in Islam can also be seen to resonate in the modern Imāmī legal discourse, though from a different methodological perspective.

5 Marriage Equality in Contemporary Shi'ī Legal Discourse

As far as this study is concerned, I believe there exist several potential discursive spaces in the modern Shi'ī paradigm of *ijtihād* which can be applied to argue for gender equality. One assumption in this paradigm is that the Islamic revelations, namely the Qur'ān and the authentic *aḥādīth*, are immutable. However, as will be explained in Chapter 2, since Muslim scholars' knowledge of Islamic revelation is epistemologically restricted and fallible, their understandings of Islamic teachings and laws might lead to wrong outcomes, and thus are potentially exposed to *ijtihād*ic change. Given this principle, Shi'ī jurists distinguish between Islamic texts and jurists' understandings of the texts.⁸⁴ This is why jurists generally hold that following the *ijtihād*ic process might lead to a correct

82 Mashhour, "Islamic Law and Gender Equality," 569.

83 Mernissi, *The Veil and the Male Elite*, 139.

84 See 'Abidī Shāhrūdī, *Qānūn-i akhlāq*.

legal ruling or could lead to extracting a wrong one. It does not necessarily imply that *ijtihād* always results in an accurate legal ruling.

It will be addressed in Chapter 2 that the principle of justice is another essential assumption of modern Shi'i legal scholarship. Although the traditional Imāmi jurists' interpretation of this principle does not always cohere with the modern notion of egalitarianism, various contemporary Shi'i jurists advocate an interpretation of this principle which significantly leans towards promoting egalitarian relationships between humans, including husbands and wives.⁸⁵ In line with these jurists, in the process of deriving Islamic law, the governance of this rule over other *ijtihādīc* principles is obligatory both rationally and in accordance with the Islamic revelatory texts. As Muṭahharī remarks, this principle is one of the cornerstones of Imāmiyya, which, above all, should lead the whole *ijtihādīc* process.⁸⁶ Taking this rule as a leading principle, some jurists practise new *ijtihād* to derive Islamic rulings concerning gender and sexuality topics from the Islamic texts which lean towards adhering to modern notions of equality and gender justice.⁸⁷

Moreover, Khumaynī, as a contemporary jurist, has offered a principle in his *ijtihād* which the man himself outlined as "the role of time and place in *ijtihād*."⁸⁸ Despite various interpretations presented by his pupils,⁸⁹ according to Khumaynī's own explanation of the principle, *ijtihād* is dynamic when considering the two important factors of time and place. If a topic or case has a special Islamic legal ruling in a particular time or place, the same topic or case might receive a different legal ruling under different political, cultural, or societal circumstances. This means *ijtihād* can adapt to cultural conditions, which inevitably change over the passage of time and variation in place. This rule makes the Islamic laws flexible over time and space or, in general, across cultures. This meaning of the principle by Khumaynī can be further justified by reading his letter to one of his prominent pupils, Muḥammad Ḥasan Qadīrī. Qadīrī critiqued Khumaynī's *fatwā* on the permissibility of playing chess

85 See, for example, Mihrīzī, "Adālat bi mathāba-yi qā'ida-yi fiqhī"; Muṭahharī, *Barrasi-yi ijmalī-yi*; Qābil, *Qā'ida-yi 'adālat wa-naḥy-i ḡulm*; Şānī'ī, *Fiqh wa-zindagi*.

86 Muṭahharī, *Barrasi-yi ijmalī-yi*, 27.

87 Mihrīzī, "Adālat bi mathāba-yi qā'ida-yi fiqhī," 192–94; Qābil, *Qā'ida-yi 'adālat wa-naḥy-i ḡulm*, 113–46.

88 Khumaynī, *Şahīfa-yi imām*, 21: 289. As discussed earlier, a similar principle has been presented by Fazlur Rahman. However, elsewhere (see Alipour, "Islamic shari'a law"), I explained that Khumaynī presumably came to this conclusion independently while struggling with the Iranian regime before the revolution and leading the country after it as Supreme Leader.

89 Kamāl al-Ḥaydarī extensively elaborates on Khumaynī's doctrine on the role of time and place in *ijtihād* (al-Ḥaydarī, *Ma'ālim al-tajdīd al-fiqhī*, chap. 4, 145–91).

without gambling. Following Qadīrī's understanding of the *aḥādīth*, playing chess is generally prohibited in Islam and cannot be permitted whether it is for gambling or not. Before responding to this critique, Khumaynī first strongly expresses his dislike of Qadīrī's outdated methodology for understanding the sacred texts and Islamic law and then argues that this way of understanding Islamic teachings would lead to obsolete results which cannot be used in our modern time and civilization.

I should express my regret for the way you interpret the *aḥādīth* and divine law. According to your letter, the use of alms tax (*zakāt*) should be only limited to needy people and those cases which are specified [by the Qur'ān and *sunna*], and thus it would not be permissible to use them for hundreds of other cases that occurred in modern times ... and [according to your understanding] the bounties (*anfāl*), which are made permissible for Shi'ī Muslims, imply that nowadays Shi'ī Muslims [under the name of bounties] are allowed to destroy jungles or forests by modern mechanical equipment; to demolish things which are necessary for the protection and health of the environment, and thus put in danger the lives of millions of humans; while there would be no one who could [legally] prevent them from their acts ... In brief, based on your understanding of the *akhbār* and *aḥādīth*, the whole modern civilization must be destroyed and people should live forever in the [primitive] huts or in deserts.⁹⁰

Yūsuf Ṣāni'ī and Muḥammad Bujnūrdī, both pupils of Khumaynī, are two contemporary Imāmī jurists who advocate these principles and apply them in their *ijtihādīc* debates, in particular in debates concerning gender and women's topics. Relying on the principle of justice, both Bujnūrdī and Ṣāni'ī believe in the equal financial compensation (*diya*) in the case of unintentional homicide and equal retribution (*qiṣās*) in the case of intentional homicide for men and women.⁹¹ Based on the same principle, these jurists also uphold that there is no difference between men's and women's ability to serve as witnesses in court.⁹² To justify this legal opinion, in addition to the principle of justice and equality, Bujnūrdī refers to the role of differences between our time and culture and the time and culture of seventh century Arabia in which women were not as present in society as their male counterparts. Moving further towards

90 Khumaynī, *Ṣaḥīfa-yi imām*, 21: 149–50.

91 Bujnūrdī, "Hamsar-i duwwūm"; Ṣāni'ī, *Fiqh wa-zindagī*, 69–71, 96–97, and 137–39.

92 Bujnūrdī, "Hamsar-i duwwūm"; Ṣāni'ī, *Huqūq-i zanān wa-kūdākān*, 47, and *Majma' al-masā'il*, 3: 275.

equality, Ṣāni'ī upholds that women may also occupy the positions of jurists, *muftīs*, and judges.⁹³

Concerning marriage and family law, Ṣāni'ī's juristic discussions and several of his *fatwās* arguably show that, in his opinion, equality and justice are principally conceded and advocated by the Qur'ān and *sunna*. One such alternative *fatwā* of Ṣāni'ī relates to polygamy. Unlike the dominant traditional jurists, Ṣāni'ī believes that polygamy is strongly discouraged by the sacred texts due to the fact that it is an unjust behaviour towards the first wife. Even if one believes that polygamy is, after all, permissible in Islam, in Ṣāni'ī's legal opinion, a man can marry a second wife only with the permission of his first wife in the context of modern times and cultural conditions. Otherwise, the second marriage legally cannot happen, so it is prohibited, and thus any sexual relations between the man and the potential second wife should be considered illicit.⁹⁴ On the same topic, Bujnūrdī argues that polygamy addressed by the Qur'ān (4:3) was a temporary law and only related to specific individuals in the early Islamic revelation during the time of the Prophet, and this law was intended to provide for the care of orphans. In this specific context, to be able to support such orphans, men could marry the mothers of the orphans. This was a specific situation, particular to the time of the Prophet, and thus this law no longer applies. Therefore, this legal ruling was neither a permanent nor a general legal ruling for every Muslim individual.⁹⁵

It is also notable that, according to Ṣāni'ī, mothers should be considered guardians of their children and the custody of a child should also go to the mother in the case of divorce.⁹⁶ In the case of *khul'* divorce—that is, if a woman initiates divorce, and thus returns the dower (*mahr*) to her husband—the husband must divorce her immediately and there is no need for further agreements between the spouses and the court according to Ṣāni'ī's legal opinion.⁹⁷ Concerning divorce, Imāmī jurists also suggested the following solution. Women may initiate divorce simply by addressing this right in the marriage contract. In response to a query on women's rights to divorce, Khumaynī issued a *fatwā* on 29 October 1979, emphasising that

For women, the sacred lawgiver determined a plain solution by which women may obtain the power to divorce. That is, if women specify in the

93 Ṣāni'ī, *Ḥuqūq-i zanān wa-kūdakān*, 45–47.

94 Ṣāni'ī, “Ḥuqūq-i zanān wa-ḥuqūq-i bashar.”

95 Bujnūrdī, “Hamsar-i duwwūm.”

96 Ṣāni'ī, *Fiqh wa-zīndagī*, 184–85.

97 *Ibid.*, 333–66.

marriage contract that they should be allowed to file for divorce, whether absolutely or in some circumstances, ... then there would be no problem for women to initiate divorce.⁹⁸

Further, regarding the aforementioned verse 4:34, which several classical jurists consider as a justifying means for a husband to beat his wife in case of the disobedience (*nushūz*), Ṣānī'ī, relying on the principle of justice, holds that this verse does not imply that husbands are allowed to beat their wives due to the wife's disobedience to her husband. According to him, it likely refers to the point that the husband should engage in foreplay with his wife and stimulate her to prepare her for making love in order to resolve the controversy and fight between themselves.⁹⁹

Pursuing the issue of disobedience (*nushūz*), it appears that the classical Sunni and Shi'ī jurists usually consider marriage as a contract between a man and a woman according to which the man receives the right to licit sexual access in exchange to dower (*mahr*) as well as the wife receiving financial support (*nafaqa*) in exchange for sexual availability to the husband during the marital relationship. This means if the wife rejects her husband's sexual demands and does not make herself sexually available to him, she would be considered as disobedient (*nāshiza*), and thus the husband is allowed to cut off financial support to her.

However, the classical approach is not the only legal view on this issue, at least, in Imāmī legal discourse. Several post-classical Shi'ī jurists do not conceive of marriage as an exchange of licit sexual availability (*tamkīn*) for dower or financial support.¹⁰⁰ These jurists argue that the aforementioned common legal view on marriage in Islam does not have evidence in the Qur'an and *sunna*, and thus it is based on a widespread agreement (*shuhra*) among jurists. As shall be discussed in Chapters 2 and 6, according to modern Imāmī legal theory, *shuhra* or consensus of Muslim jurists on a given case is not a reliable source from which to derive Islamic law on the case. Therefore, unlike the common view, the jurists al-Sabzawārī (d. 1090/1679) and al-Baḥrānī (d. 1186/1772) uphold that marriage is a consensual contract between a husband and a wife and once this contract occurs, the husband is obliged to financially support his wife, although *nushūz*, as al-Sabzawārī asserts, might give the husband a right to stop paying *nafaqa* to his wife.¹⁰¹ Other jurists hold that, once a wife and

98 Khumaynī, *Ṣaḥīfa-yi imām*, 10: 387.

99 Ṣānī'ī, "Tawḍīḥi darbāra-yi āya-yi 34 Sūra-yi nisā'."

100 For a list of jurists who argue for this point, See Muḥammadī, "Tamkīn."

101 al-Baḥrānī, *al-Ḥadā'iq al-nādira*, 25: 99–100; al-Sabzawārī, *Kifāyat al-aḥkām*, 2: 297.

a husband began to live together, the financial support of the wife applies to the husband, and this legal ruling is not conditioned to the sexual availability of the wife for the husband.¹⁰² The contemporary jurist Makārim Shīrāzī, in response to a query about the legal rulings on the sexual availability of the wife to her husband (*tamkīn*) and the husband's financial support of his wife (*nafaqa*), states that these two legal rulings are independently regulated, and thus they are not connected to each other.¹⁰³ Therefore, one may arguably conclude that, given this view, in the case that the husband does not pay *nafaqa*, the wife should still not avoid having sexual contact with her husband. In addition, if the wife, for whatever reason, avoids having sexual relations with her husband, the husband is still obliged to pay *nafaqa*.

Consensual marriage is another topic that is disputed among Muslim scholars. It is however important to first distinguish between two different stages of consent: the first stage pertains to the agreement of both contracting parties on the marriage contract; and the second stage relates to the mutual consensual sexual practices during the marital relationships. In regards to the latter type, the question is whether sexual relationship between a wife and a husband, according to Islamic law, is based on consensual sex. In other words, can a husband practise sexual activity with his wife coercively and without her consent? To respond to this question, it is important to first briefly regard the following issue.

The majority of Imāmī jurists uphold that it is a wife's duty to fulfil her husband's sexual needs. However, there is an under-studied similar legal ruling in Imāmiyya which implies that the husband also must fulfil his wife's sexual demands, albeit with differences in time and quantity. To explain this last point, jurists hold that the husband must fulfil his wife's sexual need every four months.¹⁰⁴ Nevertheless, other jurists critiqued this understanding which is based on a number of *ḥadīth* reports. Shubayrī Zanjānī, a prominent contemporary jurist, argues that the main *ḥadīth* on this topic is a report transmitted from the eighth Imām, 'Alī b. Mūsā l-Riḍā.¹⁰⁵ Given this report, the husband cannot postpone having sexual relationships with his wife more than four months. As Shubayrī Zanjānī notes, this *ḥadīth*, however, does not verify that the husband must fulfil his wife's sexual need only once in every four months. Instead, the *ḥadīth*, regarding its context, which describes a situation

102 See, for example, Arākī, *Kitāb al-nikāh*, 745.

103 Makārim Shīrāzī, "Fatāwā-yi ayatallāh Makārim Shīrāzī dar mawrid-i tamkīn."

104 See Amīrī, "Ḥuqūq-i jinsi-yi zan wa-shawhar dar islām."

105 Shubayrī Zanjānī, *Kitāb-i nikāh*, 5: 1483. The aforementioned *ḥadīth* can be found in al-Ṣadūq, *Man lā yahḍuruḥu l-faḳīh*, 3: 405, H. 4415.

in which a person, who was mourning a loss, asked the Imām about how long he might be allowed to postpone having sexual contacts with his wife; and the Imām, assuming this person's situation, responded that he may not be allowed to postpone it for more than four months. This, Shubayrī Zanjānī remarks, does not imply that a husband, without a convincing excuse, is allowed to avoid having sexual relations with his wife for four months. Therefore, Shubayrī Zanjānī concludes, the husband must fulfil his wife's sexual demands when she asks for sex, in particular if avoiding sexual contact with the wife causes her harm. Moreover, according to the majority of contemporary Shi'ī jurists, the husband must fulfil his wife's sexual needs in case she expresses her fears of falling into sinful sexual relationships if the husband avoids having sexual contact with her.¹⁰⁶

Having this point in mind, it is important to note that these two legal rulings, concerning the sexual needs of the wife and husband, do not imply that the husband or the wife is allowed to force the other partner into sexual relations.¹⁰⁷ In fact, it seems that these two legal rulings independently advise the wife and the husband to respond to the sexual needs of the other partner; otherwise, they would commit sinful behaviours in front of God by disobeying his commands.¹⁰⁸ Nevertheless, this does not permit the husband or the wife to coercively practise sexual activities with their partner. Having sexual relations, after all, needs mutual consent from both parties. Therefore, at least in Imāmi legal discourse, it is not accurate to claim that sexual relations between a wife and a husband may be non-consensual. Let us consider two *fatwās* on this matter issued by the contemporary jurist 'Alī Sīstānī:

Q. If a wife without any reasons avoids having sexual relations with her husband, can the husband force her and practise sexual acts with her without her consent?

A. It is not permissible for a wife to avoid sexual contact with the husband with no religiously legitimate (*shar'ī*) excuses. *However, the husband cannot practise sexual relations with her coercively and without her consent.*

106 For contemporary Shi'ī jurists' views on this issue, see Amīrī, "Ḥuqūq-i jinsi-yi zan wa-shawhar dar islām."

107 See Muḥammadī, "Tamkīn."

108 It is also commonly accepted in Imāmi law that the husband has the right to divorce his wife if she continuously avoids having sexual relations with him without a convincing excuse. The same right is preserved for a wife in the case that the husband, without a convincing excuse, does not respond to his wife's sexual demands. She can then ask for a divorce in a court (see Amīrī, "Ḥuqūq-i jinsi-yi zan wa-shawhar dar islām").

Q. What are the Islamic boundaries on sexual relationships between a husband and a wife? Which activities are permissible and which ones are not?

A. A wife and husband can sexually enjoy each other and get pleasures in any ways *they mutually agree on*.¹⁰⁹

Finally, concerning the first type of consent, it is unanimously upheld by Muslim jurists that both contracting parties must necessarily agree on the marriage contract. However, as discussed, this does not mean that Islamic marriage was always based on the consent expressed by the bride and groom. On some occasions, as in the case that the bride or groom or both were minors, their guardians could show consent for their marriage. Nevertheless, minor marriage is contested in the modern Imāmī *ijtihād*. Several jurists, such as Ṣānī'ī,¹¹⁰ issued *fatwās* which go against the common juristic approach that considers girls of the age nine religiously made-responsible (*mukallaḥ*), and instead imply that girls before the age of fourteen are not *mukallaḥ*. Therefore, these jurists argue that marriage with girls under fourteen is prohibited. Thus, the parents of minors cannot marry their children to each other. According to these jurists, although it is widely known that girls at the age of nine are religiously responsible, Imāmī jurists have disputed this issue, and thus offered several different ages, such as ten, eleven, thirteen, and fourteen, that could be applied in this matter.

The legal opinions of contemporary jurists on the age of religious responsibility of women and marriage are yet to establish the ideal age for sexual relationships and marriage according to our modern conventions. Broadly speaking, these contemporary jurists' alternative approaches to gender issues and women are still far from egalitarian notions of equality. However, their scholarship demonstrates that discursive spaces do exist in the modern Shi'ī *ijtihād* and this fact can potentially be applied to argue for an egalitarian approach to gender and sexuality, including marriage. In fact, a number of the contemporary Imāmī jurists, such as Kamāl al-Ḥaydarī, are aware of these limitations in Imāmiyya. For example, in his extensive juristic lessons, al-Ḥaydarī argues that the rights given to women in the Qur'an and *sunna* are only minimum rights.¹¹¹ God and the Prophet indeed aimed to elevate these rights to a maximum level. However, due to various cultural and societal considerations

109 Ṣīstānī, "Āmīzish (Nazdikī)." Emphasis added.

110 Ṣānī'ī, *Fiqh wa-zindagī*, 305–16.

111 These lectures have been delivered by al-Ḥaydarī as "Fiqh al-mar'a" in academic year 2017–18.

this goal had not been met during the life of Muḥammad, and thus it has been postponed to be accomplished at a later stage by Muslims. According to al-Ḥaydarī, this is still a religious obligation which commands every Muslim individual to endeavour for a proper cultural and societal environment to accomplish this task; to fulfil complete equality and justice between men and women in Islam. Although al-Ḥaydarī's approach is still in the process of formation, it is firmly expected to generate an opening for dialogues between Muslim feminists or reformists and contemporary Shi'i jurists, such as al-Ḥaydarī and Bujnūrdī, in order to reform Islamic law on gender and sexuality, including marriage law, based on egalitarian relationships.

Modern Shi'i *Ijtihād*: A Methodological Discussion

As noted, this study investigates modern conceptions of homosexuality through the lens of the modern Imāmī Shi'i paradigm of *ijtihād*. Modern Imāmī *ijtihād* is a complex, multi-layered methodology that, according to Shi'i jurists, can be applied to any case to explore relevant divine legal rulings (*aḥkām shar'īyya*; sing. *ḥukm shar'ī*). Like its Sunni counterpart, Shi'i *ijtihād* has continuously evolved over the centuries. However, soon after the defeat of Shi'i Scripturalism (*akhbārīgarī*) in the eighteenth century, the conceptualisation of *ijtihād*, its procedures, and levels of argumentation in Imāmī context changed considerably. While Imāmī *ijtihād* from the formative period to the classical and postclassical era has been surveyed in Western scholarship, as have Shi'i scripturalism,¹ the Western literature has paid little attention to modern Imāmī *ijtihād* and its evolution since the late eighteenth century. Nevertheless, scholarship in this field is gradually emerging, although it mostly focuses on Shi'i legal theory (*uṣūl al-fiqh*).² Scholars often assume that *uṣūl*

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- 1 See, for example, Calder, "Doubt and Prerogative" and "Judicial Authority"; Cole, "Shi'i clerics"; Gleave, "Understanding Divine Intention," "Value Ontology," *Islam and Literalism*, "Early Shi'i Hermeneutics," "Shi'i Jurisprudence," "Intra-madhab Ikhtilaf," *Scripturalist Islam*, and *Inevitable doubt*; Kazemi-Moussavi, "A Schema of Islamic Legal Methodology" and "The Usuli-Akhbari Controversy"; Kohlberg, "Aḳbārīya" and "al-Uṣūl al-arba'umī'a"; Madelung, "Akhbārīyya"; Modarressi, *An introduction to Shi'i Law*; Newman, "The Nature of the Akhbārī/Uṣūlī Dispute" and "Anti-Akhbari Sentiments"; Stewart, "An Eleventh-Century Justification," *Islamic Legal Orthodoxy*, and "The Genesis of the Akhbari Revival."
 - 2 For example, Ashk Dahlen's monograph, *Islamic Law, Epistemology and Modernity: Legal Philosophy in Contemporary Iran*, published in 2014, investigates contemporary intellectual discourses on Islam in Iran and provides a valuable introduction to Shi'i legal theory. The 2015 monograph by Ali-Reza Bhojani, *Moral Rationalism and the Shar'ā: Independent Rationality in Modern Shi'i Uṣūl al-Fiqh*, is a nuanced examination of contemporary Imāmī legal theory on independent rationalism. It investigates a commonly accepted theological approach to God's justice that is grounded in the principle of the "rational goodness of justice and vileness of injustice" (*al-ḥusn wa-l-qubḥ al-'aqlī*) and its legal implications. Bhojani concludes by asking why the theological position on the acceptance of independent rational reason as a legal source of Islamic law has not yet had a substantial impact on Imāmī jurists' reading and interpreting the Islamic scriptural texts. Robert Gleave has also devoted most of his research and writings to Imāmī legal theory. Although he writes mainly about the classical and postclassical schools of Shi'i legal theory and Scripturalism, he has published several studies on modern *uṣūl al-fiqh* that examine Iranian and Iraqi jurists' approaches to legal authority (*marja'īyya*) [See Gleave, "Political aspects," 96–116 and "Conceptions of Authority," 59–78]. In his article "Modern Shi'i Discussions of Khabar al-Wahid: Sadr, Khumayni and

al-fiqh is the most influential discipline on which Imāmī *ijtihād* relies, and they do not address the conceptualisation of modern *ijtihād* and its scope, qualifications, and processes. Nor do they describe how a *mujtahid* (an individual who specialises in the methodology of *ijtihād*) should use their mastery of the Arabic language, classical logic, legal theory, and biographical evaluation of *ḥadīth* transmitters to exercise *ijtihād* on a given case. In short, to date, Western scholarship has barely examined the modern Imāmī *ijtihād* holistically as a legal-methodological repertoire nor how Shi'i jurists often practise it to derive Islamic legal rulings on any given case.

Nor have these scholars studied several fundamental debates in modern Imāmī legal theory. One such debate addresses the process of legal reasoning: it distinguishes post-Akhhbārī legal theory, in particular the Anṣārī legal school,

Khu'i," Gleave analyses the positions of three contemporary influential Imāmī figures on the authenticity and reliability of *khbar wāhid*—roughly, according to Imāmiyya, a single chain report from one of the fourteen infallible individuals: Muḥammad, his daughter Fāṭima, and the Twelve Imāms (Gleave, "Modern Shi'i Discussions," 189–205). In his article "Imami Shi'i Legal Theory: From its Origins to the Early Twentieth Century," Gleave provides a useful introduction to the origin, development, and evolution of Imāmī legal theory from its formative period to the early twentieth century, although the section on modern legal theory is brief (Gleave, "Imami Shi'i Legal Theory," 207–30). In "Modern Shi'ite Legal Theory and the Classical Tradition," Gleave argues that modern Imāmī legal discourse is indebted to classical scholarship (Gleave, "Modern Shi'ite Legal Theory," 12–32). He elaborates on a classical issue, e.g. "divinely-instituted legal-literal usage" [*ḥaqīqa shar'iyya*], concerning whether the lawgivers (God, the Prophet, and the Imāms), when revealing the religious law, can establish brand-new meanings for existing terms as literal or real. He has shaped the discourse on the same issue in modern Imāmī *uṣūl al-fiqh*, he concludes that "the current 'ulamā' are the successors of the previous generations, and this generation's debates are but a continuation of the established tradition of scholastic enquiry. This is not to say that there is no innovation" (Gleave, "Modern Shi'ite Legal Theory," 26). There is also an edited volume *Visions of Shar'ā: Contemporary Discussions in Shi'i Legal Theory*, published in 2020, which presents several epistemological and hermeneutical debates in contemporary Shi'i legal theory (See Bhojani, de Rooij, and Bohlander (eds.), *Visions of Shar'ā*). The contributors, who are from traditional seminarian (*hawza*) and modern (Western) academic backgrounds, discuss the epistemological debate on the reception of factuality (*taṣwīb*) in Imāmī *ijtihād* (Mostafa Mohaghegh Damad), the epistemology of certainty (Hashim Bata), the role of the Qur'an in Imāmī *ijtihād* (Rahim Nobahar), and the hermeneutics of independent reason or the "justice-oriented" understanding of Islam (Ali-Reza Bhojani). Also, see Hashim Bata, *Exploring the Mind of God: An Introduction to Shi'ite Legal Epistemology*, 2023, which presents a detailed analysis of the post-nineteenth century Twelver Shi'i legal theory; and *Shi'ite Legal Theory: Sources and Commentaries*, introduced and edited by Kumail Rajani and Robert Gleave, 2023 (despite a useful introduction, the selected texts of *uṣūl al-fiqh* in this volume chiefly concern early post-Akhhbārī works). Finally, there are only two Arabic-to-English published translations of a contemporary Imāmī legal theory text, *Durūs fī 'ilm al-uṣūl* (vol. 1) of Muḥammad Bāqir al-Ṣadr (d. 1980), which were translated by Roy Mottahedeh in 2003 and by Arif Abdul Hussain and Hamid Algar in 2005.

from Akhbārī and pre-Akhbārī legal theory. In modern Shi'ī *uṣūl al-fiqh*, legal reasoning is divided into two fundamentally different types of proofs: *ijtihādīc* proofs (*adilla ijtihādīyya*), which may result in **actual** legal rulings, and juristic proofs (*adilla fiqāhatīyya*), which consist of rules that do not serve as the basis for actual legal rulings but only tell us how to tackle any given topic in **practice**. Reason or rational reasoning also plays an influential role in modern Shi'ī *uṣūl al-fiqh*: its place in Imāmī legal theory, its conceptualisation, and its scope have vastly shifted and expanded from that of pre-Akhbārī *uṣūl al-fiqh*. The modern Imāmī discourse on legal maxims (*qawā'id fiqhīyya*) and their relationships to legal theory also are unexamined in the secondary literature.

In short, there is a substantial gap between the modern paradigm of Imāmī *ijtihād* and its classical and post-classical counterparts. The present study does not seek to fill this gap as a comprehensive exploration of such a complex methodology is hardly possible in this chapter and is, indeed, beyond the scope of this research. Nevertheless, the following discussion sheds light on some aspects of modern Shi'ī legal scholarship and provides readers with a foundation to understand and contextualise the current Imāmī discourse concerning *ijtihād* and the way in which it might or could be applied to homosexuality.

In the following, I shall first compare the modern Imāmī conceptualisation of *ijtihād* with its classical and postclassical counterparts. Second, I present several key assumptions underlying the modern Imāmī paradigm of *ijtihād* and enlist the prerequisites and qualifications that a *mujtahid* is required to attain before using it. I then unpack the process of *ijtihād*, illustrating how a Shi'ī jurist would work with this methodological tool to derive an Islamic legal ruling on a given case. Finally, to better comprehend how this paradigm of *ijtihād* works, I examine an application of current Imāmī *ijtihād* practised by Āyatallāh Khumaynī to issue his *fatwās* on transgenderism and gender confirmation surgery in the 1960s and 1980s. Elaborating on the hermeneutical-juridical logic behind Khumaynī's *fatwās* will enable us to proceed with the same methodology in the case of homosexuality.³

3 The form of modern Shi'ī *ijtihād* examined in this chapter is based on a process commonly identified by contemporary Imāmī jurists in their debates on *ijtihād* and legal theory. It is modelled on an ideal structure described in Imāmī legal scholarship. However, in practice, not every jurist precisely follows all these theoretical rules and steps. As several studies have shown, sometimes Muslim jurists for cultural, societal, or even personal reasons do not practise in accordance with the exact rules established in *ijtihād* or in legal theory (On this issue, see, for example, Ahmad, *Structural interrelations*; Jackson, "Fiction and Formalism"; Larsen, *How Muftis Think*; Sadeghi, *The logic of law*).

1 Conceptualisation of Modern Imāmī *Ijtihād*

In modern Imāmiyya, the methodology of *ijtihād* is seen as the primary process to derive divine legal rulings.⁴ However, there are at least three conceptions of *ijtihād* in Muslim scholarship:

1. As a way to draw on personal opinion (*ra'y*) or legal analogy (*qiyās*) for those cases that are not covered by the Qur'ān or *sunna* (the sayings, deeds, and endorsements of Muḥammad in Sunni legal schools and of Muḥammad, his daughter Fāṭima, and the Twelve Imāms in Shi'i legal schools);
2. As exhaustion (*istifrāgh al-wus'*) of a jurist's endeavour to derive an uncertain opinion (*ẓann*) regarding a legal ruling;
3. As a method that jurists can apply to definitely attain or justifiably derive (*tahṣīl/istikhrāj al-ḥujja 'alā*) a legal ruling from reliable sources.

Imāmī scholars refute the first use of *ijtihād*, arguing that there are several undoubted *sunna* from the Twelve Imāms that deny the probativity or probative force (*ḥujjiyya*) of *ijtihād* as personal opinion or *qiyās*.⁵ In contrast, many Sunni scholars rely on this use of *ijtihād* to derive Islamic legal rulings.⁶ Several Sunni and postclassical Shi'i scholars do accept the second notion of *ijtihād*.⁷ However, the great majority of Imāmī scholars⁸ have conceptualised *ijtihād* as per the third meaning since at least the eighteenth century.⁹

4 Islamic legal rulings are divided into two types: defining rulings (*aḥkām taklīfiyya*; sing. *ḥukm taklīfī*) and declaratory rulings (*aḥkām waḍ'īyya*; sing. *ḥukm waḍ'ī*). Jurists often describe defining rulings as legal rulings connected to Muslim individuals' deeds and directly targeting their behaviours in various aspects of their lives as people, as worshippers of God, as parts of families, and as members of Muslim communities. Defining rulings are divided into five categories: obligatory (*wājib*), recommended/encouraged (*mustahabb*), permitted (*mubāḥ*), discouraged but not unlawful (*makrūh*), and prohibited (*ḥarām*). Declaratory rulings are often identified as legal rulings that do not directly target the Muslim individual's deeds and behaviours. They contain laws relating to particular situations that have indirect consequences on Muslim individuals' deeds and behaviours. For instance, Islamic marital laws directly govern a particular relationship between two partners while indirectly influencing their deeds and behaviours in terms of the five categories of Islamic defining rulings (see al-Ṣadr, *Durūs fi 'ilm al-uṣūl*, 55–56).

5 See al-Fāqīl al-Tūnī, *al-Wāfiyya*, 236; al-Khurāsānī, *Kifāyat al-uṣūl*, 325–27; al-Ḥillī (Muḥaqqiq), *Ma'ārij al-uṣūl*, 189; al-Muẓaffar, *Uṣūl al-fiqh*, 2: 167–68; al-Sharīf al-Murtaḍā, *al-Dharī'a*, 2: 792; al-Ṭūsī, *al-'Udda*, 2: 723–26.

6 See al-Jaṣṣāṣ, *al-Fuṣūl*, 4: 23, 273; Ibn Qudāma al-Maqdisī, *Rawḍat al-nāzīr*, 2: 333–34, 338–41.

7 See al-Āmidī, *al-Iḥkām*, 4: 162; al-Ḥillī ('Allāma), *Tahdhīb*, 283.

8 See al-Khurāsānī, *Kifāyat al-uṣūl*, 463–64.

9 An extensive discussion on the development of *ijtihād* in Imāmiyya can be found in Norman Calder, "Doubt and Prerogative."

The difference between these three concepts of *ijtihād* is, briefly, as follows. The first concept sees *ijtihād* only as a source among other sources of legal rulings, not as a tool or method to derive rulings from reliable sources. In fact, this concept of *ijtihād*, which is based on jurists' personal opinions, is regarded as useful when a case is not addressed by other sources, such as the Qur'ān or *sunna*. In the second and third uses of *ijtihād*, it is a tool to derive legal rulings from reliable sources. The difference between the two is that the second concept of *ijtihād* is built on mere uncertain opinion, meaning that *ijtihād* is a tool to derive uncertain legal rulings, which would then have probative force that could be acted on. In contrast, the third meaning of *ijtihād* does not consider this level of discovery sufficient and requires a higher level, namely certainty.

The difference between the second and third meanings of *ijtihād* is significant in the evolution of Shi'ī legal theory. Imāmī scholars of the formative period generally rejected the second concept of *ijtihād*, because it violated a widely accepted epistemological doctrine: Islamic laws should be known with certainty in order to have probative force (*ḥujjiyya*). In fact, some early scholars argued that there was no need for Imāmiyya to apply *ijtihād*, because legal rulings in the Imāmī school could be attained in a definitive way through the Qur'ān or the *sunna* of the Prophet, his daughter Fāṭima, and the Twelve Imāms as transmitted through their *aḥādīth* (sing. *ḥadīth*, oral or written reports of Muḥammad's, his daughter Fāṭima's, and the Twelve Imāms' sayings, deeds, and endorsements). However, the "Occultation" (*ghayba*) of the Twelfth Imām and the growing number of issues faced by Shi'ī communities that were not addressed in the Qur'ān or *aḥādīth* forced later legal scholars to rectify the Imāmī approach towards *ijtihād*.¹⁰

Al-Muḥaqqiq al-Ḥillī (d. 676/1277) was one of the first Imāmī jurists to discuss *ijtihād* positively. He argued that Imāmī scholars are allowed to deploy it to derive Islamic laws, although they must not employ legal analogy (*qiyās*) or personal opinion (*ra'y*) in their *ijtihād*.¹¹ Al-'Allāma al-Ḥillī (d. 726/1325), perhaps the most prominent pupil of al-Muḥaqqiq, explicitly addressed the second use of *ijtihād*, emphasising the role of uncertain opinion in attaining legal rulings. However, he also rejected the probative force of personal opinion and legal analogy in Imāmiyya.¹² This positive attitude towards the use of *ijtihād* in the Imāmī context continued until the sixteenth century.

In the late sixteenth century, a movement called Scripturalism (*akh-bārīgarī*), founded by Muḥammad Amīn al-Astarābādī (d. 1036/1626–7), arose

¹⁰ Gleave, *Scripturalist Islam*, 7.

¹¹ al-Ḥillī (Muḥaqqiq), *Ma'ārij al-uṣūl*, 180.

¹² al-Ḥillī ('Allāma), *Tahdhīb*, 283.

to challenge Shi'ī traditional scholarship.¹³ Astarābādī argued that the companions of the Imāms and the early Imāmī scholars had always rejected the use of *ijtihād*.¹⁴ Therefore, he strongly disavowed the innovation (*bid'a*) that, in his view, al-'Allāma al-Ḥillī had in particular introduced, urging a return to the original Imāmī approach of refuting *ijtihād*.¹⁵ Astarābādī believed that *ijtihād* was based on uncertain opinions (*ẓunūn*) regarding divine legal rulings and that uncertain opinions were insufficient grounds on which to determine Muslim practice. He held that Shi'ī scholars are required to derive Islamic laws with certainty and furthermore that such certainty is possible to attain. Astarābādī's approach was followed by his pupils and other Akhbārīs (scripturalists) and was widely accepted by Imāmī scholars until the eighteenth century.

During the time of the famous Akhbārī, Yūsuf al-Baḥrānī (d. 1186/1772), the sway of the Shi'ī Scripturalist school weakened, and the *uṣūlī* school, which promotes legal theory, under the leadership of Muḥammad Bāqir al-Bihbahānī (d. 1205/1790–1) rose in prominence. However, al-Bihbahānī and his disciples, in line with the Akhbārīs' critiques of *ijtihād*, have argued that the identification of *ijtihād* presented by postclassical *uṣūlīs*, such as al-Muḥaqqiq and al-'Allāma, reflected the influence of Sunni legal theory.¹⁶ However, in post-Akhbārī scholars' view, Imāmiyya could not accept the concepts of *ijtihād* which are based on personal or uncertain opinions, namely the first and second notions of *ijtihād*, as applied by Sunni scholarship.¹⁷

Although the post-Akhbārī conceptualisation of Imāmī *ijtihād* was established by al-Bihbahānī and his direct pupils, this meaning of *ijtihād* only became meticulously articulated and widely accepted a few decades later, due to the efforts of al-Shaykh Murtaḍā b. Muḥammad Amīn al-Anṣārī (d. 1281/1864). The modern Imāmī paradigm of *ijtihād* is therefore more identified with the school of al-Anṣārī than with al-Bihbahānī.¹⁸ According to al-Anṣārī, *ijtihād* is a methodological tool used either to attain divine legal rulings with certainty or to justifiably derive (*taḥṣīl al-ḥujja 'alā*) divine laws from and through reliable sources.¹⁹ This conceptualisation of *ijtihād* asserts that uncertain opinion is an insufficient basis for legal rulings and thus cannot be used in *ijtihād*. This is significant because it shows that post-Akhbārī scholars of legal theory return

13 See 'Alīpūr, *al-Madkhal*, 191–203; Gleave, *Scripturalist Islam*, 1–30.

14 al-Astarābādī, *al-Fawā'id al-madaniyya*, 41–97.

15 Ibid., 78.

16 See Gleave, *Scripturalist Islam*; Newman, "The Nature of the Akhbārī/Uṣūlī Dispute"; Rajani and Gleave, "Shi'ī 'Family' of Legal Theories," 31–33.

17 See 'Alīpūr, *al-Madkhal*, 197–99.

18 Modarressi, *An introduction to Shi'ī Law*, 58.

19 al-Ṣadr, *Buḥūth*, 5: 11.

to the epistemological approach presented by Shi'ī scholars of the formative period, which leaves the door open to attaining certainty (*infītāḥ bāb al-ʿilm*) in legal rulings.²⁰

Yet, the Anṣārī school of *ijtihād* did bring about a major paradigm shift. Early Imāmī scholars and Akhbārīs believed that only when jurists were able to attain definitive knowledge on a given case of Islamic law would their rulings be authorised. Thus, single-strand tradition (*khabar wāḥid*) does not have value because it only provides an uncertain opinion for *mujtahid*. Despite adhering to this principle, early Imāmī scholars and Akhbārīs also argued that *aḥādīth* collected in the major Imāmī *ḥadīth* compilations—such as *al-Kāfī fī ʿilm al-dīn* collected by al-Kulaynī (d. 329/940–1) and *Man lā yahduruhu l-faqīh* compiled by al-Ṣadūq (d. 381/991–2)—are often (if not always) surrounded by definitive indicators that confirm the certainty of their accuracy and content. Post-Akhbārī jurists do not accept these early scholars' view. Instead, they hold that most of the *aḥādīth* collected in Shi'ī *ḥadīth* compilations are single-strand traditions, which are not supported by definitive indicators. Therefore, these *aḥādīth* can at best provide uncertain opinions for *mujtahid*. Yet, the Anṣārī school argues that such *aḥādīth* still have probative force (*ḥujja/ḥujjiyya*) because of the following epistemological principle: any given proof (*dalīl*) that is supported and endorsed by definitive indicators from the Qurʾān, *sunna*, or *ʿaql* (reason), even if it provides uncertain opinion, should be considered as reliable proof to derive Islamic laws.²¹ Even though uncertain opinions do not have probative force when considered alone, they do have that force when authorised by other definitive indicators. Uncertain opinions, such as *khabar wāḥid*, and the apparent meaning (*ḥuhūr/ḥāhīr*) of texts, have probative force because they are supported by definitive indicators of the Qurʾān, *sunna*, or *ʿaql*.

Therefore, according to the Anṣārī school, divine legal rulings can be obtained either through certainty (*ʿilm/qaṭʿ*) or through uncertain opinions (*ḥunūn*) which are endorsed and supported by definitive indicators. In

20 In contrast, there is a view in Imāmī scholarship called *insidād bāb al-ʿilm*, meaning that the door to obtaining definitive knowledge to legal ruling is closed (see al-Khurāsānī, *Kifāyat al-uṣūl*, 311–17). This approach was apparently proposed by al-Mirzā al-Qummī (d. 1231/1815–6) and suggests that Shi'ī jurists need to apply uncertain opinions in general as they are given probative force by Islamic sources unless there is definitive proof indicating that a certain type of uncertain opinion does not have probative force (*ḥujjiyya*). For instance, there are some *aḥādīth* expressing that uncertain opinions provided by *qiyās* and *raʾy* would not have probative force in *ijtihād*. Therefore, given this approach, these uncertain opinions must not be applied in Imāmiyya.

21 See al-Khurāsānī, *Kifāyat al-uṣūl*, 275–80; al-Muẓaffar, *Uṣūl al-fiqh*, 2: 22–33.

line with this approach, the following is the key principle of modern Imāmī *ijtihād*: believing in and following uncertain opinions is forbidden in Islam, unless a specific case of an uncertain opinion is excluded by a definitive indicator (*al-aṣl al-awwalī ḥurmatu l-ta'abbud wa-l-'amal bi-l-ẓunūn illā mā kharaja bi-l-dalīl*) and thus regarded as *ḥujja*. The Anṣārī school therefore emphasises the concept of probative force, rather than being concerned with obtaining certain or uncertain opinions in *ijtihād*.²² By stressing the concept of probative force, these jurists identify the ultimate goal of *ijtihād* as gaining *munajjiziyya* (inculcatoriness) and *mu'adhdhiriyya* (exculpatoriness) in front of God, and not obtaining the reality per se via definitive reasoning or uncertain opinions. This means that Shi'ī *mujtahids* are required to engage in exhaustive efforts to justifiably attain or derive divine legal rulings (*taḥṣūl/istikhrāj al-ḥujja 'alā l-aḥkām al-shar'iyya*) from reliable sources; they must be able to defend their actions and achievements of *ijtihād*, or they must have convincing exculpation for the path they have followed, if they are questioned hereafter by God.²³

2 Assumptions Underlying *Ijtihād*

The modern Imāmī paradigm of *ijtihād* is based on several epistemological, methodological, and religious assumptions. Therefore, before engaging in *ijtihād*, one should recognise such assumptions. Although Imāmī scholars have not discussed all these assumptions together as a package, a review of current Imāmī scholarship confirms that the following ones are often accepted by contemporary jurists.

One. Knowledge can be attained both within and outside of the Islamic contexts.²⁴ This refutes epistemic scepticism or the view that denies the possibility of attaining knowledge in general or religious knowledge in particular.

Two. The concept of knowledge is evident and thus does not need to and cannot be analysed or defined.²⁵

Three. God, the Prophet, his daughter Fāṭima, and the Twelve Imāms are infallible. Thus, Islamic revelation is infallible.²⁶

22 al-Khurāsānī, *Kifāyat al-uṣūl*, 464.

23 The translations of *munajjiziyya* to 'Inculcatoriness' and *mu'adhdhiriyya* to 'exculpatoriness' are suggested by Mottahedeh (see al-Ṣadr, *Durūs fī 'ilm al-uṣūl*, Translated by Roy Mottahedeh, 59).

24 al-Ṭabāṭabā'ī, *Nihāyat al-ḥikma*, 293.

25 Ibid.

26 'Ābidī Shāhrūdī, "Naqd-i 'aql bi 'aql," 28; al-Muẓaffar, *Uṣūl al-fiqh*, 2: 63.

Four. Ordinary humans, namely those who are not Prophet or one of the Twelve Imāms, are restricted in terms of their knowledge: they are fallible in nature, and their acquired knowledge (*'ilm iktisābī*) is obtained gradually. Therefore, the knowledge of ordinary humans is potentially fallible.²⁷

Five. A revealed religion is a collection of knowledge, beliefs, ethical rules, and laws related to God, the world, and humans. In this context, religion refers to Islam, and Muḥammad is the Prophet of Islam. Islamic revelation happened through Muḥammad and is followed and fully explained by the Twelve Imāms.²⁸

Six. The language of Islamic revelatory texts is factual and speaks of reality and truth. Therefore, Islamic teachings, in particular those related to legal rulings, are grounded in truth. Islamic teachings—in the form of descriptive propositions, statements, or utterances—describe reality. Imperative Islamic teachings are also factual regarding their origins and purposes (*al-mabādī wa-l-ghāyāt*). Therefore, the divine commands and obligations are based on actual interests (*maṣāliḥ wāqī'īyya*) which a practitioner may obtain by executing their duties in accordance with those commands. Similarly, the divine prohibitions are based on actual vileness (*maḥāsīd wāqī'īyya*) of the acts. Muslims must avoid those prohibitions to be immune from such vile consequences.²⁹

Seven. The original sources of Islamic teachings are the Qur'ān and *sunna* of the Prophet, his daughter Fāṭima, and the Twelve Imāms. These sources cannot and must not be lessened or increased. Therefore, the approach to these sources should be *ijtihādīc* in order to understand and derive Islamic teachings through them.³⁰

Eight. Islamic revelation, namely the Qur'ān and the authentic *aḥādīth* are unchangeable. However, as Muslim scholars' knowledge of Islamic teachings is epistemologically restricted and fallible, their understandings or interpretations of Islamic laws might lead to wrong outcomes and thus are potentially subject to *ijtihādīc* change.³¹

Nine. The reasoning process for deriving legal rulings, as will be addressed in detail later in this chapter, on one division, consists of two types of proofs:

1. The first type is called *ijtihādīc* proofs (*adilla ijtihādīyya*). It consists of proofs by which a *mujtahid* might derive an actual divine legal ruling (*al-ḥukm al-shar'ī al-wāqī'ī*). There are four sources for this type of proof:

27 'Ābidī Shāhrūdī, "Jāyghāh-i 'aql dar ijtihād," 116–17 and "Naqd-i 'aql bi 'aql," 28.

28 al-Ṣadr, *Durūs fī 'ilm al-uṣūl*, 35–36; al-Ṭabātabā'ī, *al-Mizān*, 5: 350–51.

29 al-Muẓaffar, *Uṣūl al-fiqh*, 2: 26–30; al-Nā'īnī, *Fawā'id al-uṣūl*, 3: 59.

30 al-Khū'ī, *al-Bayān*, 397–402; al-Muẓaffar, *Uṣūl al-fiqh*, 2: 53 and 63–64.

31 al-Khurāsānī, *Kifāyat al-uṣūl*, 468–69; al-Muẓaffar, *Uṣūl al-fiqh*, 2: 35–39; al-Nā'īnī, *Ajwad*, 1: 200–03.

the Qur'ān, *sunna*, *ijmā'*, and *'aql*. However, *ijmā'* (consensus) is highly disputed among Imāmī scholars both as a concept and in terms of its epistemic validity. These scholars believe that *ijmā'* is not a form of independent *ijtihād*ic proof unless one discovers the view of the Prophet or the Imāms through *ijmā'*, in which case it should be treated as a *sunna* and not as independent proof.

2. The second type is called juristic proofs (*adilla fiqāhatiyya*). It is based on procedural principles (*uṣūl 'amaliyya*), which consist of rules that do not lead to actual legal rulings but only tell us how to tackle any given case in practice through what is called an apparent divine legal ruling (*al-ḥukm al-shar'ī al-zāhirī*). The key point here is that these principles can only be applied to legal rulings if the case does not have enough indicators within the primary sources of *ijtihād*ic proofs. The most frequently used procedural principles are the following: the priority of divine exemption (*aṣālat al-barā'ā al-shar'iyya*), the priority of divine precaution (*aṣālat al-iḥtiyāṭ al-shar'iyya*), the priority of optional choice (*aṣālat al-takhyīr*), and the priority of presumption of continuity (*aṣālat al-istiṣhāb*).³²

Ten. In addition to those types of proofs, there is another set of general rules called legal maxims (*qawā'id fiqhiyya*) that are comprehensively or predominantly applicable to specific legal situations.³³ There is an abundance of such principles, some of which shall be discussed later.

Eleven. The goodness of justice (*ḥusn al-'adl*) and the vileness of injustice (*qubḥ al-zulm*) are generally accepted by Shī'ī scholars as the product of independent rational assessment.³⁴ According to this principle, divine justice exists, and therefore, God never does injustice to anyone, nor does He accept that humans should do injustice to each other. It will be explicated that this principle is one cornerstone of Imāmiyya which governs other *ijtihād*ic and practical reasoning and principles.³⁵

3 Prerequisites and Qualifications of *Ijtihād*

To engage in *ijtihād*, one must master various fields of knowledge and attain several qualifications and skills: only then can one be considered a *mujtahid*.³⁶

32 'Alipūr, *al-Madkhal*, 262–63; al-Muẓaffar, *Uṣūl al-fiqh*, 2: 20–21; al-Ṣadr, *Buḥūth*, 5: 11–15.

33 al-Irawānī, *Durūs tamhīdiyya*, 1: 13; Makārim al-Shirāzī, *al-Qawā'id al-fiqhiyya*, 1: 23–24.

34 al-Khurāsānī, *Kifāyat al-uṣūl*, 123–37; al-Muẓaffar, *Uṣūl al-fiqh*, 1: 209–30.

35 Muṭahharī, *Barrasi-yi ijmāli-yi*, 27; Ṣāni'ī, *Fiqh wa-Zindagī*, 69–71, 96–97, and 137–39.

36 One should carefully distinguish between two different subjects here: the present debate which relates to the qualifications of *ijtihād* and the other topic concerning the

However, there is no consensus among contemporary Shi'ī scholars on those qualifications and areas of knowledge. In fact, the number of such required qualifications is highly contested. For example, some scholars³⁷ only require that *mujtahids* meet three of the following qualifications, whereas mandate that they meet eight³⁸ or even more.³⁹ Nevertheless, the major qualifications usually cited by modern Imāmī scholars are as follows.

I. *Mujtahids* are required to have enough knowledge of Arabic and, more specifically, classical Arabic to read and understand the Qur'ān and *aḥādīth*.⁴⁰ They need to be knowledgeable about the Arabic lexicon and philology (*ilm al-lughā*) and thus be able to understand the origins, structures, and evolution of Arabic vocabulary. They should also learn morphology (*taṣrīf*) so they can determine the divisions and forms of individual words, particularly verbs and pronouns. *Mujtahids* should learn Arabic syntax (*naḥw*) to distinguish the structures of Arabic sentences in terms of inflection (*ī'rāb*). In addition, they need to know about Arabic rhetoric (*faṣāḥa wa-balāgha*) and so be able to apprehend the (claimed) eloquent style and rhetoric method of the Qur'ān.⁴¹

II. *Mujtahids* should also have a good working knowledge of classical logic. This means they need to be familiar with different methods of conceptualising technical terms and notions, as well as with the forms of successful and unsuccessful proofs (as explained in the classical discipline of logic) to use in their *ijtihād* when needed.⁴²

III. *Mujtahids* also need to master legal theory (*uṣūl al-fiqh*).⁴³ Imāmī scholars largely perceive this field of knowledge as the most important tool of

conditions of a *muftī*—a *mujtahid* who is qualified to provide legal advice (*fatwā*) on the request of ordinary Muslims; for example, being an adult (not minor), rational (not lunatic), a believer, just, etc. In accordance with Imāmī legal scholarship, although every *muftī* should necessarily have reached the level of *ijtihād*, not every *mujtahid* is qualified to be a *muftī*. For example, a nonbeliever or unjust person may reach the level of *ijtihād* but is not qualified to be a *muftī*.

37 See al-Khū'ī, *Miṣbāḥ al-uṣūl*, 3: 443; al-Khurāsānī, *Kifāyat al-uṣūl*, 468.

38 See al-Khumaynī, *al-Ijtihād*, 9.

39 See al-Murtaḍawī al-Langarūdī, *al-Durar al-naḍīd*, 1: 47; al-Fāḍil al-Tūnī, *al-Wāfiyya*, 250.

40 al-Khū'ī, *Miṣbāḥ al-uṣūl*, 3: 443; and *al-Tanqīh*, 1: 12; al-Khumaynī, *al-Ijtihād*, 9; al-Khurāsānī, *Kifāyat al-uṣūl*, 468.

41 al-Murtaḍawī al-Langarūdī, *al-Durar al-naḍīd*, 1: 47.

42 al-Khumaynī, *al-Ijtihād*, 10; al-Murtaḍawī al-Langarūdī, *al-Durar al-naḍīd*, 1: 48. al-Khū'ī, however, denies that knowledge of classical logic should be considered a prerequisite for engaging in *ijtihād* (al-Khū'ī, *al-Tanqīh*, 1: 12–13).

43 al-Khū'ī, *Miṣbāḥ al-uṣūl*, 3: 444 and *al-Tanqīh*, 1: 13; al-Khumaynī, *al-Ijtihād*, 10–11; al-Khurāsānī, *Kifāyat al-uṣūl*, 468; al-Murtaḍawī al-Langarūdī, *al-Durar al-naḍīd*, 1: 50–53.

ijtihād, without which a *mujtahid* cannot begin to practise it.⁴⁴ This issue will be further elaborated later in this chapter.

iv. It is also considered necessary for *mujtahids* to learn the technique of biographical evaluation, called *‘ilm al-rijāl* (which literally means “science of men”), of the individuals who transmitted *aḥādīth*.⁴⁵ The purpose of *‘ilm al-rijāl* is to explore the reliability of the *ḥadīth* reports through evaluation of the characters of their transmitters.

v. Moreover, *mujtahids* must also know about the typology of *aḥādīth* and be able to comprehend and assess the credibility of various types of *ḥadīth* called *‘ilm dirāyat al-ḥadīth*.⁴⁶ Generally, there are two types of *ḥadīth* in terms of their chains of transmission:

1. *Khabar mutawātir*: a type of *ḥadīth* which is narrated through various chains of transmission (*isnāds*) and numerous transmitters, making it practically impossible for all those transmitters to collude in reporting false news (*tawātū’ alā l-kidhb*). This type of *ḥadīth*, as Shi‘i *ḥadīth* scholars note, bestows certainty regarding the accuracy of the *khabar*.
2. *Khabar wāḥid* (single-strand tradition): a type of *ḥadīth* which is narrated by one or few chains of transmission, which may not provide assurance on its authenticity as being issued by the Prophet or the Twelve Imāms.⁴⁷

Imāmī *ḥadīth* experts and jurists argue that the first type of *ḥadīth* does not need to be investigated in terms of chains of transmission (*isnāds*).⁴⁸ Moreover, it is not necessary to examine the chains of transmission of those *aḥādīth* of the second type—*khabar wāḥid*—that are surrounded by definitive indicators,

44 A group of contemporary Shi‘i *uṣūlis*—mainly the pupils and disciples of the grand *muftī* Āyatallāh Ḥusayn al-Ṭabāṭabā’ī al-Burūjirdī (d. 1340Sh/1961)—while viewing legal theory as a required discipline in *ijtihād*, argue that jurists should not exaggerate the importance of *uṣūl al-fiqh* in deriving legal rulings. Therefore, they advise *mujtahids* to distinguish between those topics that are not functional in the process of extracting legal rulings and those topics that are useful in this process. Jurists must investigate the latter type of debates and avoid the former kind of discussions. In this regard, Khumaynī, for example, while arguing against the view that rejects the role of legal theory in *ijtihād*, suggests that a *mujtahid* must only investigate those issues of legal theory that are useful for deriving legal rulings: “concerning those issues [from legal theory] which is not useful ... it is better to either avoid discussing them or they should be investigated briefly; and [instead, it would be better for a *mujtahid* to] engage with those topics [of legal theory] which are more important and fruitful” (al-Khumaynī, *al-Ijtihād*, 10).

45 al-Khū’ī, *Miṣbāḥ al-uṣūl*, 3: 443 and *al-Tanqīh*, 1: 13–15; al-Khumaynī, *al-Ijtihād*, 12; al-Murtaḍawī al-Langarūdī, *al-Durar al-naḍīd*, 1: 57–60.

46 al-Khū’ī, *Miṣbāḥ al-uṣūl*, 3: 443; al-Murtaḍawī al-Langarūdī, *al-Durar al-naḍīd*, 1: 61.

47 al-Jubā’ī al-‘Āmilī, *al-Ri‘āya*, 62–70; al-Subḥānī, *Uṣūl al-ḥadīth*, 23–40.

48 al-Muzaffar, *Uṣūl al-fiqh*, 2: 68–69; al-Subḥānī, *Uṣūl al-ḥadīth*, 26–30.

which makes it certain that they have been issued by one of the infallible persons.⁴⁹ However, *ʿilm al-rijāl* is absolutely required for *ijtihād*, because most of the *aḥādīth* received from the Prophet and the Imāms are *khābar wāḥid* which are neither surrounded nor supported by definitive indicators. This means that they were received through one *isnād* or a few *isnāds*, and thus there is no certainty regarding their origin, accuracy, and authenticity. Because of this uncertainty, it is necessary to examine the chains of this kind of *aḥādīth* and explore whether the transmitters were just and credible (*muwaththaq*) persons. The important early *rijāl* books on which Imāmī jurists often rely are *Rijāl* of Abū l-Abbās al-Najāshī and *Rijāl* of al-Shaykh al-Ṭūsī, both from the eleventh century.

Concerning the transmission of *aḥādīth*, there is another significant typology in terms of the (un)reliability of their chains: the categories are *ṣaḥīḥ*, *ḥasan*, *muwaththaq*, and *ḍaʿīf*.⁵⁰ A *ṣaḥīḥ ḥadīth* is described as a *khābar* attributed to one of the fourteen infallible individuals with a complete (unbroken) chain of transmission and with transmitters who were all regarded as credible (*thiqa*), upright (*ʿadl*), and Twelver Imāmī Shiʿī. A report is called *ḥasan* if it is a *khābar* with a complete (unbroken) chain, ascribed to one of the fourteen infallible individuals by Twelver Imāmī transmitters who were praised but not considered upright. Imāmī scholars usually treat this latter type of *ḥadīth* the same as those in the first category in terms of reliability and authenticity. *Muwaththaq* is a *ḥadīth* with a complete chain, reported by individuals who are assessed entirely credible (*thiqa*), although they are not all Twelver Imāmī Shiʿī. This kind of *aḥādīth* is often thought reliable by Imāmiyya. Finally, a *ḍaʿīf* is a *khābar* if it is ascribed to one of the infallible persons but does not fit into any of the first three categories, either because it has at least one noncredible transmitter or it has an incomplete chain, meaning that there are one or more missing transmitters within the chain of transmission. This type of *aḥādīth* is often regarded as unreliable in *ijtihād* by Imāmiyya.⁵¹

VI. According to a number of jurists, Shiʿī *mujtahids* are also required to know the bibliography of early *ḥadīth* compilations (*ʿilm al-fihrist*). As argued by several contemporary Imāmī jurists, such as Burūjirdī (d. 1340Sh/1961), Sīstānī

49 al-Muẓaffar, *Uṣūl al-fiqh*, 2: 69; al-Subḥānī, *Uṣūl al-ḥadīth*, 39.

50 al-Jubāʿī al-ʿĀmilī, *al-Riʿāya*, 77–87; al-Subḥānī, *Uṣūl al-ḥadīth*, 48–52. It is important to realise that this typology is only related to *khābar wāḥid*. Only in this type of *ḥadīth* is the investigation of the chain required according to *ḥadīth* scholars.

51 In line with Sunni scholarship, there exist various *ḥadīth* divisions and subdivisions in Shiʿī debates, but these categorisations are more theoretical discussions and are rarely applied in practice by jurists. For a comprehensive discussion on this matter (see al-Subḥānī, *Uṣūl al-ḥadīth*).

(b. 1309Sh/1930), and Madadī (b. 1329Sh/1951), the early Shi'ī companions of the Imāms—those who were the narrators of the Imāmī *ḥadīth*—were very small in number compared to the Sunni transmitters of *ḥadīth*.⁵² Therefore, early Imāmī *ḥadīth* transmitters were encouraged to write down the *aḥādīth* that they heard from the companions of the Imāms. They would then read their writings to the companions and ask for permission to transmit the written versions. There were therefore several written versions of early *ḥadīth* books before the Shi'ī major *ḥadīth* compilations, such as *al-Kāfi* and *Man lā yaḥḍuruḥu l-faqīh*, were collected. Jurists thus need to investigate these different versions of early *ḥadīth* treatises, where available, because they might influence the *ijtihādīc* process. The most important early Shi'ī bibliography (*fihrist*) books are written by Aḥmad b. Muḥammad b. Khālīd al-Barqī (d. 274/887–8 or 280/893–4), Aḥmad b. Muḥammad b. Sa'īd al-Hamdānī, better known as Ibn 'Uqda (d. 332/944), Ibn Buṭṭa al-Mu'ddab al-Qummī, better known as Ibn Buṭṭa (tenth century), Abū 'Abdallāh Aḥmad b. 'Abd al-Wāḥīd b. Aḥmad al-Bazzāz, better known as Ibn 'Abdūn (d. 423/1032–33), and al-Shaykh al-Ṭūsī (d. 460/1067).

VII. Knowledge of exegesis of the Qur'ān and *ḥadīth* (*'ilm al-tafsīr*) is another necessary prerequisite for engaging in *ijtihād*.⁵³ A Shi'ī *mujtahid* should understand and apply exegetical principles to interpret the Qur'ān and *ḥadīth* and be knowledgeable of the times, places, and the contexts in which verses of the Qur'ān and the *aḥādīth* were revealed.⁵⁴

VIII. Another recommended qualification for *ijtihād* is knowledge of the legal or *ijtihādīc* heritage of early Imāmī scholars such as al-Ṣadūqayn ('Alī b. Bābawayh al-Qummī [d. 329/940–1] and his son Muḥammad b. 'Alī [d. 381/991–2]), Muḥammad b. Ya'qūb al-Kulaynī (d. 329/940–1), Ja'far b. Muḥammad known as Ibn Qūlawayh (d. 368/978–9), Abī 'Aqīl al-'Umānī (tenth century), Ibn Junayd al-Iskāfī (tenth century), and al-Shaykh al-Mufīd (d. 413/1022).⁵⁵ Interpretation of Islamic texts requires the careful examination of their meanings according to the time, place, and context in which these utterances were issued. Because early scholars were closer in time to the period of revelation—the era of the Prophet and the Imāms—most likely they were more aware of the contextual and verbal indicators (*qarā'in*) that increase understanding of the Islamic revelatory texts. Most of these textual and contextual indicators gradually disappeared from the texts and are no longer accessible. Thus, as several contemporary Imāmī scholars assert, the interpretations

52 See, for example, Madadī, “Tabyīn-i fihristī.”

53 al-Khurāsānī, *Kifāyat al-uṣūl*, 468; al-Murtaḍawī al-Langarūdī, *al-Durar al-naḍīd*, 1: 48–49.

54 al-Khumaynī, *al-Ijtihād*, 12–13.

55 al-Ṭabāṭabā'ī al-Burūjirdī, *Nihāyat al-uṣūl*, 2: 544–45.

of early scholars can be used as guidelines or affirmations of our own understanding of these texts.⁵⁶

IX. Finally, *ijtihād* is a technical tool, meaning that using it is a skill, and like any other skill, it should be practised over an extended period in order to obtain *malakat al-ijtihād*, that is, a high level of this skill.⁵⁷ Knowing all the rules, principles, and techniques without practically applying them would not be useful in *ijtihād*, and the person would not be considered as *mujtahid* in practice.⁵⁸

4 The Process of *Ijtiḥād*

As indicated, *ijtihād* is a multi-layered and complex process of investigating Islamic law, grounded in both Islamic primary sources and general legal principles. In the following, I will elaborate a simplified version of this process. Keep in mind that every topic raised here has been thoroughly debated and contested by modern Shi'ī legal scholars.

4.1 Knowledge of the Subjects

Jurists are required to have a general understanding of the subjects/topics (*mawḍū'āt*) of their studies, so they can derive relevant legal rulings. However,

56 al-Khumaynī, *al-Ijtiḥād*, 14–17; al-Murtaḍawī al-Langarūdī, *al-Durar al-naḍīd*, 1: 53–56.

57 al-Khumaynī, *al-Ijtiḥād*, 13–14; al-Murtaḍawī al-Langarūdī, *al-Durar al-naḍīd*, 1: 57.

58 As indicated, there are other qualifications of *ijtihād* addressed by some contemporary Imāmi jurists, such as having knowledge of “Islamic scholastic theology” (*ilm al-kalām*, literally “the science of speech/debate”) and being aware of the legal debates or *fatwās* of early Sunni jurists (see al-Murtaḍawī al-Langarūdī, *al-Durar al-naḍīd*, 1: 48 and 57). However, these are not listed as the qualifications of *ijtihād* by the majority of contemporary jurists. It should also be noted that several scholars, such as Khumaynī, count knowledge of “customary understanding” (*al-fahm al-'urfī*) as a prerequisite for *ijtihād* (see al-Khumaynī, *al-Ijtiḥād*, 9–10). This is because the Qur'ān and *sunna*, in their view, are revealed in accordance with the common sense of ordinary people. This means a *mujtahid* who intends to exercise *ijtihād* is required to obtain ordinary people's skill of communication. This will help the *mujtahid* to read and interpret the revelatory texts based on a customary understanding, not a complicated philosophical/theoretical way. There is another condition—the so-called “holy/divine faculty” (*quwwa qudsiyya*)—that early modern Imāmi legal scholars considered to be a prerequisite for *ijtihād* (see al-Iṣfahānī, *Hidāyat al-mustarshidīn*, 3: 617; al-Waḥīd al-Bihbahānī, *al-Fawā'id al-ḥā'iriyya*, 337). Some postclassical scholars describe this quality as a strong ability and pure nature of a *mujtahid* to apply general principles to specific legal cases (see al-Fāḍil al-Tūnī, *al-Wāfiyya*, 283). However, most contemporary jurists do not consider it a qualification of *ijtihād* (al-Murtaḍawī al-Langarūdī, *al-Durar al-naḍīd*, 1: 97–98).

it is commonly accepted in modern Imāmī *ijtihād* that a *mujtahid* does not need to always initiate an independent investigation of the meaning and identification of the subjects of legal rulings in all cases of *ijtihād*.⁵⁹ In brief, jurists list three types of subjects (see Figure 1):

1. Subjects created and designated by revelation (the Qurʾān or *sunna*) are called divinely created and designated subjects (*al-mawḍūʿāt al-mukhtaraʿa wa-l-manṣūṣa*), such as the concepts of prayer (*ṣalāt*) and fasting (*ṣawm*) in Islam.
2. Subjects whose notions are designated by society, whether the general public or professional community, are called customary subjects (*al-mawḍūʿāt al-ʿurfīyya*), such as the various topics of trades and transactions (*muʿāmalāt*).
3. Subjects that were originally customary but whose scope might be expanded or limited by the Qurʾān or *sunna*, such as the meaning of marriage in Islam. As scholars have concluded, the concept of marriage in pre-Islamic Arabia was much broader than that of Islamic marriage (*nikāḥ*).⁶⁰

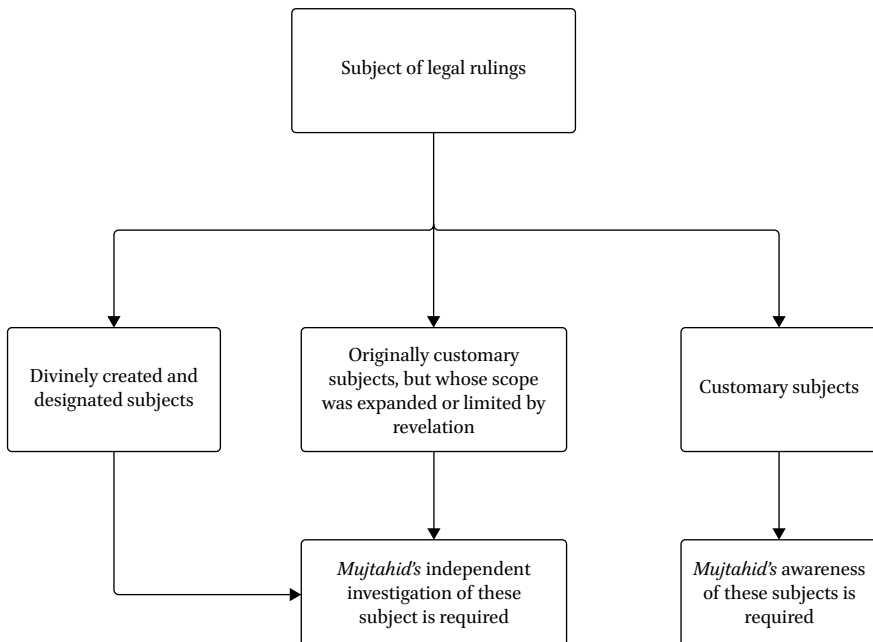


FIGURE 1 Various subjects of legal rulings

59 See Mūsawī Gurgānī, “Tabyīn-i ijtihād,” 282–83.

60 See Stern, *Marriage in Early Islam*.

In line with modern Imāmī *ijtihād*, the first and third types of subjects should be investigated by *mujtahids* directly as a first step in the process. However, *mujtahids* are not required to investigate customary topics independently; they may gain knowledge about such topics—for example, gambling, usury (*ribā*), and various kinds of trade—by taking their meanings from general society (*urf*) or by consulting experts if they involve specialised knowledge, such as different types of insurance or procreation through sperm donation or third-party reproduction.⁶¹

4.2 *Epistemology of Legal Reasoning*

The second step is to investigate Islamic sources of proofs as well as general principles to derive a divine legal ruling. The nature and applicability of these sources and principles are discussed in the field of *uṣūl al-fiqh*. Therefore, modern Imāmī jurists often consider *uṣūl al-fiqh* to be the most significant tool of *ijtihād*.

According to al-Khurāsānī, *uṣūl al-fiqh* is “knowledge of the prepared rules in order to derive divine legal rulings.”⁶² It is “a skill or profession (*ṣanāʿa*) on which one would recognise the rules that might be employed in the process of deriving legal rulings or that might be terminated to legal rulings in practice.”⁶³

This conceptualisation of *uṣūl al-fiqh*, deriving from a post-Akhbārī understanding of legal theory, was firmly articulated by the school of al-Shaykh al-Anṣārī. Ever since Imāmī *ijtihād* has been conducted on two levels.⁶⁴ On the first level, a jurist should seek **actual** divine legal rulings (*al-aḥkām al-sharʿiyya al-wāqʿiyya*) through the primary sources of argumentation called *ijtihādīc* proofs (*adilla ijtihādīyya*): the Qurʾān, *sunna* (tradition), *ijmāʿ* (consensus), and *ʿaql* (reason). If a legal ruling on a given case cannot be derived this way, then the jurist should apply the second level of *ijtihād*: tackling the issue through general principles called juristic proofs (*adilla fiqāhatīyya*). This level of *ijtihād* does not evoke actual legal rulings but results in **apparent** divine legal rulings **in practice** (*al-aḥkām al-sharʿiyya al-ẓāhiriyya al-ʿamaliyya*).

Based on these two levels of *legal reasoning*, al-Anṣārī proposed an epistemological taxonomy (see Figure 2) concerning different degrees of knowledge that the principles of legal theory might ultimately provide. Following this taxonomy,⁶⁵ there are three types of proofs in modern Shiʿī legal theory:

61 For a comprehensive debate on various topics of legal rulings, see ʿAlidūst, “Nazarāt-i kārshināsāna-yi faqih,” 43–70.

62 al-Khurāsānī, *Kifāyat al-uṣūl*, 9.

63 Ibid.

64 ʿAlīpūr, *al-Madkhal*, 385; al-Ṣadr, *Buḥūth*, 5: 9–11.

65 al-Anṣārī, *Farāʿid al-uṣūl*, 1: 25–26. See also al-Rawḥānī, *Muntaqā l-uṣūl*, 4: 5–20.

1. Definitive proof (*dalīl qaṭʿī*): A proof that leads to certainty in a legal ruling on a given case. This type is based on evidently clear texts (*nuṣūṣ*, sing. *naṣṣ*)⁶⁶ of the Qurʾān and *sunna*, *khavar mutawātir*, and reason (if it provides certainty).
2. Uncertain proof (*dalīl ḡannī* or *amāra* [pl. *amārāt*]): A proof that leads to an uncertain opinion in a legal ruling. The apparent meaning of texts (*ḡawāhīr*, sing. *ḡāhīr*)⁶⁷ of the Qurʾān and *sunna*, *khavar wāhīd*, and indecisive reason are regarded as uncertain ways of reasoning.
3. Principles called *uṣūl ʿamalīyya*—procedural principles—can be applied when the legal ruling on a given case is doubtful (*maʿa l-shakk*).

According to al-Anṣārī, the first type of proof results in **actual** divine legal rulings (*al-aḡkām al-sharʿīyya al-wāqīʿīyya*), whereas the second and third types of proofs may result in **apparent** divine legal rulings (*al-aḡkām al-sharʿīyya al-ḡāhīrīyya*). However, apparent legal rulings provided by the second type of proofs—namely, by *amārāt*—are different from apparent legal rulings based on the third type, *al-uṣūl al-ʿamalīyya*.⁶⁸ The former type *leans* towards actual legal rulings, albeit via uncertain opinions. Thus, the legal rulings derived by *amārāt* are sometimes called apparent divine legal rulings instead of actual legal rulings derived by the definitive way of reasoning. However, the third type—*uṣūl ʿamalīyya*—*never* aims or results in actual legal rulings but merely

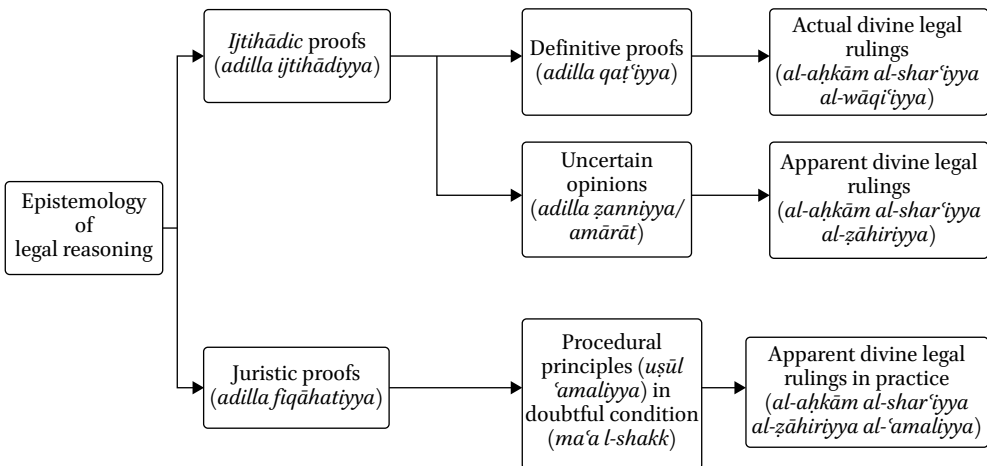


FIGURE 2 Epistemology of legal reasoning in modern Shiʿi *ijtihād*

66 Evidently clear texts convey their meanings as the intended meaning in a definitively unambiguous way. Thus, there is no possible double meaning in *naṣṣ* texts.

67 The apparent meanings of texts convey their contents with the intended meaning, though not definitively. Thus, *ḡāhīr* texts per se have more than one possible meaning.

68 al-Ṣadr, *Buḡūth*, 5: 11–15.

provides grounds from which to tackle legal topics *in practice*. Therefore, modern jurists categorise the legal rulings derived from such principles as **apparent divine legal rulings in practice** (*al-aḥkām al-sharʿiyya al-ẓāhiriyya al-ʿamaliyya*).

4.3 *Examining Ijtihādīc Proofs: The Revelatory Sources*

In modern Imāmī legal theory, those proofs leading to certainty in legal rulings intrinsically or substantially have probative force (*ḥujjiyya*), whereas uncertain opinions (*amārāt*) do not.⁶⁹ Therefore, it is not allowed to follow uncertain opinions, unless there exists a rational or revelatory indicator that explicitly confers probative force on a given uncertain opinion (*al-aṣl ḥurmatu l-ʿamal bi-l-ẓunūn illā mā kharaja bi-l-dalīl*). For example, it is argued that *khavar wāḥid* and apparent meanings (*ẓawāhir*) of the Qurʾān and *sunna* have probative force because the existing rational or revelatory indicators suffice for their validity in *ijtihād*.⁷⁰ However, the principle of legal analogy (*qiyās*) does not have probative force as there are no indicators to definitely validate the legal analogy.⁷¹

With these rules in mind, Imāmī jurists often begin the examination of a legal ruling on a certain topic by investigating the topic within the *ijtihādīc* sources—the Qurʾān, *sunna*, *ijmāʿ*, and *ʿaql*. First, they should determine whether this topic and its legal ruling are addressed by the Qurʾān. If the Qurʾān explicitly and decisively specifies the legal ruling on this topic and there are no valid indications in the *sunna* to contradict this ruling, then jurists consider it as a case of an established legal ruling which must be followed. However, if there is nothing explicit or decisive about the topic in the Qurʾān, then jurists are required to investigate the legal ruling on this case in the *sunna*.

As both the Qurʾān and *sunna* are text-based sources, investigation of the legal ruling on any given subject from these two revelatory sources requires the following steps.

First, jurists should examine the authenticity and accuracy of the texts from the Qurʾān and *sunna*. Since both texts are historical sources, it is necessary to examine the texts' chains of narration, origins, and various versions, if available. However, Muslim scholars hold that this step does not apply to the Qurʾān, because it has been received through multiple chains which provide certainty concerning its origin and authenticity. With regards to the *sunna* received through *aḥādīth*, there is some variation. It is generally believed that

69 al-Anṣārī, *Farāʿid al-uṣūl*, 1: 29 and 125–34; al-Khurāsānī, *Kifāyat al-uṣūl*, 258 and 27.

70 al-Muẓaffar, *Uṣūl al-fiqh*, 2: 69–90 and 129–47.

71 *Ibid.*, 2: 174–75.

for a *sunna* which was received through a *mutawātīr ḥadīth*, there is also no need to examine the chains of transmitters of the texts. However, if a *sunna* was received by a single-strand *ḥadīth*, then such *ḥadīth* requires examination of its origin and different versions, if available. Moreover, the people who are in the chain of this *ḥadīth* should also be examined. This means that jurists must assess the honesty, reliability, and memory condition of the individuals who reported the *ḥadīth*. In this way, jurists can verify that there was no way of fabricating, misunderstanding, or misreporting the *ḥadīth* by these narrators. Jurists accomplish this step using three fields of knowledge as previously explained: *ʿilm al-rijāl*, *ʿilm al-fihrist*, and *ʿilm al-dirāya*.

The next step is to develop an understanding of the texts of the Qurʾān and *sunna*. Jurists often assert that the texts of the Qurʾān and *sunna* are either evidently clear (*naṣṣ*) or apparently clear (*ẓāhir*). Evidently clear texts do not need further *ijtihād* to be interpreted: they evidently transmit their intended meanings. However, the latter type of texts can only be understood through a legal and hermeneutical process. This step is important because, as modern Imāmī jurists note, there are few evidently clear texts (*nuṣūs*) within Islamic revelatory sources; most of the Qurʾān and *sunna* are made up of apparently clear texts. Therefore, these texts must be understood in relation to their author and origin, as well as their time, place, and context. In this step, a *mujtahid* needs to examine all the verbal indicators (both attached and separated) and rational or contextual evidence provided by the texts.⁷²

This however should be noted that a Shīʿi jurist must always explore and interpret a text based on the author’s intention, which is chiefly conveyed by its literal meaning: the *ḥaqīqī* (real) meaning of the text, unless there are indicators referring to the *majāzī* (figurative) meaning.⁷³ As stated in legal theory, any given text conveys an apparent meaning at first glance. This is called the *prima facie* apparent meaning (*ẓuhūr badwī*), and it will not have probative force if there is no reliable evidence for this meaning: evidence that transforms it into an *established* apparent meaning (*ẓuhūr mustaqrr*). In modern Shīʿi legal theory, obtaining the established apparent meaning of any given texts of

72 It is necessary to know that there are two types of indicators (*qarāʾin*, sing. *qarīna*. See al-Muḥaffar, *Uṣūl al-fiqh*, 1: 35, 142–43): verbal or literal indicators called textual indicators (*qarīna lafẓiyya*) and nonverbal or nonliteral indicators called contextual indicators (*qarīna ḥāliyya/lubbiyya*). Textual indicators are divided into two types: (1) those which are immediately mentioned in the same part of the text, and are called ‘attached indicators’ (*qarāʾin muttasilā*) and (2) those which are not provided in that same part of a text but are mentioned elsewhere in the text, and are called ‘separated indicators’ (*qarāʾin munfaṣila*).

73 al-Khurāsānī, *Kifāyat al-uṣūl*, 281; al-Muḥaffar, *Uṣūl al-fiqh*, 1: 35–36.

the Qur'ān and *sunna* may be done by using hermeneutical tools, based on the following exegetical paired principles.⁷⁴

4.3.1 Commands (*awāmir*) and Prohibitions (*nawāhī*)

Several texts of the Qur'ān and *sunna* contain imperative forms of the verb (*awāmir*), which literally means “commands.” The principal issue is whether imperative forms imply “mandatoriness” (*wujūb*) or merely imply “recommendation” (*nadb*). Modern *uṣūlīs* often uphold that the literal or real (*ḥaqīqī*) meaning of the imperative form implies *mandatoriness*, whereas “recommendation” is the figurative (*majāzī*) meaning of this form.⁷⁵ Therefore, further evidence is necessary to accept a figurative meaning of an imperative verb as the intended meaning of a given case. Yet, there are texts from the Qur'ān and *sunna* which are expressed by prohibitive forms. The main point of discussion here is whether prohibitive forms imply forbiddenness (*ḥurma*) or “discouraged” (*kirāha*); in other words, whether something is forbidden or just disliked but not unlawful.⁷⁶ In modern Shi'ī legal theory it is often held that the prohibitive form literally means forbiddenness. Thus, “discouraged” is the figurative conception of this form; it therefore requires further evidence to be verified as the intended meaning of a certain case of prohibition.

4.3.2 General (*'āmm*) and Specific (*khāṣṣ*) Statements

The texts of the Qur'ān and *sunna* are expressed either in a general (*'āmm*) or a specific (*khāṣṣ*) form. Any revelatory text expressed in a general form must be investigated to ascertain whether there is a specific utterance related to that text. If so, the specific utterance should be considered an indicator (*qarīna*) that particularises (*takhṣīṣ*) the general text accordingly.⁷⁷ If there is no specific utterance, the text can be interpreted based on its generality (*'umūm*). Legal theory recognises several linguistic particles as signs of generality: *kull* (all), *jami'* (all), *'ayyu* (every), *kull wāḥid* (every single), and *al-* (the) identified as ‘the’ of inclusiveness (*istighrāqī*).

4.3.3 Absolute (*muṭlaq*) and Restricted (*muqayyad*) Statements

The revelatory texts are uttered either as absolute (*muṭlaq*) or as restricted (*muqayyad*) statements. When there is no evidence of a verbal, contextual, or

74 Gleave presents an excellent summary of such exegetical principles in Shi'ī legal theory (See *Islam and Literalism*, 44–55).

75 al-Khurāsānī, *Kifāyat al-uṣūl*, 70.

76 Ibid., 149.

77 Ibid., 215–16.

rational restriction (*taqyīd*) in a given Qur'ānic or *sunna* utterance, one can consider that the absolute meaning is intended by this statement. However, an absolute meaning, according to modern Shi'ī legal theory, can be attained if it meets all of the following qualifications, which are called the premises of wisdom (*muqaddimāt al-ḥikma*):

- The lawgivers (God, the Prophet, or the Imāms) should be in a position to seriously express their whole intended meaning in a given topic.
- The lawgivers do not address any contextual or verbal restrictions concerning the topic (either attached to the text or anywhere else in the scriptural sources), although it is possible for the lawgivers to mention them if intended.
- There should not exist a specific meaning or referent for the topic in the context of speaking (*al-qadr al-mutayaqqan fī maqām al-takhāṭub*), meaning that it should not evoke a specific meaning in people's minds when they address this topic.⁷⁸

When a given utterance meets all such qualifications or all the premises of wisdom exist in a specific utterance, then this utterance appears to convey an absolute statement that should also be considered its established apparent meaning. However, any utterance which seems to have an absolute meaning but may not meet one of these premises of wisdom should not be considered to have an intended or established absolute meaning. For example, if the lawgivers are not in a position to seriously express their whole intended meaning, or if the statement contains verbal or contextual or rational indicators for a restricted meaning, or if the *context of speaking* suggests a specific meaning to which that statement is referring, then in all such situations, there would not be an established absolute meaning for the utterance.

4.3.4 Ambiguous (*mujmal*) and Clear (*mubayyan*) Statements

Another hermeneutic pairing in legal theory is called ambiguous (*mujmal*) and clear (*mubayyan*) statements.⁷⁹ *Mujmal* is an utterance that may convey several meanings, but there is no indicator that one is preferred over the others. *Mubayyan* is a text that evidently clarifies the preferred meaning, though at first glance it might have numerous meanings.

4.3.5 Expressed (*mantūq*) and Implicated (*mafḥūm*) Statements

Mantūq is an utterance in which the intended meaning of the text is verbally expressed.⁸⁰ In contrast, *mafḥūm* is an utterance in which the intended

78 Ibid., 247–48.

79 Ibid., 252–53.

80 Ibid., 193–94.

meaning might be tacitly implied in the text but is not presented verbally or explicitly.⁸¹

4.4 *Examining the Ijtihādīc Proofs: Consensus and Reason*

If the divine legal ruling on a case cannot be found in the Qur'ān or *sunna* by pursuing the aforementioned process, then jurists need to investigate the legal ruling using consensus (*ijmā'*) and reason (*'aql*). The concepts of *ijmā'* and *'aql* and how they are used in Imāmī *ijtihād* shall be discussed in Chapter 6 where relevant.

4.5 *Examining the Juristic Proofs: Procedural Principles*

The process explained thus far describes the process of *ijtihād* at its first level, which applies when a given subject is addressed by *ijtihādīc* sources from which jurists might be able to derive the actual legal ruling on a subject. However, when a given subject has not been addressed in the *ijtihādīc* sources, then jurists should apply the second level of *ijtihād*, which is based on several procedural principles (*uṣūl 'amaliyya*) or juristic proofs (*adilla fiqāhatiyya*). The goal of *ijtihād* on this level is to determine Muslim individuals' position on a given topic and to explore the ways in which they should address this problem *in practice*. Therefore, a legal ruling derived from procedural principles at the second level does not imply an actual legal ruling (*ḥukm wāqī'ī*), but rather an apparent legal ruling in practice (*ḥukm zāhirī 'amali*). In fact, as al-Anṣārī notes, the need for such principles emerges when a *mujtahid*, after searching and examining all the primary sources, holds that an actual legal ruling on a given topic is still dubious or doubtful (*ma'a l-shakk*).⁸² Thus, legal rulings derived from such principles may only be applied in topics where no actual legal rulings on those topics can be found.

Although *adilla fiqāhatiyya* were established in Shi'ī legal theory much later than the *adilla ijtiḥādiyya*, it is striking that both carry equal weight in recent Imāmī paradigm of *ijtihād*. Imāmī jurists have come to realise that an increasing number of complex modern issues need to be explored using an Islamic lens. However, no scriptural texts from the Qur'ān or *sunna* can be applied to

81 *Maḥmūm* in the context of legal theory has been divided into two types. *Maḥmūm al-muwāfaqa* is a particular statement in a text regarded as an indication that those elements not mentioned imply a similar legal ruling to the expressed ruling. *Maḥmūm al-mukhālafa* is a particular statement in a text that is considered as an indication that those parts not mentioned imply an opposite legal ruling from the expressed ruling. Both types of *maḥmūm* contain various categories whose probative force are disputed in Imāmī legal theory. For a useful debate on this issue, see Gleave, *Islam and Literalism*, 49–55; al-Muẓaffar, *Uṣūl al-fiqh*, 1: 113–30.

82 al-Anṣārī, *Farā'id al-uṣūl*, 2: 10–11.

most of these issues. Moreover, many such cases are not subject to reason or rational proofs. As a result, the procedural principles are useful as they provide Muslims with solutions to tackle such legal issues in their daily lives.

There are four major procedural principles, which will briefly be explained next and in more detail in Chapter 7 where they are needed.⁸³

4.5.1 The Priority of Divine Exemption

One such principle in modern Imāmiyya is called the priority of divine exemption (*aṣālat al-barā'a al-shar'īyya*). Given this priority, if there is no clearly received evidence or proof in the primary sources (including unequivocal statements in scriptures or rational reasoning) to forbid a phenomenon or behaviour, it would be considered permissible in practice. Based on this principle, it can be concluded that, as long as there is no received evidence against a certain topic, it should be considered permissible.

4.5.2 The Priority of Divine Precaution

Another procedural principle is called the priority of divine precaution (*aṣālat al-iḥtiyāṭ al-shar'īyya*). Unlike the previous principle, this priority emphasises taking a cautionary position in cases of uncertainty (*shakk*) to make sure that legal duty has been complied with.

4.5.3 The Priority of Optional Choice

The third procedural principle is the priority of optional choice (*aṣālat al-takhyīr*). This principle applies when a given case potentially carries two possibilities and there is no received indicator which determines one side over the other. In this situation, following this procedural principle, the lawgiver

83 It is important to note that both in Sunni and pre-Anṣārī Shī'i legal theory, there exist principles named similarly to some of the procedural principles discussed here, such as *aṣālat al-barā'a* and *aṣālat al-istiṣhāb*. This similarity should not mislead us to correlate the two different types of reasoning established by pre-Anṣārī and Sunni legal theory with post-Anṣārī. However, as elaborated earlier (see Figure 3), procedural principles in post-Anṣārī legal theory are related to the third type of legal reasoning, which does not result in actual legal rulings but provides grounds from which to tackle given legal topics in practice (see al-Ṣadr, *Buḥūth*, 5: 9–11). In contrast, the *aṣālat al-barā'a* (or *aṣālat al-naḥy*, as it was commonly known as such in classical legal theory) and *aṣālat al-istiṣhāb* in Sunni and pre-Anṣārī legal theory (see, for example, al-ʿĀmilī (Ḥasan), *Maʿālim*, 319–24; al-Fāḍil al-Tūnī, *al-Wāfiyya*, 178–79; al-Ghazālī, *al-Mustasfā*, 2: 406–33; al-Ḥillī (Muḥaqqiq), *Maʿārij al-uṣūl*, 206–13; al-Samʿānī, *Qawāṭir al-adilla*, 2: 35–45; al-Sharīf al-Murtaḍā, *al-Dharʿa*, 2: 827–37) are considered either as decisive reasons or uncertain opinions (al-Ṣadr, *Buḥūth*, 5: 10). Therefore, they are either related to the first type of reasoning, which leads to actual legal rulings, or to the second type, similar to *khavar wāḥid*, which leans towards actual legal rulings, albeit via uncertain opinions.

leaves all the options in the hands of individuals, and they are free to choose either possibility as they wish but not both.

4.5.4 The Priority of Presumption of Continuity

Finally, the fourth principle is the priority of the presumption of continuity (*aṣālat al-istiṣhāb*). This priority implies that if a given case or a given legal ruling was previously known by certainty, and its condition has now become doubtful/uncertain, the case or the legal ruling should be presumed to continue as before, and thus the current uncertain situation should be neglected.

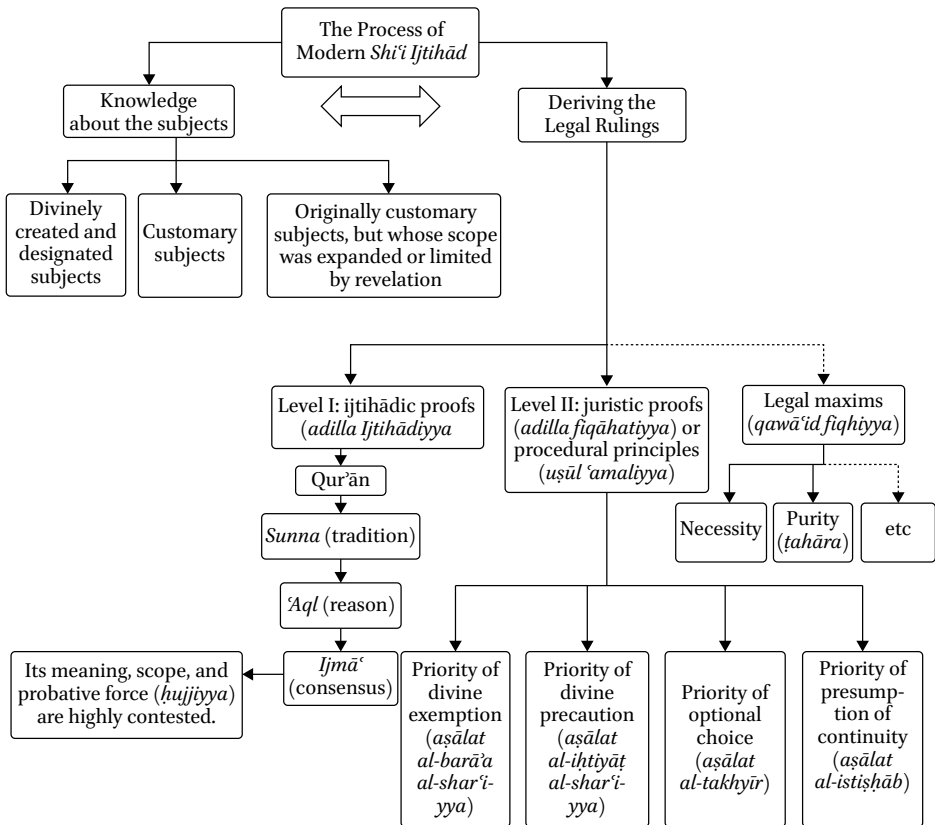


FIGURE 3 The modern Shi'i ijthādic procedure

Note: Legal maxims, as will be elaborated in Chapter 7, are not considered a different level of *ijthādic* procedure in Imāmī discourse. In fact, these maxims either result in certainty or reliable personal opinions, or they provide solutions to tackle a legal problem in practice. In the latter case, such maxims should be counted as procedural principles, and thus they belong to the second level of the modern Shi'i *ijthādic* process. In the former two situations, where these maxims provide certainty or reliable personal opinions about legal rulings, they should be regarded as *ijthādic* reasoning and thus belong to the first level of the *ijthādic* process. This is why I use a dashed line while referring to legal maxims.

4.6 *The Role of Legal Maxims*

In addition to the *ijtihādīc* proofs and procedural principles, there are other rules called legal maxims (*qawā'id fiqhīyya*) that Imāmī jurists often use to derive legal rulings. In fact, the process of *ijtihād* on any given case, as per modern Imāmī *ijtihād*, would not be complete if *mujtahids* did not consider or seek the applicable legal maxims in their investigation. Legal maxims consist of the general principles of *fiqh* that can comprehensively or predominantly be applied to all of their related specifics. There are numerous legal maxims in Shi'i legal scholarship, including the maxims of dominance (*qā'idat al-taslīt*),⁸⁴ purity (*al-ṭahāra*),⁸⁵ no harm and no retribution (*lā ḍarar wa-lā ḍirār*), the necessary elimination of harm (*al-ḍarar yuzāl*),⁸⁶ and necessity (*al-iḍṭirār*).⁸⁷ Some of these maxims will be discussed in Chapter 7.

5 **Shi'i *Ijtihād* on Trial: A Case Study of Modern Shi'i *ijtihād* on Transgenderism**

Modern medical technologies have been used to perform gender confirmation surgery (GCS) since the middle of the twentieth century. Although GCS is considered a positive innovation, with proponents contending that it has positive effect on individuals who wish to undergo this transition, it has resulted in challenges for religions, including Islam. Muslim jurists have encountered several questions as the demand for GCS has grown among transgender Muslims in various societies or communities. Experts have been asked, in particular, to issue *fatwās* regarding the (im)permissibility of this surgery in Islam. In response to such demands, a number of jurists argued that GCS should be

84 In accordance with this maxim, individuals have the right to control over their soul, body, and property. However, it is important to know that this right is limited to all possessions that are considered as rational within humans or within Muslim societies (see al-Irawānī, *Durūs tamhīdiyya*, 2: 104–10; Makārim al-Shīrāzī, *al-Qawā'id al-fiqhīyya*, 2: 34–37).

85 This maxim implies that everything is pure or clean unless one knows definitely that it is not clean or pure (al-Irawānī, *Durūs tamhīdiyya*, 2: 44; Makārim al-Shīrāzī, *al-Qawā'id al-fiqhīyya*, 2: 417–22).

86 According to this widely accepted principle in Islamic legal scholarship, Muslims are not allowed to harm themselves or harm others; rather, they must take care of their own and others' lives, health, and property (see al-Irawānī, *Durūs tamhīdiyya*, 1: 89; Makārim al-Shīrāzī, *al-Qawā'id al-fiqhīyya*, 1: 54–59).

87 This maxim, which in its complete format is articulated as *al-ḍarūrāt tubīḥu l-maḥzūrāt*, implies that necessities render impermissible or unlawful acts or behaviours permissible or lawful (Muḥaqqiq Dāmād, *Qawā'id-i fiqh*, 4: 123–24).

regarded as sinful, and thus prohibited (*ḥarām*) in Islam.⁸⁸ However, the Imāmī jurist Āyatallāh Khumaynī issued a *fatwā* in the 1960s legalising GCS in Islamic law and then, a few decades later, in the state law of Iran. I have discussed this subject extensively elsewhere.⁸⁹ However, to show how the modern Shī'ī paradigm of *ijtihād* deals with new phenomena, I briefly explain Khumaynī's *fatwās* on GCS.

5.1 *Khumaynī and the Theology of Opponents*

Muslim jurists who oppose GCS take the easy route by simply forbidding the surgery. They believe that transgender Muslims must be identified as female or male based on their biological and sexual organs, and consequently they must perform the Islamic mandatory practices as a male or female. These jurists have tried to enlist a variety of proofs to support the prohibition of GCS, but their most important proof, as the Islamic Fiqh Council of the Muslim World League stated, is that surgery is an alteration of God's creation.⁹⁰ Suffice it to recall it briefly that in the Islamic theological tradition, God has created everything as it is, including human beings, and God does not make mistakes. Therefore, individuals are, in fact, created in their God-given natures, and they must go back to Him as they were born. If GCS is performed, then God's own creation is interfered with, a creation no one in existence has any right to alter. There is a verse in the Qur'ān (4:119) that states:

[A]nd surely I shall lead them astray, and arouse desires in them. I shall command them and they will slit the ears of cattle; I shall command them and they will alter God's creation. Whosoever takes Satan as a protector apart from God has surely suffered a manifest loss.

Some Muslim scholars use this verse to argue that God commands us not to change the creation of Allāh. Otherwise, Satan will take shape instead of Allāh, and we will be acting against God's intrinsic nature. Khumaynī seems to uphold that all the proofs presented against GCS cannot convincingly forbid GCS. In his opinion, there is enough evidence in the Qur'ān and *sunna* of the Prophet or Imāms to show that changing "the creation of God" as mentioned in the Qur'ān refers to other issues, such as changing Islam and one's faith, not

88 See, for example, al-Jīzānī, *Fiqh al-nawāzil*; al-Tabrīzī, *Aḥkām al-muḥtaribūn*; al-Qarāḍāwī, *al-Ḥalāl wa-l-ḥarām*.

89 Alipour, "Islamic Sharī'a law" and "Transgender Identity." For some useful discussion on this *fatwā*, also see Najmabadi, *Professing Selves*, in particular, chap. 5; Saeidzadeh, *Trans and Sex Change*.

90 The Muslim World League, "The Sixth Fatwa Resolution." See also al-Kanaan, *al-Mawsū'a; Karīmīniyā, Taḥyīr-i jinsīyat*.

operations on the human body.⁹¹ Khumaynī, therefore, exercised *ijtihād* to the topic of GCS and issued a new *fatwā* legalising GCS in Islam.

5.2 *Khumaynī and the Fatwā on Gender Confirmation Surgery*

Perhaps the first response to the issue of GCS among Muslim jurists was by Khumaynī, in his book *Tahrīr al-wasīla*, in the 1960s.⁹² Khumaynī addressed this topic in a section devoted to “The Changing of Gender and/or Sex.”⁹³ This section discusses ten problems. Problem 1 is a *fatwā* which explicitly discusses the permissibility of GCS for every individual, including transgender people. Subsequent problems deal with the specific results of GCS, such as the status of a person’s marriage and kinship after surgery. Here is the *fatwā*:

It seems that changing the sex and/or gender (*jins*) of a male to a female by surgery is not prohibited (*ḥarām*) [in Islam] and vice versa, and it is also not prohibited for an intersex person (*khunthā*) undergoing it to be attached to one of the sexes and/or genders [female or male]; and does the surgery become obligatory if a woman finds in herself [sensual] desires similar to man’s desires or some evidence of masculinity in herself—or a man finds in himself [sensual] desires similar to the opposite sex or some evidence of femininity in himself? It seems that [in such a case] if a person really belongs to a [determined] sex and/or gender, surgery is not obligatory (*wājib*), but the person is still eligible to change their sex and/or gender (*jinsīyya*) into the opposite sex and/or gender.⁹⁴

Khumaynī issued another *fatwā* on GCS in the late 1980s, perhaps a year before his death. This later *fatwā* was issued on the demand of a transgender woman

91 Karīmīniyā, *Taghyr-i jinsīyyat*, 124–31.

92 This *fatwā* was issued almost two decades before Iran’s 1979 revolution under Khumaynī’s leadership. Therefore, it appears that Khumaynī issued the *fatwā* in favour of GCS far beyond his political biases. In fact, there is no convincing evidence to attest that Khumaynī, various political parties in Iran, or even the authorities of the country knew that such a revolution would happen two decades after the issuing of this *fatwā*.

93 The title of this section in *Tahrīr al-Wasīla* is “*taghyr al-jinsīyya*.” Following modern scholarship on gender studies, Iranian scholars or those who write in Persian generally distinguish between two concepts of sex and gender. They usually use the term *jins* to address sex and the term *jinsīyyat* to refer to gender. Therefore, given the modern conception, the term *jinsīyyat* in the title should be translated as *gender*. Whether Khumaynī was aware of such distinction or not, in this *fatwā* as well as the following one, he consistently applies both terms interchangeably. Thus, this point needs to be further investigated in Khumaynī’s scholarship. However, to keep all possibilities open, I shall address both concepts while discussing Khumaynī’s *fatwās*.

94 al-Khumaynī, *Tahrīr al-wasīla*, 2: 626.

called Maryam-Khātūn Mulkārā, whose fascinating story has been discussed elsewhere.⁹⁵ In this *fatwā*, Khumaynī allows Maryam-Khātūn to undergo GCS on recommendation from trustworthy doctors. Here is this second *fatwā*:

In the Name of God Almighty. Changing the gender and/or sex (*jinsiyyat*) [by surgery] is not prohibited in Islam if reliable medical doctors recommend it. *Inshā Allāh* you will be safe and hopefully the people whom you had mentioned might take care of your situation.⁹⁶

The Islamic government of Iran seems to have followed this *fatwā* and changed the state law. Under current state law, transgender GCS is allowed and supported by the Iranian government. Transgender people have the security of a new birth certificate, a new identity card, and a new passport, as well as access to other facilities for their operations, such as through a loan provided by the government. The Iranian transgender community has remained active, establishing an organization to counsel and help transgender persons. Although the efforts of the community led to changes which ensured embedded Islamic tolerance and acceptance in Islamic law and, subsequently, state law, it will take much longer for people who have undergone GCS to be accepted by the patriarchal society and culture of Iran.

5.3 *Reviewing Khumaynī's Ijtihādīc Process on GCS*

As indicated, Khumaynī issued two *fatwās* on GCS. The *fatwās* are short but quite clear, allowing transgender Muslims to undergo GCS. In fact, Khumaynī's earlier *fatwā* clearly includes every person who wishes to confirm their sex and/or gender by this method. However, a number of jurists hold that if the GCS is not necessary and urgent, it cannot be permissible in Islam.⁹⁷ According to these jurists, in such a case GCS necessarily encounters other prohibitions, that is surgery requires surgeons to look at and touch the genitalia of another person who is not their wife or husband. Therefore, in this instance, though the GCS is not prohibited in itself, it must be avoided because of other prohibitions that proscribe temptation. Nevertheless, Khumaynī's *fatwās* do not contain such a restriction. In addition, since GCS is considered necessary and urgent for transgender people, the *fatwās* in any case include them.

95 Alipour, "Islamic Sharī'a law."

96 An image of the original *fatwā* in Persian can be seen on this website: <https://iranwire.com/en/special-features/66920/>.

97 al-Kharrāzī, "Taghyīr al-jinsiyya," 24; al-Muntaẓirī, *Dirāsāt*, 2: 517–18; al-Mu'min, *Kalimāt sadīda*, 94–95.

Now let us consider Khumaynī's method for providing transgender people with such *fatwās*. As is normal among Imāmī jurists, Khumaynī did not cite his religious sources. He also did not discuss the case in his expanded scholarly books. However, it is still possible to enquire into his proofs by investigating his methodology.

The first step for Khumaynī was to understand the topic of his *ijtihādīc* investigation. Since this topic, namely transgender GCS, is a professional customary subject, he needed to consult with some scientists to fully understand the issue. Based on Mulkārā's report, she had sent two letters to Khumaynī concerning her case. But, on both occasions, Khumaynī mistakenly thought she was an intersex person and so told her to practise Islam as such. This prompted Mulkārā to meet him in person and explain her situation. Khumaynī then consulted scientists about the issue, including psychologists, physicians, and surgeons.⁹⁸ He wanted to understand the subject clearly.

As elaborated earlier in this chapter, the legal ruling on any case in (Shī'ī) Islam should first be investigated by reference to *ijtihādīc* reasoning which contains four original sources: the Qur'ān, *sunna*, *ijmā'*, and *'aql*. If a case does not have enough proof in these sources, the legal ruling should be understood by legal maxims or by procedural principles at the level of the second stage. Khumaynī, indeed, as a neo-traditional Imāmī jurist, believes in this method.⁹⁹ However, because transgenderism is a new subject, there is nothing in the Qur'ān and *sunna* that clearly refers to it. No wonder the subject remains controversial among Imāmī Muslim scholars. Moreover, at this first stage, there is no clear statement from *'aql* regarding the question of transgender GCS. Therefore, by his methodology of *ijtihād*, there is no way, except by returning the subject to *qawā'id fiqhīyya* or *uṣūl 'amaliyya*, to seek a second solution. At this level, Khumaynī could possibly employ some different principles to derive a legal ruling on transgender GCS. Let us consider two of Khumaynī's possible proofs for the permissibility of GCS.¹⁰⁰

First, there is an Islamic legal maxim called the maxim of dominance (*qā'idat al-taslīṭ*). According to this rule, everybody has a right to, or control over, their body and property. Imāmī jurists consider this highly rational, a rule which Shari'a does not deny. But it is important to know that this right in Islam is limited to all possessions that are considered as rational within humans or within Muslim societies.¹⁰¹ If changing the body by surgery is considered as

98 Tait, "A fatwa for freedom."

99 al-Khumaynī, *Manāhij*, 1: 51–54; and *al-Rasā'il*, 2: 95.

100 For a comprehensive examination of Khumaynī's proofs through legal maxims and procedural principles, see Alipour, "Islamic Shari'a law."

101 al-Kharrāzī, "Taghyīr al-jinsiyya," 24.

rational, as it is in many modern societies, everybody, following this rule, is eligible to use their right to change their body through surgery. It is not difficult to see that Khumaynī partly grounded his *fatwā* on this rule. The only precondition mentioned in this proof is that the given action should be deemed as rational within humans. It seems that Khumaynī, in the case of considering this maxim for his *fatwās*, held that undergoing GCS is a rational act that can be chosen by individuals as they are in possession of their bodies.

Second, the priority of divine exemption is a principle that perhaps Khumaynī took into account for issuing this *fatwā*. Assuming this priority, if there is no clearly received evidence in Islamic sources (including unequivocal statements in scriptures or rational proofs) to forbid a subject or action or practice, it would be considered permissible in practice.¹⁰² This is because the famous verse of the Qur'ān (17:15) states that Muslims will not be punished without a received message, and a *ḥadīth* from the Prophet Muhammad says that Muslims are relieved of that which they do not know by clear received proof.¹⁰³ Grounding on this principle, it can be concluded that as long as there is no received evidence against GCS, it should be presumed permissible.

In addition, there is yet another important principle in Khumaynī's methodology of *ijtihād* that influenced his *fatwās*. This principle was named "the role of time and place in *ijtihād*" by the man himself.¹⁰⁴ As he articulated, *ijtihād* is dynamic when considering the two important factors of time and place. If a subject has a special *ḥukm* (legal ruling) in Islam in a particular time or place, the same subject, because of a different political and societal situation, might be changed in its *ḥukm*. This means that *ijtihād* can adapt to cultural conditions, which inevitably change over the passage of time and variation in place. This rule makes the Islamic legal rulings flexible over time and space or, in general, across cultures. During his leadership, Khumaynī used this principle to rectify the common traditional approaches to various topics in post-revolutionary Iran, such as the permissibility of music, playing chess, and women's rights to be elected to parliament. Transgender GCS is one of the cases Khumaynī saw as pertinent to the new situation. Following this rule, he issued the *fatwā* generally, without limitations that traditional Muslim scholars would consider; he did not explicitly or tacitly address any restrictions to it. It shows that he did not agree with such traditional limitations for surgery, because of the new cultural context regarding human life.

102 For a detailed analysis, see Chapter 7.

103 al-Ṣadūq, *al-Khiṣāl*, 417.

104 Khumaynī, "Manshūr-i rawḥāniyyat."

6 Final Remarks

This chapter has explored the modern Shi'ī paradigm of *ijtihād* in order to provide the methodological repertoire for the rest of the study. Then, to show how the methodology of *ijtihād* works when it encounters modern topics, Khumaynī's *fatwā* on the issue of transgender GCS was investigated. This examination explains how the modern Imāmī *ijtihād* realised its potency by producing an enlightened *fatwā*. Prompted by such a *fatwā*, one may wonder whether contemporary jurists or '*ulamā*' could provide new *fatwās* on analogous phenomena such as homosexuality and bisexuality, and their legalisation. In response to this question, Ḥujjat al-Islām Karīmīniyā, a Shi'ī cleric, holds that this is absolutely not possible.¹⁰⁵

Concerning homosexuality, one may wonder whether there is really no door for discussion that can be opened. In the last decade, indeed, a number of scholars have presented several alternative interpretations of Islamic sources on homosexuality.¹⁰⁶ The present study, however, does not discuss the reformist scholars' approach. This study also does not take the approach of clerics such as Karīmīniyā, who are not jurists or *muftīs*, and thus ineligible to issue *fatwās* on new topics, such as homosexuality. Rather, the query is addressed to (neo-)traditional Muslim jurists investigating whether there is any light that could be shed on this new subject through modern Imāmī *ijtihād*. Therefore, one may ask Shi'ī '*ulamā*' who follow this paradigm of *ijtihād* whether homosexuality is prohibited according to Islamic law. And if so, do the condemnation and criminalisation of modern homosexuality cohere with Islamic sources, and are there any alternative understandings of Islam on this topic? These questions could open up the possibility for Imāmī jurists to develop a tolerant or even accepting approach towards homosexuality. Given that, such an opened door could propel Islamic scholarship to provide homosexual Muslims with progressive *fatwās* which could expand the scope of Islamic tolerance and acceptance on this issue.

This study, following the same route of *ijtihād* established and widely exercised by modern Imāmiyya, investigates Shi'ī legal rulings on homosexuality with the aim of opening a dialogue with Imāmī jurists. Taking the example of the GCS *fatwā* as a starting point, this study will explore how an alternative discursive space, and thus a new interpretation of Islamic tradition towards homosexuality, is possible.

¹⁰⁵ Najmabadi, *Professing Selves*, 186.

¹⁰⁶ See, for example, Ali, *Sexual Ethics and Islam*; Jahangir and Abdullatif, *Islamic Law and Muslim Same-Sex Unions*; Kugle, *Homosexuality in Islam*.

Modern Homosexuality and the Pre-Homosexual Categories

1 Conceptualisation of Homosexuality

The present study aims to investigate discursive spaces on homosexuality in the modern Imāmī legal system. Concerning the Imāmī *ijtihād*, any legal ruling should pertain to a specific subject (*mawḍūʿ*). However, identification of the subjects of legal rulings is mainly beyond the scope of *ijtihād*. Nevertheless, to issue relevant *fatwās*, *mujtahids* need to clearly understand the subjects or topics on which they wish to exercise *ijtihād*. As elaborated in Chapter 2, subjects of divine legal rulings are divided into three different types: (1) subjects that are created and designated by the Qurʾān or *sunna*, (2) subjects that need to be taken from society, (3) subjects which are originally customary but whose scope may be extended or limited by the revelatory texts. Presuming that homosexuality is a modern phenomenon, it is clearly not a subject created and designated by the Qurʾān or *sunna*; nor has its scope been extended or limited by the Qurʾān or *sunna*. Therefore, it should be considered a subject which needs to be understood from within the societies where individuals have been engaged in homosexual behaviours.

The very modern scholarship on homosexuality was established in the late 1960s under the influence of scholars such as Mary McIntosh (1936–2013), Michel Foucault (1926–1984), John Boswell (1947–1994), and Jeffrey Weeks (b. 1945). Scholars began to carefully investigate this topic ever since. They have introduced various articulations of homosexuality.¹ However, the nature of homosexuality is yet a matter of dispute as it seems to be more complicated than it appears at first glance. In the present study, I am not in a position to examine all notions of homosexuality. Instead, briefly reviewing Foucault’s approach, I explicate the meaning of homosexuality based on Jeffrey Weeks’s and David Halperin’s views. I focus on their views not only because they are

1 See, for example, Boswell, *Christianity, Social Tolerance, and Homosexuality*; Foucault, *The History of Sexuality: Volume 1* (HS1); Gunther, *The Elastic Closet*; Halperin, *How to Do the History of Homosexuality*; Halwani, “Essentialism, social constructionism, and the history of homosexuality”; Iemmola, and Ciani, “New Evidence of Genetic Factors”; McIntosh, “The Homosexual Role”; Sedgwick, *Epistemology of the Closet*; Weeks, *Coming Out* and *The World We Have Won*.

most compatible with the present study, but also because their scholarship has constituted the central debate on this topic ever since.

2 A Canonical Reading of a Passage from *The History of Sexuality*

Foucault, in a famous passage in *The History of Sexuality*, compares the two phenomena of sodomy/sodomite and homosexuality/the homosexual and makes distinctions between them. According to him,

[t]his new persecution of the peripheral sexualities entailed an incorporation of perversions and a new specification of individuals. As defined by the ancient civil or canonical codes, sodomy was a category of forbidden acts; their perpetrator was nothing more than the juridical subject of them. The nineteenth-century homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and a morphology, with an indiscreet anatomy and possibly a mysterious physiology. Nothing that went into his total composition was unaffected by his sexuality. It was everywhere present in him: at the root of all his actions because it was their insidious and indefinitely active principle; written immodestly on his face and body because it was a secret that always gave itself away. It was consubstantial with him, less as a habitual sin than as a singular nature. We must not forget that the psychological, psychiatric, medical category of homosexuality was constituted from the moment it was characterized—Westphal's famous article of 1870 on 'contrary sexual sensations' can stand as its date of birth—less by a type of sexual relations than by a certain quality of sexual sensibility, a certain way of inverting the masculine and the feminine in oneself. Homosexuality appeared as one of the forms of sexuality when it was transposed from the practice of sodomy onto a kind of interior androgyny, a hermaphroditism of the soul. The sodomite had been a temporary aberration; the homosexual was now a species.²

A canonical reading of this passage seems to verify the following understanding which has often been presented by scholars since the publication of *The History of Sexuality*, volume 1 (HS1).³ Before the nineteenth century, societies,

² Foucault, HS1, 42–43.

³ For instance, Stephen O. Murray (Murray, *Homosexualities*) and Mark D. Jordan (Jordan, *The Invention of Sodomy*) have such an understanding of this passage of HS1 and then criticise

as Foucault elaborates, commonly categorised sexual differences based on various types of sexual practices. There was no discussion of sexual agents, subjects, or characters; in fact, sexual practices were not considered to manifest any indications of sexual identity or sexual subjectivity. From the nineteenth century onwards, however, sexual behaviours have represented the subjectivity of sexual agents. Thus, the concept of sexuality which expresses sexual orientations and new categorisations of individuals was invented, and furthermore, sexual differences began to be perceived as different sexual identities. For example, in the case of sodomy, Foucault explains that it was a category of sinful or forbidden practice that a person may commit; it did not manifest the person's character. However, modern homosexuality is understood as a *personage*, an identity and a style of life. Therefore, for Foucault, *sodomite* is a *temporary aberration* whereas *the homosexual* is a *species*.⁴

This understanding of Foucault's differentiation between modern homosexuality and sodomy can be further confirmed by considering that Foucault repeated the same idea, in more explicit remarks, in his less famous work entitled *Vingt ans et après* (Twenty Years After) published in 1978 under the name of his interviewee Thierry Voeltzel. This book originally consisted of several of Foucault's interviews with Thierry Voeltzel, a young gay man. Foucault made these interviews as he was completing HS1. In this interview, Foucault explains the distinction between the two phenomena of sodomy and homosexuality by stating that homosexuality, as a category of sexuality, was invented in very modern times and did not exist in the past.⁵ What existed in the past, in Foucault's view, was sodomy, which can properly be described as different types of same-sex sexual acts, some of which were legally condemned.

Thus, in Foucault's view, *homosexuals* as individuals who identify as such did not exist in the past. Moreover, his idea of modern identifications of sexuality implies that pre-homosexual categories, such as sodomy, only refer to sexual practices and not to agents of the sexual acts. Thus, it appears that, in Foucault's view, there were no sodomites as individuals who identified as such.

In a chapter entitled 'Forgetting Foucault', David Halperin challenges this widely known understanding of the quoted passage of HS1.⁶ He even, seemingly oddly, asserts that Foucault, in his observation presented in *Vingt ans et après*, was trying to make the discussion understandable for his non-academic

Foucault's view on this matter. Murray even argues that this is the only way to interpret Foucault's opinion here. Therefore, in his view, David Halperin's attempt to understand this passage differently deviates far from Foucault's intention in this segment.

4 Halperin, *How to Do the History of Homosexuality*, 27.

5 Voeltzel, *Vingt ans et après*, 33.

6 Halperin, *How to Do the History of Homosexuality*, 29–32.

interlocutor or perhaps to sympathise with his ideas.⁷ Foucault, as Halperin remarks, is not claiming that there were no sexual identities but only sexual practices in the premodern period. Halperin finds it hard to accept that Foucault made such an argument which, in Halperin's view, is "heedless of European history."⁸ Therefore, he regards the common interpretation of this passage "as inattentive to Foucault's text"⁹ and offers an alternative understanding of Foucault based on his general project on sexuality—albeit still one which is perhaps not very consistent with Foucault's own words.

Halperin begins with a close reading of the quoted passage. According to him, the common misunderstanding happened by forgetting the following significant statement of Foucault where he states, "[a]s defined by the ancient civil or canonical codes, sodomy was a category of forbidden acts."¹⁰ This clause, as Halperin notes, is a significant part of the passage where Foucault suggests only a modest doctrine. That is, in Foucault's view, there are different ways to prohibit same-sex sexual relationships. In premodern times, same-sex sexual relationships would be disqualified through canonical or civil definitions of sodomy, whereas in the modern period, that disqualification happens through modern medical or psychiatric formulations of homosexuality. Explaining this point is in fact Foucault's project which, as Halperin suggests, can be grasped by paying close attention to the wider context of Foucault's *The History of Sexuality*: Foucault's goal is to point out the particular technology that the modern discourse on sexual relationships applies to generate the concept of homosexuality and the identity of the homosexual. Thus, Foucault in this passage, as throughout *The History of Sexuality*, is focusing on "discursive and institutional" acts.¹¹ There is nothing here about an individual's sexual practices in their private lives nor anything about views of such practices. Foucault, in fact, attempts to demonstrate that the definition of sodomy in the premodern period was based on the civil laws of several European countries, canon law, and Christian teachings, whereas homosexuality is conceptualised through the writings of modern medical professionals and then sexologists. In short, as Halperin states,

[Foucault's] schematic opposition between sodomy and homosexuality is first and foremost a discursive analysis, not a social history, let alone an

7 Ibid., 161.

8 Ibid., 29.

9 Ibid.

10 Foucault, HS1, 42.

11 Halperin, *How to Do the History of Homosexuality*, 29.

exhaustive one. It is not an empirical claim about the historical existence or non-existence of sexually deviant individuals.¹²

Historical research has eliminated nearly all doubt that in premodern times human societies encountered different forms of deviant sexual relationships.¹³ More importantly, they even tried to conceptualise these sexual phenomena, as can be grasped from the *Symposium* and *Phaedrus* of Plato, to name just two works. Clearly, Foucault does not deny this point but attempts to explore it in his second and third volumes of HS. Again, thanks to historical studies which have documented massive amounts of new information on sexual behaviours in the past, it has now become clear that sexual manifestations or categories in premodern times were matters of practices which had links to agents of the acts and their subjectivities.¹⁴

Nevertheless, this idea, as commonly understood, has seemingly been denied by Foucault's famous passage in HS1. Foucault most likely was aware of such historical studies, as some had been published before his *The History of Sexuality* was released. There were more studies on this matter published at the time Foucault was completing this work and after the publication of HS1. Thus, even if Foucault was not aware of such studies before publishing the first volume, he most definitely should have known about them afterwards. However, somewhat strangely, he does not refer to these new studies and leaves his famous passage as it is without revisions in any subsequent editions of HS1. Thus, intentionally or unintentionally, Foucault provides the grounds for his readers to interpret this passage and, hence, his approach as they have been commonly understood. Moreover, given that Foucault was aware, as I assume he was, of the historical studies but still suggested his idea in a way that can readily be understood as it has been commonly interpreted, then it is plausible to conclude that Foucault did view the issue of sexual behaviours and sexual relationships in the premodern period differently from historians such as Dover, Boswell, Williams, and Halperin.

On top of all this, in case Foucault was not aware of such historical studies while writing HS1, one might assume that, after its publication, he should have considered them. This would have given him the opportunity to represent them in the second and third volumes of *The History of Sexuality*, in which

12 Ibid., 31–32.

13 See, for example, Dover, *Greek Homosexuality*; Boswell, *The Marriage of Likeness*; Broton, *Love Between Women*; Halperin, *How to Do the History of Homosexuality*; Harris, "Sex on the Margins"; Williams, *Roman Homosexuality*; Clark, *Desire*.

14 See, for example, Dover, *Greek Homosexuality*; Williams, *Roman Homosexuality*.

Foucault conducted an extensive study on sexuality in ancient Greece and Rome. However, it seems that Foucault was not interested at all in going back to this discussion and changing or amending the passage above to prevent the alleged misreading of his doctrine. Oddly enough, Halperin, in supporting his interpretation of this passage of HS1, also does not make any reference to the later volumes of HS.¹⁵ Therefore, one may claim that Halperin is imposing his view on Foucault's approach.

Nevertheless, Halperin's understanding of Foucault might have an underlying point which the common interpretation of the passage is apparently missing. To begin with, it is important to note that Halperin ponders on Foucault's whole project on the emergence of modern sexuality (its genealogy, invention, and identification) in order to understand this passage and, ultimately, Foucault's approach correctly.

The term "sexuality" was invented in the early nineteenth century to refer to the peculiarity of being sexual entities.¹⁶ However, the issue of sexuality, which led to massive discursive unities emerged during the transition to modernity from the eighteenth century. There were in fact critical instruments or strategies of power-knowledge over both individuals and species by focusing on sex.¹⁷ The very real goal of such strategies, Foucault argues, was not to fight against sexuality but to control and regulate it.¹⁸ Sexuality, in Foucault's approach, is neither an intrinsic phenomenon which power attempts to control nor an unknown scope which knowledge seeks to gradually discover. Instead, as Foucault states, sexuality "is the name that can be given to a historical construct."¹⁹

Following Foucault, later scholars of sexuality argued for this modern constructed notion as a merging concept that brings together different discourses which apparently do not have inherent linkages, such as medical, moral, regulatory, legal, and scientific discourses. Interestingly, the concepts of "sex" and "sexual," which are essential to the term sexuality, are also products of discourses which made it possible for modern individuals or populations to identify as sexual entities who enact their erotic lives,²⁰ which provide complex sets

15 To be precise, as Halperin indicates, Foucault in 1982, while writing a review of Dover's *Greek Homosexuality*, first published in 1978, does implicitly distinguish modern homosexuality from pre-homosexual categories in a different way from his famous passage of HS1 (Halperin, *How to Do the History of Homosexuality*, 161–62).

16 Weeks, *The Languages of Sexuality*, 198.

17 Foucault, HS1, 103–5.

18 *Ibid.*, 105.

19 *Ibid.*

20 See Gagnon and Simon, *Sexual Conduct*.

of performances by which the concept of *sexual* is originated and performed²¹ and which ground a context for narrating various sexual histories which individuals tell to each other regarding their bodies.²²

In fact, the invention of the concept of sexuality provided a new discursive space for modern debates on sexual behaviours, thus making new divisions and conceptualisations of sexual identities, such as homosexuality and heterosexuality, possible. However, one might assert that the historical construction of sexuality proposed by scholars such as Foucault, by rejecting the inherent sexual orientations, leads to a questioning of the validity of modern sexual categories. Nevertheless, as Weeks notes, this is in fact the exact point of social constructionism, which the critics seem to neglect.²³ This is because a “historicalised approach to sexuality opens the whole field to critical analysis and assessment. It becomes possible to relate sexuality to other social phenomena.”²⁴ Without questioning the conception of sexuality as an inherent or essential phenomenon, it would not become possible to reconsider the definitions of the *sexual*.

With the topic of sexuality in mind, it seems naïve to agree with the standard interpretation of the earlier quoted passage of HSI, which asserts that, in Foucault’s view, there were different categories of sexual practices, but not of sexual identities in premodern times, and that the different categories of sexual identity were produced and articulated in modern period, linking sexual acts to sexual actors. However, unlike this well-known understanding of the passage, Foucault simply demonstrates that, since the end of the nineteenth century, people increasingly defined themselves in terms of their sexual identity, rather than in terms of other social categories, such as caste, class, or faith. Therefore, when Foucault remarks that before the modern period *the homosexual* did not exist, it is solely a statement of the following: the category, the name, the idea of someone being identified in their essence by their sexuality, rather than by other social statuses, simply did not exist. This, as Halperin notes, is “a discursive analysis, not a social history.”²⁵ Thus, Foucault is not suggesting any empirical assertion of the idea that there did or did not exist individuals who were deemed as sexually deviant. He does not imply that people in the past never described or identified themselves in terms of their sexual

21 See Butler, *Gender Trouble*.

22 See Plummer, *Telling Sexual Stories*.

23 Weeks, *The Languages of Sexuality*, 199–200.

24 *Ibid.*, 200.

25 Halperin, *How to Do the History of Homosexuality*, 32.

practices. That is a matter for empirical investigation, and as historical studies have convincingly documented, there is evidence to the contrary.²⁶

However, what is relevant to this study is that, after all, in Foucault's view, modern homosexuality is different from sodomy or any other manifestations or categories of same-sex sexual relationships which existed in the past or pre-modern times. Homosexuality, as the phenomenon we have known since the last century, essentially depends on *sexuality*. Jeffrey Weeks and David Halperin both agree with Foucault on this matter, which we turn to briefly now.

3 Weeks and Different Articulations of Homosexual Behaviours

Jeffrey Weeks is a pioneering British scholar of the modern history of (homo)sexuality who was inspired by Mary McIntosh, Michel Foucault, and Ken Plummer. If Foucault was dealing with the homosexual discourse as a genealogist and a philosopher, Weeks has conducted his scholarship from a socio-sexological perspective, albeit that the history of homosexual behaviours is also significant in his project.

Since the last third of the twentieth century, sociologists and historians, as several scholars argued, made it clear that there is a key distinction between homosexual behaviours and homosexual classifications, roles, and identities.²⁷ Weeks notes that, since the late nineteenth century, sexologists and anthropologists have been aware of the existence of homosexual behaviours in different cultures and societies; they understood there were multiple responses to homosexuality from various cultures and during different periods of time. Therefore, as Weeks concludes, there is no way to consider a universalistic or holistic history and conceptualisation of homosexuality.²⁸

There is another significant point to explain Weeks's view on homosexuality. Along with several sociologists and scholars of sexualities such as Plummer,²⁹ Weeks holds that this phenomenon is a socially constructed issue, not an inherent or a genetic matter. Therefore, not only have the approaches to homosexual practices differed, but the public and individual conceptualisations of homosexuality have equally been specified by various cultures. Thus,

26 See, for example, Dover, *Greek Homosexuality*; Boswell, *Christianity, Social Tolerance, and Homosexuality*; Williams, *Roman Homosexuality*.

27 See, for example, Hocquenghem, *Homosexual Desire*; Plummer, *Sexual Stigma*; Weeks, *Sexuality and its Discontents*, chap. 4.

28 Weeks, *Sex, Politics and Society*, 97.

29 See Plummer, *Sexual Stigma*, "Building a Sociology of Homosexuality," 17–29 and "Homosexual Categories," 53–75.

one can only comprehend the social importance of homosexual behaviours in their specific historical context.³⁰ In fact, current homosexuality, in Weeks's approach, should inevitably be constructed of different factors determined by the interactions of modern society, culture, and modern humans' demands. Therefore, it should not and cannot be traced back to other societies and cultures throughout history, as those cultures and societies in the past had different situations and demands which led them to construct language and concepts related to their needs for expressing their gender status and sexual appetites.³¹

Now it is possible to summarise Weeks's articulation of modern homosexuality. Influenced by a short essay by Mary McIntosh entitled "The Homosexual Role," first published in 1968, Weeks begins to investigate this subject by considering the different phases of the modern history of homosexuality while following a similar route to Foucault's approach.³² Foucault famously outlined the point that sexual behaviours have been perceived differently throughout history, that is, via the moralisation, criminalisation, and medicalisation of sexual behaviours.³³ Independently, Weeks, over four decades, has upheld and expanded a similar idea. According to Weeks, homosexual behaviours in the history of the Christian and then the secular West were regarded differently,

30 Weeks, *Sex, Politics and Society*, 97.

31 Although, according to Weeks, the process of labelling and categorisation is not desirable, it is unavoidable as humans trapped by language and conceptualisation. Therefore, as Weeks expounds in an interview with me (31 January 2019; the sound recording is available on request), it is difficult for us to think outside the boundaries of language. "For that reason," Weeks continues, "I see this process as a dual process, what I call, in *Coming Out*, definition and self-definition."

32 In this essay, McIntosh does not focus on the question of the causes of homosexuality, which has been asked frequently by various scholars since the nineteenth century. Instead, she puts her attention on the point that everyone is so concerned with considering homosexuality as a condition that has "causes". To respond to this question, she suggests that homosexuality should be regarded "as a social category rather than a medical or psychiatric one" (McIntosh, "The Homosexual Role," 192). As McIntosh notes, there is a vital distinction between homosexual behaviour and the homosexual role: homosexual behaviour was and is widespread, while homosexuality as a set of distinctive roles has evolved only in some cultures, and they might not contain all kinds of same-sex sexual behaviour (Ibid., 188–91). In terms of the criminalisation and punishment of same-sex sexuality in the classical and medieval world, McIntosh holds that "[t]he creation of a specialized, despised, and punished role of homosexual keeps the bulk of society pure in rather the same way that the similar treatment of some kinds of criminals helps keep the rest of society law-abiding" (Ibid., 183–84).

33 See Foucault, *HS1* and *Discipline and Punish* and *Madness and Civilization*.

meaning that they were viewed as sin, as crime, as medical state, and as a way of life.³⁴

The first phase of same-sex sexual categorisation, as Weeks elaborates, might be seen as the moral and legal regulation of homosexual behaviours that can be observed in criminal law and punishment for same-sex sexual practice adopted by the European states beginning in third and fourth centuries.³⁵ They embedded the legal ruling on these kinds of acts into their penal codes. For instance, in England, sodomy was implicitly placed in statute law for the first time, as in the 1533 Act of Henry VIII against buggery. Following the same logic of the Church, this law considered any practices of buggery to go *against nature*, and buggery was thus prohibited and punished by the death penalty until 1861. What is significant in this law is that it outlined different kinds of sexual practices, not particular types of individuals. Here Weeks is confirming Foucault's remark on this issue discussed earlier in this chapter. Therefore, there was no indication of the notion of *homosexual* in law. Thus, homosexuality was not considered as a quality of a specific kind of people but as a possibility in every wicked person.

The second type of homosexual categorisation in Weeks's view can be identified through the lens of the medical model.³⁶ Although it is true that the concepts of sin and disease have always been closely connected in both the public mind and the legal view, the distinction between these two concepts can be traced back to the eighteenth century onwards. By the edge of the nineteenth century, homosexual behaviours were gradually decriminalised and, instead, medicalised. Medicalisation of homosexual behaviours supplanted the Church with medicine in public minds, although not totally as the notion of sin was not replaced entirely. This distinction between sin and disease, according to Weeks, has had a vast impact on the contemporary concept of homosexuality.³⁷

Weeks investigates the various reasons for the emergence of the medical model for conceptualising homosexual behaviours. He sees the main factor as the need for new criminal codes.³⁸ Therefore, medical professionals of the late nineteenth and early twentieth centuries debated how to classify this new concept of homosexual behaviours: as an "innate" or natural phenomenon, or an "acquired" or non-inborn matter. By the mid-twentieth century, scholars and

34 Weeks, *Coming out*. In this study, I generally use the first edition of this book (published in 1977), unless otherwise explicitly mentioned.

35 Ibid.

36 Ibid., chap. 2.

37 Ibid., 23.

38 Ibid., 26.

activists were mostly advocating the theory of the inborn orientation of homosexuality, and thus tried to campaign for the decriminalisation of same-sex sexual behaviours. Interestingly, this support ultimately resulted, albeit slowly, in the reduction and then removal of the penalties for homosexual behaviours in England and Wales: first, from death to some years of imprisonment, and then to being entirely free from criminal charge in the late 1960s. By then, in the eye of public, homosexuality had become an illness which needed medical treatment. In their view, “sickness in this light was preferable to wickedness.”³⁹ As a result, it had become widely accepted in the United Kingdom and Europe that a sick person, namely a homosexual, must be treated, not sanctioned or punished.

Weeks introduces the third phase of the conceptualisation of homosexuality as follows. This phase, which goes back to the early twentieth century, conceptualise homosexual behaviours as a way(s) of life or as an identity(ies) or self-identification. In Weeks’s view, homosexual behaviours cannot be fitted into any predetermined or preconceived mould.⁴⁰ Concurring with The Kinsey Institute for Research in Sex, Gender, and Reproduction, Weeks holds that there are homosexualities, but not one single homosexuality.⁴¹ He, influenced by McIntosh,⁴² traces homosexual behaviours as self-identification or awareness of different styles of life to the late nineteenth century in the works of Carpenter (d. 1929), Ellis (d. 1939), and Freud (d. 1939). Although Weeks underlines various types of same-sex sexual lifestyles which were common at the time, he argues that setting all different kinds of homosexual behaviours into “a total way of life” would be impossible.⁴³ This is because the concept of “a homosexual” as an individual who could enjoy living “a life fully organised around his sexual orientation” should be regarded as a result of very modern times.⁴⁴

Here Weeks acknowledges that the concept of modern homosexuality as a way of life and self-identification of human beings and their subjectivity is an entirely different phenomenon from the previous manifestations of this category. For example, Weeks indicates that “the idea of “the homosexual” as a distinct sort of being has not always existed. It is an invention of the modern world. It is historically and socially constructed.”⁴⁵

39 Ibid., 29.

40 Ibid., chap. 3.

41 Ibid., *Sex, Politics and Society*, 108.

42 McIntosh, “The Homosexual Roles.”

43 Weeks, *Coming out*, 33–34 and *Sex, Politics and Society*, 109.

44 Weeks, *Sex, Politics and Society*, 109.

45 Weeks, *Coming out* (second edition 1990), x.

Although it seems that Weeks does not believe in an ultimately unique meaning of homosexuality, he acknowledges that there are various historical notions of homosexuality “depending on the culture, the context, the shifting balance of forces, the possibility of articulating your sense of self in terms of sexuality.”⁴⁶ Therefore, the emphasis on the conceptualisation of homosexuality, in Weeks’s opinion, relates to the notions of identification and self-identification of individuals with regard to their sexuality. Application of sexual identity as a theoretical and scientific term can be traced to the late nineteenth century in early sexologists’ debates. Despite the efforts of sexologists and other scholars to explain sexual identity as an instinctive, pre-determined or categorised notion, Weeks upholds that sexual identity, such as homosexuality, is a self-constructed phenomenon, a matter of choice, and indeed a selective and collective process.⁴⁷ It is true that not all individuals who identify as homosexual and even contribute to LGBT activities practise or wish to practise same-sex sexual acts. It is also true that not all people who, at some point in their life, executed homosexual behaviours or intend to do so in the future consider themselves as *homosexual*. However, as Weeks notes, identification with homosexuality has become a necessary political choice for gays and lesbians in the modern world to achieve their rights and articulate their responsibilities simultaneously.⁴⁸ Thus, it is about what homosexual individuals, males and females, and homosexual communities wish to be or could manage to be: it is about the quality of homosexual people’s lives and the articulation of the morality of homosexual relationships in society.

Considering all the historical, cultural, and societal situations, Weeks cautiously articulates his understanding of the modern homosexuality as

the would-be egalitarian model, which assumes a high degree of similarity in terms of status, sexual tastes and choice between peers, with a distinctive identity and complex ways of life.⁴⁹

46 In an interview with me on January 22, 2019.

47 Weeks, *Against Nature*, 79–83.

48 *Ibid.*, 83–85.

49 Weeks, *The World We Have Won*, 218. In an interview with me held on 31 January 2019, Weeks, although not very happy with my question on his perception of homosexuality from the 1970s onwards, proposes a slightly different definition of this phenomenon. That is, homosexuality consists of “a range of circumstances in which I as an individual give my priority, emotional, and sexual commitment to people of the same gender.” He then emphasises that this is a political notion for him in the context of a set of circumstances such as the emergence of the gay movement and the evolution of our understanding of gender. However, when I asked him about his view on the definition cited in this chapter from his book *The World We Have Won*, Weeks answered that he agrees with

Weeks is careful not to generalise his notion of homosexuality. Therefore, he remarks that this definition of homosexuality is only one of the many that can be distinguished about this modern phenomenon. Moreover, it solely belongs to its own historical and cultural context, namely to the contemporary time and place. However, this approach to homosexuality demonstrates that Weeks agrees with the general understanding of Foucault's famous passage discussed earlier in this chapter. That is, modern homosexuality deals with the sexual identity and subjectivity of a new species, namely *the homosexual*, whereas other homosexual behaviours, such as sodomy and buggery, in the past were considered, conceptualised, and criminalised as matters of act based on class, gender, and age differences. The same line of reasoning, though with a different strategy, is suggested by Halperin, which I shall discuss in the following section.

4 Halperin and Modern Homosexuality versus Pre-Homosexual Categories

David M. Halperin is an American classicist, philologist, and historian of sexuality studies. His theoretical works on the history of homosexuality, sexual and gender categories in ancient Greece and Rome, and (male) gay culture have been influential in the field of queer studies since the 1990s. Michel Foucault essentially shaped Halperin's research approach in this field, in particular on the issues of same-sex sexual desire, behaviour, and orientation.

Halperin has for almost three decades been arguing for homosexuality as being a phenomenon related to modern Western culture and that this modern category should be distinguished from the pre-homosexual categories of the ancient world.⁵⁰ However, more recently, Halperin has argued that

this definition, and in fact, it is closer to his personal practice, though there are other definitions of homosexuality that he does not necessarily reject. This articulation of modern homosexuality, according to Weeks, suggests an ideal way of relationships, but there are many more legitimate types of homosexuality which perhaps do not precisely lie within this concept.

50 It seems fair to say that the modern gay and lesbian movements started in North America and Western Europe. However, in contrast with the approach of scholars such as Halperin (see Halperin, *How to Do the History of Homosexuality*) and Joseph Massad (see Massad, *Desiring Arabs*, 160–90), though through different routes and argumentation processes, I hold that homosexuality is not exclusively a Western issue. Regardless of the theoretical and academic debates on this matter, it is, I believe, sufficiently justified discussing modern homosexuality (with various notions it might have) that exists globally due to the existence of individuals in all different continents (including in Muslim societies) who

homosexuality as a modern phenomenon can be reduced neither to mere sexual desire nor to sexual identity, but rather consists of a varied span of gay cultures and “queer longings.”⁵¹ Although Halperin’s new approach is thought provoking, this interpretation of homosexuality is highly questionable, as he tries to reduce the role of homosexual identity and homosexual orientation in favour of gay culture(s). Therefore, this study shall focus on what might be referred to as Halperin’s earlier approach to homosexuality.

Halperin, inspired by Foucault and Weeks, believes that while *sex* has no history, *sexuality* does. As discussed earlier, Foucault demonstrated that *sexuality* is a modern production which did not exist in the past. This modern phenomenon, in Foucault’s view, is not an objectively natural fact or entity which cannot be changed in humans’ minds or in their subjectivities. Rather, it is a “set of effects produced in bodies, behaviors, and social relations by a certain deployment deriving from a complex political technology.”⁵² Although Halperin agrees with Foucault on this matter, he holds that more needs to be done to document the history of sexuality. For Halperin, it is important to first articulate what one understands about the notion of sexuality. A currently common understanding of sexuality addresses an affirmative, distinguished, and constructive aspect of humans’ character in terms of their sexual practices, sexual desires, and sexual pleasures. Regarding this meaning of *sexuality*, Halperin states,

[Sexuality] is not a purely descriptive term, a neutral representation of some objective state of affairs or a simple recognition of some familiar facts about us; rather, it is a distinctive way of constructing, organizing, and interpreting those “facts”, and it performs quite a lot of conceptual work.⁵³

This statement considers sexuality as a distinctly sexual aspect of human beings embedded in the greater scope of their psychophysical nature. It also explains the differentiation of sexuality from other similar individual or public behaviours, such as passion, virility, eroticism, love, desire, and affection. In addition, sexuality produces sexual identity, meaning that it provides every individual with a unique sexual nature. This leads to the individualisation

are self-identified as *homosexual* in its very modern sense; people who are courageous enough to fight against religious and cultural patriarchy, achieve their basic human rights, love same-sex mates, and live with their same-sex peers.

51 Halperin, *How to be Gay*, 69.

52 Foucault, *HSI*, 127.

53 Halperin, “Is There a History of Sexuality?”, 417.

of human beings based on their sexuality. If sexuality is articulated this way, then, as Halperin suggests, this modern concept of sexuality is alien to what existed in the past.⁵⁴ There are at least two elements which seem to be crucial for the categorisation of sexuality—the independence of sexuality as a distinct aspect of humans' life and the use of sexuality as a basis of the individuation of human sexual identities—both of which are missing in ancient and medieval Mediterranean cultures. Therefore, as Halperin concludes,

Because ... erotic desires and sexual object-choices in antiquity were generally not determined by a typology of anatomical sexes (male versus female), but rather by the social articulation of power (superordinate versus subordinate), the currently fashionable distinction between homosexuality and heterosexuality (and, similarly between “homosexual” and “heterosexual” as individual types) had no meaning for the classical Athenians: there were not, so far as they knew, two different kinds of “sexuality”, two differently structured psychosexual states or modes of affective orientation, but a single form of sexual experience which all free adult males shared—making due allowance for variations in individual tastes, as one might make for individual plates.⁵⁵

Halperin, in line with this passage, suggests that, given the absence of *sexuality* in the past, it is understandable to say homosexuality did not exist in the ancient world. The central tenet of modern homosexuality seems to be sexuality, not social status, economic class, religious beliefs, or even gender norms, all of which had been considered in ancient categorisations of sexual relationships. In fact, wherever the notion of sexuality is absent, there can be no notion of either homosexuality or heterosexuality: a conception of sexuality which can be seen as the basis of differentiation or distinction between various types of individuals.⁵⁶ Therefore, since sexuality is a modern phenomenon, homosexuality, too, is a modern subject. Halperin's attitude towards homosexuality is generally along the same lines as Foucault's and Weeks's. Therefore, for Halperin, too, homosexuality is a socially constructed phenomenon linked to its specific social and cultural conditions.

Now the question is what modern homosexuality means. Halperin has consistently addressed this topic in his work, particularly in his article entitled “How to Do the History of Male Homosexuality?” first published in *GLQ* in 2000

54 Ibid., 418–24.

55 Ibid., 424.

56 Halperin, *One Hundred Years of Homosexuality*, 26.

and later reprinted in 2002 in his book of the same title. In this article, Halperin constructively explains a strategy which makes the history of (male) homosexuality possible. According to this approach, Halperin, following a genealogical analysis, introduces different phenomena which existed in the past and compares and contrasts them with the modern phenomenon of homosexuality. This allows him to elaborate on how and to what extent this subject was different from pre-homosexual phenomena which existed long before homosexuality.⁵⁷ In this study, following Halperin's strategy, I shall apply the genealogy of homosexuality to pre-homosexual categories which existed in early and medieval Muslim societies.

Halperin illustrates several pre-homosexual phenomena or categories or patterns (he uses various terms) in order to explore the similarities and differences these phenomena might have with each other and with the modern category of homosexuality. Precisely speaking, Halperin identifies four different kinds of (male) sexual behaviours or gender deviance in ancient Greek culture: effeminacy, active sodomy, friendship/male love, and passivity/inversion. Unlike John Boswell,⁵⁸ Halperin argues that, although all these four pre-homosexual categories and homosexuality might overlap to some extent, they do have distinguishing features which make them clearly different from each other and from modern homosexuality. He provides a table (which will be used and modified, as shown later in this study) to make the overlapping and distinguishing features of these categories more visible.⁵⁹

Counting homosexuality as a distinct modern category, Halperin articulates homosexuality as a phenomenon which absorbs three different concepts that were not correlated with each other in premodern times: *sexual orientation* (a psychological concept), *sexual object choice* (a psychoanalytic concept), and *sexual behaviour* (a sociological concept). While none of these notions alone can successfully define homosexuality, it seems that modern homosexuality is a variable combination of all three concepts, that is, "homosexuality' is at once a psychological condition, an erotic desire, and a sexual practice."⁶⁰

57 Halperin acknowledges that sociologists and historians have previously distinguished various types of same-sex sexual practices which are somehow similar to what Halperin identifies in his study. However, for Halperin, it is highly important to realise that his view is forthrightly not "historical" (in its extreme definition) or "sociological, but 'genealogical'" by which he aims to focus on various discourses of homosexuality that are essential in (Western) European traditions (Halperin, *How to Do the History of Homosexuality*, 108, 110).

58 See Boswell, *Christianity, Social Tolerance, and Homosexuality*; also *The Marriage of Likeness*.

59 Halperin, *How to Do the History of Homosexuality*, 135.

60 *Ibid.*, 131.

To understand the distinction between homosexuality and other pre-homosexual categories, it is useful to note that pederasty only identifies the active partner while the other partner, namely the passive or receptive person, is not considered in the category. Inversion also refers only to the vulnerable effeminate man, whereas the other partner is not regarded. Unlike these two categories, homosexuality addresses “both partners, whether active or passive, whether gendered normatively or deviantly.”⁶¹ The implication of homosexuality is to reject the differentiation between the homosexual partners in the conceptualisation of the term based on the roles of the partners or to classify them by seeing one partner “more (or less) homosexual than the other.”⁶² However, it should be noted that this articulation of homosexuality does not imply that age, sexual role, or social or economic differences per se are significant. Instead, these kinds of relationships can be inappropriate, unethical, or even illegal once they fall into pederastic or hierarchical or power-based relationships.

As mentioned earlier, modern homosexuality is essentially based on sexuality and thus allows us to categorise individuals as homosexual/heterosexual. One consequence of the intentional distinction between homosexuality and heterosexuality is that homosexuality, unlike pre-homosexual categories, does not necessarily require unequal sexual roles or social status. It does not, in fact, essentially need to be defined based on power relations, social and cultural hierarchies, sexual positions, gender, or age.⁶³ Rather, homosexuality is about *sameness* and *mutuality*:

Homosexual relations are not necessarily lopsided in their distribution of erotic pleasure or desire. Rather, like that of heterosexual romantic love, the notion of homosexuality implies that it is possible for sexual partners to bond with one another not on the basis of their difference but on the basis of their sameness, their identity of desire and orientation and “sexuality.”⁶⁴

61 Ibid., 132.

62 Ibid.

63 However, as Halperin himself admits, this does not mean to negate the fact that such factors, in particular power relations or social and cultural hierarchies, may still be influential in modern homosexual relationships.

64 Ibid., 133.

5 Genealogy of Homosexuality in Premodern Muslim Cultures

It was explicated that modern homosexuality has been variously articulated as a “species” and “personage” (Foucault), as an egalitarian model of sexual relationships “with a distinctive identity and complex ways of life” (Weeks), or as a same-sex sexual relationship “on the basis of ... sameness, ... identity of desire and orientation and ‘sexuality’” (Halperin). Whatever definition we choose, homosexuality crucially depends on modern notions of sexuality and sexual identity, not gender, class, social status, and so on. In the following, concurring with Foucault, Weeks, and Halperin, I shall elaborate on homosexuality in contemporary Muslim cultures through the lens of modern sexuality. Therefore, I count homosexuality, which currently exists in various Muslim societies, as an egalitarian way of life between Muslim same-sex peers who identify based on their sexuality as gay or lesbian and presume sameness and mutuality in terms of social status, sexual desire, and choice between mates. Such a category is not based on power relations or on hierarchy in gender, sexual role, or age differences. Thus, it may categorically happen between two adults (two males or two females) who have a mutual sexual attraction to same-sex mates, choose to consensually practise same-sex sexual relationships, and identify themselves as homosexual men or women.

Given this identification, I hold that such a modern phenomenon of homosexuality did not exist in early and medieval Muslim cultures. Nevertheless, as shall be discussed, Muslim individuals have traditionally practised various pre-homosexual models of same-sex sexual behaviours throughout the history of Islam. Unlike a number of scholars who have correlated these early behaviours with homosexuality,⁶⁵ I will argue that after comparing and contrasting differences between the various pre-homosexual models with modern homosexuality, we can distinguish between these pre-modern categories of same-sex sexual behaviours and homosexuality. Inspired by Halperin’s analysis of homosexuality, I shall use a genealogical approach towards homosexuality within early and medieval Islamic societies.

Khaled El-Rouayheb, pursuing Halperin’s approach, has already studied pre-homosexual categories in late medieval Arab-Islamic societies. El-Rouayheb distinguished the following types: pederasts, phathics, aesthetes, and sodomites.⁶⁶ However, despite the fact that such pre-homosexual categories or behaviours had been widely known or practised across the Muslim world, his discussion was limited to Arab-Islamic culture between the fifteenth

65 See, for example, Habib, *Female homosexuality*; and Murray and Roscoe, *Islamic Homosexualities*, 3–10.

66 See El-Rouayheb, *Before Homosexuality*.

and eighteenth centuries. Therefore, the genealogy of homosexuality with regard to early and medieval Muslim cultures still needs to be fully investigated. Nevertheless, there exist a few academic studies, albeit not comprehensive, on a number of pre-homosexual categories in Muslim societies.⁶⁷ I shall treat the existing studies on the topic as my guideline in this debate, though I do not always agree with the approaches and outcomes proposed by such research.⁶⁸

I first need to emphasise that, unfortunately, very few studies done by classical scholars on early Muslims' sexual cultures have survived. However, the extant literature, whether in the form of poetry and prose (mainly in Arabic and Persian), anecdotal collections, or profligacy or obscenity (*mujūn*) and bawdy (*hazl*) genres, suffices to accurately illustrate the sexual behaviours and cultures of early Muslim societies. Moreover, there are received *sunna* (traditions) from the Prophet and Twelve Imāms on the topic of same-sex sexual behaviours which are equally significant and practical in illuminating this topic. This period is important for my study, as my focus is on Islamic legal rulings on homosexuality for which the *sunna* literature is one of the main sources. Islamic revelations were arguably based on events and incidents that occurred in Muslim societies at the time of the revelation to guide Muslims in their behaviours. Therefore, the context of the Qur'ān and the *sunna* can also implicitly explain or represent the social and cultural contexts of Muslims' behaviours at the time. Regarding sexual behaviours, the *aḥādīth* are related to the circumstances of the Muslim communities in Ḥijāz and Shām (roughly current Syria) and (later during the time of 'Abbāsīd period) in Iraq and Iran. With these points in mind, I shall proceed to a discussion on the genealogy of homosexuality in early and medieval Islamic cultures.

Following this strategy, it is not hard to identify the following seven pre-homosexual categories in classical Muslim cultures: *takhannuth* (effeminacy), *tarajjul* (mannish-ness), *liwāt* (male active pederasty), *'ishq al-ghilmān* (male love of boys), *mu'ākhāt* (male friendship or comradeship), *ubna* (male pathological passivity), and *saḥq/sihāq* (female same-sex sexual behaviour—often between a senior female and her female slave or a young virgin girl). Following

67 See, for example, Oberhelman, "Hierarchies of Gender, Ideology, and Power," 55–93; Rowson, "The Effeminates of Early Medina," 671–93, "The Categorization of Gender," "Two Homoerotic Narratives from Mamlūk Literature," 149–91, and "Gender Irregularity as Entertainment," 45–72; Shamīsā, *Shāhid-bāzī*; and Wright, "Masculine Allusion," 1–21. Also, for Ottoman and Turkish literature, see Schick, "Representation of Gender and Sexuality" and "Three Genders, Two Sexualities."

68 For example, Rowson seems to read and correlate the early and medieval Muslims' homoerotic debates on *liwāt* and *sihāq* with modern homosexuality(ies) discourse, which goes against the core thesis of this study.

Halperin's strategy for approaching the history of homosexuality, I shall identify each category and then compare and contrast them with each other and with the modern phenomenon of homosexuality.

It is, however, important to emphasise that although I do not intend to exclude the history of same-sex practices, my task here is not to collect descriptive instances of these sexual behaviours or create a "social history". Instead, pursuing a genealogical approach, I chiefly attempt to present various prevalent models of discourse on same-sex sexual behaviours in premodern Muslim cultures. By pressing on prevalent models, I acknowledge the limitation of this approach as I will not seek those behaviours which, as Halperin notes, are "discursive silences, the subjugated knowledges, the non-represented voices that must figure significantly, or at least be taken into account, in any substantive history of ... homosexuality."⁶⁹ For example, thanks to historical studies, there is almost no doubt that there were incidents in premodern Muslim cultures in which a young boy played the active penetrative role and the older man was the receiver; or the young boy agreed to be penetrated by an adult man "in exchange for then taking the role of the penetrator himself" a person who was called *mubādil*.⁷⁰ Moreover, the extant premodern Arabic and Persian literary works enlighten us about cases in which homoerotic behaviours happened between two adult males or those of a similar age, such as the homoerotic love relationships between Abū Bakr Muḥammad b. Dāwūd al-Iṣfahānī (d. 297/909) and a pharmacist called Muḥammad (Wahb) b. Jāmi' al-'Aṭṭār al-Ṣaydalānī⁷¹ or the poems delineating love relationships between two legendary boys called Nāzīr and Manzūr, composed in Persian by Waḥshī Bāfqī (d. 991/1583).⁷² Both stories rather illustrate mutual homoerotic love that can hardly be placed in the aforementioned categories of "pederasty" or "male love of boys" because these two categories, as shall be explicated, often project same-sex sexual or homoerotic love behaviours between adult males and very young boys. Nonetheless, I have left out such instances from the pre-homosexual categories

69 Halperin, *How to Do the History of Homosexuality*, 110.

70 Rowson, "Gender Irregularity as Entertainment," 53.

71 al-Sāmurrāī, "al-Muqaddima," 1: 10. Muḥammad b. Dāwūd al-Iṣfahānī was a jurist and poet. He was the son of Dāwūd b. 'Alī (d. 270/884), the founder of al-Zāhirī legal school, and lived in Baghdad. The only extant work of Ibn Dāwūd is *Kitāb al-zahra* (a collection of Arabic poetry with his critical comments), which, in line with an anecdotal narrative, dedicated to his beloved (al-Sāmurrāī, "al-Muqaddima," 1: 28). To read about the biography of Ibn Dāwūd al-Iṣfahānī and *Kitāb al-zahra*, see Raven, "Ibn Dāwūd al-Iṣfahānī" and *Ibn Dāwūd al-Iṣbahānī*; Nasser, "The Traditional Qaṣīdah"; Van Gelder, "Gleanings of Curiosities"; Harb, "Beyond the Known Limits."

72 Bāfqī extensively recount the story in 1561 verses (Waḥshī Bāfqī, *Dīwān*).

to be examined in this chapter because they do not appear to have generated prevalent models of discourse in premodern Muslim cultures.

5.1 *Effeminacy and Mannish-ness*

Takhannuth (effeminacy) and *tarajjul* (mannish-ness) are two categories which have been known to Muslim cultures since the very early Islamic revelation. The classical lexicographers' notes and observations, the *Kitāb al-aghānī* ("The Book of Songs"; an encyclopaedic collection of songs, anecdotes, and poems) of Abū l-Faraj al-Iṣfahānī (d. 356/967), and *ḥadīth* sources⁷³ convincingly suggest the existence of individuals who were called *mukhannath* (effeminate, pl. *mukhannathūn*) and *mutarajjil* (mannish woman, pl. *mutarajjilāt*) by the Muslim community in Medina at the time of the Prophet, if not before Islam. The question is to what extent these individuals were effeminate or mannish, and whether they were considered as such in their orientations, behaviours, and gender norms or in their sexual desires and preferences.

The words *takhannuth* (effeminacy) and *mukhannath* (effeminate), according to the Arabic lexicons, are derived from the root *kh-n-th*. The verb *khan-atha* means to bend the opening of a waterskin for drinking as al-Khalīl b. Ahmad al-Farāhīdī (d. 170/786) states: "I bent the mouth of the waterskin, thus it opened."⁷⁴ Abū 'Ubayd b. Sallām (d. 224/838) indicates that "a woman due to her languidness or elasticity was called *khunuth*."⁷⁵ Al-Jawharī (d. ca. 393/1003) notes that "*inkhināth*" means suppleness (*tathannī*) and languidness (*takassur*).⁷⁶ Early lexicographical dictionaries remark that a *mukhannath* (pl. *mukhannathūn*) person was called as such due to his languidness, suppleness, and softness (*līn*). Therefore, various terms derived from this root imply the idea of folding towards elasticity, delicacy, suppleness, and languidness.⁷⁷ In this way, *mukhannathūn* would have a special status in Muslim communities. For example, as can be confirmed by several *ḥadīths* attributed to the Prophet, the *mukhannathūn* were allowed to enter the households of Muslims and have

73 Everett Rowson has carefully gathered such Prophetic *aḥādīth* transmitted by the Sunni *ḥadīth* collections. There are also several *ḥadīths* on this matter transmitted by the Imāmī *ḥadīth* compilations. However, it should be noted that all such *aḥādīth* recorded by the Imāmī collections are attributed to the Prophet as well, and thus are very similar to the Sunni *ḥadīths* on this matter.

74 al-Farāhīdī, *Kitāb al-'ayn*, 4: 248.

75 Abū 'Ubayd b. Sallām, *Gharīb al-ḥadīth*, 2: 283. Abū l-Faraj al-Iṣfahānī indicates the same point where he discusses a poet named Muḥalhal (his name was 'Uday b. Rab'ā b. al-Ḥārith) who had languidness (*khunuth*) and softness (*līn*) and was often in the company of women (al-Iṣfahānī, *Kitāb al-aghānī*, 5: 41).

76 al-Jawharī, *al-Ṣiḥāḥ*, 1: 281.

77 Ibn Manẓūr, *Lisān al-'arab*, 2: 145; al-Zabīdī, *Tāj al-'arūs*, 5: 240–41.

intimate friendships with the women, whereas male strangers were not usually permitted to do so.

Regarding the Prophetic *ahādīth*, *mukhannathūn* could even freely be in the company of Muḥammad's wives in his house. In a *ḥadīth* transmitted from Umm Salama, one of the Prophet's wives, a *mukhannath* called Hīt was at the Prophet's house in the company of Umm Salama while her brother 'Abdallāh b. Abī Umayya was also present. The Prophet came to visit his wife and heard that Hīt was giving advice to Umm Salama's brother about a female stranger while explaining the attractiveness of her body. The Prophet then said to his wife that she should not allow the *mukhannath* Hīt into her presence.⁷⁸ A similar *ḥadīth* narrated by 'Ā'isha, another wife of the Prophet, recounted a time when the Prophet learned that a *mukhannath* person did not lack interest in women, and he said, "Oho! I think this one knows what goes on here! Do not admit him into your presence!"⁷⁹ Based on some versions of this *ḥadīth*, the Prophet banished this person from Medina to a desert, and he was henceforth only allowed to enter the city once or twice a week to beg for food.

While *takhannuth* was not deemed to be a similar phenomenon to *ubna* or male sexual inversion as classical Arabic and Persian literary works suggest, *mukhannath* was sometimes conceived as an equivalent to *ma'būn* (passive male or *pathic*) in later Islamic periods, and thus the two concepts were occasionally used interchangeably.⁸⁰ Moreover, a number of works of early Islamic medical literature propose that effeminate males and masculine women are, at least, partly two biological phenomena resulting from various combinations and domination of what they deemed to be male and female partners' semen.⁸¹

Nevertheless, following the early Muslims' understanding of *takhannuth*, one could be a *mukhannath* without being a *ma'būn* person or having any sexual desire, including homoerotic desire. Moreover, although a person with *ubna* commonly displayed effeminate behaviour, outward effeminacy did not necessarily seem to be a sign of male passivity, meaning that a passive male perhaps could hide his desire, if not behaving like a regular masculine man, while the public appearance and social behaviours of effeminate men were crucial to *mukhannathūn*. As far as the early Muslim community was

78 Rowson, "The Effeminates of Early Medina," 674.

79 Ibid.

80 El-Rouayheb, *Before Homosexuality*, 21–22; Scalenghe, *Disability in the Ottoman*, 159–60; Shamisā, *Shāhid-bāzī*, 13.

81 Ibn Sīnā, *al-Qānūn*, 3: 449; al-Rāzī, "Risāla fī l-ubna (*al-dā' al-khafī*)", 123–25. This treatise has been translated by Rosenthal and published with useful detailed information on its various manuscripts (see Rosenthal, "Ar-Razi on the Hidden Illness," 45–60). Al-Rāzī even goes on to argue that effeminacy is the actual cause of *ubna*, which he classifies as a disease (Rosenthal, "Ar-Razi on the Hidden Illness," 55–56).

concerned, *mukhannathūn* were recognisably male people who were openly applying a female style of makeup, for example using henna, and wearing female clothing and jewellery, but they were not committing indecent acts. According to al-Ṭabarānī (d. 360/971), as al-ʿAynī (d. 855/1451) notes, “in the days of the Prophet the *mukhannathūn* spoke languidly, and dyed their hands and feet (with henna), but were not accused of immoral acts.”⁸² Ibn Ḥabīb (d. 238/852) describes this phenomenon as the following:

A *mukhannath* is an effeminate (*muʿannith*) man, even if he is not known to be guilty of immoral acts, the derivation being based on the idea of languidness in gait and in other ways.⁸³

According to the anecdotal stories (illustrated in *Kitāb al-aghānī* of al-Iṣfahānī on the *mukhannathūn*, such as Khālid al-Khirrit, Hayt, Dalāl, and Ṭuways, and their activities, such as singing, writing/reciting poems, and acting as comedians), effeminacy was more about a reversal of gender roles than sexual orientation.⁸⁴ The reason that some people would freely choose to be *mukhannath* in a Muslim society was perhaps to receive social privileges by effecting such a gender reversal role. Based on al-Iṣfahānī’s report, the *mukhannathūn* with their special gender role could claim a position as singers which previously had been held by women, or perhaps more importantly, they could use their position as entertainers to make fun of the authorities, governors, or even the Caliphs (*khulafāʾ*), and thus to speak out against them politically. Furthermore, according to the *ḥadīth* sources, the *mukhannathūn*’s effeminacy provided these people with the opportunity to have access to women’s communities and quarters where other Muslim males were not allowed. One may also assume that the *mukhannathūn* were exempted from serving in wars due to their softness and female attitudes or behaviours. If so, then this should be considered an unimaginable privilege to grant a male individual in early Muslim society, particularly as various wars had occurred from the time of Muḥammad and the early Caliphs to the time of the Umayyad dynasty. Having such advantages that other Muslim males normally lacked, the *mukhannathūn* may still have been able to share the privilege of maleness with other males of the Muslim community; they could, for example, receive twice as much heritage as their

82 Rowson, “The Effeminate of Early Medina,” 675.

83 Ibid.

84 See, for example, al-Iṣfahānī, *Kitāb al-aghānī*, 3: 23; 8: 367–69; 22: 275, 288. See also Rowson, “The Effeminate of Early Medina,” for some fascinating stories on the social and gender behavioural roles of the *mukhannathūn* of the early Muslim community of Medina which confirm this understanding of the effeminate.

female siblings and not be obliged to wear the female veil according to Islamic law. Thus, their gender flexibility could facilitate them to play different roles which would not be possible for them as males.

With regard to the *ḥadīth* sources, it can be concluded that *mukhannathūn* were first conceived of as people who had no sexual desires at all, perhaps equivalent to asexual people in modern times. However, the Prophet later learned that *mukhannathūn* enjoyed having sexual desires, in particular, sexual interests in women. Therefore, as the previous two *ḥadīths* suggest, the Prophet advised his wives to forbid such *mukhannathūn* from entering their quarters, while according to some other *aḥādīth*, the Prophet advised Muslims in general to prevent *mukhannathūn* from entering mosques and Muslims' homes.⁸⁵ Moreover, there are even *aḥādīth* indicating that the Prophet cursed *mukhannathūn*. For example, there is a *ḥadīth* in *al-Ja'fariyyāt* (also known as *al-Ash'athīyyāt*), an early Imāmi *ḥadīth* collection, which was attributed to 'Alī b. Abī Ṭālib who said "the Prophet cursed the effeminate, [and] said, 'cast them out of your house.'"⁸⁶ In another *ḥadīth* recorded by Aḥmad b. Ḥanbal (d. 241/855) transmitted from Ibn 'Abbās, a great companion of the Prophet, the Prophet cursed 'effeminate males' (*mukhannathūn min al-rijāl*) and 'mannish females' (*mutarajjilāt min al-nisā*). According to this *ḥadīth*, Ibn 'Abbās then told Muslims to "keep the *mukhannathūn* out of your houses because the Prophet banished a person and 'Umar [the second Caliph] banished another."⁸⁷

85 al-Ṣadūq, *Ilal al-sharā'i*, 2: 602, H: 63 and 64.

86 Ibn Ash'ath al-Kūfī, *al-Ja'fariyyāt/al-Ash'athīyyāt*, 127.

87 Ibn Ḥanbal, *Musnad*, 3: 443, H: 1982. However, it would be misleading to conclude that the Prophet banned *mukhannathūn* from entering mosques and Muslims' homes just because they had sexual desires for the opposite sex. This is because, in both of the previously mentioned *ḥadīths* in which the Prophet barred two effeminate from entering his quarters and deported them from Medina, the deportations happened after the Prophet had heard that these *mukhannathūn* were describing the beauty of female strangers' bodies to male strangers in a sexual or sensual manner while advising the male strangers to go after the women and engage in an illicit sexual relationship. In fact, according to these reports, this is when the Prophet first understood that such people had sexual interests in women, as implied by the earlier quoted Prophetic *ḥadīth* with regards to the *mukhannath* Hit. This means the Prophet learned that these *mukhannathūn* were deceiving Muslims by claiming such an effeminate status in order to enter women's private quarters where male strangers were not allowed. After learning about their true sexual desires towards females, that the Prophet banned the *mukhannathūn* from entering the women's quarters is readily understandable as any male Muslim strangers would not be allowed to do so. Nevertheless, what cannot easily be justified or understood is that the Prophet generally cursed them and barred them from mosques. If a person has an unusual sexual desire but just lies about it, or only hides it, or claims a lack of any sexual desire, this does not imply that the person should not be allowed to enter the mosques or should be deported. It is understandable that such people, according to Islamic law, should not be

However, although *mukhannathūn* were tolerated by the early Muslim community on some occasions, they also were seen as a threat to the heavily patriarchal and military culture of the Arab and then the Muslim community. Given the various wars which had occurred during the early period of Islam, a true Muslim man was seen as a person who could display his courage and strong nature in a warzone or on the battlefield. It appears that effeminate people in ancient Greek, Roman, and medieval European cultures whom Halperin eloquently articulates as *womanizers* can be seen as parallels of the *mukhannathūn* who lived in the early period of Islam. As Halperin notes, effeminate men were outlined as unmasculine, at least on some occasions, because “they were *womanizers*.”⁸⁸ This, means that these effeminate men, in such cultures

deviated from masculine gender norms insofar as they preferred the soft option of love to the hard option of war. In the culture of the military elites of Europe, at least from the ancient world through the Renaissance, normative masculinity often entailed austerity, resistance to appetite, and mastery of the impulse to pleasure. [...] A man displayed his true mettle in war, or so it was thought, and more generally in struggles with other men for honor—in politics, business, and other competitive enterprises.

allowed to enter females' private quarters or women's gatherings (for instance, in the case of mosques, they should not be allowed to enter the women's section of the mosque, but should not be barred from the mosque entirely). These two points call for a deeper investigation and reading of the *aḥādīth* on this matter. Is there an issue which was considered immoral in the eye of Muḥammad and the Muslim community and caused the Prophet to impose such a harsh verdict on such *mukhannathūn*? Although the *aḥādīth* and anecdotal sources are not very explicit here, it is possible to infer from some *aḥādīth* that these *mukhannathūn* were taking advantage of their social status in order to facilitate illicit sexual acts, namely *zinā*, between Muslim men and women by making matches between them. For instance, this occurred in the previous *ḥadīth* in which the Prophet banished a *mukhannath* from his quarters and from the city of Medina, because that *mukhannath* was arousing the sexual lust of a man, namely Umm Salama's brother, towards a female stranger. Therefore, the Prophet not only banned the person from his house but even banished him from Medina. This point can explain those Prophetic *aḥādīth* which convey the banishment of *mukhannathūn* from Medina and indicate that they were not allowed to enter mosques. It is also worth noting that, despite the fact that the Prophet cursed the *mukhannathūn* and even banished them in some cases, he did not regulate or execute a punishment on them, such as killing or whipping them, solely for being *mukhannath*. In one case, which Abū Dāwūd (d. 275/888) attributed to the Prophet through Abū Hurayra, the Prophet banished a *mukhannath* from Medina. However, his companions wondered whether the *mukhannath* should have been killed. The Prophet responded to them by saying, “I have been forbidden to kill those who pray” (Rowson, “The Effeminate of Early Medina,” 673–74).

88 Halperin, *How to Do the History of Homosexuality*, 111.

Those men who refused to rise to the challenge, who abandoned the competitive society of men for the amorous society of women, who pursued a life of pleasure, who made love instead of war—they incarnated the classical stereotype of effeminacy.⁸⁹

The same phenomenon, as the *ḥadīth* and early Muslim anecdotal sources illustrate, can be seen in the early Muslim community in Medina and in Damascus, the capital of the Umayyad dynasty. On the one hand, the *mukhannathūn* preferred to stay in the company of women while presenting *feminine* signs both in their inward behaviours and outward appearances. On the other hand, there is no reliable documentation showing that these people were present or participated in wars with the Prophet or other Muslim leaders. This can perhaps explain why the *mukhannathūn* were in favour of staying in the company of women, and thus in favour of the “soft option of love” rather than “the hard option of war,” to use Halperin’s terminologies. It appears that they did not feel comfortable competing with other males in war to display their courage and strong mettle. In the eyes of the Prophet and other Muslim leaders of a newly established community which massively needed warriors to establish its authority and expand its territory, the effeminate males would perhaps be considered a threat to these goals, and thus would ultimately endanger the nascent Muslim society. Hence, the best way to defeat such a threat, in their view, was either to isolate and banish them from the heart of Muslim territory or to constantly insult them and regard them as inferior people within Muslim society. Perhaps this is why later Umayyad and Marwanīd governors both oppressed and suppressed the *mukhannathūn*: for example, by ordering them to be castrated or by isolating and banishing them from the major Islamic cities of Medina, Mecca, and Damascus. However, this is not to deny that such harsh punishments towards effeminate males could also be motivated by other political reasons, such as the *mukhannathūn*’s critiques of the legitimacy of the governors, as some scholars have pointed out based on anecdotal reports.⁹⁰

Unlike *takhannuth*, *tarajjul* (mannish-ness), does not appear in enough surviving sources in Islamic tradition to be examined in detail. However, analysing the *ḥadīth* literature makes it almost certain that in the early Muslim community there were women who displayed male traits in dressing and behaviours. For example, in the aforementioned *ḥadīth* recorded by the Sunni *ḥadīth* scholar Aḥmad b. Ḥanbal, the Prophet cursed two groups: “effeminate males” and “mannish females.” Or in another report recorded by Imāmī *ḥadīth* scholar

89 Ibid.

90 See Rowson, “The Effeminate of Early Medina.”

al-Mīrzā Ḥusayn al-Nūrī (d. 1320/1902) from the Book of Abī Saʿīd al-ʿUṣfūrī ʿAbbād, the text describes how the Prophet said, “God cursed a male who resembles female-ness (*taʿannathat*) and a female who resembles male-ness (*tadhakkarat*); and the Angels affirmed the God’s curse.”⁹¹

Nonetheless, these *aḥādīth*, unlike those about the *mukhannathūn*, do not provide us with more information about such women, their characters, and their public behaviours, sexual desires, and sexual orientations. Moreover, although Muslim scholars of later Islamic periods discussed female gender and sexual deviations or role reversals—for instance, al-Tifāshī (d. 651/1253) devoted a chapter of his book *Nuzhat al-albāb fī-mā lā yūjad fī kitāb* to female same-sex sexual behaviours—they did not address this point independently or conceived of them as individuals who inclined to female same-sex sexual practice.

However, since this term was used in opposition to male effeminacy, we can infer that mannish women would claim a reversal in gender roles by imitating male Muslims’ status (possibly both inwardly and outwardly) either to gain access to male privileges of the new Arab-Islamic patriarchal community or to compete with the males of the heavily masculinised society—perhaps by going to war or working on farms to show that Muslim women too can be as masculine as men, if not stronger, and thus they should not be counted inferior to Muslim males. Whatever *tarajjul* was, it appears that this phenomenon had no direct link to sexual desires and preferences, meaning that a *mutarajjil* was not necessarily a person who was inclined to female same-sex sexual relationships, as not every female individual who desired or practised female same-sex sexuality was a *mutarajjil* with mannish behaviours, according to later Islamic sources. Hence, although it cannot be confirmed due to the lack of sources discussing these women, it is not impossible to imagine that *mutarajjilāt*, while claiming masculine roles, were mostly married women with husbands and children.

In summary, *takhannuth* and, most likely, *tarajjul* were known phenomena related to the reversal of gender roles that did not necessarily have ties with sexual behaviours, whether related to same-sex or opposite-sex preferences.

5.2 Male Active Pederasty

Although *liwāt* in Muslim legal discourse, as shall be discussed, often implies “anal intercourse between two males,” disregarding who is the penetrator and who is the receiver, it was commonly understood as active sexual intercourse between an adult man and a young boy—or a boy prostitute—in early

91 al-Nūrī, *Mustadrak*, 14: 349, Ḥ: 16919.

and medieval Muslim communities, particularly from the ‘Abbāsīd period onwards. The term *lūṭī* (an adult man who practised *liwāṭ*) in the vernacular language of Muslim Arab societies often, if not always, conveyed “pederast.”⁹² As far as the Shi‘i *ḥadīth* literature is concerned, this understanding of *liwāṭ* is confirmed by several *aḥādīth*, particularly by those ascribed to the Shi‘i Imāms who lived during the ‘Abbāsīd period, such as the sixth Imām Ja‘far b. Muḥammad al-Ṣādiq (d. 148/765) and the eighth Imām ‘Alī b. Mūsā l-Riḍā (d. 203/818). In such *aḥādīth*, as will be demonstrated in Chapter 5, *liwāṭ* is regarded as same-sex sexual relationships, whether kissing, intercrural, or anal sexual intercourse, between an adult man and a very young beardless boy or a teenager/minor,⁹³ whether free-born or a slave.

Arabic literary studies often distinguish between the active penetrating role and the passive receiving role in male same-sex sexual behaviours. For example, al-Jurjānī (d. 1089), in his book entitled *al-Muntakhab min kināyāt al-udabā’ wa-ishārāt al-bulaghā’*, devotes two chapters to male same-sex sexual behaviours: a chapter on *ijāra* (boy prostitution) and *liwāṭ* and one on *bighā* and *ubna* (male passivity or *pathic*). Or al-Tifāshī, in *Nuzhat al-albāb fī-mā lā yūjad fī kitāb*, devotes separate chapters to *liwāṭ* and *ubna*, although he groups *ubna* and *takhannuth* (the first pre-homosexual category discussed here) into one category. It appears that medieval and early Muslim categorisations of sexual behaviours set clear distinctions between a male desire to penetrate and a male desire to be penetrated. The latter category—namely, male passivity—will therefore be discussed separately in this study. Borrowing Halperin’s terminology, in the early Islamic world, *liwāṭ* was usually conceptualised as the male *superordinate* sexual penetration of a *subordinate* male, that is, a free boy or a young slave. However, there was also a tradition of practising pederasty only with young slave boys. For example, ‘Unṣur al-Ma‘ālī Kaykāwūs b. Wushmgīr b. Ziyār (d. 403/1012), in *Qābūs-nāma*, advises his son (Gilān Shāh) to have sexual relationships with slave boys in summer and with women in winter.⁹⁴ In the practice of *liwāṭ*, there was often an older man or a male

92 Rowson, “Gender Irregularity as Entertainment,” 53 and “The Effeminates of Early Medina,” 57; El Rouayheb, *Before Homosexuality*, 16.

93 It is important to note that the concept of “teenager” or “minor” in various modern societies apparently includes individuals between 12 and 19 years old. However, regarding Islamic law, which counts 15 as the age of religious responsibility (*taklif*) for boys, the use of these terms in this context should be limited to this age accordingly. Although, in line with the principle of “the role of time and place in *ijtihād*,” proposed by Fazlur Rahma and Khumaynī (see chap. 1), one might argue that the age of religious responsibility is open to cultural adaptations.

94 Wushmgīr b. Ziyār, *Qābūs-nāma*, 86.

superior who often penetrated a very young or beardless boy (*amrad*) who was considered inferior in terms of age, social class, gender style, and often sexual role.⁹⁵ These notions of super-ordination and sub-ordination represent the penis or phallic penetration as an indication of hierarchical power relations.⁹⁶ Therefore, a powerful active male could sexually penetrate all those who were considered to have an inferior status in Muslim societies: boys (free-born and slave), women (free-born and slave), prostitutes (male and female), and even strangers and enemies (males and females).

Unlike *ubna* (the sixth pre-homosexual category discussed here), it appears that there is little extant documentary evidence from early and medieval Arab-Islamic societies that perceives *liwāṭ* as a pathological condition—namely, perversion or a mental or physical illness (*dāʿ* in its literal-medical meaning)—or considers a *lūṭī* as a person who suffers from a disease and needs to be cured medically. In fact, as El-Rouayheb notes,

There were no medical discussions of *liwāṭ* or any other indication that a tendency to commit *liwāṭ* was held to be a disease in the strict sense, with a physiological basis, physical symptoms, and natural remedies.⁹⁷

Rather, the act of *liwāṭ* was deemed as perversity, and a *lūṭī* was regarded as an immoral person who practises perverse sexual behaviours. Therefore, it was usually believed that they were morally corrupt people or libertines (*fussāq*). For this reason, pederasty has mostly been mentioned together with drinking wine in Islamic literature: “he is suspected of drinking wine and being inclined

95 However, the sexual role could be reversed, though not very often, meaning that the adult male could demand to be penetrated by the young boy (El-Rouayheb, *Before Homosexuality*, 32).

96 As studies show, the culture of seeing phallic penetration as domination, subjugation, and even humiliation of the inferior or subordinate male still exists in Muslim Arab and Persian societies today, as reflected in jokes and insults (Abedinifard, “Structural functions of the targeted joke,” 350–53; El-Rouayheb, *Before Homosexuality*, 13). It is noticeable that phallic penetration as a weapon to punish or humiliate enemies who were presumed as inferior was common in later Muslim patriarchal cultures. In this case, male penetration of another male was conceived in distinction from the context of sexual desire or sexual pleasure; it was seen solely as a means of getting revenge or punishing enemies. For instance, the Muslim scholar al-Būrīnī (d. 1615) interprets the act of the people of Lot (*amal qaḥm Lūṭ*) as a tactical anal sexual penetration of strangers to keep them out from their properties and tribe, “without having any sexual desire to do that” (El-Rouayheb, *Before Homosexuality*, 14–15).

97 El-Rouayheb, *Before Homosexuality*, 19.

to beardless boys,”⁹⁸ and he “loves boys and drink.”⁹⁹ The poet Māmāya al-Rūmī (d. 1579) seems to articulate pederasty as a sinful act, alongside fornication and drinking alcohol:

My career in pursuit of fancy is ruined, so have mercy on me, O Bestower
and Benefactor!
I've lost this world and the next, on fornication, booze, and beardless
boys in my time.¹⁰⁰

This discussion uncovers a significant aspect of pederasty in early and medieval Muslim societies: the superior male's sexual intercourse with an inferior young boy does not necessarily manifest any abnormality per se (whether sexual or psychological) which required medical treatment. In fact, male pederasts were in many cases married men, and thus could penetrate both females and young boys and would still be considered as masculine and dominant men with natural male sexual desires; such people might be not diseased but immoral, unless a pederast demanded to be penetrated by another male. Demanding such penetration would negatively affect his social hierarchical status, and thus he would be considered ill (*marīḍ*). This shows that the sexual relationship in pederasty was not based on equality, mutual enthusiasm, and shared pleasure, but on power relations, the beauty and attractiveness of beardless boys, and the erotic appetite that the adult males had for young boys.¹⁰¹ In this model, sexual behaviour does not imply identity but difference. Nevertheless, this does not mean that, in such relationships, passionate love or intimacy between the two partners is completely missing. However, the junior partners have consciously been ignored, and thus there is not much information about their character type, desire, and sexual passion in Muslim literature. Therefore, sexual delight and passion in such relationships seem to be lopsided. As Halperin, with regard to male pederasty in ancient Greek culture, notes, this means that the active adult partner was held to be

the *subject* of desire and the recipient of the greater share of pleasure from a younger partner who figures as a sexual *object*, feels no comparable desire, and derives no comparable pleasure from the contact. The

98 Ibn Ayyūb al-Anṣārī, *al-Rawḍ al-ʿaṭir*, 23, cited from El-Rouayheb, *Before Homosexuality*, 19.

99 Ibn Kannān al-Ṣāliḥī, *al-Ḥawādiṯ al-yawmiyya*, 38, cited from El-Rouayheb, *Before Homosexuality*, 19.

100 El-Rouayheb, *Before Homosexuality*, 19.

101 Rowson, “The Categorization of Gender,” 58.

junior partner's reward must therefore be measured out in other currencies than pleasure, such as praise, assistance, gifts, or money. As an erotic experience, pederasty or sodomy refers to the "active" partner only.¹⁰²

As early as the 'Abbāsid period (roughly from the late eighth century) in Muslim societies, Rowson observes that there was a widely known subgenre of erotic discussion on the comparison between the desire for boys and the desire for women.¹⁰³ Such discussions would often happen between two males on whether boys or women were their preferable object-choice for sexual pleasure; and they are found in Arabic prose and poetic literature.¹⁰⁴ One early influential example of such a debate can be found in the book of *Mufākharat al-jawārī wa-l-ghilmān* by a prominent littérateur of the ninth century, 'Amr b. Baḥr al-Jāḥiẓ.¹⁰⁵ The same debate can be found in later Persian culture as well.¹⁰⁶ For example, in his widely known work entitled *Maqāmāt-i ḥamīdī*, Qāḍī Ḥamīd al-Dīn 'Umar b. Maḥmūd al-Balkhī (d. 559/1164–5) devoted a whole chapter to a pederast and an adulterer arguing about the superiority of their sexual object-choice.¹⁰⁷ This demonstrates an awareness of males' conscious sexual preferences for other males (in this context, for boys until they grew beards) in early and medieval Muslim societies.

However, it does not appear that such conscious erotic preferences in the context of pederasty illustrate homosexual orientation in its current form, meaning an exclusive orientation of individuals towards same-sex mates. In fact, such sexual orientation was seemingly missing in this conception of Arab and Muslim hierarchical-patriarchal pederasty. Halperin makes the following remark in the context of same-sex erotic preferences in ancient Greek culture which can readily be applied to the Arab-Muslim context as well: namely, those males who preferred same-sex mates over females usually demanded erotic pleasure, or at least were capable of demanding it, from both beautiful women and young boys. Therefore, their choice represents a preference more like one's choice to be a vegetarian, rather than homosexuality. Moreover, it does not make a distinction between different males based on their *sexuality*.¹⁰⁸

102 Halperin, *How to Do the History of Homosexuality*, 115–16.

103 Rowson, "The Categorization of Gender," 58–59.

104 For more discussion on this issue, see Oberhelman, "Hierarchies of Gender, Ideology, and Power," 55–93; Rowson, "Two Homoerotic Narratives from Mamlūk Literature," 158–91.

105 al-Jāḥiẓ, "Mufākharat al-jawārī," 161–96.

106 See Shamīsā, *Shāhid-bāzī*.

107 Qāḍī Ḥamīd al-Dīn al-Balkhī, *Maqāmāt-i ḥamīdī*, 52–59.

108 Halperin, *How to Do the History of Homosexuality*, 116.

Yet, scholars such as John Boswell argue that the category of pederasty, at least, made it possible for males to show their sexual tastes and to discuss and even articulate them by comparing and contrasting their erotic preferences.¹⁰⁹ This point is significant for such scholars, since they identify homosexuality as the *conscious erotic preferences* of same-sex mates for each other. Therefore, in their view, homosexuality is a premodern phenomenon that existed in different ancient and medieval cultures. However, Halperin eloquently demonstrates that such conscious same-sex erotic preference does not imply modern homosexuality.¹¹⁰ This is because this erotic preference was in a different context, namely in the context of male active pederasty which was based on hierarchical, unequal, and power-based relations between a senior man and a junior boy. Moreover, although pederasty might loosely share with modern homosexuality its conscious erotic preference, it only represents one peculiar element of modern homosexuality, not homosexuality per se.

5.3 *Male Love of Boys*

Ishq al-ghilmān (male love of boys) is another phenomenon which can be distinguished in early and medieval Muslim societies, in particular in Persian and Arab cultures. A person who loved boys for their beauty but who did not wish to engage in sexual activities with them. Such people have occasionally been called *jamālī*, in Arabic,¹¹¹ and *jamāl-parast*, in Persian,¹¹² meaning aesthete. As with the previous category of pederasty, there are abundant *mujūn* and poetry works from the ‘Abbāsid period onwards which refer to this phenomenon. Moreover, later Muslim philosophy and *taṣawwuf* (mysticism) also discussed this form of love. Although both a *jamāl-parast* and a *lūṭī* were senior males who would pick a very young or beardless boy (*amrad*) as their object-choice, the former, at least categorically, would not engage in any sexual or erotic affairs with his object-choice. *Ishq al-ghilmān* was commonly justified on the ground of the beauty, softness, and cuteness of the beloved boys. It seems that premodern Muslim poets consciously preferred boys over girls in their prose and poems.

Thus, there is a clear distinction between the love of boys and having lust or erotic delight for boys in Muslim discussions on this matter.¹¹³ However, this obviously did not mean that those people who were practising the love of boys

109 Boswell, *Christianity, Social Tolerance, and Homosexuality*, 44.

110 Halperin, *How to Do the History of Homosexuality*, 117.

111 El-Rouayheb, *Before Homosexuality*, 54.

112 Shamīsā, *Shāhid-bāzī*, 14–15.

113 El-Rouayheb, *Before Homosexuality*, 54–60.

never engaged in sexual relationships with their beloveds. For example, the early ‘Abbāsid poet Ḥasan b. Hānī, better known as Abū Nuwās, (d. 199/814–5) was openly in favour of loving handsome boys and wrote several poems for his beloved boys. In one case, while blaming other Arabs who do not favour boys over girls, he writes,

That [boy] shows us his moonlike cheeks whose blaze is superior to the
blaze of the moon.

His face increases in beauty as you increase your gazing at him.¹¹⁴

Qāḍī Ḥamīd al-Dīn al-Balkhī, however, described Abū Nuwās as a *lūṭī*.¹¹⁵ The prominent Iranian poet, Sa’dī Shīrāzī (d. 690/1291–2), in his work of *mujūn* or *hazliyyāt* genre, also called Abū Nuwās a *lūṭī*:

Whoever, like Abū Nuwās, became known for *liwāt*; he would be free
from the grief of revenge and the pain of being the master [of the tribe
and family] (*kad-khudāṭ*).¹¹⁶

Muslim Ṣūfīs, who allegedly sought a pure love of boys, were also accused of engaging in erotic sexual practice with their beardless beloveds, and thus were occasionally deemed to be pederasts.¹¹⁷

As indicated, the debate around the love of boys found its way into Muslim philosophical and mystical discourse. Muslim mystics in medieval Islamic societies—with exceptions, such as Ibn al-‘Arabī (d. 638/1240)¹¹⁸ who appears not to have endorsed such a metaphorical love—were generally in favour of this love; they described it as a gateway (*qanṭara*) towards spiritual love and, ultimately, the love of God. Examples include the tenth-century Muslim scholars known as the Ikhwān al-Ṣafā (Brethren of Purity) in their mystical treatises¹¹⁹ and the Iranian philosopher Ṣadr al-Dīn al-Shīrāzī (d. ca. 1045/1636). The latter, in his masterpiece known as *al-Ḥikma al-muta‘āliyya fī l-asfār al-arba‘a*, seems to have been sparked by Greek philosophy, in particular by Plato’s Symposium; he suggests that pure love may happen only with regard to “elegant” boys (*ẓurafā’*), not women.¹²⁰ He, like the Ikhwān al-Ṣafā, holds that people with

114 Abū Nuwās, *Dīwān Abī Nuwās*, 281.

115 Qāḍī Ḥamīd al-Dīn al-Balkhī, *Maqāmāt-i ḥamīdī*, 54.

116 Sa’dī Shīrāzī, *Kullīyyāt*, 993.

117 El-Rouayheb, *Before Homosexuality*, 36–39.

118 See Chittick, “The Spiritual Path,” 4–16.

119 Ikhwān al-Ṣafā, *Rasā’il Ikhwān*, 3: 277–78.

120 Ṣadr al-Dīn al-Shīrāzī, *al-Ḥikma al-muta‘āliyya*, 7: 229–39.

refined hearts and those living in sophisticated nations were in favour of the love of youths as that would lead to a higher level of love—namely to the love of beauty per se—which is not physical and, ultimately, to the love of God; in contrast, those who had coarse hearts and unsophisticated characters were not used to practising the love of boys. This latter group was only in favour of liking women for the purpose of reproduction, a desire which humans share with beasts. The existence of the love of boys represents God's wisdom as it is strongly beneficial for the purpose of educating youths; without this love, education would not be easily done. However, both the Ikhwān al-Ṣafā and Ṣadr al-Dīn al-Shīrāzī explicitly distinguish between spiritual love and passionate erotic love of adults for beardless boys. They consider the latter morally unacceptable as it is prohibited in Islam too, while the former is desirable and should be advised.

These examples, along with other similar sources, convincingly demonstrate that in this context, the love of boys was encouraged, and the lover would be praised, not blamed for his love. In fact, if a senior male loved a boy but also took care of his usual sexual life (meaning that he was married with children or had a strong intention to marry and have children), he would not be called deviant either in gender or sexuality nor mentally or physically sick. As a result, this practice would not harm his masculinity and manhood and indeed might strengthen them. However, it is important to note that this category was based upon hierarchical and power-based relationships. The lover was a senior and superior male in age and social status. He could be the teacher or mentor of his beloved boy or, generally, a well-known scholar or an individual with a high official position in Islamic society (for example, a judge), and thus he would be superior financially. Therefore, such men could provide the very young objects of their affection with financial support or even seduce them this way, as it can be imagined that such a young male would be drastically in need of such support from his adult lovers.

From this discussion, it can be inferred that the lover was the subject of debate, and not the beloved, who would often only be seen as an object for the lover's desire. However, we should not ignore those sources from premodern Islamic times which are entirely devoted to describing the beauty of young boys.¹²¹ These texts are only about physical characteristics of beauty inasmuch as they were relevant to justifying the desires of superordinate males. Otherwise, these texts pay little attention to the object of the love. In fact, the beloved is not seen as an independent subject who could also love or have intimate relationships with other humans, whether male or female. The texts

121 El-Rouayheb, *Before Homosexuality*, 64.

also do not address whether the beloved has a desire or any positive emotion towards his lover. On the contrary, in the extant anecdotal and poetic literatures of this period, one often finds that, not only does the young beloved lack all feelings of passionate love towards his senior lover, but he also feels humiliated by being in a love affair with a senior male lover. This is perhaps because the boy sees such a love affair as negatively affecting his masculinity and even his future love and erotic life with women. Therefore, on some occasions, the boy behaves harshly or even brutally towards his lover by cursing or threatening him with death. Sa'di Shīrāzī, in his prose masterpiece *Gulistān*, chapter 5, anecdote twenty, tells a marvellous story about the *qāḍī* (judge) of Hamadan, who was deeply in love with a blacksmith boy.¹²² The *qāḍī* constantly spoke about his beloved boy both privately and publicly. The *qāḍī* once described his beloved as

That straight tall cypress [once] was witnessed by my eye. He hijacked my heart and threw me down.

This wanton sight carries my heart with a lasso. Wish you to not give your heart to anyone, close your sight.

When the young boy heard about the *qāḍī*'s passion, he felt immensely angry and went to see the *qāḍī* in a place where other people were also present. Then he verbally insulted the *qāḍī*, grabbed a stone to injure him, and carried out other disrespectful behaviours towards the *qāḍī* to show his dissatisfaction at such a lopsided love. But the *qāḍī*, in response, merely recited the following verses:

Look at his bearing witness (*shāhidī*) and his anger, and [look at] the node of his bitter-sweet eyebrow.

In the Arab region, [people] say: a slap from a beloved is [sweet like] raisins. Being punched in the mouth by you is sweeter than eating bread with my hand.

Interestingly, the *qāḍī* was finally able to seduce the boy by offering him financial and social support. Although this story appears to be related both to the love of boys and to pederasty, it illustrates my point that this kind of love was a hierarchically unbalanced phenomenon.

Halperin, in his genealogy of homosexuality in ancient and medieval Greece, did not discuss this category, despite the fact that this phenomenon

¹²² Sa'di Shīrāzī, *Gulistān*, 145.

commonly existed in Greek culture, as, for example, Plato's *Symposium* explicitly demonstrates. He did not discuss this category perhaps because, in his view, it does not help us understand the genealogy of modern homosexuality. This is because the love of boys was not based on a desire for sexual relations at all, or if it was, it should be included in the category of pederasty. Moreover, unlike comradeship (the next category), this phenomenon is not grounded on mutually non-hierarchical passionate love. Although this argument seems convincing, I still believe that it is worth considering this phenomenon in the genealogy of homosexuality, as it might be deemed similar to homosexual love. Bear in mind that the love of boys in Islamic cultures has been consciously chosen and preferred over the love of girls. Modern male homosexuality also contains the same element. However, as explained in the previous category of pederasty, it seems that such conscious male-love preference does not imply modern homosexuality. This is because this preference was expressed in a hierarchical context of power-based relations between a senior man and a junior boy, whereas homosexuality does not contain such relationships. Moreover, although the love of boys might loosely share the aspect of a conscious passionate love preference with homosexuality, again that represents only one peculiar element of homosexuality and not homosexuality per se.

5.4 *Male Friendship/Comradeship*

Mu'ākhāt (brotherhood) refers to male friendship or comradeship. It is another category that Halperin introduces as a pre-homosexual phenomenon found in ancient Greek culture. As he notes, Aristotle indicates in his *Nicomachean Ethics* that the best type of friend is "another self" or ego.¹²³ There are abundant examples in sources from the ancient and medieval periods which describe such passionate male friendship with a language which seems, to our modern mindset and cultural upbringing, like erotic love. Or as Halperin articulates it, such language "appears to modern sensibilities suspiciously overheated, if not downright erotic."¹²⁴ However, this type of male friendship was categorically, although not always, built on "equality, mutuality, and reciprocity in love between men."¹²⁵ Friendship could thus occur when the two individuals were equal in age, social rank, and gender-based masculinity.

The same phenomenon that Halperin observes in ancient Greece can be recognised in early and medieval Muslim cultures as well. It appears that the Sumerian and Babylonian *Epic of Gilgamesh* which tells of the heroic

123 Halperin, *How to Do the History of Homosexuality*, 118.

124 *Ibid.*, 119.

125 *Ibid.*, 118.

comradeship of Gilgamesh and Enkidu was widely known by pre-Islamic cultures of Arabs and Iranians; they were both geographically and culturally close to the cultural context of this story. It does not seem outlandish to assert that such a phenomenon was perhaps in the Prophet Muḥammad's mind when he asked *muhājirūn* (early Muslims who migrated from Mecca to Medina with Muḥammad) and *Anṣār* (the locals of Medina) to become brothers to one another in his early years in Medina while the new Islamic state was being established. Although this brotherhood type of contract, which is called *'aqd al-mu'ākhāt* in Arabic, was a religious or faith-based friendship as it occurred through a ritual ceremony offered by the Prophet, it provided strong grounds for various Muslim cultures to regard it as a Prophetic tradition, and thus use it to justify their way of comradeship.¹²⁶ The eleventh-century scholar 'Uṣur al-Ma'ālī Kaykāwūs b. Wushmgīr b. Ziyār holds that male friendship is the most valued relation amongst humans: "It is better for a man to have no brother than no friend."¹²⁷ This kind of brotherhood relationship often had various consequences for both parties. It would start by one person making a vow in Arabic (which was also allowed to be translated and said in the person's own language), conveying the point that they would be considered as brothers thereafter, and thus they would have rights and responsibilities over and towards each other, although not on legal and heritage matters. The other person would simply say, I accept this, and then the state of brotherhood (*mu'ākhāt*) would exist between them.¹²⁸

In the context of Iranian culture, brotherhood (*barādarī*—in Persian) would be recognised as an indication of long-lasting mutual, and often equal, trust and respect between two male friends who would often be regarded as having more or less the same status in age and social class, if not also in economic standing.¹²⁹ It would show that they had shared a long and intimate friendship, which primarily meant that they spent a great deal of time together, ate together, went out together, slept at each other's houses, aided each other in difficult times (financially and non-financially), perhaps travelled together, and so on. More than that, it would show that the friends would be willing

126 Amir-Moezzi, *La religion discrete*, 39–40 and "Reflections on the Expression *dīn 'Alī*," 38.

127 Wushmgīr b. Ziyār, *Qābūs-nāma*, 138.

128 A relatively similar phenomenon (called *adelphopoiesis*) had been practised in premodern Christian societies. John Boswell (see Boswell, *Christianity, Social Tolerance, and Homosexuality*) interpreted this phenomenon as a form of same-sex unions in premodern Europe or the marriage of likeness. However, this interpretation was strongly disputed by other scholars who work on Christian tradition (see, for example, Rapp, *Brother-Making in Late Antiquity and Byzantium*).

129 See Afshārī, *Futuwwat-nāmihā*.

to make sacrifices for each other when needed. This friendship would then be celebrated by a contract (*‘aqd*)—in the public sense and relating to religious tradition—made official by making a ritual-based vow (*‘aqd-i barādarī*). Iranian society would often understand such comradeship as a mutual intimate male friendship which deserved to be praised, as it was not deemed to go against the commonly accepted norm of masculinity. Conversely, it would empower the masculine norm of Iranian patriarchal culture through the manifestation of a culturally respected value of medieval Iranian society, namely *chivalry* or *manliness* (*futuwwat/jawānmardī*).¹³⁰ According to the public understanding of Iranian society, there was no sign of erotic intimacy between the partners of this comradeship.

Nevertheless, the manifestations of the phenomenon of comradeship or male friendship were not always as simple as have been outlined here. Male friendship could easily be transformed into hierarchical, power-based, and perhaps erotic relationships, if they were between two friends of different ages, social class, economic condition, and so on. Moreover, even if they occurred between two males of the same status, such relationships would easily become an erotic passionate love between peers, and there exist several anecdotal documents illustrating this point.¹³¹ The fear of same-sex erotic love in male friendship appears to exist in modern and post-Islamic revolutionary Iran, too. Therefore, despite the authorities’ interest in enacting Islamic traditions in the daily life of Iranians—they seem to have been successful in bringing new life to several forgotten Islamic traditions on society, such as *i’tikāf* (a three-day period of retreat in a mosque in the month of *Rajab*), *ṣadaqa* (almsgiving), *fāṭimīyya* (mourning for the death of *Fāṭima*, the daughter of the Prophet)—the authorities in post-revolutionary Iran have not promoted the tradition of *mu’ākhāt* which was widely practised by working-class religious individuals in different periods in Iran after Islam.¹³²

As demonstrated, homoerotic pederasty and love of boys were conceived of either as the sexual penetration of a boy by an adult or an adult’s possessive love towards a boy, suggesting that these categories are “all about position, superiority and inferiority, rank and status, gender and difference.”¹³³

130 Ibid; Ridgeon, “The Felon, the Faithful and the Fighter,” 1–24.

131 Several such anecdotes can be found in the *mujūn* or *hazliyyāt* book of the thirteenth-century Iranian poet Sa’dī Shīrāzī (see Sa’dī Shīrāzī, *Kullīyyāt*, *hazliyyāt* section).

132 This tradition had particularly been practised and promoted by the Ṣafawīd in the feast of *Ghadīr khumm*, at which Imāmiyya generally hold that the Prophet, on returning from his last pilgrimage (*hajj*), announced ‘Alī b. Abī Ṭālib as his successor and the Imām or Caliph.

133 Halperin, *How to Do the History of Homosexuality*, 121.

In contrast, male friendship “is all about sameness: sameness of rank and status, sameness of sentiment, sameness of identity.”¹³⁴ The discursive context of male love, therefore, is different from that of pederasty and the love of boys, as it puts the stress on non-hierarchical, mutual, and non-erotic love. Therefore, unlike the other two previous categories, it represents a consensual friendship. At the same time, this phenomenon should be distinguished from modern homosexuality, as it is not based on homoerotic love. However, since this phenomenon—practising male love or comradeship—provided an often accepted or even encouraged social context in which two males could express their intimate and mutual love or comradeship without hesitation, it can be compared to modern homosexuality, as such intimate, equal, and mutual love between two individuals of the same sex is a crucial part of what is currently called homosexuality. Therefore, it seems necessary to include this long-existing category in the genealogy of homosexuality.

5.5 *Male Pathological Passivity*

Ubna (male pathological passivity) is a category which can be traced back at least to the early ‘Abbāsīd period. There are abundant sources from this period onwards which illuminate this phenomenon. However, the earlier Islamic communities of the Umayyad period, the era of the first four Caliphs, and perhaps of the time of Muḥammad himself, had also encountered this phenomenon. There are some reports attributed to the first four Caliphs and even to the Prophet which discuss males who desired to be penetrated by other males.¹³⁵ A number of such reports will be presented in Chapter 5. Islamic juristic discourse, which was essentially based on *ḥadīth* reports, used the term *mafʿūl bihī* (one who is penetrated) to refer to such passive males, in contrast to the active partner who would be called *fāʿil* (one who penetrates).¹³⁶ However, as Rowson notes, during the Umayyad period, the term *ḥulāq* was more commonly used as synonym for *ubna* and the person who wanted to be penetrated called *ḥalaqī*.¹³⁷

In the ‘Abbāsīd era, when this phenomenon was widely practised in Muslim society, the term *ubna* was used to describe it. The male person who had the desire to be penetrated by another man was then called a *maʿbūn*. It seems that early Muslim medical practitioners, such as the prominent Iranian physician

¹³⁴ Ibid.

¹³⁵ Although there are some reports from the Prophet on this matter, the *ḥadīth* scholar Muḥammad b. Ṭāhir al-Fattānī (d. 986H/1578) holds that such reports are fabricated (see al-Fattānī, *Tadhkirat al-mawḍūʿāt*, 181).

¹³⁶ See, for example, al-Mufīd, *al-Muqnaʿa*, 785; al-Ṭūsī, *al-Nihāya*, 703.

¹³⁷ Rowson, “The Effeminate of Early Medina,” 686.

Muḥammad b. Zakariyyā l-Rāzī (d. ca. 313/925), were influenced by the works of ancient Greek scholars and viewed these people to be suffering from a disease; they thus sought its causes and then prescribed various instructions for its cure.¹³⁸ However, the disease discourse of passive males can be traced back to the earlier *ḥadīth* literature. There are reports attributed to Imām ‘Alī which imply that those males who wish to be penetrated by other males are people who are afflicted with a sickness. In one such *ḥadīth*, the narrator recounts how Imām ‘Alī, after punishing a man who had been penetrated by another man, said,

There are servants for God who possess wombs similar to the women’s wombs but their wombs do not function for reproduction, because their wombs are inverted (*mankūsa*). They have humps in their anuses like the humps of a camel; so whenever the humps thrill, they thrill and when the humps cool down, they calm down.¹³⁹

However, there is a *ḥadīth* ascribed to Abū Ja‘far al-Bāqir, the fifth Imām, which provides a sceptical point of view on regarding a *ma‘būn* person as being afflicted with a disease.¹⁴⁰ In line with this *ḥadīth*, only a person who does not have patience and calls other males to himself to engage in sexual affairs in public can be marked as having a disease. However, a person who can hide his desire and only performs this act privately is not really diseased, and thus should be blamed for what he does. This report apparently assumes that, if one is afflicted with a disease or is addicted to something (whether physical or mental), it is impossible for the person to hide the disease.

Moreover, it seems that in *ḥadīth* literature there is a difference between *mukhannathūn* who like to be with females but are attracted to the opposite sex (as the two previously mentioned reports of the Prophet suggest), and those passive males who are similar to *mukhannathūn* in favouring femininity in their physical appearance and personal behaviours while sexually preferring other (masculine and usually heterosexual) men and who take a *feminised* receptive role in sexual intercourse with such men (I shall return to this topic in Chapter 5). Therefore, one should not get confused about these *aḥādīth* even though the language of these two different types of *ḥadīth* is very similar. The

138 Rosenthal, “Ar-Razi on the Hidden Illness,” 56–60).

139 al-Ṭūsī, *Tahdhīb al-aḥkām*, 10: 52–53; al-Ṭabāṭabā‘ī al-Burūjirdī and al-Mu‘izzī al-Malāyirī, *Jāmi‘ aḥādīth al-shī‘a*, 30: 464, H: 46471.

140 al-Kulaynī, *al-Kāfī*, 5: 550–51; al-Ṭabāṭabā‘ī al-Burūjirdī and al-Mu‘izzī al-Malāyirī, *Jāmi‘ aḥādīth al-shī‘a*, 25: 475, H: 37657.

fact that a passive male was often regarded as a feminine person with female desire is a repeated theme of premodern Muslim literatures, although such a male was sometimes characterised as effeminate.¹⁴¹

In addition to medical discourse and *ḥadīth* literature, this topic also appeared in Muslim classical poetry, prose, and *mujūn* genres of the ‘Abbāsīd period and beyond. However, the significant point is that, in these works, the *ma’būn*, unlike the male active penetrator or *lūṭī*, would be regarded as a disgraceful and perverted person. Al-Jurjānī devoted a chapter of his previously mentioned book to *ubna*, and explicitly takes this approach towards passive males while tacitly praising the *lūṭī*. For instance, he says,

He is more devoted to *bighā’* (*ubna*)¹⁴² than a needle
But he pretends to people that he is a *lūṭī*.¹⁴³

As Wright accurately observes, the same motif is present in the poems of Abū Nuwās.¹⁴⁴

There is thus a contrast between the *lūṭī* and the *ma’būn* in early and medieval Islamic cultures. A *lūṭī* was often seen as a person who practised an immoral act and was a sinner according to Islamic ethics and law; otherwise, his desire for seeking sexual satisfaction in both women and boys would perhaps be viewed a normal need for a man in that patriarchal masculinised culture. In contrast, a *ma’būn* (an adult passive man) was not only a sinner who was performing an abomination by accepting the passive role in sexual intercourse with another man (mostly a heterosexual, powerful, and married man) but he was also a disgraceful person in the eye of the public, and often even in the eye of his active penetrator partner, and would not receive approval from Muslim society in any way.¹⁴⁵ In this context, even a boy prostitute (*mu’ājir*) who accepted being penetrated by another male would be regarded to have a superior position to a bearded male *ma’būn*, as the prostitute boy was performing this act under a more reasonable or, at least, understandable excuse, namely to make money.¹⁴⁶

141 See Rowson, “Gender Irregularity as Entertainment.”

142 *Bighā’* in classical Arabic literature mainly refers to male pathological passivity, albeit it is sometimes regarded as offering sexual services for payment (Rowson, “Gender Irregularity as Entertainment,” 59 and 66).

143 al-Jurjānī, *al-Muntakhab*, 37 (The translation is by Rowson, “The Categorization of Gender and Sexual Irregularity,” 64).

144 See Wright, “Masculine Allusion.”

145 El-Rouayheb, *Before Homosexuality*, 64–69.

146 Wright, “Masculine Allusion,” 14.

It seems that, unlike male pederasty, the love of boys, and male friendships, male passivity would endanger the premodern distinction between the genders, despite the fact that all four categories share an aspect of desiring males as their object-choice of love or eroticism. We should bear in mind that three of the categories (pederasty, love of boys, and friendship) were in line with the male gender norm of masculinity, whereas male passivity, with the adoption of an allegedly female style of seeking pleasure in desiring a passive role, would strongly challenge this premodern conception of the two gender norms established in the early and medieval Muslims' mind. The significant point is that, although the act of penetration also existed in male pederasty, the boys who would be penetrated in the act of pederasty were not, as explained previously, motivated by pleasure. They submitted to this sexual act for other motives, such as making money, social status, or gaining other benefits. Therefore, as abundant sources of anecdotal and prose literature in Persian and Arabic indicate, the young boys would not usually submit themselves to pederasts unless they were seduced by them or granted with rewards in return, such as gifts, money, and so on.

Moreover, the fact that passive males were actively seeking pleasure by being penetrated by another male would situate them in a risky and shameful position in Muslim society, according to which they would be recognised as entities with feminised gender, desire, and orientation. It seems that, as in many cultures, female gender and sexual orientation in early and medieval, if not also contemporary, Muslim cultures were commonly regarded as inferior and passive and were controlled by males.¹⁴⁷ Therefore, the adult lover or penetrator could engage in loving or penetrating boys, albeit within limits and in some close friendly contexts, as these phenomena would not challenge the masculinity of the penetrator. However, the passive male not only could not celebrate his act but he also must not speak about his desire, orientation, and practice in public as they were considered shameful. In addition, male passivity was often, if not always, a phenomenon that could outwardly be represented in the physical and personal behaviours of the passive parties (recall the earlier *ḥadīth* report of al-Bāqir which can clearly confirm this point), whereas pederasts or lovers of boys could not readily be discerned from other males solely by their public appearance or look.

Perhaps the more difficult task is to explain the distinction between *takhannuth* (effeminacy) and *ubna* (male passivity), as the latter often shares

147 See, for example, Ahmed, *Women and Gender in Islam*, chaps. 3 and 6; Ali, *Sexual ethics and Islam*, chap. 1.

characteristics of femininity and softness with *takhannuth*.¹⁴⁸ Therefore, it was a constant challenge for some Muslims to distinguish these two phenomena from each other, and in some cases this failure to do so resulted in damaging consequences. However, these two phenomena differ in several ways. First, as previously discussed, not all *mukhannathūn* had sexual desires or preferences for same-sex object-choice. Following Islamic *ḥadīth* and anecdotal literature examined earlier, *mukhannathūn* were often marked as people who sexually desired females but represented a soft version of the *masculine* male gender. Although both effeminate and passive males were identified gender-deviant people and often described as soft and effeminate, there was a fine distinction between them: borrowing Halperin's terminology, *mukhannathūn* were *liking* to be in presence of women, whereas passive males were desiring *to be like* women in their gender identity and sexual appetite.¹⁴⁹ In fact, passive males were soft in the sense that they were considered a minority group of deviant people who could not embrace masculinity and were thus, in an unequal way, seeking disgraceful and shameful pleasure from other males by adopting feminine behaviours in their relations with them. However, *mukhannathūn* were regarded soft in that they were seen as deviant feminine males who could potentially be recognised as a threat to or as a betrayal of the whole structure of male masculinity.

Ubna was also clearly different from modern homosexuality. *Ubna*, or sexual inversion, had a heavily pathological connotation in Islamic society, and it was generally viewed as a cultural disgrace for *ubna* individuals by their respective Muslim communities. Although male passivity represents sexual orientation, it does not necessarily and exclusively contain a homoerotic desire. Therefore, one can be an inverted *ma'būn* but not a homosexual. Conversely, one can be a homosexual person and practise a same-sex sexual relationship without being categorised as *ma'būn* or inverted or *pathic*. Moreover, it should be noted that an *ubna* person cannot be compared to a modern gay man who desires to be penetrated. An *ubna* practised passive sexual behaviours in a hierarchical masculine-male context in which the *ubna* was believed to be inferior and disgraceful in the eye of the public and even, often, the penetrator partner. Thus, *ubna* was generally suppressed by society as a whole. However, a modern homosexual man who desires to be penetrated opts to practise this role in an equal environment, meaning that both the penetrated and penetrating

148 As previously indicated, it would be misleading to count passive males as individuals who were always feminine or soft outwardly. One could be a passive male or *ma'būn* without showing it publicly, although often this was not the case.

149 Halperin, *How to Do the History of Homosexuality*, 123.

partners freely, respectfully, and mutually agree on taking specific roles in their sexual activities. Therefore, the male penetrated partner would not be accused of being afflicted with a pathological condition because of his desire and role in sexual relationships. Thus, he would not be suppressed or shamed by his own penetrator partner or the society at large solely because of his sexual orientation and role.

5.6 *Female Same-Sex Sexual Behaviour*

Although in Islamic law *sahq/sihāq* applies to female same-sex sexual behaviours in general, it often refers to senior females same-sex sexual behaviour with their female slave or a virgin girl in early and medieval Islamic societies. Unfortunately, again patriarchal Muslim society seemed not to value female sexual behaviours, often viewing them to be inferior, and thus not worth discussing. Therefore, unlike the vast categorisations of male sexual behaviours debated in Islamic literature, there is no such enthusiasm whatsoever, positive or negative, about female sexual desires and practices. However, the surviving documents, from *ḥadīth* and *mujūn* literature, provide us with some information on female same-sex sexual behaviours which were often discussed under the shadow of male sexual behaviours.¹⁵⁰ The *aḥādīth* ascribed to the Prophet or Imāms sometimes only indicate female same-sex sexual behaviours in general: unlike those related to male same-sex sexual behaviours, they neither explicate the very nature of this act nor explain the entity of the two female partners who engage in it. Nevertheless, as will be seen in Chapter 5, there are a good number of *aḥādīth* which discuss female same-sex sexual behaviours as a phenomenon that used to happen between a (married) woman and her female slave or a young virgin girl. For example, a *ḥadīth* attributed to Abī ‘Abdallāh (the sixth Imām) conveys:

If a man had sexual intercourse with his wife, then the wife while carrying his sperm practised *sihāq* with a slave girl of her husband and thus made her pregnant, then the wife should be stoned, the slave girl should be disciplined and the child is for the father.¹⁵¹

One can put such *ḥadīth* literature in context and read other *aḥādīth* in this light.

¹⁵⁰ To learn about females (same-sex) sexual behaviours in premodern Islamic cultures, see Habib, *Female homosexuality*; Myrne, *Female Sexuality*.

¹⁵¹ al-Ṣadūq, *al-Faḥḥ*, 4: 43; al-Ṭabāṭabā’ī al-Burūjjirdī and al-Mu’izzī al-Malāyirī, *Jāmi‘ aḥādīth al-shī’a*, 30: 473, H: 46503.

Parallel to *takhannuth* and *liwāt*, the terms *tarajjul* and *saḥq* or *siḥāq* seem to be used (perhaps first) by Muslim jurists and then by other scholars. They also appear in *mujūn* literature, albeit rarely. For example, al-Jurjānī, in his vice lists, does not devote a separate chapter to female same-sex sexual behaviours but only mentions *saḥq* in a chapter devoted to intercruel intercourse, male masturbation, and tribadism. Moreover, his statements on this issue, as Rowson correctly notes, are based on the centralisation of male fantasy and erotic desire written by male poets. They also contain “aggressive implications of the military expressions.”¹⁵² In one case, al-Jurjānī quotes,

May God curse the ‘head-shavers’,
For they are a scandal to respectable women:
They manifest a war in which there is no spear-thrusting,
But only fending off a shield with a shield.¹⁵³

Al-Tifāshī in *Nuzhat al-albāb*, however, devotes a relatively extensive chapter to female same-sex sexual behaviours.¹⁵⁴ He briefly mentions various medical approaches towards this phenomenon, such as the view that marks *saḥq* as an illness, and thus refers to the reasons that may cause such a disease, or the opinion that it was a natural sexual desire in females.¹⁵⁵ He suggested that the practice of this desire would often happen between adult females and their female slaves or between adult females and young virgin girls. This point shows that such erotic behaviour, unlike modern lesbian relationships, was mainly based on hierarchical, unequal, and power-based relations between a senior woman and her female slave or a junior girl.

6 Comparing and Contrasting Homosexuality and Pre-Homosexual Categories

To make the similarities and differences between these categories more visible and to demonstrate that they are not reducible to each other, I created a table

¹⁵² Rowson, “The Categorization of Gender,” 63.

¹⁵³ al-Jurjānī, *al-Muntakhab*, 34 (The translation is by Rowson, “The Categorization of Gender and Sexual Irregularity,” 63).

¹⁵⁴ al-Tifāshī, *Nuzhat al-albāb*, 235–36. See, also, see Myrne, *Female Sexuality*, chap. 1.

¹⁵⁵ Samar Habib provides a very useful summary of this chapter, though she reads al-Tifāshī’s work in the context of modern lesbian discourse, an approach with which this study principally disagrees (Habib, *Female homosexuality*, 66–82).

of the categories (Figure 4) that is similar to Halperin's chart.¹⁵⁶ However, it is important to mention a number of points before reviewing the table. Unlike Halperin, who compared homosexuality with pre-homosexual categories that existed in ancient and medieval Greece and Rome, as fits the scope of this study, I compare homosexuality with the pre-homosexual categories that existed in early and medieval Islamic society. Corresponding to my study, the table is slightly changed from Halperin's in numbering and identification of the observed categories, as well as in quality and order of the questions; all of these changes can readily be grasped by comparing the two tables. However, I removed one question that was presented by Halperin: "Is it constant across sex or gender transition?" This is because, according to Halperin, none of the pre-homosexual categories was constant across sex or gender, and his answer to this question with regard to homosexuality is *maybe yes*, which also means *maybe not*. I believe this question is not essential to this discussion as it does not show a great deal of difference between homosexuality and pre-homosexual categories. Instead, I added two questions which address crucially important aspects in contemporary understandings of homosexual relationships: "is the category based on consensual sexual relationships?" and "is the category based on hierarchical and power relations?" Moreover, my answers to the questions are based on my discussion, understanding, and articulation of the categories debated here, and thus in some cases are different from Halperin's. However, as Halperin himself emphasised, the answers to such questions are open to debate.¹⁵⁷ Although my terminologies are almost the same as Halperin's, three additional concepts have been applied to my table: *most likely* (in the sense of almost yes but not for sure), *not applicable/NA* (when a question does not apply to a category), and *categorically Yes/No* (namely, based on the definition, the answer is yes or no). Lastly, this table shall contain, compare, and contrast both the male and female pre-homosexual categories and homosexuality with each other.

Questions:

1. Is it a sexual orientation?
2. Does it involve homoerotic desire?
3. Does it involve same-sex sexual practice?

¹⁵⁶ See Halperin, *How to Do the History of Homosexuality*, 135.

¹⁵⁷ Interestingly, some of his own responses are different in the two different versions of this table he provided between 2000, when the article was published for the first time in *GLQ* 6, no. 1 (2000): 87–123 and 2002, when it was published in his book *How to Do the History of Homosexuality*.

4. Is it a sexual preference?
5. Does it represent a character type?
6. Does it involve gender-deviance?
7. Does it classify women and men together?
8. Is it based on consensual sexual relationships?
9. Is it based on hierarchy and power relations?

To better understand the approach to comparing and contrasting categories proposed in Figure 4, it would be helpful to observe the distinctions between the category of this study, namely homosexuality versus the other seven categories. My genealogical investigation confirms that all seven pre-homosexual phenomena that existed in early and medieval Islamic societies essentially relied on the concept of gender norms. Although gender deviance was the core element of *takhannuth* (effeminacy), *tarajjul* (mannish-ness), and *ubna* (male passivity), as these groups were deemed to be violating traditional masculine or feminine gender norms, *liwāt* (pederasty), *‘ishq al-ghilmān* (love of boys), and *mu’ākhāt* (male friendship) and *saḥq* (senior females’ same-sex sexual behaviours with their female slave or a virgin girl) are also based on gender status as they were articulated as manifestations of masculinity. Homosexuality, in contrast, principally depends on the notion of *sexuality*, which was inessential, if not neglected, by premodern Muslims’ system(s) of gender, because they regulated social and sexual behaviours solely via gender norms. Modern notions of sexuality make it possible to classify all individuals based on their sexual orientation. Therefore, they make possible new categorisations of homosexuality, heterosexuality, bisexuality, and so on, which was not the case for the early and medieval Muslim societies or perhaps any other societies and cultures previously.

Moreover, other factors such as age difference and social and gender hierarchies were key to the generation of pre-homosexual categories that existed in premodern Muslim cultures. For example, pederasty relies on differences in age, status, and sexual role, and male pathological passivity conceptualises itself in terms of gender hierarchy. Homosexuality, in contrast, emphasises non-hierarchical relationships that are not based on power. Although age, sexual role, social, or economic differences *per se* are not significant for homosexuality, these kinds of relationship can be inappropriate, unethical, or even illegal once they fall into pederastic or hierarchical or power-based relationships.

Finally, while the notion of *consensual* sex, that can only be reliably expressed by both partners in an equal and non-power-based relationship, is an essential element for homosexual practices, this concept, as demonstrated, appears to be entirely absent in the pre-homosexual categories that existed in premodern Islamic societies. In those societies, none of the categories

	<i>Homosexuality</i>	<i>Takhammuth</i>	<i>Tarajjul</i>	<i>Lwaṭ</i>	<i>‘Ishq al-ghilmān</i>	<i>Muṭākhāt</i>	<i>Uḥna</i>	<i>Siḥāq</i>
1	Yes	No	No	Not really	No	No	(Most likely) Yes	Not really
2	Yes	Sometimes	Sometimes	Yes, at least for the active partner	No	No	Not necessarily	Yes, at least for the adult partner
3	Mostly	Not necessarily	Not necessarily	Mostly	No	No	Sometimes	Mostly
4	Yes	No	No	Sometimes	No	No	Maybe	Sometimes(?)
5	Maybe	Yes	Yes	No	No	No	Yes	No
6	Maybe	Yes	Yes	No	No	No	Yes	No(?)
7	Yes	No(?)	No(?)	No	No	No	(Most likely) yes	No
8	(Categorically) Yes	NA	NA	No	NA	NA	No	No
9	(Categorically) No	Maybe	Maybe	Yes	(Most likely) yes	(Most likely) no	Yes	Yes

FIGURE 4 Homosexuality and pre-homosexual categories in Muslim cultures

containing same-sex sexual behaviours were based on consensual sexual relationships. In fact, in most if not all cases of the pre-homosexual categories in Muslim societies, consensual sex was not even possible: sexual relationships with a boy, a girl, a slave, or a male passive (with consideration of his vulnerable situation) simply could not be consensual, as all such practices were based on hierarchy and power relations.

7 Legal Concepts of *Liwāt* and *Siḥāq*

Despite the diversity of pre-homosexual categories in Islamic sources and cultures as well as in Muslim medical, prose, and poetry discourses, jurists at a later stage constricted various pre-homosexual categories to the following two phenomena: *liwāt* and *siḥāq/saḥq*.¹⁵⁸ They applied *liwāt* to different types of male same-sex sexual behaviours, such as male active pederasty and male passivity or inversion. They have endeavoured to find a justification for such an expanded notion of *liwāt* through their broad interpretation of verses of the Qurʾān related to the act of the tribe of Lot (*mal qawm Lūt*) and some *aḥādīth*. Parallel to male same-sex sexual relationships, they also perceived the concept of *siḥāq/saḥq* as female same-sex sexual behaviours in general.

Given the scope of this study, it is necessary to explain the two legal concepts of *liwāt* and *siḥāq*. What is significant here is that, unlike in homosexuality, these two concepts, as Muslim legal discourse highlights, are articulated based on certain types of same-sex sexual practices performed by wicked persons, not qualities of specific kinds of people. Thus, they do not have anything to do with sexual orientation and sexual identity of the people who engage in these behaviours. Bearing this point in mind, *liwāt* is usually defined by jurists as anal intercourse between two males.¹⁵⁹ The majority of Imāmī jurists, however, define *liwāt* as either intercrural (*tafkhīdh*) or anal sexual intercourse between two men.¹⁶⁰ Nevertheless, several Sunni jurists uphold that anal sexual intercourse between a man and his wife or a female stranger should also

158 See, for example, Ed., "Liwāt"; Juynboll, "Siḥāk"; Omar, "From Semantics to Normative Law," 222–56 and "In Search of Authenticity," 339–58; Lange, *Justice, Punishment and the Medieval Muslim Imagination*, chaps. 5 and 6; Tolino, "Homosexual Acts in Islamic Law," 187–205; Brown, "A Pre-Modern Defense of the Hadiths on Sodomy," 1–44.

159 al-Nafrāwī al-Azhari, *al-Fawākih al-dawānī*, 2: 210; al-Māwardī al-Baṣri, *al-Ḥawī l-kabīr fī fiqh*, 13: 222; al-Najafī, *Jawāhir al-kalām*, 41: 376.

160 al-Mufīd, *al-Muqnaʿa*, 785; al-Ṭūsī, *al-Nihāya*, 703; al-Ḥillī (Muḥaqqiq), *Sharāʿi al-islām*, 4: 941; al-Khumaynī, *Taḥrīr al-wasīla*, 2: 469.

be viewed as *liwāt*.¹⁶¹ Muslim jurists often articulate *sihāq* as same-sex sexual relations between two women by touching each other's genitalia.¹⁶²

It appears that traditional Shi'ī and Sunni jurists generally believe in the prohibition of *liwāt* and *sihāq* based on an Islamic defining ruling (*ḥukm taklīfī*). Moreover, jurists often hold that those who practise *liwāt* and *sihāq* deserve punishment in line with an Islamic declaratory ruling (*ḥukm waḍ'ī*), though they dispute which types of punishment should be applied to such people.

Imāmī jurists often view that adult males who practise anal sexual intercourse should be punished by the divinely ordained punishment (*ḥadd*, pl. *ḥudūd*) of the death penalty; and those who practise intercrural sexual activity (*tafkhīdh*) should be punished by the divinely ordained punishment of 100 lashes in the first three incidents and the fourth time the death penalty should be executed.¹⁶³ However, if individuals who perform the act of anal or intercrural sexual activities are minors, that is if they are not yet religiously made-responsible (*mukallaḥ*), then they should be punished by discretionary chastisement (*ta'zīr*).¹⁶⁴ Concerning *sihāq*, jurists often remark that in the first two/three incidents of practising *sihāq* by adult females, they should be punished by the punishment of 100 lashes and in the third/fourth incident, their punishment should be the death penalty. The less known position, however, holds that in the first two incidents, such adult females should be punished by discretionary chastisement and the third time, the punishment should be 100 lashes or the death penalty. In cases where those females who perform *sihāq* are minors, they should be punished by discretionary chastisement.¹⁶⁵

Sunni jurists, on the other hand, often hold that those women who practise *sihāq* should be punished by discretionary chastisement, while those adult men who commit *liwāt* are mainly considered to be deserved a divinely ordained punishment. However, several Ḥanafī jurists and Ibn Ḥazm al-Ẓāhirī

161 al-Bujayramī, *Tuḥfat al-ḥabīb*, 5: 16–17; Abū Zayd, *al-Ḥudūd wa-l-ta'zīrāt*, 161.

162 al-Mufīd, *al-Muqna'a*, 787–88; al-Ṭūsī, *al-Nihāya*, 706; Ibn Qudāma al-Maqdisī, *al-Mughnī*, 9: 61; al-Māwardī al-Baṣrī, *al-Ḥāwī l-kabīr fi fiqh*, 13: 224; al-Najafī, *Jawāhir al-kalām*, 41: 387; al-Khānsārī, *Jāmi' al-madārik*, 7: 83.

163 al-Khumaynī, *Tahrīr al-wasīla*, 2: 469–70. *Ḥudūd*, literally boundaries, consist of offences whose punishments are specified in the Qur'ān or definitive *sunna* (see al-Ḥillī (Muḥaqqiq), *Sharā'ī' al-islām*, 4: 136).

164 al-Khumaynī, *Tahrīr al-wasīla*, 2: 469–70. *Ta'zīr* (disciplining/discretionary punishment) consists of offences that the Qur'ān or *sunna* have not specified punishments for; instead, it is at the discretion of a Muslim judge to determine the chastisement for such offences. However, the degree of such chastisement must never exceed the lowest *ḥadd* punishment and, in fact, should always be less than the lowest divinely ordained punishment (see al-Jubā'ī al-Āmilī, *Masālik al-afḥām*, 14: 325–27).

165 Khumaynī, *Tahrīr al-wasīla*, 2: 470; al-Khū'ī, *Mabānī takmalat al-minhāj*, 41.

(d. 456/1064) hold that practising *liwāt* should be punished by discretionary chastisement.¹⁶⁶

Among Shi'ī jurists, however, there are scholars, who argue for suspension of the divinely ordained punishments in Islam on the grounds of the *nazariyyat ta'ṭīl al-ḥudūd* (the theory of suspension of divinely ordained punishments).¹⁶⁷ Given this approach, although divinely ordained punishments for offences may never be removed, all these punishments must be suspended during the time of the absence of the Prophet and the Twelve Imāms, because they are the only authorities who have the right to enforce the divinely ordained punishments on those who performed punishable acts. In line with this approach, although the divinely ordained punishments for practising *liwāt* and *siḥāq* will never be removed completely, they should be suspended during the absence of the Prophet and Twelve Imāms. There are other Imāmī scholars who could not decide whether the *ḥadd* punishments should be enforced or suspended during the absence of the Prophet and Twelve Imāms, and thus take a cautionary position (*iḥtiyāt*) on this matter.¹⁶⁸ This means that they tackle the problem in practice by suspending *ḥadd* punishments during the absence. There is a third group of jurists who hold that, instead of *ḥadd* punishments, all various types of offences during the absence of the Prophet and Twelve Imāms are subject to discretionary chastisement.¹⁶⁹

As indicated, Muslim jurists assert that these expanded notions of *liwāt* and *siḥāq* are obtained from the Qur'ān and *sunna*. The question now is whether this assertion is accurate and can convincingly be understood from the Qur'ān and *sunna*. In Chapters 4 and 5, I will demonstrate that such a wide interpretation of the Qur'ān and *sunna* on *liwāt* and *siḥāq* might not be supported by these two revelatory sources.

166 al-Sughdī, *al-Nutaf fi l-fatāwā*, 1: 269; Ibn Ḥazm al-Zāhirī, *al-Muḥallā bi-l-āthār*, 12: 396. Camilla Adang presents a detailed analysis of Ibn Ḥazm's legal opinion on *liwāt* and *siḥāq* (Adang, "Ibn Hazm on Homosexuality," 5–31). See also Kugle, *Homosexuality in Islam*, 157–66.

167 See, for example, Ibn al-Barrāj, *al-Muḥdhab al-bārī*, 1: 341–42; Ibn Idrīs al-Ḥillī, *al-Sarā'ir*, 2: 24–25; al-Ḥillī (Muḥaqqiq), *al-Mukhtaṣar al-nāfi'*, 115; al-Khānsārī, *Jāmi' al-madārik*, 5: 411.

168 See al-Muqaddas al-Ardabīlī, *Majma' al-fā'ida*, 7: 545.

169 See al-Mirzā l-Qummī, *Jāmi' al-shitāt*, 1: 395.

PART 2

*Homosexuality through
the Lenses of Modern Shi'i Ijtihād:
Four Sources of Argumentation*



Examining the Qurʾānic Discourse on Homosexuality

1 Introduction: The Subject of Homosexuality

As expounded in the previous chapter, homosexuality, as a modern phenomenon, mainly emerged within the last century. Although homosexuality is not generally understood in the same way by all societies or communities, or even by individuals of a particular society, it is often deemed to be a new way of identification of a group of people based on their sexuality, sexual orientation, sexual object-choice, and sexual behaviour. This study conceptualises homosexuality as an egalitarian way of life between two same-sex partners which presumes sameness and mutuality in terms of social status, sexual desire, and choice between mates. Such a category is neither based on power relations nor on a hierarchy of gender, sexual role, or age. Therefore, this phenomenon occurs between two adults (two males or two females) who have a mutual sexual attraction to same-sex mates, may choose to consensually practise same-sex sexual relationships, and identify as homosexual men or women. This conceptualisation of homosexuality provides the central focus for this study, which aims to investigate its legal ruling in Shiʿi law.

This concept of homosexuality, among others, contains two essential elements: (1) same-sex sexual desire and orientation; (2) same-sex sexual practice. These two elements could be seen as two independent topics. Therefore, some scholars believe that they should be examined independently. For example, Naraghi and Kugle assert that the main characteristic of homosexuality is same-sex sexual orientation.¹ Therefore, they tend to argue for homosexuality based on essentialism whereby same-sex sexual desire is an innate, natural, or God-created sexual orientation. Thus, it cannot be subject to an Islamic legal ruling of prohibition. Alternatively, Muḥsin Kadīwar, a neo-traditional Shiʿi scholar, focuses on same-sex sexual practice and insists that such sexual practice between same-sex mates is deemed prohibited in Islam.²

In terms of same-sex sexual desire and orientation, I have demonstrated elsewhere that an essentialist approach does not mount a suitable defence

¹ See Kugle, *Homosexuality in Islam*; Naraghi, “The Qurʾān and Human Rights.”

² See Kadīwar, “Ḥuqūq-i aqalliyat-i jinsī.”

of all manifestations of homosexuality, not only because it is very narrow (as it excludes homosexual Muslims who believe that their sexual orientation is socially constructed) but also because it cannot defend the view of homosexuality as an inborn or natural disposition.³ In brief, although homosexuality as same-sex sexual desire and even orientation might be envisioned as God's creation or inborn, solely having the desire to perform sinful acts without (the intention of) performing them is not prohibited, and thus not punishable in Islam. This is because the subject of prohibition and punishment within Islam refers to committing sinful acts by choice and free will. Therefore, same-sex sexual desire without practice will not be discussed in this study. However, same-sex sexual practice will be examined here as it has been debated by Muslim jurists under the categories of *liwāt* and *siḥāq*.

2 The Qur'ān as a Source for or against Homosexuality

The Qur'ān addresses the modern phenomenon of homosexuality neither positively nor negatively. Therefore, it is not possible to derive an Islamic verdict either for or against homosexuality from the Qur'ān. One convenient explanation for the Qur'ān's silence on this topic is that homosexuality, as an identified egalitarian relationship between same-sex mates, did not exist in the era of the Islamic revelation. In other words, the tribes and people of the Arabian Peninsula or Ḥijāz did not encounter this phenomenon. This was perhaps particularly the case in the two cities of Mecca and Medina, where the Qur'ānic verses were gradually revealed to Muḥammad based on incidents arising among these people. Therefore, homosexuality—in the sense of mutual, equal same-sex relationships—was not an issue for Muḥammad or his followers. As a result, it was not felt necessary to address this issue in the Qur'ān, either explicitly or implicitly.

However, there are two groups of verses in the Qur'ān that jurists, including Imāmīs, apply to prohibit two similar phenomena: *liwāt* and *siḥāq*. These verses are those pertaining to the story of Lot's tribe (*qawm Lūṭ*), and those concerning two persons who commit the act of indecency (*al-fāḥisha*). The question now is whether these verses can also be applied to argue against homosexuality. To answer this question, it is necessary to examine these groups of verses.

3 See Alipour, "Essentialism and Islamic Theology of Homosexuality."

3 The Story of the Tribe of Lot

The first group of verses that a number of Shi'i jurists address to argue for the prohibition of *liwāṭ* deal with the story of the Prophet Lot's tribe.⁴ The story of Lot and his people is also addressed, with some differences, by both the Old and New Testaments. The Qur'ān refers to this story, the divine punishment of this tribe, and the reason(s) for that punishment in twelve places, with Lot's name alone mentioned in other verses as well.⁵ Those cases which indicate the divine punishment of Lot's tribe, known as Sodom in the Old Testament and a number of Islamic *ḥadīths*, can be classified into several groups.⁶ It only takes a quick glance at these verses to see that the people of Lot indulged in a variety of immoral behaviours or, as in the Qur'ān, "indecencies" (*fawāḥish*, sing. *fāḥisha*), "sinful deeds" (*sayyi'āt*, sing. *sayyi'a*), or "abominations" (*khabā'ith*, sing. *khabīth*).⁷

For example, the Qur'ān (11:77–83 and 15:57–74) blames the people of Sodom for their various acts of wrongdoing. The people, after learning that Lot had guests, ran to his home and blamed him for inviting strangers to his house; they claimed that Lot had already been informed about the city's allegedly established rule, whereby nobody in the tribe was permitted to invite strangers to their house. Thus, they forced Lot to hand over his guests to them.

4 The Qur'ānic narrative of the tribe of Lot has been revisited by various contemporary studies, albeit often in a Sunni context. See, for example, Jahangir and Abdullatif, *Islamic Law and Muslim Same-Sex Unions*, chap. 2; Jamal, "The Story of Lut"; Kugle, *Homosexuality in Islam*, chap. 2; Siraj, "Alternative realities." Also, see Vaid, "Can Islam Accommodate Homosexual Acts?". Pursuing a traditional exegetical approach, Vaid passionately rejects reformists' (in particular Kugle's) understanding of the story of Lot in the Qur'ān.

5 For example, in one case (Q. 66:10), the name of Lot is mentioned in the Qur'ān together with the Prophet Noah in order to characterise their wives as impure and unbelieving persons. In another verse (Q. 6:86), the Qur'ān addresses the names of Lot and some other Prophets, such as Ishmael, Elisha, and Jonah, in order to praise them. The Qur'ān (11:74–76 and 15:58–77) also addresses the tribe of Lot when it narrates the story of Abraham's meeting with the Prophets of God (the angels). Aligned with these verses, the angels inform Abraham of God's command to punish Lot's tribe. Abraham argues with God and urges Him not to punish Lot's tribe. Amreen Jamal (2001) extensively examined all these cases (see Jamal, "The Story of Lut"). Including verse 10 of chapter 66, where the Qur'ān addresses Lot's wife, Lot and his tribe, as Jamal reckons, were mentioned fourteen times in the Qur'ān. However, Jamal seems to make some obvious mistakes in citing verse numbers, which perhaps should be counted as typographical errors.

6 The Qur'ān always refers to the tribe as "the people/the tribe of Lot" (*qawm lūt*) and never uses the name "Sodom".

7 The Qur'ān uses different terms to address the tribe's misconduct, including the three terms in the text. As Jamal eloquently explored, the Qur'ān applies all these concepts to both sexual and non-sexual forms of misconduct (see Jamal, "The Story of Lut").

The discussion between Lot and the assailants, as will be discussed later, shows that the people's ultimate aim was to sexually assault and then rape Lot's guests. Further study of this case reveals the following indecencies or wrongful deeds of the people of Lot: attacking the home of a "citizen" and disrupting his privacy illegally; disrespecting and humiliating an individual without a convincing reason; disrespecting, humiliating, and violating the rights of Lot's guests; and ultimately denying Lot's position as a Prophet of God. To have a better understanding of the indecencies and wrongful deeds of Lot's people, it is necessary to review a list of the main indecencies, sinful deeds, or abominations committed by the tribe of Lot as addressed in the Qur'ān.

1. The indecency of males approaching other males either separately (in two cases: Q. 7:80–84 and 27:54–58) or listed together with other indecencies or wrongful deeds (in two cases: Q. 26:160–73 and 29:28–35).
2. The indecency or sinful deed of unbelief (*kufri*) through violent rejection of Lot's prophethood and the denial of his warning of divine punishment, either separately (in three cases: Q. 22:42–43, 38:12–14, and 50:12–14) or listed together with other wrongful deeds (in three cases: Q. 26:160–73, 54:33–39, and 29:29).⁸
3. The indecency of committing robbery on the roads (in one case: Q. 29:29).
4. The indecency of committing dishonour in the assembly (in one case: Q. 29:29).
5. The indecency or sinful deed of attacking Lot's house and violently requesting him to hand over his guests forcibly, either separately (in two cases: Q. 11:77–83 and 15:57–74) or listed together with other abominations (in one case: Q. 54:33–39).
6. Verses which address the abominations (*khabā'ith*) (Q. 21:74) and sinful deeds (*sayyi'āt*) (Q. 11:78) of the people of Lot but do not specify which ones.
7. Verses that refer to the divine punishment of Lot's tribe due to their indecencies, abominations, or sinful deeds, again without specifying which ones (in one case: Q. 37:133–38).

8 Q. 29:29, in my view, should be regarded as a case of this type. According to the addendum of this verse, the people, in response to Lot's blaming them for their abominations, indecencies, and wrongful deeds, told him that if he was honest in his claim, namely that he was a messenger of God, and in his warning of divine punishment, then he should ask God to send them the divine punishment. This response should be counted as the people's rejection of Lot's prophethood and his warning about the divine punishment. In fact, by this statement, they meant that Lot could not bring divine punishment on them. Therefore, Lot, in their opinion, was lying about being a prophet or messenger of God, as well as about the warning of punishment.

As outlined, several verses, such as Q. 37:133–38, only address the punishment of the people of Sodom without addressing the reason(s) for their punishment, meaning that the indecencies, abominations, and sinful deeds behind the divine punishment were not revealed in these verses. Conversely, a number of verses, such as Q. 21:74, generally address the abominations and sinful deeds of the people of Sodom as causing the revelation of divine punishment but do not describe the specific types of wrongful deeds committed by these people. However, both these sets of verses can be better understood by studying others in which the indecencies, abominations, and sinful deeds of this tribe are specified in more detail. In fact, the specific cases of the indecencies, abominations, and sinful deeds of the people of Lot generally referred to in the last two categories (6 and 7) are apparently those which were particularised in the first five categories (1–5).

Nevertheless, among the indecencies or abominations of Lot's tribe outlined in the Qur'ān, two are mentioned more than any other wrongdoings: "unbelief" (six times) and "males approaching other males" (four times). Other less-mentioned abominations are attacking Lot's house and violently forcing him to hand over his guests to them, committing robbery on the roads, and committing dishonour in the assembly. All of the abominations would be better understood in relation to each other. For example, considering the tribe's violent attack on Lot's home and forcing him to hand over his guests to them in conjunction with the indecency of "males approaching other males" would allow for a deeper and more comprehensive explanation and interpretation of this story in the Qur'ān.

As al-Shaykh al-Ṭūsī, an Imāmī exegete and jurist of the eleventh century (implicitly) and Ibn Ḥazm al-Zāhirī, a Sunni exegete and jurist of the tenth century (explicitly), remarked, it can be reasonably concluded from verses concerning Lot's tribe that there were different grounds for the divine punishment.⁹ The Qur'ān addressed at least five different separate grounds:

9 al-Ṭūsī, *al-Tibyān*, 4: 457; Ibn Ḥazm al-Zāhirī, *al-Muḥallā bi-l-āthār*, 1: 393. Ibn Ḥazm, in his interpretation of verses related to the tribe of Lot, strongly argued that the reasons for the punishment of this tribe were their different abominations and indecencies mentioned in the Qur'ān. Amongst those, as he notes, unbelief, rejection of Lot's prophethood, and rape were the worst indecencies of these people. One of the indecencies of Lot's tribe, according to Ibn Ḥazm, was that males were approaching other males, which, in his view, happened not to be the worst indecency they were committing. Therefore, according to Ibn Ḥazm, this indecency was not the only or even the major reason for the punishment of this tribe. Moreover, as Ibn Ḥazm explains, according to the Qur'ān, the wife of Lot, other women, even children, and in fact the whole tribe (except Lot and his daughters) were punished by God, even though they did not participate in the abominating of males approaching other males. A comprehensive report and analysis of Ibn Ḥazm's view on this topic can be found in Adang, "Ibn Hazm on Homosexuality," 5–31.

unbelief or rejection of Lot's prophethood; males approaching other males; violating other people's rights and privacy, including sexual violation; committing robbery on the roads; and committing dishonour in the assembly.

However, several scholars emphasise the indecency of males approaching other males as the only ground for the punishment of this tribe, thus neglecting any other transgressions. For example, the modern prominent Imāmī exegete Muḥammad Ḥusayn al-Ṭabāṭabā'ī (d. 1360Sh/1981) presumes that the only reason for the punishment of Lot's tribe was the indecency of males approaching other males. Therefore, he questions why, if this was the case, the females of Lot's tribe (to whom this particular indecency did not apply) had equally been punished.¹⁰ To find a way out of this predicament, al-Ṭabāṭabā'ī provides a number of *aḥādīth* conveying that the females of Lot's tribe were also engaging in same-sex sexual practices, namely *siḥāq*.¹¹ This detail however is not found in the Qur'ānic report of the story of Lot. Reinforcing his proof, al-Ṭabāṭabā'ī adds the following point: if the females of Lot's tribe were not committing the indecency of *siḥāq*, they would have supported Lot and acted against the males' wrongful intentions and practices. However, according to al-Ṭabāṭabā'ī, there is nothing in the Qur'ān confirming that the females of Lot's tribe supported Lot or were against the males' wrongful intentions and deeds. Therefore, as al-Ṭabāṭabā'ī concludes, they were also punished by God.

It is, however, striking to see how this view of the punishment of Lot's tribe, rather than the explicit text of the Qur'ān, has been imposed on the Qur'ānic narration of Lot's tribe and has led to some scholars, like al-Ṭabāṭabā'ī, providing a troubling proof for the punishment of the females of Sodom. It appears that there is little need for such an argument to justify the punishment of the tribe's females. This is because, conforming to the Qur'ān, the indecency of unbelief through rejection of Lot's prophethood and the denial of his warning, most frequently addressed among other indecencies and abominations of the tribe's people, is generally attributed to *all* people of the tribe. Therefore, it should include the females of the tribe. Notably, al-Ṭabāṭabā'ī himself emphasises that both the males and the females of the tribe were infidels and in

¹⁰ One important point is that Muslim scholars often hold that all the people of the tribe, including women and children, except Lot and his daughters, had to be destroyed as a result of this indecency, namely males approaching other males. If this is true, then the extension of this punishment to the women and, in particular, to the children of the tribe can hardly be maintained. Punishing women and children for the indecency of the males of the tribe does not correspond with the justice that Abrahamic religions, including Islam, ascribe to God. Moreover, in the case of children, they are not the subjects of any religious obligations in Islamic law.

¹¹ al-Ṭabāṭabā'ī, *al-Mizān*, 10: 354.

denial of Lot's prophethood.¹² Al-Ṭabāṭabā'ī could simply understand the punishment of the females of the tribe because of their unbelief and rejection of Lot's prophethood. Thus, he did not need to address *aḥādīth* that attribute the indecency of *siḥāq* to the females of Lot's tribe to (morally) justify their punishment; indeed, appealing to the *aḥādīth* contradicted his own methodology of the interpretation of the Qur'ān, which is deemed to be the interpretation of the Qur'ān by the Qur'ān. The Qur'ān itself singles out the indecency of unbelief and rejection of Lot's prophethood several times.¹³ It also explicitly states that the people of Sodom deserved to be punished primarily, if not exclusively, because they rejected Lot's prophethood and his warning and as such they were unbeliever (*kāfir*). For example, the Qur'ān states,

The people of Noah denied before them, as did 'Ād and Pharaoh of the tent poles, Thamūd, the people of Lot, and the inhabitants of the thicket; they are the parties. Each of them did naught but deny the messengers; so My Retribution came due. (Q. 38:12–14)

The people of Lot denied the warnings. Truly We sent upon them a torrent of stones, save the family of Lot, whom We delivered at dawn. (Q. 54:33–34)

Following Islamic theological doctrine, unbelief and rejection of the prophets constitute the worst indecency, abomination, or sinful deed that a human can commit. The weight of this sin is such that Muslims usually measure the weight of other sinful deeds in comparison with unbelief. For example, grounding on a *ḥadīth* from Imām 'Alī received through Ja'far al-Ṣādiq (the sixth Imām), the indecency of sexual intercourse between male same-sex mates has also been measured by a comparison with unbelief on some occasions.¹⁴

However, since the reasons for the punishment of Lot's tribe are not the focus of this study, the different approaches of Shi'ī scholars on this matter will not be discussed in detail. What is, however, most relevant to this study is that the indecency of males approaching other males, as traditional Muslim scholars often argue, is one of the major grounds for the punishment of Lot's tribe. Although this deed is regarded as an indecency (*al-fāḥisha*), the nature of this indecency is not clearly addressed by the Qur'ān, and thus needs to be explored through a close examination of verses concerning the tribe of Lot.

¹² Ibid.

¹³ See Q. 38:12–14, 50:12–14, and 54:33–34.

¹⁴ al-Ḥurr al-'Āmilī, *Tafṣīl wasā'il al-shī'a*, 20: 339.

Yet, it could be argued that the indecency of males approaching other males addressed in the Qurʾān refers to *liwāṭ*, as some Imāmī scholars assert.¹⁵ In their view, *liwāṭ* is similar to male homosexuality in that both involve same-sex sexual practice. However, the phenomenon of males approaching other males does not fit into the category of *liwāṭ*. Moreover, even if one accepts the interpretation of males approaching other males as *liwāṭ*, according to Imāmiyya, there is still no authentic logic to transmit an Islamic ruling on a subject (e.g. *liwāṭ*) to another subject—homosexuality. As noted in Chapter 3, although some similarities may exist between *liwāṭ* and male homosexuality, it should be clear at this point that these two phenomena are essentially different topics, and their Islamic rulings need to be derived through different exercises of *ijtihād*. In addition, according to Imāmiyya, the mere similarity between two phenomena does not constitute valid grounds for transmitting the verdict of a similar phenomenon, in this case *liwāṭ*, to another, in this case male homosexuality, as legal analogy (*qiyās*) has no validity in this legal school.

The question now is whether verses related to Lot's tribe concerning their indecency of males approaching other males and their subsequent punishment (even if correctly linked to *liwāṭ*) imply that modern homosexuality is indeed an indecent phenomenon and those who practise it deserve to be punished from an Islamic perspective. As pointed out, this specific indecency of Lot's tribe addressed by the Qurʾān concerns a wrongful act of Lot's people, happening to be engaged with some sort of sexual connotation, rather than self-identified homosexual people and egalitarian same-sex sexuality. Therefore, the answer to this question seems to be “no”. The story of Lot's tribe and their indecencies in the Qurʾān does not contain a verdict on homosexuality or the modern homosexual lifestyle, either explicitly or implicitly.¹⁶ It is important to note that the phenomenon being examined in this study is

15 See Kadīwar, “Liwāṭ wa-dū muqaddima-yi hamjinsgarā’ī.”

16 This study does not claim that the concept of *lifestyle* per se should be counted as grounds for accepting a subject or behaviour ethically, legally, or religiously. In fact, the discussion here is about this *specific* lifestyle, namely homosexual relationships, described in this study, and not lifestyle in general. Therefore, Kadīwar's argument against homosexuality as a lifestyle is not accurate (see Kadīwar, “Ḥuqūq-i aqalliyyat-i jinsī”). In brief, according to Kadīwar, the term “lifestyle” in the Islamic legal system of *fiqh* does not merit respect in itself. In other words, this term is only respectable if it causes no harm to others and does not endanger public health, morality, and safety. To explain his point, Kadīwar offers a description of some behaviours, such as violent sex, mass suicide, gang rape, and child sacrifice, that could be classed as lifestyles but which are not accepted in Islam. However, what Kadīwar overlooks is that (while there are convincing ethical, legal, or religious grounds to forbid violent sex, mass suicide, gang rape, and child sacrifice due to the fact that they may harm others and endanger public health, morality, and safety), as will be

a new subject with different descriptions, characteristics, and consequences from pre-homosexual behaviours, as confirmed in Chapter 3. If this is the case, then it can reasonably be understood that verses pertaining to Lot's tribe are not associated with this phenomenon of modern homosexuality. Therefore, scholars who still want to use this story to support the prohibition of homosexuality in Islam first need to argue that the indecency of the males of Lot's tribe, namely males approaching other males, was not solely a matter of sexual practices but instead dealt with a type of sexual identity which can be categorised as homosexuality according to its modern conceptualisation(s).

4 What about Same-Sex Sexual Practice?

The discussion thus far explains that the Qur'ānic narration of the indecency of Lot's tribe, namely males approaching other males, does not address homosexuality. However, several Imāmī scholars view this Qur'ānic reference as the origin of Shi'ī juristic debates on male same-sex sexual practice under the category of *liwāṭ*, its prohibition, and punishment in Islam. It should now become clear that even if Imāmī jurists' understanding of the indecency of Lot's tribe as *liwāṭ* and, accordingly, their understanding of the prohibition of *liwāṭ* in Islam is authentic, this alone does not mean that homosexuality is prohibited in Islam as well.

Nevertheless, there still exists a point in the story of Lot from which Muḥsin Kadīwar argues for the prohibition of homosexuality in Islam.¹⁷ To explain, verses related to the tribe of Lot do address an indecency which some Imāmī jurists interpret as *liwāṭ*. In Kadīwar's view, the essential characteristic of *liwāṭ* is same-sex sexual practice. Therefore, aligned with verses related to Lot's tribe, same-sex sexual practice *per se* is indeed prohibited in Islam. Kadīwar then goes on to assert that one of the fundamental characteristics of homosexuality is also same-sex sexual practice. In fact, as he remarks, without the possibility of having same-sex sexual relationships, homosexual people most likely would not suffer the high cultural, societal, and legal price that comes with this lifestyle.¹⁸ Kadīwar then concludes that homosexuality, as it contains same-sex sexual practice, is also implicitly prohibited in the Qur'ān. He apparently

affirmed in present study, there are apparently no such ethically, legally, or religiously justified grounds to prohibit homosexuality.

17 See Kadīwar, "Ḥuqūq-i aqalliyat-i jinsi."

18 I suspect that Kadīwar's assumption that homosexuality always entails same-sex sexual practices is accurate. However, whether one holds that same-sex sexual activity is a principal element of modern homosexuality or not, it appears that the legal fulfilment

presents a powerful argument here. Scholars who advocate the idea of reconciliation between homosexuality and Islam have no choice but to either accept it, and hence change their position towards the acceptance of homosexuality in Islam accordingly, or to provide an adequate response if they insist on their position that homosexuality can be accommodated by Islam.

However, scholars who have discussed the topic of homosexuality in Islam seem not to have confronted this argument so far. This study's aim is to open up a discussion on this matter. The first task is to understand what the indecency of "males approaching other males" precisely means in verses concerning Lot's tribe. In other words, it is necessary to explore the subject of this indecency among the male individuals of Lot's tribe. The Qur'ān makes it clear that the specific conduct of the males of Lot's tribe was wrong, meaning that such an indecency was legally prohibited (*ḥarām*). It is important to know, however, whether this indecency was a mere male same-sex sexual practice or, in more technical terms, whether the subject of this legal ruling was pure same-sex sexual practice without any restrictions (*quyūd*), as some Imāmī jurists, such as Kadiwār, argue. It should also be investigated whether Shi'ī traditional jurists have even correctly recognised the subject of the indecency of males approaching other males addressed in the Qur'ān. Responding to these questions, it is necessary to begin with a close examination of verses referring to this indecency.

5 Digging into the Meaning of the Indecency of Males Approaching Other Males

Before delving into the hermeneutics of verses addressing Lot's tribe which concern the indecency of males approaching other males, it is significant to review all such verses. As indicated, the Qur'ān refers to the indecency of males approaching other males in four places as follows:

1. Q. 7:80–84:

And Lot, when he said to his people, "What! Do you commit an indecency such as none in the world committed before you? Verily you **approach men** with **strong** desire [*shahwatan*] instead of women. Indeed, you are

of same-sex sexual needs was one purpose of the twentieth-century's homosexual movement.

an excessive people [*musrifūn*]!” And the reply of his people was but to say, “Expel them from your town! Truly they are a people who keep themselves pure.” So We saved him and his family, except for his wife; she was among those who lagged behind. And We sent down a rain upon them; so behold how the guilty fared in the end.

2. Q. 26:160–73:

The people of Lot denied the messengers, when their brother Lot said unto them, “Will you not be reverent? Truly I am a trustworthy messenger unto you, so reverence God and obey me. And I ask not of you any reward for it; my reward lies only with the Lord of the worlds. Among **the people of the worlds** do you **approach** males, leaving your spouses your Lord created for you? Nay, but you are a transgressing people [*‘ādūn*].” They said, “If you cease not, O Lot, you will be among those who are expelled.” He said, “Truly I am of those who detest what you do. My Lord! Deliver me and my family from what they do.” So We delivered him and his family all together, save for an old woman among those who lagged behind. Then We destroyed the others. And We rained a rain upon them. Evil was the rain of the warned!

3. Q. 27:54–58:

And [We sent] Lot, when he said to his people, “Do you commit indecency, though you see? Do you really **approach men** with **strong** desire instead of women? Nay, but you are an ignorant people!” Yet the reply of his people was naught but to say, “Expel the family of Lot from your town! Truly they are people who keep themselves pure!” His people’s answer was nothing but to say, “Expel the family of Lot from your village; truly, they are people who pretend to be pure.” So We saved him and his family, except for his wife. We decreed that she should be among those who lagged behind. And We poured down upon them a rain—evil is the rain of those who were warned!

4. Q. 29:28–35:

And [We sent] Lot, when he said to his people, “Truly you commit indecency such as none in the worlds committed before you. What! Do you **approach men**, cut off the way, and commit reprehensible deeds in your gatherings?” Yet the answer of his people was but to say, “Bring us God’s

Punishment, if you are among the truthful.” He said, “My Lord, help me against the people who work corruption.” And when Our envoys came unto Abraham with glad tidings, they said, “We shall surely destroy the people of this town; truly its people are wrongdoers.” He said, “Verily, Lot is in it.” They said, “We know better who is in it. Assuredly We shall save him and his family, save for his wife; she is among those who lagged behind.” And when Our envoys came unto Lot, he was distressed on their account; yet he was constrained from helping them. And they said, “Be not afraid, nor grieve. We shall surely save thee and thy family, save for thy wife; she is among those who lagged behind. Truly we shall bring down upon the people of this town a torment from Heaven for having been iniquitous.” And We indeed have left of it a manifest sign for a people who understand.

In these verses, the Qur’ān talks about an act of the males of Lot’s tribe and describes it as “the indecency of males approaching other males.” Following the language of Imāmī legal theory, the Qur’ān appears to assign this indecency to the males of this tribe as an absolute utterance (*al-kalām al-muṭlaq*). Moreover, the argument that Lot gave to the males of his tribe implicitly shows that all or most males of the tribe were practising this indecency, even though there is no indication of generality (*‘umūm*) in the Qur’ānic narration. Nevertheless, the Qur’ān does not fully specify what exactly this act entailed or what were its characteristics. However, a closer reading of these verses reveals that there are references to two characteristics of this indecency: “strong desire” (*shahwa*) and “instead of women” (*min dūn al-nisā*). According to these two characteristics, this indecency implied some type of same-sex sexual activity. However, the Qur’ān does not define the nature of the same-sex sexual behaviour of this tribe nor consider whether this phenomenon was restricted (*muqayyad*) to any conditions, either through an evidently clear text (*naṣṣ*) or an apparently clear text (*ẓāhir*).

In other words, the Qur’ānic narration of Lot’s tribe does not explain the nature of the same-sex sexual acts that the males of Lot’s tribe were committing. That is, the Qur’ān does not describe whether their behaviours resembled what was known as sodomy in premodern times or what has been called *homosexuality* since the last century, or even bisexuality. It also does not explicitly state whether their behaviours were one-on-one sexual behaviours as such or were manifestations of polyamorous sexual relationships. Moreover, the Qur’ān does not clarify whether their deeds were practised privately or publicly. It also does not clearly indicate whether their behaviours were conducted based on a consensual agreement between pairs or were established by the

dominant powers of the males of Lot's tribe to sexually attack and rape others. In addition, the Qur'ān also does not express whether these acts were happening only between adult males or whether adolescent boys were involved as well. Finally, it also does not represent to what extent this sexual conduct included non-intercourse sexual practices, such as kissing and cuddling of same-sex partners, that would lead to same-sex partners touching their genitals, including using their thighs for sexual pleasure and practising anal sexual intercourse.

This discussion demonstrates that verses which address the indecency of males approaching other males are not evidently clear texts (*nuṣūṣ*), and thus cannot convey the meaning of this indecency decisively. If not ambiguous (*mujmal*), these verses, at best, are in the form of absolute utterances which might have the capacity to be considered as apparently clear texts (*ẓawāhir*) and thus can be recognised as ultimately conveying the meaning of this indecency indecisively. However, because of the lack of clarity in defining the indecency addressed by these verses of the Qur'ān, they are not explicitly apparent texts. Hence, their meaning needs to be explicated through *ijtihād*ic means. Regarding the absolute form of the Qur'ān to express this indecency of males approaching other males, it may potentially contain all or most of the manifestations of sexual behaviours mentioned previously. However, the question is whether this apparently absolute meaning of verses coheres with the intended meaning as well or whether there are verbal or non-verbal restrictive indicators in the Qur'ān which can limit the meaning of the indecency and reveal the intended meaning of it.

A close reading of the Qur'ānic story demonstrates that there do exist several restrictive indicators which need to be taken into account to provide an accurate interpretation of the story. According to the hermeneutical rules provided by Shi'i legal theory, when interpreting a textual revelation which is not received in the form of an evidently clear text (*naṣṣ*), it is necessary to first understand the text based on two types of indicators (*qarā'in*): verbal or literal indicators called textual indicators (*qarā'in lafẓiyya*) and non-verbal or non-literal indicators called contextual indicators (*qarā'in ḥālīyya/lubbīyya*). Textual indicators are divided into two types: (1) verbal indicators which are immediately mentioned in the same part of the text called attached indicators (*qarā'in muttaṣila*) and (2) verbal indicators which are not provided in that same part of a text but are mentioned elsewhere in the text called separated indicators (*qarā'in munfaṣila*). Now following these hermeneutical rules, it is necessary to closely study all verses related to the story of Lot's tribe to understand the indecency of males approaching other males relying on verbal (both attached and separated) and non-verbal indicators.

5.1 *A Close Examination of the Indecency of Lot's Tribe*

Among the verbal and non-verbal indicators that may facilitate a grasp of the meaning of the indecency of males approaching other males, the following are significant.

I. An important restriction (*qayd*) which can be used as a *qarīna muttaṣila* (attached indicator) to understand the act of males approaching other males, is the concept of “strong desire” (*shahwa*). This term has been mentioned twice in the Qur’ānic narration of the indecency of Lot’s tribe. Arabic philologists believe that the root *sh-a-h-a-w-a* and its derivations (*mushtaqqāt*) imply desiring and liking something eagerly.¹⁹ In the Qur’ānic context, this term applies to desiring both sexual and non-sexual practices. Moreover, it contains positive or ethical implications in some cases, such as Q. 21:102 and 77:42, where the Qur’ān addresses the strong desire of believers to go to paradise in the afterlife; in other cases, *shahwa* conveys negative or unethical meanings, such as Q. 3:14, where those who have strong desires for their properties, wives, and children are chided.²⁰ This term with its different derivations is used in the Qur’ān thirteen times. An overview of all these cases suggests that *shahwa* in the Qur’ān connotes some sort of avarice and transgression. However, the valence of *shahwa* depends on the object of desire: it is understood as a positive or graceful intention whenever this desire relates to spiritual and hereafter wishes; conversely, it is considered a negative or disgraceful desire whenever it centres on worldly or sexual behaviours. In the case of the desire of Lot’s people for that specific behaviour—that is, males approaching other males—this concept implies avaricious sexual behaviours, and thus it has a negative and disgraceful connotation. In addition, the people of Lot are also described in the Qur’ān as both excessive people (*musrifūn*) and transgressors (*‘ādūn*) because of their unethical or wrongful behaviour. According to the Qur’ān, an individual who eagerly and excessively takes advantage of a worldly blessing should be viewed as a disgraceful person and, thus, be considered as transgressor.

II. Given the Qur’ānic report, one characteristic of the indecency of males approaching other males was that males of the tribe had engaged in a wrongful act and left behind the females of the tribe, in general, or their wives, in particular. The restriction (*qayd*) of “instead of women” (*min dūn al-nisā’*) is mentioned twice in the Qur’ān: Q. 7:81 and 27:55. This concept is qualified to be considered as a *qarīna muttaṣila*, facilitating the understanding of the meaning of this indecency. The concept “instead of women” apparently implies that

19 See, for example, Ibn Manẓūr, *Lisān al-‘Arab*, 14: 445.

20 Jamal extensively and carefully investigated the roots, derivations, and applications of this concept in the Qur’ān (Jamal, “The Story of Lut”).

the males of Lot's tribe were approaching other males for their sexual needs, despite the presence of women among them and despite the possibility of having sexual relationships with females.²¹ There is one other case in the Qur'ān (Q. 26:165–66) in which a similar restriction is applied. However, in this latter case, the Qur'ān uses the concept of “your spouses” (*azwājikum*) instead of the concept “women” (*nisā'*). Therefore, the males of Lot's tribe, according to this verse, were married, but for whatever reason, they left their spouses behind and approached other males.

Because these two meanings—‘your spouses’ (*azwājikum*) or ‘women’ (*nisā'*)—are not juxtaposed, it should be reasonable to assume that the Qur'ān is referring to both situations: the situation that the wives of the married males were available for them and the situation that females generally were available for males, whether married or unmarried. Therefore, it is plausible to imagine that some males of the tribe were married and some unmarried, though it was possible for the latter group to marry women. Despite this fact, the males of Lot's tribe left their wives or the women behind and approached other males. Al-Ṭabāṭabā'ī considers this restriction exclusive, meaning that this verse limits licit sexual relationships in Islam to those between opposite sexes. Then he concludes that the males of the tribe of Lot, instead of having sexual relations with females (with their wives, or with women generally), which was the only

21 Scott Kugle argues that, in this verse of the Qur'ān, the concept of “women” (*al-nisā'*) in “instead of women” (*min dūn al-nisā'*), as well as the concept of “men” (*al-rijāl*), are used with a definite article, i.e., “al”, which implies that all males of Lot's tribe who used to approach other males were married and had their wives. Kugle then concludes that the men of Lot's tribe were not homosexual people, and thus their indecency and crime was not homosexuality or same-sex practice per se (Kugle, *Homosexuality in Islam*, 55). Perhaps because of this understanding, Kugle tends to consider the males of Lot's tribe who were approaching other males as behaviourally bisexual people (*ibid.*, 11). Although, I agree with Kugle on the fact that the indecency and illegal acts of Lot's tribe were not homosexuality or even same-sex sexual practice, Kugle's understanding here does not seem to be accurate. First, it is plausible to assume that, among the males of the tribe who were practising this act, there also existed unmarried men who had not had sexual relationships with females at all. Moreover, it is also plausible to assume that some of the males of this tribe did not have any sexual desire towards females and perhaps, if possible, they would not marry women in their lives. According to scholars such as Kugle, these verses should not include such groups of men of the tribe, because, as explained, they seem to generally address all males of the tribe and there is no exclusion of such individuals who had happened to have same-sex sexual desires. Therefore, it seems that the article *al*, unlike in Kugle, is not a definite article but a general article called *istighrāqī* (inclusiveness) in legal theory. Therefore, to justifiably articulate this idea that the indecency of the men of Lot's tribe had nothing to do with homosexuality or same-sex desires and acts demands different hermeneutical rules.

licit sexual practice, approached other males sexually, which was not permitted and thus counted as indecency.²²

However, these verses are open to an alternative interpretation. To explain, the restrictions mentioned in the aforementioned verses—namely “instead of women” and “instead of your wives”—should not be regarded as indicators limiting licit sexual relationships in Islam to those between opposite sexes. In fact, such a meaning is neither verbally expressed (*manṭūq*) nor implicated (*mafḥūm*) by these verses. Moreover, Imāmī scholars often note that understanding an exclusive meaning from the Qurʾān is usually difficult, if not impossible. In fact, Shiʿī jurists often do not argue for exclusive meanings from the Qurʾān, even in cases where a *prima facie* apparent meaning (*zuhūr badwī*) implies it. For example, consider the following verses of the Qurʾān.

Q. 4:1:

O mankind! Reverence your Lord, Who created you from a single soul and from it created its mate, and from the two has spread abroad a multitude of men and women. Reverence God, through Whom you demand your rights of one another, and family relations. Truly God is a Watcher over you.

Q. 42:49:

Unto God belongs sovereignty over the heavens and the earth; He creates whatsoever He will, bestowing females upon whomsoever He will, and bestowing males upon whomsoever He will.

Q. 75:39:

[A]nd made from him the two genders, male and female.

Q. 92:3:

[B]y Him Who created the male and the female.

According to the *prima facie* apparent meaning of these verses, God only should have created humans as male and female pairs. Thus, there should not be any other sex or gender category within humankind. This logic, which is

²² See al-Ṭabāṭabāʾī, *al-Mizān*, 15: 309–10.

known as the binary logic of male and female, is accepted by various Imāmī exegetes and jurists.²³ The most important proof that these scholars cite to refute the idea that a third sex or gender is possible in Islam is often grounded on an interpretation of these verses on how the humans created by God are categorised into male and female exclusively.

However, this is not the only interpretation of the aforementioned verses proposed by Shi'ī scholars throughout history.²⁴ In fact, a large number of Imāmī scholars, from premodern to modern times, have not invested in the binary logic of male and female.²⁵ This includes scholars such as Shams al-Dīn Muḥammad b. Makkī al-Āmilī (better known as *al-shahīd al-awwal*), a Shi'ī jurist of the fourteenth century; Zayn al-Dīn al-Jubā'ī al-Āmilī (better known as *al-shahīd al-thānī*), an early sixteenth century Imāmī jurist; Mullā Aḥmad al-Narāqī, a well-known Iranian jurist of the eighteenth century; Muḥammad Kāzim al-Ṭabāṭabā'ī al-Yazdī, one of the most distinguished Najaf-based Shi'ī jurists of the nineteenth and early twentieth centuries; Muḥammad Ibrāhīm al-Yazdī, a pupil of Muḥammad Kāzim al-Yazdī. All these eminent jurists hold alternative interpretations of the above verses.

For example, both *al-shahīd al-awwal* and *al-shahīd al-thānī* suggested that these verses do not divide humans into two categories of male and female exclusively. In their view, although the Qur'ān only addresses the majority of humankind, namely the two categories of male and female, there is no evidence in the Qur'ān that God did not create other sexes, such as intersex people (*khunthā*).²⁶ Therefore, the existence of a third category (*ṭab'ā thālitha*) in these scholars' view is plausible. The concept *ṭab'ā thālitha* literally means

23 See, for example, Ibn Idrīs al-Ḥillī, *al-Sarā'ir*, 3: 280–81; al-Ḥillī (ʿAllāma), *Mukhtalaf al-shī'a*, 9: 100.

24 See Alipour, "Transgender Identity."

25 Gesink argues for a similar theme in Sunni legal discourse (see Gesink, "Intersex in Islamic Medical, Law and Activism" and "Intersex Bodies"). According to her, the classical Sunni jurists formed biological sex as a range between "all-male/protectors," "all-not-male/protected," and "intersex as a medial possibility" which required distinct duties and rights regarding Islamic laws on marriage, inheritance, dress, purity, prayer, travel, burial, etc (Gesink, "Intersex Bodies," 153). By the sixteenth century, as Gesink notes, the *khunthā*'s non-binary status was implicitly established in Sunni scholarship so that the Ḥanafī jurist Ibrāhīm al-Ḥalabī (d. 1549) legally advised the owners of slaves to state particular phrases to free intersex slaves, as the two concepts "all males" and "all females" would not include them.

26 al-Āmilī, *al-Durūs*, 2: 379; al-Jubā'ī al-Āmilī, *al-Rawḍa al-bahiyya*, 2: 332. Classical Muslim scholars often identify a *khunthā*'s sex through biological signs such as by looking at which genitalia the *khunthā* urinates from or the one the urine initiates from or ends from, during childhood, and before puberty, or by observing the facial hair and semen for males and the growth of breasts and menstruation for females, after puberty (see Gesink,

the “third nature” versus the female and male natures. Based on this point, a scholar such as Mullā Aḥmad al-Narāqī interestingly argued that, since there is no exclusive binary sex and/or gender in the Qurʾān and the *sunna*, it is reasonable to consider a complicated/indeterminate intersex individual (*khunthā mushkil*) as having a third nature.²⁷ Al-Ṭabāṭabāʾī al-Yazdī and his pupil, Muḥammad Ibrāhīm al-Yazdī, went one step further and held that these people should be counted a third category.²⁸ They maintain that there is a firmly established customary/vernacular understanding (*al-fahm al-ʿurfī*) that perceives *khunthā mushkil* as a third category versus male and female categories. To demonstrate the existence of such a customary understanding, they propose a semantic experiment called *ṣiḥḥat al-salb* (the validity of negation) in legal theory, examining the relationships between the subjects of *khunthā mushkil* and the two possible predicates, namely “being male” and “being female” in a proposition. They demonstrate that both being male and being female can be negated from this subject without contradiction. Therefore, it is possible to say that “*khunthā mushkil* is not a male”, and also “*khunthā mushkil* is not a female”. As a result, the two concepts of the male category and the female category do not fulfil all or part of the denotation of the concepts of *khunthā mushkil*. This suggests that *khunthā mushkil* people, relying on the customary understanding, are neither male nor female but a third category.

This discussion makes clear that accurate interpretations of verses require careful examination of their hermeneutics as in many verses an intended meaning, which is called the established apparent meaning (*ẓuhūr mustaqarr*) of the text, does not always correspond with the first apparent meaning. Therefore, an exegete of the Qurʾān should be cautious about attributing exclusive meanings to the Qurʾān. In conclusion, it seems that the story of Lot’s tribe, in contrast to al-Ṭabāṭabāʾī’s assertion, does not address the issue of the articulation and restriction of licit sexual relationships to heterosexual relationships, as it might imply by its *prima facie* apparent meaning.

In addition, the Qurʾān often, if not always, addresses the dominant categories of humankind, namely males and females. This is the case when it comes to sexual desires and acts as well. Thus, the Qurʾān refers to those who are currently understood as heterosexual people and their sexual relationships, as they seem to be the majority of humans. The Qurʾān does not address, either

“Intersex Bodies in Premodern Islamic Discourse” and “Intersex in Islamic Medical, Law and Activism”; Sanders, “Gendering the Ungendered Body”).

27 al-Narāqī, *Mustanad al-shīʿa*, 19: 228.

28 al-Ṭabāṭabāʾī al-Yazdī, *Ḥāshiyat al-Makāsib*, 1: 16; al-Ṭabāṭabāʾī al-Yazdī and Ibrāhīm al-Yazdī, *Ḥāshiyat Farāʿid al-uṣūl*, 1: 225, 2: 320.

explicitly or implicitly, members of sexual minority groups, including individuals whose sexual desires relate to same-sex mates or to both same-sex mates and opposite-sex mates. The Qur'ān also does not refer to intersex and transgender people. However, this clearly does not imply that in Islam intersex or transgender persons do not exist or have not been created by God. The same logic works for the case of homosexuality and bisexuality: not being addressed by the Qur'ān does not imply that homosexual or bisexual people do not exist in the (Islamic) world, and thus in Qur'ānic discourse.

This approach makes it plausible to argue that in the Qur'ānic story of Lot's tribe, God is in fact addressing heterosexual males of the tribe who were only attracted to the opposite sex. These men were most likely to have been the dominant group among the males of the tribe. Either they were already married and had wives, or they had the possibility to marry opposite-sex mates, and thus to have sexual relationships with opposite-sex partners. However, for whatever reasons, they left their women (either their actual wives or the potential ones) behind and, in opposition to their expected sexual desires, approached other males for same-sex sexual practice. This practice, according to the Qur'ān, was not an ethical and licit sexual relation. Therefore, God explicitly blames them for their sexual behaviours. If this is the case, then the unethical behaviour or indecency of this group of males of Lot's tribe should not be extended to other groups of males, including those who have same-sex sexual desires. This, again, implies that the story of Lot's tribe, in contrast to al-Ṭabāṭabā'ī's view, does not seem to address the issue that the only licit sexual relationships are heterosexual relationships.

III. There is another characteristic of the indecency of males approaching other males, which appears twice in the Qur'ān (Q. 7:80–81 and 29:28–29), and may serve as an attached indicator: this characteristic, following the Qur'ān, was the unprecedented nature of the behaviour. It had not been previously practised by other tribes and peoples in the world. However, several historical studies have clearly demonstrated that same-sex sexual behaviour had indeed been practised by those living before the time of the story.²⁹ On the other hand, as explained in Chapter 2, Shi'ī jurists generally hold that the language of the Islamic revelatory sources is factual and infallible. Thus, these texts, in Shi'ī jurists' view, always accurately speak of reality and truth. Therefore, any interpretation of the indecency of “males approaching other males” residing in this behaviour being unprecedented is factually incorrect. To avoid this conclusion, it is necessary to interpret the indecent act of the males of Lot's tribe as behaviour which differs from merely a same-sex sexual practice.

29 See, for example, Mondimore, *A Natural History of Homosexuality*.

iv. On one occasion the Qurʾān (26:165), referring to the indecency of males approaching other males, applies the concept of “the peoples of the worlds” (*al-ʿālamīn*). It states, “Do you approach the males of the people of the worlds?” It is necessary to establish what “the people of the worlds” means here. To understand this, it is first important to note that this concept is found in two other places in the Qurʾānic narrative of Lot’s tribe.

In one case (Q. 15:70), the people of the tribe menacingly say to Lot: “Did we not forbid you from [hosting and providing protection] to all the people of the worlds?” It is clear that, in this case, the people of the tribe are not referring to the other males of the tribe. According to the context described in the Qurʾān, the people of the tribe did not generally have a problem with hosting and protecting the people of the tribe in their homes. In fact, these people together used to commit all the indecencies and abominations outlined in the Qurʾān, including the attack on Lot’s household and his guests. Following the Qurʾān, Lot’s people used to organise parties at their houses or in public places with the intention to perform wrongful deeds in full view, and no one was blamed for doing so. Therefore, what seems to have made the people of the tribe angry and aggressive towards Lot was the fact that he invited and provided protection to strangers both in the town and in his home. Based on this explanation, the concept of “the people of the worlds” means the unfamiliar people who entered the town from other cities or places and were hosted by a person of the tribe. In the other case, the Qurʾān (7:80) applies this concept as the following: “And Lot, when he said to his people, ‘What! Do you commit an indecency such as none in the world committed before you? ...’” The apparent meaning (*zuhūr*) of the concept—namely “none in the world”—in this verse also implies those people who were from other lands or from other time periods, not the people of Lot’s tribe.

These two cases can serve as *qarīna munfaṣila* to confirm the apparent meaning of the same concept used in Q. 26:165. Therefore, there are adequate grounds to interpret “the people of the worlds” in Q. 26:165 as being “the strangers”.³⁰ This then means that the males of Lot’s tribe were used to

30 The New Testament (Jude 1:7) addresses the people of Sodom and describes their different misconducts, including fornication and going after *strange or other flesh*. Although several commentators of the New Testament interpret this implicit indication as same-sex sexual practices of Lot’s people (see, for example, Kistemaker, *New Testament Commentary*, 381), the connotation of the text itself may not support such an interpretation. As noted, this verse applies the concept of “strange or other flesh” which could be interpreted as other or unfamiliar people from towns and places rather than from Sodom. Based on this interpretation, the verse indicates that Lot’s people approached strangers who happened to enter their city. Given the similar context of the Qurʾān and the New Testament on this story,

approaching unknown men, not other males within the tribe. This understanding of the concept of “*the people of the worlds*” indeed is in accord with some *ḥadīth* reports, including a *ḥadīth* narrated by ‘Alī b. Ibrāhīm al-Qummī, which will be discussed in detail later in this chapter.

v. There is yet another indecency attributed to the people of Lot by the Qur’ān which can be applied as another *qarīna munfaṣila* to enable a better understanding of the indecency of males approaching other males. That is, the people of Lot’s tribe were constantly practising an indecency which would currently be categorised as the gang rape of strangers. Lot’s people seemed to have a specific intention and plan for committing this act: they were aiming to demonstrate their power and dominance over strangers and consequently over Lot, who was warning them about their wrongful behaviours. The Qur’ān addresses this indecency in three different places. Due to the importance of this issue, it is appropriate to consider all these three cases.

Q. 11: 77–79:

When Our messengers came to Lot, he was distressed on their account, and felt himself powerless concerning them. And he said, “This is a terrible day!” And his people came hurrying towards him, while earlier they had been committing evil deeds. He said, “O my people! These are my daughters; they are purer for you. So reverence God, and disgrace me not with regard to my guests. Is there not among you a man of sound judgment?” They said, “Certainly you know that we have no right to your daughters, and surely you know that which we desire.”

Q. 15:61–64 and 67–71:

So when the messengers came to the family of Lot, he said, “Verily you are an unfamiliar folk.” They said, “Nay, but we bring thee that which

this point can verify the understanding of this current study that the Qur’ānic concept of “the peoples of the worlds” (*al-‘ālamīn*) refers to unfamiliar people or strangers. To my knowledge, however, the phrase “went after strange or other flesh” in the New Testament has not been interpreted as unknown people or strangers by biblical exegetes, and some commentators believe that it refers to these people’s approach towards non-human, namely angelic, flesh. Aligned with this understanding, biblical exegetes conclude that this verse cannot imply same-sex sexual behaviour, as same-sex sexuality demands going after the *same* type of flesh, namely human flesh. For some useful debates on this issue, see Bauckham, *Word Biblical Commentary*, 50: 54; Kelly, *A Commentary on the Epistles of Peter and of Jude*, 258–59; and Hayes, *The Moral Vision of the New Testament*, 404.

they used to doubt. And we bring thee the truth, and surely we are truthful [...]” And the people of the city came, rejoicing. He said, “Truly these are my guests; so dishonour me not! Reverence God, and disgrace me not.” They said, “Did we not forbid you from [providing protection] to **the people of the worlds?**” He said, “These are my daughters, if you must act.”

Q. 54:33–37:

The people of Lot denied the warnings. Truly We sent upon them a torrent of stones, save the family of Lot, whom We delivered at dawn as a blessing from Us. Thus do We requite whosoever gives thanks. And indeed he had warned them of Our assault, but they disputed the warnings. They had sought to lure him from his guests; so We blotted out their eyes. So taste My Punishment and My warnings!

Aligned with the Qur’ānic narrative, God sent His messengers to Lot and his tribe. When Lot met the messengers, he did not realise they were sent by God and instead thought they were several strangers who happened to enter Sodom. Given that Lot knew that the people of his tribe were vicious persons and that they would likely commit shameful behaviours towards strangers, he “was distressed” on the strangers’ behalf. In fact, Lot was quite sure that if he invited these unfamiliar people to his house, both the guests and he himself would face a formidable problem: the people of the tribe would come and shamelessly do evil deeds towards his guests. In such a situation, Lot would be powerless to protect them. Therefore, he first tried to dissuade the strangers from entering the town. The strangers, however, did not accept Lot’s proposal to pass the city by without entering it, offering the excuse that darkness would soon come, and thus they had no choice but to stay in this town for the night. Ultimately, Lot agreed to invite the strangers to his house. Although the Qur’ān is silent on this issue, Lot should naturally have tried to hide the presence of the guests from his people. Yet, despite his efforts, the people of the city learned that there were some guests in his home.³¹

Rushing to Lot’s home, the people of Sodom coercively asked Lot to hand over the guests to them. Lot argued with his people and offered them his daughters instead, according to the Qur’ān: “O the people, these are my daughters. They are purer for you,” and “These are my daughters, if you must act.”

31 The Qur’ān does not say how Lot’s people learned about his guests. However, according to the Old Testament as well as several *ḥadīths*, the people of the tribe were informed about the presence of the guests in Lot’s house by Lot’s wife.

This offer confirms that the people, in particular, the males of the tribe, had the intention to engage in (violent) sexual activities with Lot's guests. In other words, since Lot's guests likely were not willing to participate in any sexual acts, this would lead the people of Lot to rape the guests. Moreover, the Qur'ān, in its narration of Lot's people's attack, applies in one instance (Q. 54:37) the concept of "to seduce" (*rāwada*). This same term is also used in the Qur'ānic narration of the story of the prophet Joseph (Yūsuf, in the Qur'ān) and the wife of Aziz of Egypt (Potiphar, according to the Old Testament, who was the captain of the palace guard). The Qur'ān (12:32) narrates that the wife of Azīz approaches Joseph and tries to seduce him (*rāwadtuḥu*) and violently force him to have sexual relations with her. Therefore, the application of this concept in the story of Lot implies that the people of Lot also had this intention to sexually approach the guests.

According to the Qur'ān, Lot first tried to persuade them not to commit this violent act and to return to their houses. He explicitly asked them not to humiliate him in front of his guests. However, the people of the tribe did not listen to his advice and insisted on engaging in violent sexual activities with the guests. Then Lot told them that, if they had such an indecent intention towards his guests, he would offer his daughters to them, arguing that his daughters were purer for them to fulfil their (violent) sexual lust.³² The people of the town,

32 Regarding Lot's proposal and whether he had the right to offer his daughters to the assailants, there is a long debate among Shi'i and Sunni scholars. However, it seems that Lot's proposal should not be understood in its literal sense. This is because, as some Shi'i exegetes of the Qur'ān have noted, Lot was not permitted to persuade people not to practise a wrongful deed by offering them the possibility of doing another wrongful act (see al-Ṭabāṭabā'ī, *al-Mizān*, 10: 339). To avoid this problem, al-Ṭabāṭabā'ī tries to interpret Lot's offer as a proposal for the males of the tribe to marry his daughters. However, according to the Old Testament and some *hadiths*, Lot had only two daughters. Although the Qur'ān does not mention the number of Lot's daughters, it uses a plural pronoun, instead of a dual pronoun, to refer to his daughters. This might mean that Lot had more than two daughters. Nevertheless, it is hard to believe that the number of Lot's daughters was high enough to be sufficient to marry all the males of the town. Thus, it seems that Lot would not be permitted to marry three or a few more of his daughters to a large group of the males of the tribe. While al-Ṭabāṭabā'ī did not indicate this challenge at all, he mentions another interpretation of Lot's proposal held by some exegetes. According to this interpretation, Lot, by offering this proposal to the males of the tribe, meant that the women of the tribe—namely the wives of the assailants, which he allegedly claimed as his daughters—are purer for them. And since Lot was the Prophet and the shaykh of his tribe, he had the right to claim these women as his daughters. However, as al-Ṭabāṭabā'ī also convincingly remarks, this interpretation does not have proof in its favour and is against the evidently clear meaning (*naṣṣ*) of the term "daughters". Moreover, the people's answer to Lot contradicts this interpretation. They responded to Lot that they do not have any rights to his daughters. Obviously, this response in case of the interpretation of the

however, responded in a strong voice to Lot that they had no rights over his daughters. Then they reminded Lot that he should not be ignorant of their real purpose. In fact, Lot, according to the people of the tribe, was fully aware of why the people attacked his house: nothing but to force Lot to hand over his guests to them and to violently rape the strangers. By doing so, they intended to humiliate and then dominate them to prove their power to Lot and his stranger guests.

According to some *ḥadīths*,³³ Lot's people (both males and females) were instead motivated by greed: they never offered hospitality to strangers and could not abide any unknown individuals being hosted by members of the tribe. Therefore, they decided that if any citizen did not follow the rules, and instead invited strangers to his home and offered them shelter, food, drink, and beds, the people of the tribe would then have the right to attack that person's house and forcibly ask him to hand over his guests; the townspeople then would humiliate and violently rape the guests to frighten off any other potential strangers who might wish to enter this town. The Qur'ān (15:70) forthrightly refers to this point in the part of the narrative where Lot's people were furiously arguing with Lot about this issue of hospitality, about which they several times warned Lot. That is, Lot, according to them, was not allowed to fraternise with strangers, to invite them into the city, and to offer them hospitality as a host.

There are several *ḥadīths* which verify this understanding of the verse.³⁴ For instance, there is a narration of the same story from *Kitāb tafsīr al-qummī* of

term "daughters" as the women of the tribe or the wives of the males of the tribe is incorrect. In addition, the people of the tribe did not believe that Lot was a Prophet at all and did not also consider him as the master of the tribe. Therefore, they did not consider their wives as his daughters, and thus Lot was not indeed in a position to claim as such. There are other different solutions proposed by exegetes of the Qur'ān to explicate this proposal. However, it appears that none of the proposals is able to explain Lot's offer without a challenge. It seems, after all, that Lot intended his own daughters in his proposal without asking their consent, and he only had two or three or a few more daughters, which were not enough for all the assailants. Therefore, it was neither plausible nor ethical for Lot to offer his few daughters to all the many attackers. As a result, it is still necessary to investigate a suitable interpretation for Lot's offer. This can be one such interpretation: Lot's aim in offering his daughters to the assailants was perhaps to challenge his people and their ill conscience. He thought by offering his own daughters to them, they would come to realise that they could not possibly rape girls from their own tribe; perhaps his people's hearts would be awakened, and thus they would be able to see the obscenity of the indecent act that they wished to do with Lot's guests (see also Kugle, *Homosexuality in Islam*, 107).

33 al-Ṭabāṭabā'ī al-Burūjirdī and al-Mu'izzī al-Malāyirī, *Jāmi' aḥādīth al-shī'a*, 25: 459–62.

34 Ibid. The Old Testament's narration of the story also seems to affirm this interpretation. Genesis 18 and 19 describes the people of Lot as unjust or unrighteous people who were

‘Alī b. Ibrāhīm al-Qummī, an early Imāmī commentary of the Qur’ān which has interpreted the Qur’ān by *aḥādīth*.³⁵ Al-Qummī narrated Lot’s meeting with the messengers of God through a reliable chain, according to Imāmī *ḥadīth* scholars, from Abū Ja‘far (the fifth Imām):

The messengers (angels) stopped close to Lot at this time, while he was irrigating his farm. Lot asked: “who are you?” They answered: “we are left on our way (*abnā’ al-sabīl*), invite us [to your house] for the night.” Lot responded: “O people, the residents of this town [...] are bad residents. They sexually approach the [stranger] men and rob their belongings.” But they said: “we are indeed late, so invite us [for the night].” Thus, [ultimately] Lot [accepted to offer them a hospitality and] went to his family

committing a variety of abominations. However, same-sex sexual deeds are not mentioned as one of them. The only case where same-sex sexual behaviour is implicitly addressed in the Genesis narrative is when the messengers (angels) of God went to Lot’s house. According to Genesis, when Lot’s people learned about the presence of the messengers in Lot’s house, they rushed to the house and coercively asked Lot to hand over his guests to them. This narration implies that the assailants’ intention was to violently gang rape the guests in order to humiliate Lot and the guests. If this is the case, then this specific act of the indecency of Lot’s people was not associated with sexual behaviour based on consent. Perhaps this is because some exegetes of the Old Testament interpreted the unrighteousness of Lot’s people as their lack of hospitality (see, for example, Fields, *Sodom and Gomorrah*; and Safren, “Hospitality Compared”). This understanding of the misconduct of Lot’s people corresponds with the book of Ezekiel (16:49), which addresses the wrongful deeds of these people as follows: they did not support the needy and poor; they were greedy and were gluttons. Moreover, Genesis, in contrast to the generally perceived figures of the messengers of God (angels) as embodied into beautiful teenagers or very young boys, describes the angels as two old men who in God’s company went to Abraham. God stayed with Abraham. and the two angels went towards Lot’s tribe to carry out their mission, as God had commanded, namely to punish the people of Sodom and destroy the city and the people.

35 ‘Alī b. Ibrāhīm b. Hāshim al-Qummī was a narrator and collector of *ḥadīth*, as well as an exegete of the Qur’ān, from the third century after *Hijra* (ninth-century common era). He lived around the same time as two Shi‘ī Imāms: ‘Alī b. Muḥammad al-Hādī (tenth Imām) and Ḥasan b. ‘Alī al-‘Askarī (eleventh Imām). He was a *ḥadīth* teacher of Muḥammad b. Ya‘qūb al-Kulaynī, the author of *al-Kāfi*, one of the four *ḥadīth* compilations of Imāmiyya. Shi‘ī *rijāl* scholars, such as *al-Najāshī* and al-‘Allāma al-Ḥillī, described him as a strongly authentic and honest person (*al-Najāshī*, *Rijāl*, 260; al-Ḥillī (‘Allāma), *Khulāṣat al-aqwāl*, 187). Many books are also attributed to him (*al-Najāshī*, *Rijāl*, 260; al-Ṭūsī, *al-Fihrist*, 152). Al-Qummī’s *tafsīr* book, though it is disputed, is considered by Imāmī scholars as wholly or partially authentic. Āyatallah al-Khū‘ī, one of the prominent scholars of later *‘ilm al-rijāl*, holds that the whole *Kitāb tafsīr al-qummī* is authentic, and this, in fact, is one of the rare attributions of general authenticity that al-Khū‘ī gives to a whole *tafsīr* or *ḥadīth* book (al-Khū‘ī, *Mu‘jam al-rijāl*, 1: 49).

[to inform them about the guests]. And he said to his wife, who was like the people of the tribe, that “I have some guests for tonight, so do not disclose the news to the people, then I will forgive all your abominations.” The wife of Lot [agreed and said,] “[so] do it.” The sign between the people of the town and Lot’s wife was that whenever Lot invited guests during the day, she would make a smoke on the roof and whenever he invited guests during the night, she would make a fire. Then when Gabriel and [other] angels with Lot entered Lot’s house, Lot’s wife went onto the roof and made a fire. Thus, the people of the town learned [that Lot was hosting some strangers] and they rushed to his house from everywhere ... When they arrived [in front of] his house, they said: “O Lot, had not we prohibited you from [inviting] strangers?” So, God narrated, Lot said to them: “These are my daughters; they are purer for you. So reverence God, and disgrace me not with regard to my guests. Is there not among you a man of sound judgment?”³⁶

Regarding this *ḥadīth*, the indecency of males approaching other males was not an absolute and mere practice of same-sex sexuality, unlike its *prima facie* appearance (*zuhūr badwī*). In fact, it was restricted to a practice of violent rape committed by the males of the tribe with unfamiliar males from other towns and places who happened to enter the city of Lot. This behaviour was thus seemingly conceived as a socio-political tool by the people of Lot who, according to both Qur’ānic narration and this *ḥadīth*, absolutely did not tolerate their citizens inviting strange people to their city and offering them hospitality. Therefore, if strangers happened to enter their town, for whatever reason, and were offered hospitality by a citizen, both the guests and host would be punished. Concerning the guests, the people of Lot would punish them by violently raping them to prove their power and dominance over strangers; in this way, they would also humiliate them. To punish and humiliate the guests even more, they would then rob them by taking all their goods and belongings. This content of the *ḥadīth* coheres with the Qur’ānic narration, where the indecency of males approaching other males is listed together with robbery in the Qur’ān.

In addition, this *ḥadīth* explicitly sheds light on the verse which addresses the people of the tribe who forbade all the citizens inviting strange people to the town and their houses. Aligned with this *ḥadīth*, the townspeople established a rule by which any citizen who invited strangers into the city and offered them hospitality would be punished by others from the tribe. Lot was

36 al-Qummī, *Kitāb tafsīr*, 1: 335.

a person of the tribe who not only considered this rule unethical and inhumane, and thus disagreed with it, but also strongly advised his people to avoid all their indecencies and wrongful behaviours, including this indecency. This led the people of the town, including Lot's wife, to come together and plot against Lot. Based on the Qur'ān (Q. 15:70), the tribespeople said to Lot, "Did we not forbid you from [providing protection] to the people of the worlds?" The insinuated context of this verse, as the *ḥadīth* also indicates, is that Lot had already offered several strangers hospitality in his house, an issue which led every time to similar arguments between Lot and his people. Responding to Lot's resistance towards their unethical intention and rule, the people of the tribe, according to the Qur'ān, threatened several times to exile him from Sodom Or, alternatively, as Q. 29:29 reports, Lot could ask his God to send a divine punishment to them, although the tone of the people on this suggestion was based on a denial of Lot's and his God's power to make such a punishment happen.

VI. The story of Lot's tribe in the Qur'ān (see Q. 29:29) also includes information on other abominations of the people of Sodom: those which were committed by the people publicly and altogether. The question is what these specific abominations were. The Qur'ān is silent on the nature of these abominations. However, a number of *ḥadīths*, as al-Ṭūsī collected, describe them as a cluster of wrongful deeds.³⁷ In line with these *aḥādīth*, Lot's people, supposedly both the males and the females, were using indecent words and getting completely naked in the assembly. It is not hard to imagine that they were committing all these abominations in the eyes of the whole society, including children. Following Q. 29:29, al-Ṭabāṭabā'ī also holds that the people of the tribe were committing different indecencies in public.³⁸ This can be conceived of as contextual proof that the indecency of males approaching other males was also committed publicly by Lot's people.

The aforementioned debate appears to affirm the following conclusions as to the established apparent meaning of the indecency of males approaching other males: This specific indecent act of the people of Lot's tribe did not have a direct or intrinsic link to same-sex sexual practice. This is because the Qur'ān, as elaborated in detail, attributes some characteristics to this indecency which do not cohere with mere same-sex sexual relationships. However, relying on indicators I and II, this indecency contained same-sex sexual activities. As already noted, the Qur'ān ascribes the behaviour of Lot's people to their strong desire (*shahwa*) and so calls them excessive people (*musrifūn*) and

37 al-Ṭūsī, *al-Tibyān*, 8: 202.

38 al-Ṭabāṭabā'ī, *al-Mizān*, 10: 353.

transgressors (*'ādūn*). The Qur'ān also describes that this indecency had been committed because of the avoidance of the tribe's males from their actual or potential wives.

Aligned with indicator III, this indecency was unprecedented. Thus, it could not be merely same-sex sexual behaviour, because such practices existed long before in other times and places. Regarding indicator IV, the males of Sodom would commit this activity with strange peoples of the worlds (*al-ālamīn*) who happened to come to Sodom from other towns and places. Lot's tribe, based upon indicator V (which the Old Testament's narration of Sodom confirms as well), did not tolerate any strangers in their town. Hence, whenever an unknown person entered their city or was invited in by a citizen of the town, the males of the tribe would rush to him, violently approach him sexually, and then rob him.

Moreover, the Qur'ān, as indicator VI suggests, addresses different abominations which Lot's people were committing in the assembly or in public. Since the context of these publicly committed abominations is closely related to other indecencies of this tribe, it should be seen as proof for the indecency of males approaching other males, meaning that, based on this proof, the indecency of 'males approaching other males' can be understood as a publicly committed indecency.

Now, based on indicators I–VI, it is possible to conceptualise the indecency of males approaching other males. It seems that the unprecedented practices of the males of Lot's tribe had a same-sex sexual connotation. These people had extreme sexual desires (*shahwa*) towards strangers (who happened to enter their town) based on their predetermined agenda and aims. That is, the people of Lot agreed to violently gang-rape strangers in public. As the Qur'ān confirms, they used to hold banquets during which they performed a variety of unethical deeds and abominations, including gang-raping the strangers who entered the town. Although this act used to be committed by the males of the tribe, the females of the tribe seemed to also participate in this indecency by encouraging the males in (or, at least, by not discouraging them from) executing this indecency in the assembly.

One purpose of Lot's people in committing this indecency was to punish the strangers who were entering their city by humiliating and robbing them. The intention of Lot's people was to prove their political and societal power and their dominance over such strangers. However, the ultimate aim of Lot's people was to deny Lot's prophethood and warnings. Therefore, they were using the sexual assault or rape of strangers, particularly those given hospitality by Lot, as a tool to humiliate and punish Lot.

In summary, the practice of Lot's people, namely males approaching other males, was an indecency not because it denoted or even connoted sexual

practice between same-sex mates which was based on consent or mutual agreement, but because it was a phenomenon which can be categorised as sexual assault or rape. Lot's people were using this sexual violence as a political tool to defeat two of their alleged enemies: Lot and the strangers. According to this approach, if one of the partners of this indecency was a person of the opposite sex, the Qur'ān would still call it as indecency and would condemn it accordingly. This is because it cannot be just accepted that the Qur'ān would permit the people of Lot to rape female strangers.

Finally, this study can reasonably conclude that the sexual desire or behaviour of Lot's people was not essentially the case for the Qur'ān to refer their deed as indecency, and thus to condemn it. Whether Lot's people were all heterosexual or homosexual or bisexual persons or combinations of different groups, and whether Lot's people were committing this behaviour towards males or towards females, such behaviour would still be deemed wrongful based on the logic behind the Qur'ānic narrative of this story, namely gang-rape of strangers.

6 If Two Commit 'the' Indecency

The Qur'ān in two verses of Chapter al-Nisā'—Q. 4:15–16—refers to an indecency (*al-fāḥisha*), although it does not specify the meaning of this indecency, either before or after these verses. Q. 4:15 illustrates a situation in which several women (two or more) practise an indecent act in which if four witnesses testify against them, those women must be imprisoned in their house until either they die or God provides them with a way to be released.

As for those of your women who commit an indecency, call four witnesses among you to bear witness against them. And if they bear witness, then confine them to their houses until death takes them, or until God appoints for them another way. (Q. 4:15)

Among Shi'ī jurists, Āyatallāh Abū l-Qāsim al-Khū'ī, a prominent contemporary Imāmī scholar, to my knowledge, is the only renowned jurist who holds that the indecency addressed in this verse either relates to only two/more women who practise female same-sex sexual relationships (*siḥāq*), or it refers both to sexual activities between a man and a woman outside marriage called fornication or adultery (*zinā*) and female same-sex sexual practices.³⁹ In contrast, relying on the approach of earlier exegetes, such as Ibn 'Abbās (d. 68/687–8), Mujāhid (d. 104/722), Qatāda (d. 117/735–6), and al-Jubbā'ī (d. 303/915–6),

39 al-Khū'ī, *al-Bayān*, 50: 310–13.

Imāmī exegetes, such as al-Ṭūsī (d. 460/1067), al-Ṭabrisī (al-Ṭabarsī, d. 548/1154), al-Fayḍ al-Kāshānī (d. 1091/1680), and al-Ṭabāṭbāʾī (d. 1360Sh/1981), interpret the indecency outlined in this verse as female–male fornication or adultery.⁴⁰ In their opinion, the interpretation of the indecency here as female same-sex sexual practice is against the consensus of Muslim exegetes who interpret it as female fornication or adultery.⁴¹ Moreover, Shiʿi jurists also often uphold that this verse refers to female fornication or adultery (*zinā*), not female same-sex sexual relationships (*siḥāq*).⁴²

The next verse, namely Q. 4:16, addresses two persons who commit indecency. Aligned with this verse, both individuals must be punished unless they repent, whereby they must be forgiven.

And if two of those among you are guilty thereof, punish them both; but if they repent and make amends, then let them be. Truly God is Relenting, Merciful. (Q. 4:16)

Again, relying on the approaches of earlier exegetes, such as Ibn ʿAbbās, Mujāhid, Qatāda, and al-Jubbāʾī, Imāmī exegetes often argue that the indecency in this verse refers to both male and female fornication/adultery.⁴³ They reject the possible interpretation of the indecency outlined in this verse as being *liwāt*, seeing that interpretation as an obsolete understanding of the verse and holding that there is a consensus amongst Muslim scholars that the indecency in this verse implies only fornication/adultery. Imāmī jurists also often suggest that this verse refers to fornication/adultery. However, a few Shiʿi scholars propose that the indecency here possibly implies male–male same-sex sexual practice: hence, in their opinion, it relates to the phenomenon of *liwāt*.⁴⁴

Suffice it to briefly note that the indecency in Q. 4:15–16 implies *zinā* (fornication/adultery) conforming with the dominant view among Imāmī scholars (both exegetes and jurists). However, regardless of the meaning of the indecency in these two verses, what is more significant here is that, following a unanimous opinion expressed by Shiʿi and Sunni Muslim exegetes, both verses

40 See al-Ṭūsī, *al-Tibyān*, 3: 141–45; al-Ṭabrisī, *Majmaʿ al-bayān*, 3: 39–41; al-Fayḍ al-Kāshānī, *Tafsīr al-ṣāfi*, 1: 430; and al-Ṭabāṭbāʾī, *al-Mizān*, 4: 234.

41 As al-Jaṣṣāṣ notes, Sunni legal scholars also often view that the verse addresses fornication or adultery (al-Jaṣṣāṣ, *Aḥkām al-Qurʾān*, 2: 107).

42 See, for example, Ibn Idrīs, *al-Sarāʾir*, 3: 431; al-Jubāʾī al-ʿĀmilī, *al-Rawḍa al-bahiyya*, 6: 2017; and al-Ṭabāṭbāʾī al-Ḥāʾirī, *Riyāḍ al-masāʾil*, 15: 524.

43 See, for example, al-Ṭūsī, *al-Tibyān*, 3: 141–45; al-Ṭabrisī, *Majmaʿ al-bayān*, 3: 39–41; al-Fayḍ al-Kāshānī, *Tafsīr al-ṣāfi*, 1: 430; and al-Ṭabāṭbāʾī, *al-Mizān*, 4: 234.

44 See, for example, al-Khūʾī, *al-Bayān*, 50: 310–13; and al-Muntaẓirī, *Kitāb al-ḥudūd*, 110.

have been abrogated by the revelation of Q. 24:2–9.⁴⁵ This means that the validation of these two verses had been limited to the revelation of Q. 24:2–9 in which God reveals new legal rulings on *zinā*. Thus, even if these verses, before their abrogation, could have been applied to the prohibition and punishment of female and male same-sex sexual practices, it is no longer possible to argue for this interpretation. This point perhaps caused a jurist such as Muntaẓirī to be cautious about the possibility of using Q. 4:16 to argue for the prohibition of *liwāṭ*.

Nevertheless, al-Khūṭī is again perhaps the only renowned Imāmī scholar who does not accept the abrogation of Q. 4:15–16. It is important to note that al-Khūṭī's approach here is built on his other doctrine in which he rejects a commonly accepted approach among Sunni and Shi'ī scholars on the Qur'ānic abrogation; instead he holds that abrogation in the Qur'ān, albeit possible, only happened in one case: Q. 58:12. According to al-Khūṭī, this verse (in which God commands the companions of the Prophet to give charity before their consultation with the Prophet) was abrogated by Q. 58:13 (where God removes this command as a prerequisite of consultation with the Prophet).⁴⁶

Let us now evaluate al-Khūṭī's view on the hermeneutics of these two verses in detail. As noted, al-Khūṭī holds that the indecency in Q. 4:15–16 has two possible interpretations: either it consists of *siḥāq* and *liwāṭ* respectively—and thus has nothing to do with *zinā* (fornication/adultery)—or, it implies all three categories of *siḥāq*, *liwāṭ*, and *zinā*. Building on his doctrine of abrogation, he argues that these two verses are not abrogated by other verses of the Qur'ān or by definitive *sunna* or *ḥadīth mutawātir*. Then he goes on to explain why these two verses are not abrogated. It is important to carefully explicate and examine his proofs against the abrogation of verses 15 and 16.

As the abrogation of verse 4:15 is concerned, al-Khūṭī elucidates that it is grounded in two assumptions: First, the imprisonment of women who committed the indecency in their house for the rest of their lives (as it is addressed in this verse) should be counted the punishment for these women. Second, the final phrase in verse 15 where it states “or until God appoints for them another way” should be understood as God's promise to the Prophet Muḥammad and his companions that He will reveal a new law in the future to release such women from being imprisoned in the house. God realised this promise either by revealing Q. 24:2–9 (whereby He regulates a new punishment for

45 See, for example, al-Tūsī, *al-Tibyān*, 3: 141–45; al-Jaṣṣāṣ, *Aḥkām al-Qur'ān*, 2: 107; and al-Ṭabāṭibā'ī, *al-Mizān*, 4: 234. For Sunni discussions on these verses, see Ali, *Sexual Ethics*, 81; Kugle, *Homosexuality in Islam*, 63–65.

46 al-Khūṭī, *al-Bayān*, 50: 373–77.

the indecency of fornication/adultery, that is, flogging) or by a *sunna* from the Prophet or Twelve Imāms (whereby the punishment for fornication/adultery is considered to be stoning).

Al-Khū'ī, however, upholds that both assumptions are ill-founded. The apparent meaning of verse (*ẓāhir al-āya*), he notes, rather implies that the sole aim of imprisoning women who commit the indecency in the house is to prevent them from committing the same indecency again. Therefore, it should not be counted as punishment for such women. In fact, the command in verse 15 of *al-Nisā'*, according to which women who commit the indecency must be imprisoned in their house, coheres with the obligatory Islamic legal principle called "forbidding wrong deeds" (*al-nahy 'an al-munkar*). In this case, it means Muslims must forbid those women who committed the indecency from doing it again. The best way to prevent such women from committing the same indecency, as al-Khū'ī suggests, is to keep them in their houses for the rest of their lives.

Regarding the second assumption, al-Khū'ī remarks that the final phrase of verse 15 ("or until God appoints for them another way") should not be interpreted as a promise from God to the Prophet and his followers of a new legal ruling in future which would release those women who commit the indecency. This is because, as al-Khū'ī notes, such an interpretation leads to a contradiction. Briefly explained, the abrogation of this verse would mean that those women would not have been released from punishment but in fact would have received a harsher punishment: according to the advocates of the abrogation, this verse was abrogated either by Q. 24:2–9 according to which those women who commit the indecency would have been sentenced to one hundred lashes or by a *sunna* which would have led them to be punished by stoning. However, as al-Khū'ī asserts, imprisoning such women in their houses for the rest of their lives is indeed a lighter punishment than one hundred lashes or stoning.

Moreover, al-Khū'ī continues, the purpose of the legal ruling mentioned in Q. 24:2–9 and the *sunna* is entirely different from the intent of the legal ruling in verse 15 of *al-Nisā'*. Namely, the purpose of the latter is to forbid a wrongful deed, and the purpose of the former is to establish a punishment for committing a wrongful deed. Therefore, Q. 4:15 cannot be abrogated by Q. 24:2–9 or by the *sunna* which aims to decree a punishment for the indecency of *zinā*. As a result, this verse, as al-Khū'ī's concludes, is still a valid ruling, and it decrees either the legal punishment of *siḥāq* alone or of both *zinā* and *siḥāq*.

Nevertheless, in both cases, aligned with al-Khū'ī's understanding, women who commit the indecency (*siḥāq* or both *zinā* and *siḥāq*) must be kept in their houses until God opens a door for their release such that Muslim society becomes assured that they will not commit this indecency again. As al-Khū'ī

notes, the Muslim community can be reassured on this issue through honest repentance of these women that they will not commit this indecency again; or the ageing of such women may reassure the Muslim society that these women are no longer capable of committing this indecency; or, finally, marriage contracts between such women and other men could reassure the Muslim community that these women would not commit the indecency again. In fact, the last segment of this verse “or until God appoints for them another way,” in al-Khūṭī’s view, implicitly addresses such plausible ways of release for those women who committed *siḥāq* or both *zinā* and *siḥāq*. Therefore, the legal ruling addressed in Q. 4:15 still has a probative force (*ḥujjiyya*), and thus it has not been abrogated. In contrast, Q. 24:2–9, which sets out the punishment of flogging for the indecency of fornication, and the *sunna* which imposes the sentence of stoning for fornication are different legal rulings for how to discipline women who commit the indecency of fornication/adultery.

Concerning Q. 4:16, al-Khūṭī holds that the view of the abrogation of this verse also relies upon two assumptions: First, the pronoun *hā* (referring to a female) attached to the verb *ya’tiyānihā* (two persons who commit the indecency) refers to the indecency of *zinā*. Second, the punishment (*īdhā*) alluded to in this verse implies corporal punishment (with a shoe according to some *ḥadīths*) and verbal denunciation of people who commit the indecency of *zinā*.

However, in al-Khūṭī’s view, both assumptions are incorrect as they do not cohere with the apparent meaning (*ẓāhīr*) of verse. First, the pronoun *hā* here does not imply the indecency of *zinā*, because in this verse there is a plural pronoun, namely *kum* (you; grammatically a plural form used to refer to males), which is attached to the preposition *min* as *minkum* (among you), which is also used twice previously in verse 15: *nisā’ikum* (your wives) and *minkum* (among you). In the literal sense, the first two instances of this pronoun in verse 15 refer to males. Therefore, as al-Khūṭī concludes, this pronoun in verse 16 also should refer to males. With this in mind, in line with al-Khūṭī, the meaning of verse is as follows: “if **two males** among you commit the indecency, then punish them both. Then if they both repent and correct [their behaviour], leave both alone. Surely, God is Forgiving, Merciful.” If this is the case, then, as al-Khūṭī suggests, the indecency addressed by this verse should be interpreted as *liwāṭ*.

Moreover, al-Khūṭī notes that there is a male dual grammatical connector, namely *al-ladhāni*, as well as a verb with a pronoun referring to two persons, namely *ya’tiyāni* (two persons who commit [something]), in verse 16. According to Arabic grammar, a male dual connector and a male dual pronoun refer to only two male persons and not a group of males. Therefore, if this verse were referring to males in the plural form, it would need a plural pronoun, following proper Arabic language use, as it is used in the same grammatical structure in

the previous verse in its plural form to refer to women who commit indecency. In al-Khū'ī's opinion, this linguistic point provides strong evidence for the interpretation of the indecency addressed in this verse as *liwāṭ* and not *zinā*. Al-Khū'ī also holds that his explanation demonstrates that this verse has not been abrogated by Q. 24:2–9 or by *sunna* from the Prophet and Twelve Imāms. This is because the punishment of flogging indicated in Q. 24:2–9 and the punishment of stoning mentioned in the *sunna* both aim to decree penalties for *zinā* and not for *liwāṭ*.

Nevertheless, al-Khū'ī ultimately limits his assertion slightly. He refers to a situation whereby the legal ruling in verse 16 does not apply exclusively to the punishment of *liwāṭ* but also addresses *zinā* as well. Al-Khū'ī then argues that, in this case, the second assumption will be problematic. Based on the second assumption, the chastisement mentioned in this verse consists of specific punishments, namely corporal punishment (with a shoe) and verbal denunciation of people who commit this indecency. Given this assumption, the punishments were abrogated by the revelation of Q. 24:2–9 or the *sunna*, which legalised flogging or stoning instead. This assumption, as al-Khū'ī views, is not correct because, following the apparent meaning of verse 16 of *al-Nisā'*, the concept of *īdhā* only means chastisement or disciplining an offender in general, without specifying the type of punishment. In fact, the types of sentence for these indecencies, namely *zinā* and *liwāṭ*, have been defined and limited by other verses or *aḥādīth*, such as Q. 24:2–9, which decrees flogging for *zinā*, and the *sunna*, which rules that stoning is the punishment for *zinā* and *liwāṭ*. Al-Khū'ī concludes that there is no indicator for the abrogation of Q. 4:15–16; and scholars who upheld the abrogation of these two verses either believed in this view by solely imitating each other or by applying *khābar wāḥid* which neither provides knowledge theoretically nor implies a specific practice.

Al-Khū'ī's exegetical understanding of the aforementioned verses, however, does not seem to be accepted by the majority of Shi'i, let alone by Sunni, jurists. As indicated, there seems rather to be an agreement among Sunni and Imāmī scholars on the abrogation of these two verses. Yet, al-Khū'ī hastily attributes this agreement among jurists to their imitation of each other. A quick review of the Muslim exegetical and juridical literature explicitly shows that they have extensively debated verses 15 and 16 of *al-Nisā'* from different linguistic and semantic aspects and are not just imitating each other.⁴⁷ Moreover, these scholars' interpretations of the indecency in these verses as fornication or adultery and their view of the abrogation of these two verses

47 See, for example, al-Ṭūsī, *al-Tibyān*, 3: 141–45; al-Jaṣṣās, *Aḥkām al-Qur'ān*, 2: 107; and al-Ṭabāṭbā'ī, *al-Mīzān*, 4: 234.

are based on several authentic *ḥadīths* from the Prophet and Twelve Imāms according to al-Fayḍ al-Kāshānī.⁴⁸ Although these *aḥādīth* are not *mutawātir*, they are not only *ḵhabar wāḥid*. In fact, as al-Ma'rifat eloquently articulates, these *aḥādīth* are widely known, which lends support to this interpretation.⁴⁹

It is however more important to note that, according to my investigation, none of the Imāmī jurists throughout the history of Islam has applied Q. 4:15–16 to argue for the punishment of *zinā* or *liwāt* or *siḥāq*. It seems that no Shi'ī jurist supports the imprisonment of a woman in the house for the rest of her life for committing *zinā* or *siḥāq* as described in verse 15. Also, no Imāmī jurist would impose the punishment of beating males with a shoe or engaging in verbal denunciation in the case of *liwāt* as stated in verse 16. This explains why Muslim jurists, since early times, also held that these two verses were abrogated and could no longer be used to argue for the punishment of *zinā* or *liwāt* or *siḥāq*. More interestingly, al-Khū'ī himself in his legal debates does not address verses 15 and 16 to argue for the punishment of *siḥāq* or *liwāt*.⁵⁰

Regarding verse 15, as discussed, al-Khū'ī critiques the view of abrogation of this verse by rejecting the two assumptions that, in his opinion, underpin that theory of abrogation. Rejecting the first assumption, he argues that the imprisonment of women who committed indecency in the house for the rest of their lives was to prevent these women from committing the same indecency again. So, this is a case of the legal principle of forbidding wrongful deeds (*al-naḥy 'an al-munkar*) and not a form of punishment for these women. It seems that this interpretation is in contrast with the majority, if not of all, Shi'ī scholars' understandings. As addressed, there is a unanimous view among Imāmī scholars that this expression, namely imprisoning the women who committed the indecency of *zinā* in the house until their death, refers to their punishment which has been abrogated by Q. 24:2–9. In addition, al-Khū'ī's view deviates far from the text and context of verse. Although this verse does not address the term “punishment,” its primary connotation is only the punishment for the women who committed indecency. This is because it first addresses an indecency (*zinā*, according to the majority of Shi'ī scholars) committed by Muslim women and then commands Muslim society to imprison these women in their houses until their death (apparently as a punishment) or perhaps until God provides a solution for their release.

Moreover, on the one hand, the contexts of verse 15 and verse 16 are closely related to each other in terms of the general topic raised, that is, indecency

48 al-Fayḍ al-Kāshānī, *Tafsīr al-ṣāfi*, 1: 430.

49 al-Ma'rifat, *al-Tamhīd*, 2: 306.

50 See al-Khū'ī, *al-Qaḍā' wa-l-ḥudūd*, vol. 41.

committed by females in verse 15 and by females and males in verse 16. On the other hand, verse 16 explicitly uses the term punishment (*īdhā*) and states that those who commit the indecency (of *zinā*, according to the majority of Imāmī scholars) must be punished via beating by shoe or verbal denunciation. Regarding the coherence between the context of verses 15 and 16, the imprisoning of these women in the house should therefore also be interpreted as their punishment.

Finally, there is a principle in legal theory called customary understanding (*al-fahm al-ʿurfī*) of the revelatory texts.⁵¹ This principle, according to Imāmī legal theory, should be employed to understand the revelatory texts, in particular, when the meaning of a given Qurʾānic text is contested.⁵² In brief, this rule implies that when a Qurʾānic text is disputed, it should be interpreted based on a common sense of Muslim laypeople, not a complicated technical manner.⁵³ Returning to our discussion, it seems that a common-sense understanding of verse 15 also contradicts al-Khūʿī's interpretation and confirms the view of the majority of Shiʿī scholars.

To briefly explicate, it is hard to imagine that grassroots Muslims would understand the imprisonment of such women indicated in this verse as anything other than punishment. To support this view, it is useful to examine the following situation. Let us suppose a rule has been regulated by a state by which whoever commits a given offence will be arrested and imprisoned. In such a case, a customary understanding of this legal statement among the grassroots population appears to be as follows: according to the close connotation, if not denotation, of this legal statement, imprisonment is regarded as a punishment for a person who did not obey the law and committed that offensive act. Thus, people would not consider it as a case of the principle of forbidding wrong deeds (*al-nahy ʿan al-munkar*). In fact, the first and direct meaning deriving from the statement “you will be imprisoned if you commit a given offence” is most likely that imprisonment is a punishment for that offensive act or behaviour. Therefore, in such a situation, practising the principle of forbidding

51 The importance of this rule led some scholars to count it as a condition of *ijtihād* because the Qurʾān and *sunna*, in their view, are revealed in accordance with the common sense of ordinary people (see, for example, al-Khumaynī, *al-Ijtihād wa-l-taqlīd*, 9–10; al-Murtaḍawī al-Langarūdī, *al-Durar al-naḍīd*, 1: 47–48). This means a person who intends to exercise *ijtihād* is required to master skill of communicating with ordinary people and the way in which they understand each other. This will help the person to read and interpret the scriptural texts based on a customary understanding, not a complicated technical manner.

52 al-Khurāsānī, *Kifāyat al-uṣūl*, 57 and 281.

53 al-Khūʿī, *Miṣbāḥ al-uṣūl*, 3: 159.

wrong deeds may not even come to mind, although, at a second stage, one of the implications of punishments (and, in our case, imprisonment) is to prevent people from committing the same indecencies again.

The second assumption behind Imāmī scholars' interpretation of this verse, according to al-Khū'ī, is that the final segment of the verse where it states "or until God appoints for them another way" should be understood as a promise from God to Muḥammad and his companions to reveal a new legal ruling in the near future. Al-Khū'ī, however, believes that if one accepts this assumption, then one is required to look for the promised ruling of the release of such women who committed that indecency. According to the dominant approach among Shi'ī exegetes of the Qur'ān, this new promised ruling, as al-Khū'ī illustrates, can be found in the requirement for flogging those women (as of Q. 24:2–9) or stoning them (as of *sunna* from the Prophet and Twelve Imāms). Yet, in contrast, al-Khū'ī holds that this new ruling not only does not provide such women with any solution to release them from punishment but rather imposes on them more severe punishments than being imprisoned in the house.

In response to this critique, one might say that, as far as the Qur'ān is concerned, verse 15 has been abrogated by Q. 24:2–9. Moreover, Q. 24:2–9 says nothing about stoning. It only speaks of flogging (we should note that the verdict of stoning is never mentioned in the Qur'ān). As elaborated on in Chapter 2, it is widely accepted in Imāmī *ijtihād* that the Qur'ān is the first source of legal ruling, and a jurist must first turn to the Qur'ān in every case. If the Qur'ān contains an explicit legal ruling on a case, the jurist must not apply other sources, such as *sunna* or *'aql*, particularly if they contain a legal ruling that differs from the Qur'ān. In fact, legal rulings that explicitly dispute the legal rulings specified in the Qur'ān are not authentic and must be refused, according to some *aḥādīth*.⁵⁴ Interestingly, in this case, Q. 24:2–9 clearly imposes flogging as the punishment for fornication. If so, one could argue that the people regard flogging as a lighter punishment for such women than being imprisoned in the house until death without contact with their families, friends, and others.⁵⁵

54 See al-Kulaynī, *al-Kāfi*, 1: 69.

55 Some Imāmī scholars, such as al-Ma'rifat, in objection to al-Khū'ī's view, suggests that the Qur'ānic notion of *lahunna sabīlan* ("or until God appoints for them another way") does not imply that the new ruling would contain any suggestion for the release of such women. Therefore, according to them, this expression is neutral about the new ruling as being in favour of or against these women (al-Ma'rifat, *al-Tamhīd*, 2: 309). However, it seems that there is no linguistic indicator for this understanding. Moreover, it differs from the commonly accepted interpretation of this verse held by the majority of Muslim scholars.

However, there is another way to respond to al-Khū'ī's objection. To explain, one might agree with him that the statement in verse 15, namely "or until God appoints for them another way," is not a promise from God to reveal a new legal ruling for this indecency—*zinā*—as the majority of Imāmī scholars argue. Instead, one may understand this statement as a legal punishment for females (in case of committing *zinā*) for that specific course of time before the abrogation of verse 15 by Q. 24:2–9. According to this interpretation, the punishment of a female fornicator in that period of time was that she had to be imprisoned in the house for the rest of her life. Or, as al-Khū'ī also noted, God may open a door for her and provide her with a solution release for instance, through marriage or by true repentance through which Muslim society is assured that she will not commit the same indecency again. This can mean that the last part of verse 15 is also related to the period before its abrogation, and thus there is no promise to reveal a new legal ruling in future to release such women. Therefore, once the time of this legal ruling ended and this verse was abrogated by Q. 24:2–9, the old ruling, namely imprisonment until death, has been completely substituted by the punishment of flogging as expressed by the new verses. Therefore, as there is no imprisonment in the new ruling, there is no need for release as well. The punishment, according to the new verses (Q. 24:2–9), is only flogging.

Concerning verse 16, as outlined, al-Khū'ī also critiques two assumptions on which, in his opinion, the view of the abrogation of this verse relies. The first assumption is that the pronoun *hā* attached to the verb *ya'tiyānihā* refers to the indecency of fornication/adultery. Al-Khū'ī upholds that this assumption is incorrect, as the pronoun *hā* in this verse does not imply the indecency of *zinā*. This is because there is a plural pronoun, namely *kum* (attached to *min-kum*), in this verse which had been also applied twice in verse 15, that is, *nisā'ī-kum* and *min-kum*. In the first two cases of the application of this pronoun in verse 15, they refer to males. Therefore, he concludes, it should refer to men in this case too. Moreover, in this verse a male connector, namely *al-ladhāni*, and a male verb referring to two persons, namely *ya'tiyāni*, are used, and according to Arabic linguistics, a male dual connector and pronoun imply only two male persons, and not a group of more than two men. This is because if males (in plural) were intended, a plural grammatical connector and a plural pronoun would be used, as in proper Arabic language. In al-Khū'ī's view, these linguistic points provide strong proof for interpreting the indecency mentioned in this verse as *liwāṭ* and not *zinā*.

However, there is, in fact, no clear linguistic evidence for al-Khū'ī's understanding of the plural pronoun of *kum*, which is mentioned three times in verses 15 and 16. In other words, there is no reason to believe that, as this

pronoun in the first two cases of verse 15 refers to males, it should also refer only to men in its third application in verse 16, rather than to both men and women. Even though this is a male plural pronoun, it seems that in all three cases it refers to the whole of Muslim society, including males and females. In fact, following Arabic linguistic rules, whenever there is a group of men and women, a male pronoun should be used due to the principle of male dominance (*naẓariyyat taḡhlīb al-mudhakkār*).⁵⁶ It seems that the Qur'ān also follows this standard rule. Therefore, in all three cases in verses 15 and 16, the plural pronoun *kum* can be regarded as referring to the whole Muslim community, both males and females. Thus, God commands Muslim society to impose punishments on those Muslim males and females who commit this indecency—that is, fornication/adultery—as the majority of Shi'ī scholars understand. Therefore, verse 16 implies that if a male and a female in Muslim society commit the indecency of fornication or adultery, the rest of the Muslim community must punish them, and in case of true repentance, they must forgive them.

In addition, al-Khūṭ's proof that the male connector in verse 16, namely *al-ladhāni*, and the male verb, namely *ya'tiyāni*, should be counted as indicators to regard both sides of this act as male does not seem to be correct. Rather, the male connector and the verb in verse 16 do not suggest that the indecency addressed in verse 16 implies *līwāṭ* as opposed to *zinā*. As already explicated, according to the Arabic linguistics of male dominance, when referring to mixed groups of males and females with one pronoun or connector or verb, often, if not always, a male pronoun or a male connector or a male verb should be applied to address such groups of people.

That being said, one might object that, if we link the indecency in verse 16 to male and female fornication/adultery, then the punishment established in this verse—beating and verbal denunciation—should apply to females as well. However, according to the view of the majority of Imāmī scholars, verse 15 already suggests a different punishment for female in case of *zinā*, namely imprisoning such women in the house. One then might argue that this is an ad hoc position, as it would not make sense that the Qur'ān would impose a punishment for female fornication in verse 16, after it already decreed a different punishment just one verse before in Q. 4:15.

Following a suggestion made by a number of exegetes, one can respond to this point that it is arguably possible to illustrate two different punishments for female fornication/adultery over time as determined by verses 15 and 16 of *al-Nisā'*. This means during this period, before the abrogation of these two

56 See, for example, al-Zabīdī, *Tāj al-'arūs*, 8: 146; al-Kaffawī, *al-Kulīyyāt*, 281; al-Suyūṭī, *Ham' al-hawāmi'*, 1: 150.

verses, women committing *zinā* would be sentenced to a separate punishment established for females in verse 15: namely, such women would be imprisoned in their houses for the rest of their lives. Then these female fornicators would receive an extra punishment, as in verse 16, namely corporal punishment and verbal denunciation.⁵⁷ Perhaps this is why scholars, such as al-Ṭūsī, al-Ṭabrisī, and al-Jaṣṣāṣ, held that verse 16 was, in fact, revealed before verse 15, according to which the punishment for male and female fornicators had already been established. Then verse 15 was revealed and imposed an extra punishment for female fornicators. However, once Muslims were collecting, ordering, and writing down the Qurʾān, the Prophet or his companions ordered these two verses to be placed in the Qurʾān as it is now.⁵⁸

In response to al-Khūṭī's objection to the second assumption, the concept of *īdhā* in this context only means general chastisement or disciplining Muslim people who commit offensive acts, without specifying the types of punishment. In fact, the specific penalties of this indecency, namely *liwāṭ* (according to al-Khūṭī's interpretation), have been defined by Q. 24:2–9, which decrees flogging, and by *sunna* from the Prophet and Twelve Imāms, which decrees stoning as the punishment for *liwāṭ*. However, it appears that al-Khūṭī is here disregarding the fact that Q. 24:2–9 solely decrees the punishment for *zinā*, in line with a unanimous approach of Muslim scholars, including al-Khūṭī himself. Therefore, these verses cannot be seen to argue for the punishment of *liwāṭ*. Moreover, his view that there is a definitive *sunna* of stoning for the punishment of *liwāṭ* is a disputed topic which will be debated in the next chapter when the *sunna* or *ḥadīth* on the prohibition and punishment of *liwāṭ* will be examined.

Scholars, such as al-Khūṭī, still might not agree with the view presented in this study, which concurs with the majority of Shiʿi scholars on these two verses: they may not accept that the indecency addressed in these two verses denotes *zinā*, believing instead that these verses imply *siḥāq* and *liwāṭ*. They also might not accept that these verses have been abrogated by Q. 24:2–9. Nevertheless, their proof cannot work against homosexuality because even if one holds that the indecency alluded to in the aforementioned verses refers to

57 On this point see, for example, al-Ṭūsī, *al-Tibyān*, 3: 144; al-Ṭabrisī, *Majmaʿ al-bayān*, 4: 41; and al-Jaṣṣāṣ, *Aḥkām al-Qurʾān*, 2: 133–34.

58 There are more discussions and theories on the interpretation of these two verses. For instance, some scholars believe that verse 15 implies a legal ruling for fornication committed by married women and verse 16 implies a legal ruling for fornication committed by unmarried men and women. Other scholars believe that verse 15 was revealed first, and it was later abrogated by verse 16 (to find all these different approaches, see al-Ṭūsī, *al-Tibyān*, 4: 144; al-Jaṣṣāṣ, *Aḥkām al-Qurʾān*, 2: 133).

siḥāq and *liwāt*, it is not therefore related to homosexuality. It has been demonstrated that the phenomena of *liwāt* and *siḥāq* differ from modern homosexuality. We must also recall that a mere similarity between these three subjects does not permit a Shi'ī jurist to use the same legal ruling between one subject and another, as *qiyās* (legal analogy) is not deemed authentic in Imāmī *ijtihād*.

7 Conclusion

As maintained by the Qur'ān, the indecency of males approaching other males had a unique position among the various indecencies committed by the people of Lot. Perhaps this is the reason that the Qur'ān refers to it several times as an unprecedented indecency and describes it as a transgression which went beyond ethical principles.⁵⁹ This chapter confirmed that the specific behaviour of Lot's people can at best be categorised as the sexual assault of male strangers. This suggests that the story of Lot's tribe, their behaviour, and punishment do not have a direct connection to mutual and consensual same-sex sexuality. However, Shi'ī jurists might not agree with this interpretation, asserting that this particular indecency of Lot's people (i.e. males approaching other males) should be understood as *liwāt*, or they might also hold that Q. 4:15–16 imply *siḥāq* and *liwāt*. However, after all, they cannot deny that it is not possible to conceptualise the two topics of *liwāt* and *siḥāq* from the Qur'ān alone, without deploying the *sunna/aḥādīth*. Therefore, ultimately, the question remains whether Muslim jurists perceived and confined these two categories from the Qur'ān in the first place.

Chapter 3 explicated that *liwāt*, as Imāmī jurists suggest, is defined as intercrural (*tafkhīdh*) or anal sexual intercourse between two males. However, some other Muslim/Shi'ī jurists hold that anal sexual intercourse between a man and his wife or a stranger woman should also be considered as *liwāt*. Shi'ī jurists define *siḥāq* as same-sex sexual relationships between two women in which they touch each other's genitalia. Although these definitions of *liwāt* and *siḥāq* are not addressed in the Qur'ān, one might still wonder to what extent Imāmī jurists consulted with the Qur'ān to obtain these concepts.

This chapter has shown that jurists occasionally referred to the story of Lot's tribe and verses 15 and 16 of *al-Nisā'* to legitimise the prohibition of *liwāt* and *siḥāq*. However, it does not seem that the legal conceptualisations of these two

59 Schmitt, however, suggests that the repetition of the story in the Qur'ān is partly because Muḥammad wanted to emphasise the fact that those people did not listen to their Prophet, not because of the wrong-doing per se (Schmitt, "Liwāt im Fiqh," 61).

phenomena were taken from the Qurʾān as it does not provide enough information to be used for this purpose. It is however striking that Imāmī jurists, whether writing in classical times, the post-classical period, or the modern era, often have not sought guidance from the Qurʾān for these two categories. In fact, they have not dwelled on the interpretation of the Qurʾānic narration regarding Lot and his people or of Q. 4:15–16. They perhaps deemed that they were not required to discuss these verses of the Qurʾān, as there are enough *aḥādīth* by which these scholars could conceptualise *liwāṭ* and *siḥāq* from an Islamic view.

Jurists' lack of consultation with the Qurʾān on these topics apparently comes from a broader legal standpoint. To explain, Shiʿi jurists, in general, have disputed whether the Qurʾān can be viewed as an independent source of Islamic legal rulings: there are several approaches in Imāmī legal school on which the Qurʾān is not deemed to be a source for derivation of legal rulings. One such approach belongs to the Scripturalists (*Akhhārīyyūn*), who challenged the possibility of understanding the Qurʾān independently, rather than exploring it through the received *sunna/aḥādīth*.⁶⁰ In their opinion, the Qurʾān cannot be independently understood by ordinary, fallible humans because they are not its direct audience (*man khūṭiba bihi*). The direct audience for whom the Qurʾān was revealed were *infallible* people, namely, the Prophet, his daughter Fāṭima, and the Twelve Imāms. Thus, ordinary Muslims need to understand the Qurʾān and benefit from it through the path of the infallible persons. The interpretations of the infallible people from the Qurʾān have been received by their *aḥādīth*. Therefore, according to the Scripturalists, the Qurʾān, without *aḥādīth*, cannot be a source of Islamic legal rulings.⁶¹

Another approach, as Āyatallāh Madadī notes, comes from scholars who hold that the Qurʾān should not be viewed as a source for legal rulings on particular topics.⁶² In their view, the Qurʾān was revealed to the Prophet Muḥammad as

60 As briefly discussed in Chapter 2, Shiʿi Scripturalism (*akhhārīgarī*—in Persian) was a movement in Imāmiyya that originated in the early sixteenth century and soon became a dominant methodology for understanding and deriving Islamic laws. It actively survived in Imāmī scholarship until the early eighteenth century. Mullā Muḥammad Amīn al-Astarābādī (d. 1036/1626–27) founded this movement after writing his masterpiece entitled *al-Fawāʿid al-madaniyya*. He was strongly against the methodology of Imāmī *ijtihād* and the practice of legal theory. According to the received *aḥādīth* from the infallible Imāms, he deemed the *uṣūlī* method to be a discouraging tool to understand Islam. To read a rather comprehensive discussion on Shiʿi *Scripturalism*, see Gleave, *Scripturalist Islam*; Newman, “Akhhārī-Uṣūlī Dispute”; Stewart, *Islamic Legal Orthodoxy*.

61 See al-Astarābādī, *al-Fawāʿid al-madaniyya*, 241–42 and 254–59.

62 This point from Madadī is reported from my own writings of his lessons in the academic year 2006–7.

general slogans or precepts to provide him with a suitable ground on which to establish Islam. According to this approach, the Qur'ānic verses are similar to any general slogans as might be used by the founder(s) of any revolution or new movement to motivate people. However, these general slogans are no substitute for the constitution as well as legal rulings of the given movement or new state. The constitution and law should be written and approved separately, although they should be inspired by the precepts on which this given movement was founded. Thus, the position of the Qur'ān in Islam, following this approach, is that Islamic sources of legal rulings should be influenced by the Qur'ān, but the Qur'ān itself is not one of the sources.

Regardless of these two attitudes, both of which suggest that the Qur'ān is not theoretically an independent source of law in Islam, it is important to note that Imāmī jurists often seemingly have not used the Qur'ān as a source of legal rulings *in practice*. This practical manner, as contemporary scholar Āyatallāh al-Ḥaydarī articulates, can be demonstrated by reviewing the legal works of Imāmī jurists throughout history.⁶³ Given this approach, although such jurists theoretically view the Qur'ān as an independent source of law together with the *sunna*, in practice, they have only occasionally addressed the Qur'ānic verses in their legal scholarship.

Returning to the present study, it appears that Shi'ī jurists both theoretically and practically have not conceptualised the subjects of *liwāṭ* and *siḥāq* by turning to the Qur'ān while several *ḥadīths* from the Prophet and the Twelve Imāms are, in their view, available. This point indicates the great influence of *sunna* on jurists' views on *liwāṭ* and *siḥāq* and the way they construct Islamic legal rulings. This issue will be discussed in the next chapter.

63 al-Ḥaydarī eloquently argues that Imāmī jurists hardly ever use the Qur'ān in their scholarship (see al-Ḥaydarī, *Mafāsil*, 211–81). Also, Muḥammad Ṣādiqī (d. 2011), a prominent Shi'ī exegete and jurist, pinpoints this issue in his scholarship a few decades earlier (see al-Ṣādiqī, *al-Furqān*, vol. 1).

Gauging the Sunna on Homosexuality

1 Introduction

Chapter 2 has elaborated that the *sunna* is the second major source of Imāmī *ijtihād*. It is often described as the sayings, deeds, and endorsements of fourteen infallible individuals in Imāmiyya, namely Muḥammad, his daughter Fāṭima, and the Twelve Imāms. The *sunna* can generally be known through oral or written reports of these individuals' sayings, deeds, and endorsements. Such reports are called *ḥadīth* or *khabar*. In line with a widely accepted approach among Imāmī *ḥadīth* scholars, in the early Shi'i community there existed various recorded *khabar* from the fourteen infallible persons, often from the Twelve Imāms, particularly the sixth Imām Ja'far al-Ṣādiq (d. 148/765), which were famously named *uṣūl* (sing. *aṣl*).¹ It was often believed that these *uṣūl* numbered up to 400 *aṣl*, though some even mentioned the number 700 as well.² Although most such *uṣūl* treatises have not survived, around sixteen have been saved. They are recorded in two relatively late *ḥadīth* compilations: *Bihār al-anwār* of Muḥammad Bāqir al-Majlisī (d. 1110/1699) and *Mustadrak Wasā'il al-shī'a* of al-Mīrzā Ḥusayn al-Nūrī (d. 1320/1902). It is commonly thought that the primary Imāmī *ḥadīth* compilations were based on these *uṣūl*, which still existed at that time.

The early major Imāmī *ḥadīth* compilations are known as *al-Kutub al-arba'a* (the Four Books), that is, *al-Kāfī fi 'ilm al-dīn* (henceforth, *al-Kāfī*), collected by Muḥammad b. Ya'qūb al-Kulaynī (d. 329/940–1); *Man lā yaḥḍuruhu l-faqīh* (henceforth, *al-Faqīh*), collected by Muḥammad b. 'Alī b. Bābawayh, known as al-Ṣadūq, (d. 381/991–2); *Tahdhīb al-aḥkām* (henceforth, *al-Tahdhīb*); and *al-Istibṣār fi-mā ukhtulifa min al-akhbār* (henceforth, *al-Istibṣār*) both collected by Muḥammad b. Ḥasan al-Ṭūsī (d. 460/1067). There are several other early collections of *akhbār*, such as *al-Maḥāsīn* compiled by Aḥmad b. Muḥammad Khālīd al-Barqī (d. 274/887–8 or 280/893–4) and *Fiqh al-riḍā* (apparently) compiled by 'Alī b. Bābawayh al-Qummī (d. 329/940–1), although it is also attributed to 'Alī b. Mūsā l-Riḍā (the eighth Imām). These are not as famous, as reliable, or as much cited among Shi'i jurists as the first four books. There are

1 See Kohlberg, "Shi'i Ḥadīth: Introduction."

2 Ibn Shahr Āshūb al-Māzandarānī, *Manāqib*, 1: 218. To find excellent information on this issue, see Kohlberg, "al-Uṣūl al-arba'umi'a," 128–66.

other *ḥadīth* compilations, such as *Da‘ā’im al-islām* of Abū Ḥanīfa al-Nu‘mān b. Muḥammad, better known as al-Qāḍī al-Nu‘mān, (d. 283/896)—the most prominent jurist and *ḥadīth* scholar of the Ismā‘īlī *madhhab*—which are often considered unreliable by Twelver Shi‘i scholars, as this source dropped the chains of transmission from *akhbār*. Where relevant, some such sources and their value and credibility among Shi‘i *ḥadīth* scholars shall be addressed in this chapter.

Moreover, there was a second wave in *ḥadīth* scholarship during which later Imāmī *ḥadīth* scholars put in writing several collections of *akhbār*. However, these compilations should be seen as secondary sources compared to the early collections. In fact, the later compilations mostly contain the *akhbār* which had already been recorded in the primary *ḥadīth* collections, though in different orders and structures, and under different titles. The most notable *ḥadīth* compilations of the second wave are as follows: *al-Wāfi* of Mullā Muḥsin al-Fayḍ al-Kāshānī (d. 1090/1680), *Bihār al-anwār* of Muḥammad Bāqir al-Majlisī (d. 1110/1699), *Tafṣīl wasā’il al-shī’a ilā aḥkām al-sharī’a* of Ḥasan b. al-Ḥurr al-‘Āmilī (d. 1104/1693), and *Mustadrak Wasā’il al-shī’a* of al-Mīrzā Ḥusayn al-Nūrī (d. 1320/1902).

It is also important to note that, in the twentieth century, Shi‘i grand *muftī* Āyatallāh Ḥusayn al-Ṭabāṭabā’ī al-Burūjirdī (d. 1340Sh/1961) together with several of his pupils, conducted a vast project to compile all *aḥādīth* associated with Imāmī law from various early and later compilations in a single book. The result of this project was a collection entitled *Jāmi‘ aḥādīth al-shī’a* in thirty-one volumes (hereon, al-Burūjirdī’s collection/compilation). This is an invaluable source which allows researchers to see almost all extant *khabar* on Imāmī law (whether reliable or not) in one place. Therefore, it has become one of the major secondary sources of *ḥadīth* for Shi‘i jurists since its publication.

Before starting the discussion, let me briefly elaborate on the validity or probative force (*ḥujjiyya*) of *aḥādīth*. There have always been disputes among people studying *ḥadīth* literature regarding the probative force of *akhbār*, as they could not be assured that *aḥādīth* accurately represent the *sunna* of the infallible people. Moreover, more recent orientalist studies have raised serious doubts regarding the origins and dates of such early *ḥadīth* manuscripts. My task would be far easier if this study were to follow in the footsteps of modern scholars of Islamic *ḥadīth* tradition, such as Joseph Schacht (d. 1969) and G.H.A. Juynboll (d. 2010), who believe that *ḥadīth* manuscripts appeared one or two centuries after the death of Muḥammad.³ According to this approach, one could argue that *akhbār* cannot be applied to the Islamic laws as they are

3 See Schacht, *The Origins*.

recorded based on memories of the *ḥadīth* transmitters, which could easily be forged or mistaken. Although I do not discount the significance of such scholars' works for current Islamic studies, my research is not based upon modern critical approaches to *ḥadīth*. Regardless of the counter-approach proposed by other scholars,⁴ such modern views have often conducted research based on the history of Sunni *ḥadīth* and *fiqh* traditions and so have barely referred to the Shi'i sources.⁵ Moreover, following the Imāmī unique position on the existence of the infallible people for almost three centuries after the death of Muḥammad, one can be sceptical about whether such orientalist attitudes can be applied to Imāmī *ḥadīth* tradition. This is in particular because, as several studies noted, the tradition of writing the *aḥādīth* in Shi'i community was a custom based on the Shi'i Imāms' advice.⁶ However, I do not follow the easy route in this study for any of these reasons but because my study, as explained, is not conducted on the reformist perspective but on the modern Shi'i paradigm of *ijtihād*.

The modern Imāmī *ijtihād* acknowledges that not all *ḥadīths* attributed to the infallible people are sound or reliable. However, this does not imply that *akhbār* should be disregarded when investigating Islamic laws. Hence, Imāmī *ḥadīth* scholars have provided some tools, such as *'ilm al-rijāl*, *'ilm al-fihrist*, and *'ilm al-dirāya*, to distinguish between sound and unsound *khbar*. These three disciplines were explained in Chapter 2, but as a brief reminder, *'ilm al-rijāl* is about the biographical evaluation of the individuals who have transmitted *aḥādīth*. It explores the reliability of the *ḥadīth* reports through assessment the characters of the *ḥadīth* transmitters. *'ilm al-fihrist*, or the bibliography of early Shi'i *ḥadīth* literature, is another discipline that Imāmī jurists believe is required to be known before practising *ijtihād*. In the small community of early Shi'i companions of the Imāms, there were very few Imāmī *ḥadīth* narrators

4 See, for example, Schoeler, *The Genesis*; Motzki, Boekhoff-van der Voort, and Anthony, *Analysing Muslim Tradition*.

5 Robert Gleave does not shy away from expressing his disappointment with the current scholarship on Islamic studies, in particular Islamic law, for often limiting their focus to Sunni sources and disregarding Shi'i legal developments (Gleave, "Shi'i Law/Islamic Law"). Moreover, as Wael Hallaq notes, orientalist views on Islamic *ḥadīth* literature are often based on pure historical accuracy: namely, they solely investigate the historical facts or documents to distinguish between an actual-authentic *ḥadīth* and a forged one. However, as Hallaq notes, Muslim jurists generally examine the *aḥādīth* based on legal indicators, not purely historical facts. This is because jurists often search for probative force (*ḥujjiyya*) of the *aḥādīth* to be applied to their relevant cases, regardless of whether these *akhbār* were actually stated by the infallible people (see Hallaq, "The Authenticity of Prophetic Ḥadīth," 75–90).

6 See, for example, Chittick, "Introduction"; Dakake, "Writing and Resistance"; Modarressi, *Tradition and Survival*.

compared to the Sunni transmitters of *ḥadīth*. Therefore, early Shi'i transmitters were encouraged to write down the *aḥādīth* which they were hearing from the companions or the companions of the companions of the Imāms. They would read their writings to these companions and ask for permission to transmit the written versions. There were therefore several written versions of early *ḥadīth* books and various permission chains to transmit them before the major *ḥadīth* collected works of Imāmiyya, such as *al-Kāfī*, were compiled. Jurists today thus need to investigate these different versions of the early *ḥadīth* treatises, where available, as they might influence the *ijtihād*ic process. Muslim scholars developed the technique of *'ilm dirāyat al-ḥadīth* to learn about the typology of *aḥādīth* and so better comprehend and examine the credibility of various types of *khābar*. It should be noted that, according to *'ilm al-dirāya*, there are generally two types of *ḥadīth* in terms of their chains of transmission (*isnāds*): *khābar mutawātir* and *khābar wāḥid*. The former type is a *ḥadīth* which is narrated through the various chains of transmission and numerous transmitters, making it practically impossible for all those transmitters to collude in reporting false information or forgery (*tawāṭū' 'alā l-kidhb*). This type of *ḥadīth*, as *ḥadīth* scholars remark, provides certainty concerning the origin of the *ḥadīth* as being issued by the Prophet or the twelve Imāms. The latter type, namely *khābar wāḥid*, is described as a *ḥadīth* that is narrated by one or few chains of transmission, such that it may not provide assurance on the authenticity of the *khābar* as being issued by the Prophet or the twelve Imāms.

Imāmī *ḥadīth* experts hold that the first group—*khābar mutawātir*—do not need to be investigated in terms of their chains of transmission. Moreover, there are *ḥadīths* from the second group, i.e., *khābar wāḥid*, which are supported by definitive verbal or contextual indicators which make it certain that they were issued by one of the infallible persons. Therefore, their chains of transmission also do not need to be investigated. However, *'ilm al-rijāl* is absolutely required for *ijtihād* as most of the *aḥādīth* received from the Prophet and the Imāms are single-strand traditions which are not surrounded by definitive indicators. This means that these *aḥādīth* have been received through one *isnād* or a few *isnāds* which do not provide certainty regarding their origin, accuracy, or authenticity. Therefore, it is necessary to examine the chains of this kind of *aḥādīth* and explore whether the transmitters of these *aḥādīth* were just and credible (*thiqa*).

Regarding the transmission of *ḥadīths*, there is another significant typology in terms of the (un)reliability of their chains⁷ that divides *aḥādīth* into

7 It is important to realise that this typology is only concerned *khābar wāḥid*. This is because only in this type of *ḥadīth* the investigation of the chain is required.

the following categories: *ṣaḥīḥ*, *ḥasan*, *muwaththaq*, and *ḍaʿīf*.⁸ A *ṣaḥīḥ ḥadīth* is described as a *khbar* attributed to one of the fourteen infallible individuals with a complete (unbroken) chain of transmission and with transmitters who were all assessed as credible (*thiqa*), upright (*ʿadl*), and Twelver Imāmī. A report is called *ḥasan* if it is a *khbar*, with a complete (unbroken) chain, ascribed to one of the fourteen infallible individuals by Twelver Imāmī transmitters who were praised but not considered upright. Imāmī scholars usually treat this latter type of *ḥadīth* the same as those in the former category in terms of reliability and authenticity. *Muwaththaq* is a *ḥadīth* with a complete (unbroken) chain, reported by individuals who are assessed entirely credible, although they are not all Twelver Imāmī Shiʿis. This kind of *ḥadīth* is often thought reliable by Imāmī jurists. Finally, a *ḍaʿīf* is a *khbar* if it is attributed to one of the infallible persons but does not comply with any of the first three categories, either by containing (at least one) non-credible transmitter or by an incomplete chain, meaning that there are one or more missing transmitters within the chain of transmission.⁹ This type of *ḥadīth* is generally assessed as unreliable by Imāmī jurists.

2 *Sunna* as a Source for or against Homosexuality

As indicated in the previous chapter, the essential source for the prohibition of same-sex sexual relationships is apparently the *sunna* according to Imāmī jurists. It has been indicated that jurists do not articulate homosexuality in accordance with the Qurʾān while several *aḥādīth* from the Prophet and the twelve Imāms are, in their view, available. This point demonstrates the great influence of *ḥadīth* on jurists' approach concerning this topic in particular and also illustrates the way that they construct Islamic legal rulings in general.

However, it appears that, similarly to the Qurʾān, the *sunna* does not address the modern homosexuality either positively or negatively. Therefore, it is not possible to derive an Islamic verdict either for or against homosexuality from the *sunna*. The likely reason why the *sunna* is silent on this issue is that the phenomenon of homosexuality, as referring to those who identify as homosexuals; practise egalitarian and consensual sexual relationships with other

8 al-Jubaʿī al-ʿĀmilī, *al-Riʿāya*, 77–87; al-Subḥānī, *Uṣūl al-ḥadīth*, 48–52.

9 Following Sunni scholarship, there exist various *ḥadīth* divisions and sub-divisions in Imāmiyya, but these categorisations are more theoretical discussions and are rarely applied in practice by jurists. For a comprehensive discussion on this matter, see al-Subḥānī, *Uṣūl al-ḥadīth*.

same-sex mates, did not exist in the era of the Islamic revelation. In other words, as the genealogy of homosexuality in premodern Muslim cultures has confirmed, there is no reference to this phenomenon in the sources attributed to the tribes and people of early Islamic society. Therefore, homosexuality seems not to have been an issue for Muḥammad, the twelve Imāms, and their companions. Thus, it was not felt necessary to address this issue in the *sunna*, either explicitly or implicitly.

Nevertheless, there are various groups of *khbar* ascribed to Muḥammad or the twelve Imāms that Shi'i jurists often use to legitimatise prohibiting *liwāt* and *sihāq*. As shown in Chapter 3, jurists often describe *liwāt* as male same-sex anal or intercrural sexual intercourse and *sihāq* as female same-sex sexual practices by touching each other's genitalia. Therefore, by applying these *aḥādīth*, they have concluded the prohibition of male and female same-sex sexual behaviours only under these two categories. For example, the contemporary jurist Muntaẓirī refers to several *khbar* to legitimise the prohibition of male same-sex anal sexual intercourse as *liwāt*,¹⁰ whereas the *akhbār* that he refers to on this subject are either associated with sexual behaviours between adult males and very young boys (which should be categorised as pederasty), or to suppressed passive males (which should be distinguished as male pathological passivity), or to the acts of the tribe of Lot (which, as explored in the previous chapter, should be articulated as rape).

A close reading of such reports, however, shows that these *aḥādīth* have been stated in different contexts and refer to various groups which can hardly be relegated to the two juristic categories of *liwāt* and *sihāq*. Although *ḥadīth* compilations also include such *aḥādīth* in one chapter (*bāb*) or two,¹¹ the earliest *ḥadīth* treatises or the surviving *uṣūl* (such as *aṣl* of Zayd al-Zarrād or *aṣl* of Ja'far b. Muḥammad al-Ḥaḍramī) and the early *muṣannaḥāt* (sing. *muṣannaḥ*, such as *masā'il* of 'Alī b. Ja'far) indicate that *aḥādīth* were not generally

10 al-Muntaẓirī, *Kitāb al-ḥudūd*, 143–44.

11 It should be noted that in two major *ḥadīth* compilations, namely *al-Kāfī* and *al-Tahdhīb*, all *akhbār* concerning same-sex sexual behaviours were placed in two chapters—one on *ḥadd al-liwāt* (punishment of *liwāt*) and one on *ḥadd al-sahq* (punishment of *sahq*)—while in *al-Faqīh* all such *aḥādīth* were put together in one chapter entitled *ḥadd al-liwāt wa-l-sahq*. However, al-Ṭūsī in *al-Istibṣār* only wrote a chapter containing those *aḥādīth* related to *ḥadd al-liwāt*. Therefore, he does not collect the *aḥādīth* implying the punishment for female same-sex sexual behaviours (*ḥadd al-sahq*) in this book. Nevertheless, there still exist other *akhbār* dealing with same-sex sexual behaviours which these compilations do not mention in chapters devoted to *liwāt* and *sihāq*. Instead, these *aḥādīth* are spread out across the various chapters of these compilations.

ordered or structured as such.¹² These books usually contained various *ḥadīths* on different issues which had been set all together. Therefore, it is plausible to imagine that in the case of same-sex sexual behaviours the *aḥādīth* were not also compiled in one place or collected under specific titles. Whether there were two categories, as Shi'ī jurists generally enlist, or multiple categories, as suggested in this study, the question now is whether these *aḥādīth* can be applied to legitimise the prohibition of homosexuality. Before this question can be answered, the chain and content (*matn*) of such *aḥādīth* must be examined. However, if one knows about the Shi'ī *ijtihādīc* process and *ḥadīth* literature, one would realise that this is indeed not an easy task to accomplish in a short chapter such as this. It is even more challenging when it comes to such a sensitive topic as same-sex sexual behaviours because the volume of the *akhbār* on this subject is quite large. Despite these challenges, I will investigate the typology, context, and content of the *aḥādīth* associated with same-sex sexual behaviours in as much detail as possible within the scope of this study. The chains of such *aḥādīth* shall also be examined where needed.

In the rest of this chapter, I shall discuss the *sunna* in three arenas: first, I will investigate the *aḥādīth* on same-sex sexual behaviours in their historical context to explore to what historical categories these *aḥādīth* refer. I will then elaborate on how contemporary Imāmī jurists understand the *sunna* on this topic. Finally, I will critically examine the jurists' understandings of the *aḥādīth* in the light of legal-hermeneutical repertoires as established in the modern Imāmī *ijtihād*.

3 Typology of the *Sunna* on Same-Sex Sexual Behaviours

To provide an accurate typology of the *akhbār* on this topic, I shall first review the *aḥādīth* on this issue by examining the most comprehensive Shi'ī legal *ḥadīth* compilation—al-Burūjirdī's collection, namely *Jāmi' aḥādīth al-shī'a*.

12 Since the very early period, there was generally an assumption among Imāmī *ḥadīth* scholars that *uṣūl* books were different from *muṣannaḥāt* (al-Ṭūsī, *al-Fihrist*, 22). Although there are disputes on the meaning of *uṣūl* and *muṣannaḥāt*, al-Tustarī (d. 1374Sh/1995) notes that the *uṣūl* were those *ḥadīth* treatises which solely transmitted a number of *akhbār* without any discussion about them in terms of their (in)validity, (un)reliability, or the (in)existence of counter-example *ḥadīths* on a specific subject. The authors of the *uṣūl* might have heard the *aḥādīth* from the infallible people directly and thus ascribed them to these people or they might ascribe the *aḥādīth* to them through other transmitters. In contrast, *muṣannaḥāt* were considered to be books written in a broader sense: they could be on different topics and contain various scientific or theoretical discussions, or they could contain the *aḥādīth* with discussion on the (in)validity or (un)reliability of the *akhbār* (al-Tustarī, *Qāmūs al-rijāl*, 1: 64–65).

In this collection, if we leave out the repetitive *aḥādīth*, there seem to be well over 100 *ḥadīths* on various issues regarding male and female same-sex sexual behaviours. However, keep in mind that the aim of al-Burūjirdī's collection was to provide Shi'i *aḥādīth* from all extant sources, whether they were reliable or not.¹³ Therefore, one should not jump to any conclusion at this stage solely based on the quantity of the *aḥādīth* in this collection. It is striking that the number of *aḥādīth* concerning this subject in the compilations which principally aimed to provide only reliable *aḥādīth* is far smaller than the number in *Jāmi' aḥādīth al-shī'a*. For example, there are no more than forty *ḥadīths* on this issue collected by *al-Kāfi* and no more than ten collected by *al-Faḥih*. Moreover, unlike the early *ḥadīth* compilations which mostly allocated one or two chapters for same-sex sexual behaviours, al-Burūjirdī's compilation devotes multiple chapters to addressing the topic. Nevertheless, not all such chapters in this collection contain *aḥādīth* with a direct denotation or explicit connotation of same-sex sexual practice: for example, one chapter is devoted to the *aḥādīth* addressing two males or two females who are found in one bed or under a blanket.

The *aḥādīth* on same-sex sexual behaviours are placed in volumes 25 and 30 of al-Burūjirdī's collection. The titles and subtitles of the chapters containing such *aḥādīth* are as follows.

Volume 25, book of marriage (*kitāb al-nikāḥ*):

Chapters on forbidden marriage (*abwāb al-nikāḥ al-muḥarram*):

- Chapter 9: on the prohibition of a male and a female or two males or two females found in solitude under one blanket, and the legal ruling on separation between children and women in bed (*bāb taḥrīm khalwat al-rajul wa-l-mar'a aw al-rajulayn aw al-mar'atayn taḥt liḥāf wāḥid wa-ḥukm al-tafrīq bayn al-ṣibyān wa-l-nisā' fi l-maḍāji'*), pp. 451–56.
- Chapter 11: on the prohibition of *liwāṭ* for active/penetrator and passive/penetrated [partners] and on what have been received [from *aḥādīth*] about the expelling of effeminates from houses and mosques (*bāb taḥrīm al-liwāṭ 'alā*

13 In fact, al-Burūjirdī's collection gathered *aḥādīth* of this subject from more than thirty sources. In addition to the early four compilations (*al-Kutub al-arba'a*), this book provided *aḥādīth* from *al-Ghayba* of Faḍl b. Shādhān (d. 260/873), *al-Maḥāsin* of Aḥmad b. Muḥammad al-Barqī (d. 274/887–8 or 280/893–4), *Da'ā'im al-Islām* of al-Qāḍī al-Nu'mān (d. 283/896), *Tuḥaf al-'uqūl* of Ḥasan b. 'Alī b. Ḥusayn b. Shu'ba al-Ḥarrānī (a *ḥadīth* scholar of the fourth/tenth century), *al-Ja'fariyyāt* of Muḥammad b. Ash'ath al-Kūfī (a scholar of the fourth/tenth century), *al-Iḥtijāj* of Aḥmad b. 'Alī b. Abī Ṭālib al-Ṭabrisī (d. 548/1154), and *Manāqib āl abī ṭālib* of Ibn Shahr Āshūb al-Māzandarānī (d. ca. 588/1192), all of which are often assessed either as unreliable or disputed in Shi'i legal scholarship.

l-fā'il wa-l-maf'ūl bihi wa-mā warada fī ikhrāj al-mukhannathīn min al-buyūt wa-l-masājīd), pp. 457–78.

- Chapter 12: on what [from *aḥādīth*] have been received on that *liwāt* is less than anal [penetration] and anal [penetration] is disbelief (*bāb mā warada fī anna l-liwāt mā-dūn al-dubur wa-l-dubur huwa l-kufr*), pp. 478–79.
- Chapter 13: on the prohibition of kissing minor (very young) boys for sexual pleasure and clarification of punishments for this behaviour, as well as on avoiding the children of rich people (*bāb taḥrīm taqbīl al-ghulām min shahwa wa-bayān 'uqūbatih wa-l-ḥadhar min awlād al-aghniyā'*), pp. 479–81.
- Chapter 14: on what cures *ubna* (*bāb mā yu'ālaj bihi l-ubna*), p. 481.
- Chapter 15: on the prohibition of *siḥāq* for the rider and the one who is given the ride (*bāb taḥrīm al-siḥāq 'alā l-rākib wa-l-markūb*), pp. 481–87.

Chapters on what is prohibited due to the marriage contract (*abwāb mā yuḥarram bi-l-tazwīj*):

- Chapter 5: on whoever penetrates a minor (a very young boy), then the daughter, mother, and sister of the boy shall be prohibited to the penetrator; and on the legal ruling on the marriage of the son of either of these two partners (the penetrated boy and the penetrating man) with the daughter of the other; as well as on the legal ruling on a person who marries a woman and then penetrates her brother¹⁴ (*bāb anna man atā ghulāman ḥurrimat 'alayhi ibnatuhu wa-ummuhu wa-ukhtuhu wa-ḥukm tazwīj ibn aḥadhimā ibna l-ākhar wa-ḥukm man tazawwaja imra'atan thumma awqaba akhāhā*), pp. 558–60.

Volume 30, Book of Punishments and Discretionary Chastisements (*kitāb al-ḥudūd wa-l-ta'zīrāt*):

Chapters on punishments for adultery/fornication (*abwāb ḥadd al-zinā*)

- Chapter 26: on if two unmarried males or two unmarried females or an unmarried male and an unmarried female are found under one blanket or

14 This point has been addressed by several *ḥadīths*. However, neither the texts of the *akh-bār* nor Shī'i jurists have explained the rationale behind it. Therefore, it is important to demonstrate the logic behind this legal ruling. Was it obtained because the previous male–male anal penetration had set up a kind of familial relationship between the two partners on the grounds of which marriage with the penetrated boy's female relative would now constitute a kind of bigamy or incest? Or it was the case because engaging in sexual acts with the female relatives was being withheld from the male penetrator as a punishment, namely using females as a bargaining chip? Ali also addresses a similar topic from Sunni legal sources (Ali, *Sexual Ethics*, chap. 4).

one cloth/cover unnecessarily and without having any kinship, they shall be chastised [on the first three offences] and killed on the fourth time (*bāb anna l-rajulayn aw al-mar'atayn aw al-rajul wa-l-mar'a idhā wujidā fī liḥāf wāḥid aw thawb wāḥid mujarradayn min ghayr ḍarūra wa-lā qarāba yu'azzarān wa-yuqṭalān fī l-rābi'a*), pp. 422–30

- Chapter 42: on whoever practises *zinā* with a deceased woman shall be punished with the punishment of fornication and whoever practises *liwāṭ* with a deceased man shall be punished with the punishment of *liwāṭ* (*bāb anna man zanā bi-mayyitatin fa-'alayhi ḥadd al-zinā wa-man lāṭa bi-mayyitin fa-'alayhi ḥadd al-liwāṭ*), pp. 453–54.

Chapters on punishments of *liwāṭ* (*abwāb ḥadd al-liwāṭ*):

- Chapter 1: on punishment of *liwāṭ* with anal penetration or without anal penetration; and on *liwāṭ* that can be proven by four times of confession; and on some legal rulings on *liwāṭ* (*bāb ḥadd al-liwāṭ ma'a l-iqāb wa-'adamih wa-thubūthi bi-l-iqrāri arba'an wa-jumla min aḥkāmih*), pp. 460–69.
- Chapter 2: on punishment of an individual who is forbidden to kiss a minor (very young) boy for sexual pleasure (*bāb ḥadd al-muḥarram idhā qabbala ghulāman min shahwa*), pp. 469–70.
- Chapter 3: on what has been received about the punishment of a male found on another man's mattress or two males found under one blanket (*bāb mā warada fī 'uqūbat al-rajul idhā wujida taḥt firāsh rajul aw-l-rajulayn idhā wujidā taḥt liḥāf wāḥid*), p. 470.

Chapters on punishment of *saḥq* (*abwāb ḥadd al-saḥq*):

- Chapter 1: on what have been received [from *aḥādīth*] on the punishment of *saḥq* (*bāb mā warada fī ḥadd al-saḥq*), pp. 470–71.
- Chapter 2: on legal ruling on a case if a man had sexual intercourse with his wife and the wife then practised *siḥāq* with a virgin [girl or slave girl] who gets pregnant by this act (*bāb ḥukm mā law jāma'a l-rajul imra'atahu fa-sāḥaqat bikran fa-ḥumilat*), pp. 471–73.

Given the structure of these chapters, it appears that the compilers of this collection must have understood various divisions and categories in the *ḥadīth* literature on this subject.¹⁵ The following categorisations seem to be more notable in this compilation:

15 In regard to Sunni scholarship, Omar illustrates the following nine possibilities in *liwāṭ* and *siḥāq* that imply different decrees of punishments for each penetrated and penetrating person: (1) a minor and/or insane boy penetrating a free sane adult woman; (2) a free sane adult female “penetrating” a free sane adult female, i.e. *siḥāq*; (3) a free sane adult

- I. The defining ruling (*ḥukm taklīfī*) and the declaratory ruling (*ḥukm waqʿī*) on *liwāṭ* and *siḥāq*: according to this division of the *aḥādīth*, male and female same-sex sexual behaviours are prohibited according to the Islamic defining ruling, and those who practise them deserve punishments concerning the Islamic declaratory ruling.
- II. Male and female same-sex sexual behaviours, namely *liwāṭ* and *siḥāq*: the second categorisation of the *aḥādīth*, which has often been referred to by various *ḥadīths* and juristic works, addresses two separate categories—*liwāṭ* and *siḥāq*—by focusing on their defining and declaratory legal rulings.
- III. Anal intercourse (*dukhūl*), intercrural intercourse (*tafkhūdh*), kissing (*taqbūl*), and being in solitude with another person on one mattress (*firāsh*) or under one blanket (*lihāf*) or one cover/cloth (*thawb*): this typology is interesting as it distinguishes between various same-sex sexual practices regardless of gender or sex differences, although the first two—anal intercourse and intercrural intercourse—as the *aḥādīth* indicate, are apparently concerned male same-sex sexual behaviours. According to this typology, anal intercourse is the worst form of same-sex sexual behaviour and in some cases might warrant the death penalty for its practitioners. After this come, in decreasing severity, same-sex intercrural intercourse, kissing, and being in solitude with another person on one mattress or under one blanket.
- IV. Same-sex sexual behaviours with minors/very young boys or girls, both free people or slaves: although this typology is not evident from al-Burūjirdī's collection and the compilers of the book have apparently overlooked it, it can be grasped tacitly from the *aḥādīth* collected in the various chapters of the book.

Although these categorisations of the *aḥādīth* deserve to be investigated independently, only one is significant for this study: the second typology which addresses the distinction between male and female same-sex sexual behaviours. Other than that, whether the *aḥādīth* refer to defining or declaratory rulings or address the different portions of punishments based on various forms of same-sex sexual behaviours or indicate the prohibition and punishments of having same-sex sexual practices with free or slave boys or girls, all

male penetrating a minor and/or insane girl; (4) a free sane adult male penetrating a free sane adult female; (5) a minor and/or insane boy penetrating a minor and/or insane girl or boy; (6) a free sane adult male master penetrating his owned male slave; (7) a free sane adult male penetrating a minor and/or insane boy; (8) a minor and/or insane boy penetrating a free sane adult male; (9) a free sane adult male penetrating a free sane adult male (Omar, "From Semantics to Normative Law," 246–47).

such categories are not the core focus of this research, and thus they shall be addressed only as they pertain to the Islamic legal ruling on homosexuality.

What is, however, crucially important in this study is another, nearly explicit taxonomy which can readily be grasped from the *aḥādīth*, but which has been almost entirely disregarded by Muslim jurists. These scholars often place all such *khābar* together without distinguishing between them. This is why contemporary jurists, such as al-Khūṭī¹⁶ and al-Muntaẓirī,¹⁷ while addressing the *aḥādīth* of *liwāṭ*, class the *aḥādīth* pertinent to pederasty together with the *aḥādīth* of male passivity and those associated with the story of the tribe of Lot. However, the *ḥadīth* literature appears not to agree with mixing up these behaviours and instead suggests the existence of various categories which need to be discerned from each other, as they are different in nature, implications, conditions, and consequences in terms of legal rulings. It is also useful to underline that this new typology of the *aḥādīth* is based upon the characteristics of the practitioners of same-sex sexual behaviours which existed in early and medieval Islamic societies, as demonstrated in Chapter 3. Given this typology, the following categories can be recognised within Imāmī *ḥadīth* literature: *takhannuth* (effeminacy), *tarajjul* (mannish-ness), *liwāṭ* (male active pederasty), *ubna* (male pathological passivity), and *siḥāq/saḥq* (female same-sex sexual behaviours).¹⁸

It would be insightful to learn about the number of the *aḥādīth* in relation to these five categories. In doing so, I choose to review the *aḥādīth* selectively based on their clarity and direct denotation of same-sex sexual behaviours. This is important because several chapters containing such *aḥādīth* in al-Burūjirdī's collection either appear to have no direct denotation or explicit connotation for same-sex sexual behaviours (such as the cluster addressing two males or two females or one male and one female found in solitude in one bed or under one blanket) or have no explicit or implicit link to this matter (such as those *aḥādīth* referring to sexual practices (whether same-sex or opposite-sex) with

16 al-Khūṭī, *al-Shahādāt wa-l-ḥudūd*, 2: 247–48.

17 al-Muntaẓirī, *Kitāb al-ḥudūd*, 143–44.

18 However, this does not mean that all *aḥādīth* on this subject can readily be categorised into these five models. There still exist *aḥādīth* addressing topics on same-sex sexual behaviours which appear to be unrelated to these categories. For instance, there are several *ḥadīths* referring to the “act of the tribe of Lot” (*ʿamal qawm lūt*) which, as confirmed in the previous chapter, is about rape or sexual behaviour based on power relations. There are also *aḥādīth* which cannot be fit into any of these categories as they are either informatively describing the origin of same-sex sexual behaviours or interpreting some verses of the Qurʾān, such as verses concerning the tribe of Lot.

the corpse of deceased people.¹⁹ In the latter case, a significant level of respect was required towards the remaining corpse of people who were no longer alive to mandate punishment for such a disgraceful act in Islam. Therefore, I shall investigate those *aḥādīth* in the earlier mentioned chapters of al-Burūjirdī's compilation which convey direct denotation or explicit connotations for same-sex sexual behaviours. Concerning these criteria, the following chapters seem to be relevant: volume 25, "book of marriage," chapters 11–15 from "on forbidden marriage"; and chapter 5 from "on what are prohibited due to the marriage contract"; and volume 30, "book of punishments and discretionary chastisements," chapters 1 and 2 from "on punishments of *liwāṭ*"; and chapters 1 and 2 from "on punishment of *saḥq*."

Based on numbering provided by the book, there are 124 *ḥadīth* in total, whether reliable or unreliable, collected in these chapters of al-Burūjirdī's compilation (excluding the repetitive ones). However, at the end of each chapter, the compilers provide references to other *aḥādīth* which are relevant to the chapter's theme but which best fit in other chapters, as their contents have closer ties to other topics. I have collected these *aḥādīth* from the indications made at the end of each chapter with great precision. By dropping the repetitive *aḥādīth* and those related to "males or females found in solitude in one bed or under a blanket," I collected another eleven *ḥadīth* on this subject. Therefore, there are 135 *ḥadīth* on this topic in al-Burūjirdī's collection. Figures 5–7 illustrate how these 135 *ḥadīth* are grouped into the five categories, as well as one entitled "other" for all *aḥādīth* which do not directly fit into any of those categories or relate to other issues (Appendix 1 provides details and criteria for this distribution).

<i>aḥādīth</i>	<i>takhannuth</i> (effeminacy)	<i>tarrajjul</i> (mannish-ness)	<i>liwāṭ</i> (pederasty)	<i>ubna</i> (male passivity)	<i>siḥāq</i>	<i>other</i>
135	12	8	52	27	22	37

FIGURE 5 Shi'i *ḥadīth* on various categories of same-sex sexual behaviour

19 It is relevant to note that al-Sharīf al-Murtaḍā has entitled his debate on male same-sex sexual practice with the corpse of a deceased as "the sexual behaviour of an adult man with the remaining corpse of a minor boy" (al-Sharīf al-Murtaḍā, *al-Intiṣār*, 514).

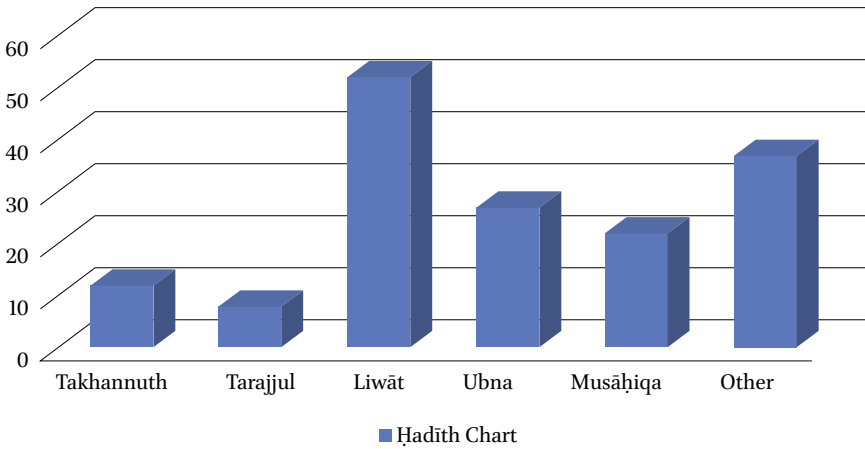


FIGURE 6 Shi'i ḥadīth on various categories of same-sex sexual behaviour

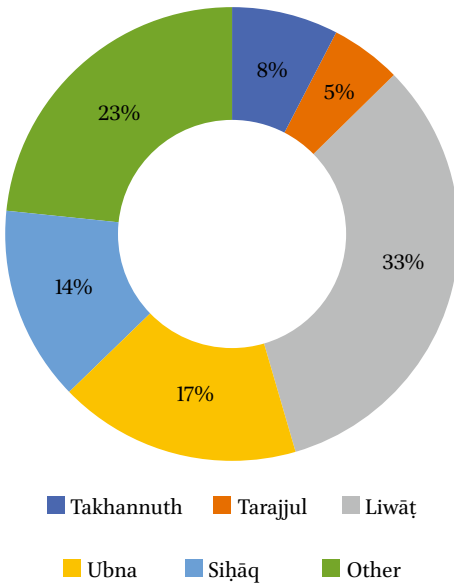


FIGURE 7 Fractions of Shi'i ḥadīth concerning each category of same-sex sexual behaviour

These charts show that *liwāt* (pederasty) is by far the most common category addressed by the *aḥādīth*, followed by *ubna* (male passivity), *siḥāq* (female same-sex sexual behaviour), *takhannuth* (effeminacy), and *tarajjul* (mannish-ness).²⁰ However, a great portion of the *aḥādīth* (23 percent

²⁰ One might wonder whether this mapping or typology is relevant to the “natural law” argument concerning the idea that semen should be used *properly* and that it should not be wasted in *inappropriate* sexual relations. It appears that in Imāmiyya, the prohibition of same-sex sexual activities is not grounded on the (in)appropriate uses of semen or the

according to the pie chart) refer to various issues not covered by the five categories which are termed *other* in this study. According to Figure 7, 32 percent of the *aḥādīth* address pederasty and 17 percent address male passivity. Female same-sex sexual behaviour (14 percent), effeminacy (8 percent), and mannish-ness (5 percent), respectively, come after. In the next section, I shall come back to the above table and the charts while explaining each category.

4 Examining the *Sunna*

4.1 *Takhannuth and Tarajjul*

As Figure 7 illustrates, effeminacy and mannish-ness constitute 8 and 5 percent of the *aḥādīth*, respectively. This demonstrates that effeminacy and mannish-ness and the way in which people could or should deal with these groups were highly contested in the early Muslim community. Let us first consider two such *ḥadīths*:

Al-Ja'fariyyāt, through its chain, from 'Alī b. Abī Ṭālib who said: "the Prophet of God cursed *al-mukhannathīn* and said, 'keep them out of your houses'."²¹

A *khabar* recorded by the *ḥadīth* scholar al-Mīrzā Ḥusayn al-Nūrī from the Book of Abī Sa'īd al-Uṣfūrī 'Abbād, according to which the Prophet said, "God cursed a male who resembles female-ness (*ta'annathat*) and a female who resembles male-ness (*tadhakkarat*); and the Angels affirmed."²²

By reviewing the *aḥādīth* on effeminacy and mannish-ness, such as the above two *khabar*, one may notice the following:

idea that semen should not be wasted. This is because, unlike the rationale behind the Roman Catholic opposition to any sex other than non-contracepted male–female penetrative vaginal sex, in Shi'i scholarship there is apparently no concept of the proper uses of semen. Therefore, as will be elaborated in Chapter 6, wasting semen by, for instance, placing it outside of the vagina, which is technically called *coitus interruptus* (*ʿazl*) in Islamic substantive law, is often accepted by Imāmi jurists. Thus, both male–female non-penetrative and contracepted penetrative vaginal sex are allowed. Moreover, as will be seen later in this chapter, consensual anal penetrative sex between a husband and wife is also considered permissible, though not recommended, in Imāmiyya.

21 al-Ṭabāṭabā'ī al-Burūjirdī and al-Mu'izzī al-Malāyirī, *Jāmi' aḥādīth al-shī'a*, 25: 473, Ḥ: 37646.

22 al-Nūrī, *Mustadrak*, 14: 349, Ḥ: 16919; al-Ṭabāṭabā'ī al-Burūjirdī and al-Mu'izzī al-Malāyirī, *Jāmi' aḥādīth al-shī'a*, 25: 473, Ḥ: 37647.

- I. Interestingly, all *aḥādīth* on mannish-ness also address effeminacy, but not vice versa; that is, there are *aḥādīth* which touch on effeminacy but do not address mannish-ness.
- II. Almost all *aḥādīth* on these two categories, such as the two *ḥadīths* just quoted, are attributed to the Prophet either directly or through Imām ‘Alī. As elaborated in Chapter 3, this indicates that the two phenomena of effeminacy and mannish-ness were a common preoccupation of the very early Muslim community of Medina at the time of the Prophet, leading him to respond and clarify his position towards these two groups of people.
- III. However, neither the Qur’ān nor the Prophet determined a divinely ordained punishment (*ḥadd*) for effeminacy and mannish-ness, although Muḥammad, according to a number of *aḥādīth* (which were discussed in Chapter 3), banned *mukhannathūn* from entering the mosques and Muslim households and expelled a number of them from Medina.
- IV. On the one hand, as there is no direct reference in *ḥadīth* literature to the same-sex sexual orientations of *mukhannathūn* and *mutarajjilāt*, it appears that these two groups can hardly be categorised as practising same-sex sexual behaviours. On the other hand, there are, as noted in Chapter 3, reports that Muḥammad expelled or banned a few *mukhannathūn* from the city of Medina because, in contrast to his mind and unlike the *mukhannathūn*’s claims, they indeed had sexual appetites and were commonly attracted to the opposite sex. When Muḥammad learned that these *mukhannathūn* were not truthful, he then banned them from entering the mosques and Muslims’ houses and, in some cases, expelled them from Medina.

4.2 *Liwāṭ*

Figures 5–7 depict that *liwāṭ* in the sense of active male pederasty is referred to by the highest percentage of the *akhbār* on same-sex sexual behaviours, namely 32%. A number of such *aḥādīth* refer to this phenomenon in order to interpret verses of the Qur’ān on the indecency (*al-fāḥisha*) of the people of Lot.²³ According to this set of *aḥādīth*, if they are reliable, both the devil (*iblis*) and angels of God appeared to the people of Lot in the form of very young boys. Several other *ḥadīths* directly prohibit sexual relationships (whether kissing, intercrural, or anal sex) between adult males and minor boys, and they decree punishments for such practices. Let us review a number of such reports:

23 al-Kulaynī, *al-Kāfi*, 5: 544–46; al-Ṭabāṭabā’ī al-Burūjirdī and al-Mu’izzī al-Malāyirī, *Jāmi’ aḥādīth al-shī’a*, 25: 459–62, Ḥ: 37615, 37616, 37617.

Ja'far b. Muḥammad (the sixth Imām) said: "the Prophet said: 'whoever kisses a minor boy for sexual pleasure God shall put a leash from fire on him on the Day of Judgement.'"²⁴

Ḥammād b. 'Uthmān (a companion of the sixth Imām) said: "About a man who penetrated a minor boy, I asked Abī 'Abdallāh whether it is permissible for such a man [to marry] the sister of this boy?" Ḥammād said: "the Imām said: 'if the man penetrated the minor boy up to the circumcised [part of the penis/the whole glans], it is not permissible for him [to marry] his sister.'"²⁵

Ja'far b. Muḥammad (the sixth Imām) through his forefathers said: "Imām 'Alī said: 'if it was permissible to stone anyone twice, that person would be the *lūṭī*.'"²⁶

Ishāq b. 'Ammār (a companion of the sixth Imām) said: "I said to Abī 'Abdallāh [the sixth Imām]: what if a male stranger kisses a minor boy for sexual pleasure? The Imām said: 'he shall be punished with one hundred lashes.'"²⁷

It is interesting to note that very few *khobar* on male active pederasty are ascribed to the Prophet Muḥammad in Shi'i *ḥadīth* literature. This indicates that such a phenomenon, unlike the previous two categories, was not commonly addressed by the early Muslim community of Medina during the time of Muḥammad.²⁸ As discussed in Chapter 3, it seems that Muslims mainly encountered this issue during the 'Abbāsīd period. Therefore, jurists of the period felt it was necessary to regulate an Islamic stance on this phenomenon

24 al-Kulaynī, *al-Kāfī*, 5: 548; al-Ṭabāṭabā'ī al-Burūjirdī and al-Mu'izzī al-Malāyirī, *Jāmi' aḥādīth al-shī'a*, 25: 479, Ḥ: 37667.

25 al-Kulaynī, *al-Kāfī*, 5: 417; al-Ṭabāṭabā'ī al-Burūjirdī and al-Mu'izzī al-Malāyirī, *Jāmi' aḥādīth al-shī'a*, 25: 559, Ḥ: 37892.

26 al-Kulaynī, *al-Kāfī*, 7: 199; al-Ṭabāṭabā'ī al-Burūjirdī and al-Mu'izzī al-Malāyirī, *Jāmi' aḥādīth al-shī'a*, 30: 463, Ḥ: 46469. It should be noted that the concept of "forefathers" in this *ḥadīth* refers to the fatherhood lineage of the sixth Imām. Thus, it means Ja'far b. Muḥammad narrates the *ḥadīth* from his father, Muḥammad b. 'Alī, who narrates from his father, 'Alī b. Ḥusayn, who narrates from his father, Ḥusayn b. 'Alī, who narrates from his father, 'Alī b. Abī Ṭālib.

27 al-Kulaynī, *al-Kāfī*, 7: 200; al-Ṭabāṭabā'ī al-Burūjirdī and al-Mu'izzī al-Malāyirī, *Jāmi' aḥādīth al-shī'a*, 30: 469, Ḥ: 46494.

28 For an in-depth analysis of the Sunni *ḥadīth* on *livāṭ*, see Kugle, *Homosexuality in Islam*, chap. 3.

and created extensive literature on *liwāt* or pederasty, including a significant *ḥadīth* scholarship. The Imāmī scholars, on various occasions, asked the Imāms to decree the Islamic laws pertinent to the actual cases of sexual relationships between adult men and minor/very young boys (pederasty), as the tone of the aforementioned *aḥādīth* echoes. The Imāms responded to the questions regarding such cases while having in mind the social and cultural demands of Muslim society at the time. Although in many cases—for example, in three of the four quoted *ḥadīths*—they directly addressed the specific phenomenon of sexual relationships of adult men with minor boys; on some occasions, as in the third *ḥadīth*, the Imāms used the term *lūṭī* (and occasionally the term *liwāt*) to refer to this phenomenon as it was widely known among Muslims. As elaborated in Chapter 3, Muslim individuals would employ this concept to describe the acts of adult men (whether married or single) engaging in sex with adolescent boys. Using the language of Shiʿi legal theory, this is a clear indicator that such *aḥādīth* which contain the concepts of *lūṭī* and *liwāt* are also referring to the phenomenon of pederasty (and thus, they are restricted [*muqayyad*]), and not to same-sex sexual relationships between males in an unconfined and absolute manner (*muṭlaq*).

Moreover, in line with Imāmī legal scholarship, boys, until at least age 15 are not made-responsible (*mukallaḥ*). Therefore, in cases where adults would be subject to punishment for breaking Islamic laws, minors would not be punished. This is why minor boys, in the case of *liwāt*, were not to receive capital or divinely ordained punishment for practising this act.²⁹ In fact, only adult males (*lūṭī*) are often deemed to be the subject of capital punishment (death penalty) for the act of *liwāt*, as conveyed in the established apparent meaning of the quoted *aḥādīth*. The third *ḥadīth*—from Imām ʿAlī, “if it was permissible to stone anyone twice, that person would be the *lūṭī*”—implies that the punishment for *liwāt* is only imposed on the *lūṭī* (active adult penetrator) because there is no mention of the punishment of the penetrated person. This makes it clear that the other partner in the act of *liwāt* was a minor boy who was not subject to punishment. Otherwise, if both partners were adults, and thus subject to punishment, the *ḥadīth* should have addressed it, as shown by the *aḥādīth* of the following category of male passivity or *ubna*. In the latter category, the participants in the same-sex sexual behaviour are both adult males, and thus both, according to the *aḥādīth*, are subject to punishments.

Therefore, *liwāt* or male active pederasty addressed by the *aḥādīth* is different from homosexuality. Pederasty is based on non-egalitarian, non-consensual, and power-based sexual relations and often does not involve passionate love

29 al-Khūʿī, *al-Shahādāt wa-l-ḥudūd*, 2: 252; al-Muntaẓirī, *Kitāb al-ḥudūd*, 149–50.

and intimacy. In contrast, homosexuality, as I articulated in this study, is based on egalitarian, consensual, non-power-based sexual relationships between two adult males. Hence, such *aḥādīth* on pederasty, whether reliable or not, are irrelevant, and there is no need for further discussion about this type of the *akhbār*.³⁰

4.3 *Ubna*

Twenty-seven of 135 *ḥadīths* address the category of male passivity (*ubna*), or 17 percent of all *aḥādīth*. Several of these *aḥādīth*, in line with the general understanding of Muslim society at the time, pictures this mode of same-sex sexual practice as a pathological characteristic of the *passive* partner.³¹ According to these *aḥādīth*, a *ma'būn* individual (the penetrated man) is a person afflicted with a kind of disease. This understanding can be attested by a *ḥadīth* attributed to the sixth Imām in which the Imām suggests a cure for a man who was allegedly afflicted with such a disease.³²

However, there is another, though not very strong, possible understanding of such *aḥādīth*: a *ma'būn* person is a man who is addicted to a perverted behaviour, namely to being penetrated by another man, preferably a married person. Given this interpretation of the *aḥādīth*, although a *ma'būn* person was not directly thought to be a sick person, he was deemed addicted to an unusual and perhaps dangerous custom from which he needed to be cured. As such, a *ma'būn* case may be similar to the modern phenomenon of drug addicts who are currently viewed as patients or people who need support to be cured of their addiction.

Whether *ubna* was seen as a disease and pathological condition or an addiction, passive males, as shown in several *ḥadīths*, are tested by God because God created this need in them to examine their purity. Therefore, if a *ma'būn* does not follow a pious life, and practises same-sex sexual acts, he shall not be exempted from punishment, in line with such *aḥādīth*. That is because, given the apparent meaning (*zuhūr*) of the *aḥādīth*, *ma'būn* individuals, despite being afflicted with a disease or addiction, can yet stop practising it. Nevertheless, as a *ḥadīth* from the sixth Imām remarks, they do not stop because they seek sexual pleasure from this behaviour.³³

30 For some similar points in the Sunni context of *ḥadīth*, see Schmitt, "Liwāṭ im Fiqh," 64–69; Kugle, *Homosexuality in Islam*, chap. 3: 180–301.

31 al-Ṭabāṭabā'ī al-Burūjirdī and al-Mu'izzī al-Malāyirī, *Jāmi' aḥādīth al-shī'a*, 25: 474–77, Ḥ: 37655, 37657, 37658, 37659, 37660, 37661.

32 Ibid., 25: 481, Ḥ: 37673.

33 al-Kulaynī, *al-Kāfi*, 5: 551; and al-Ṭabāṭabā'ī al-Burūjirdī and al-Mu'izzī al-Malāyirī, *Jāmi' aḥādīth al-shī'a*, 25: 477, Ḥ: 37661.

Another significant point needs to be discussed here. There are several *ḥadīths* which technically belong to this category, although they appear to be similar to the first category, namely *takhannuth*:

Ja'far b. Muḥammad (the sixth Imām) said: "the Prophet said: 'whoever makes himself available to be played [by other men] God shall create in him a female desire (*shahwat al-nisā'*)'"³⁴

Ja'far b. Muḥammad (the sixth Imām) said: "Imām 'Alī said: 'whenever a man speaks like a woman and walks like a woman and makes himself available to be penetrated the same way as a woman is penetrated, then stone such a man without hesitation.'"³⁵

Despite some similarities to the description of *takhannuth*, these two *khābars* appear to describe passive males who are feminine in their physical appearance and personal behaviours and sexually prefer other (masculine heterosexual) men, taking an allegedly feminised receptive role in sexual intercourse with such men. As demonstrated in Chapter 3, *mukhannathūn* used to be considered feminine males who liked to spend time with females but were usually attracted to the opposite sex. This point can be confirmed by the fact that, unlike the *aḥādīth* related to *takhannuth*, which are mainly attributed to the Prophet, the similar *aḥādīth* on male passivity, which are mainly attributed to the Imāms, established punishments for male passivity. Therefore, it is necessary to distinguish between these two categories and consider the second group of the *aḥādīth* as associated with male passivity.

Although a number of *aḥādīth* suggest that in this type of relationship both the penetrator (*fā'īl*) and the penetrated (*maf'ūl*) should be punished, the *ma'būn*/*maf'ūl* partner is the greater sinner, and thus should accept more responsibility for engaging in this behaviour.³⁶ Therefore, as several *ḥadīths* suggest, they would receive even harsher treatment and would be mentioned exclusively as the subject of punishment:

34 al-Kulaynī, *al-Kāfi*, 5: 549; and al-Ṭabāṭabā'ī al-Burūjirdī and al-Mu'izzī al-Malāyirī, *Jāmi' aḥādīth al-shī'a*, 25: 473, Ḥ: 37650.

35 al-Kulaynī, *al-Kāfi*, 7: 268; and al-Ṭabāṭabā'ī al-Burūjirdī and al-Mu'izzī al-Malāyirī, *Jāmi' aḥādīth al-shī'a*, 30: 462, Ḥ: 46464. As such punishments seem to be harsh, unjustified, or perhaps unacceptable in Shi'i legal discourse, several jurists, as outlined in the first chapter, believe that divinely ordained punishments should not be applied during the absence of the infallible Imāms. For an inclusive discussion on this matter, see Alipour, "Shi'a neo-traditionalist scholars and theology of homosexuality," 206–7.

36 al-Qāḍī al-Nu'mān, *Da'ā'im al-islām*, 2: 456; al-Ṭabāṭabā'ī al-Burūjirdī and al-Mu'izzī al-Malāyirī, *Jāmi' aḥādīth al-shī'a*, 30: 463, Ḥ: 46468.

Muḥammad b. ‘Alī al-Bāqir (the fifth Imām) said: “the penetrated male (*malūṭ*) should be punished by the same punishment as that for fornicator/adulterer (*zānī*).”³⁷

It should become clear by now that same-sex sexual behaviours in male passivity are essentially based on power relations and non-consensual sex. This is why the active-penetrator partner, who is often considered as being attracted to the opposite sex, is considered to take advantage of the vulnerable condition of a passive male and engage in sexual relations without passionate love and intimacy. This situation is clearly far removed from the notion of homosexuality that this study presents.

However, one might object to my understanding of the *aḥādīth* and assert that, although the *aḥādīth* on male same-sex sexual behaviours generally address the relationships between adult men and minor boys or pathological passive males, they are not restricted to these two kinds of relationships. Instead, the *aḥādīth* on this issue essentially imply the illicitness of same-sex sexual practices in general, whether they happen between adult males and very young boys or between free and equal adult males. Assuming this understanding of the *aḥādīth*, the two characteristics of childhood and male pathological passivity do not specify (*takhṣīṣ*) or restrict (*taqyīd*) the forbidden relationships addressed by the *aḥādīth* to the two cases of male pederasty and male pathological passivity.

Nevertheless, it seems that this understanding goes against the apparent meaning of such *aḥādīth* because it is not verified by the historical context of the *aḥādīth* on this issue. In fact, the historical and contextual indicators (*qarā’in*), as demonstrated in Chapter 3, firmly refute a general or absolute interpretation of the *sunna* on same-sex sexual behaviours. Moreover, according to the hermeneutical rules established in Imāmī legal theory, this *sunna* cannot be applied in any general sense, as there are no signs of generality (*‘umūm*) in these *aḥādīth*. Instead, they contain specific signs, that is, of the relationships between adult men and minor boys as well as between adult men and passive pathological males. In the same way, it is not possible to understand such *aḥādīth* in an absolute manner as there are restrictions such as the two restrictions mentioned above. Furthermore, the two categories of pederasty and male passivity are frequently addressed by a fair number of *aḥādīth*. Using the language of legal theory, this point implies that the prohibition of these two phenomena was specifically intended by the *sunna*. Otherwise,

37 al-Kulaynī, *al-Kāfī*, 7: 200; al-Ṭabāṭabā’ī al-Burūjirdī and al-Mu‘izzī al-Malāyirī, *Jāmi‘ aḥādīth al-shī‘a*, 30: 465, Ḥ: 46476.

expressing or emphasising these categories in such a high frequency without having a particular intention would make these expressions useless or in vain (*laghw*). Therefore, the prohibition of pederasty and male passivity should be concluded as the definitive intended meaning of the *aḥādīth* on male same-sex sexual behaviours. However, whether the *sunna* on this issue, more than the two aforementioned categories, has generally prohibited all kinds of same-sex sexual behaviours cannot be attested by these two sets of *aḥādīth*, and thus needs further compelling proofs.

4.4 *Siḥāq*

In Chapter 3, it was explicated that female sexual practice, in general, and female same-sex sexual behaviours in particular, were barely debated within early Muslim patriarchal communities. Whenever this topic was addressed, it was in the context of men relating a fantasy or erotic desire. Thus, even in such cases, women's sexual practice was not the focus. Rather, the central point was males' sexual eroticism. In such contexts, *ḥadīth* literature also dealt with this topic with less urgency and less often than male same-sex sexual behaviours: female same-sex sexual behaviours are in only 14 percent of the *aḥādīth* in contrast to male same-sex sexual practices, namely *liwāṭ* and *ubna*, which constitute 50 percent of the *aḥādīth*.

Due to the dearth of documents and sources on female sexual behaviours in early Muslim society, any definitive interpretation on the nature of Muslim female sexual practices of early times, let alone of Muslim female same-sex sexual behaviours, can hardly be conclusive. However, the *ḥadīth* literature provides us with enough information to confidently suggest that *siḥāq* was a phenomenon commonly known as a sexual practice between an adult woman and a free or slave girl. In fact, there are several *ḥadīths* on this matter resemble *siḥāq* to *liwāṭ*.³⁸ For example, a *ḥadīth* attributed to Imām 'Alī, who said that "saḥq among women is similar to *liwāṭ* among men."³⁹ Noting the *prima facie* apparent meaning of such *akhbār*, one might assume that these two phenomena are similar in their punishments.

However, this does not seem to be an accurate understanding of these *aḥādīth*, as Imāmī jurists often believe in different punishments for *liwāṭ* and *siḥāq*. In the case of *liwāṭ*, *luṭī* (the penetrator adult man) would often be given the death penalty by stoning or other ways of execution while anyone who

38 al-Ṭabāṭabā'ī al-Burūjirdī and al-Mu'izzī al-Malāyirī, *Jāmi' aḥādīth al-shī'a*, 25: 484–85, Ḥ: 37681, 37682, 37683 and 30: 471, Ḥ: 46499.

39 al-Ṭabāṭabā'ī al-Burūjirdī and al-Mu'izzī al-Malāyirī, *Jāmi' aḥādīth al-shī'a*, 25: 484, Ḥ: 37682.

practises *siḥāq*, at least for their first three offences, would be sentenced to flogging.⁴⁰ Although there are a number of *aḥādīth* which imply stoning for *siḥāq*, Imāmī jurists did not accept them, as they did not issue *fatwās* accordingly. Because of the different punishments for *liwāt* and *siḥāq*, jurists deemed it necessary to look for further resemblance between these two phenomena. Several jurists, such as Khumaynī, interpret the point of similarity between *liwāt* and *siḥāq* as addressed by such *aḥādīth* as relating to ways in which these two behaviours might be proved, namely by providing four male witnesses or four separate admissions by the female practitioners of the act.⁴¹ Another possible similarity would be the issue of age difference between the two partners. This means the concept of *siḥāq*, similar to *liwāt*, refers to same-sex sexual relationships between adult women and free or slave girls. Therefore, given these *aḥādīth*, one might argue that *siḥāq* is similar to *liwāt* regarding the partners who play roles in such sexual relationships.

This understanding of female same-sex sexual practice addressed by the aforementioned *aḥādīth* is further evidenced in several other *ḥadīths* on this subject, which tacitly describes conditions in which some women practised sexual relations with free or slave virgin girls immediately after having sexual relations with their husbands—thereby transmitting the sperm of the husbands to those virgin girls and making them pregnant. These *aḥādīth* decreed the legal ruling on and punishment for such women. For example, a *ḥadīth* ascribed to Abi ‘Abdallāh (the sixth Imām) conveys:

If a man had sexual intercourse with his wife, then the wife while carrying his sperm practised *siḥāq* with a slave girl of her husband and thus made her pregnant, then the wife should be stoned, the slave girl should be disciplined and the child is for the father.⁴²

According to this cluster of *aḥādīth*, *siḥāq* can hardly be understood as female same-sex sexual behaviour in its general (*‘amm*) or absolute (*muṭlaq*) sense.

40 al-Khūṭī, *al-Shahādāt wa-l-ḥudūd*, 2: 249–51 and 275.

41 al-Khumaynī, *Tahrīr al-wasīla*, 2: 470. It is striking to note that *siḥāq* is one of the cases where female witnesses are not sufficient to argue against those women who allegedly practised same-sex sexual behaviour: it is necessary for the witnesses to be male. This opinion of Imāmī jurists can perhaps be explained by addressing the dominant hierarchical male culture of Muslim society which allows the male’s gaze to decide or determine whether a female same-sex sexual activity has happened in a case.

42 al-Ṣadūq, *al-Faqīh*, 4: 43; al-Ṭabāṭabā’ī al-Burūjirdī and al-Mu’izzī al-Malāyirī, *Jāmi‘ aḥādīth al-shī‘a*, 30: 473, Ḥ: 46503.

However, this group of *aḥādīth*, together with the first group addressed earlier, may provide a fair explanation to consider those *aḥādīth* which apparently convey absolute utterances as related to the above widely known mode of female same-sex sexual practice, namely sexual practice between an adult woman and a slave or free girl. If this is the case, then *siḥāq* should be recognised as different from present day lesbianism, which is categorically between identified homosexual women based on egalitarian relationships.

5 Male Same-Sex Sexual Penetration Act and the Dilemma of the Absolute Statements

It has arguably been demonstrated that a great portion of the *aḥādīth* on male same-sex sexual behaviours relate to male active pederasty and male passivity, which are essentially different from homosexuality, at least in the sense that this study has conceptualised. However, there are still nearly one-quarter (23 percent) of the *aḥādīth* on this subject which address various issues and I arbitrarily categorised as *other*. A quick review of these *aḥādīth* reveals that several such reports provide clarifications for the Qur'ānic narration of the story of Lot's tribe, comment on other verses of the Qur'ān, provide reasoning for the prohibition of same-sex sexual behaviours, or raise issues that either were discussed in the previous chapter (such as the story of the tribe of Lot) or will be addressed in the next chapter (such as the rational or ethical proofs for the prohibition of same-sex sexual behaviours). Generally speaking, these kinds of issues are not directly relevant to this chapter as Imāmī jurists hardly argued for the prohibition of same-sex sexual behaviour based on such explanatory reports.

5.1 *Absolute Statements and the Premises of Wisdom*

Nevertheless, there are still a dozen *ḥadīths* conveying absolute statements with regard to the prohibition and punishment of males' intercrural or anal penetrative sexual behaviours. In other words, the absolute statements on this set of *aḥādīth*, without conditioning the prohibition or punishment of male same-sex sexual acts to pederasty or male passivity, imply that such practices are prohibited and should be punished whether it happens between an adult and a boy, between two adults of whom one is afflicted with male passivity, or two free adults with equal status. Having not distinguished between the various categories of male same-sex sexual behaviours, Imāmī jurists often refer to several *ḥadīths*, which they consider reliable, and suggest that these *aḥādīth*

prohibit *liwāṭ* in the general sense of male same-sex sexual practice, albeit such *aḥādīth* appear to associate with pederasty or male passivity.⁴³ However, Imāmī jurists occasionally argue for the prohibition of *liwāṭ* by applying the *aḥādīth* which convey *prima facie* absolute statements. For example, al-Khūṭī refers to one of such *khābar* and sees it as reliable.⁴⁴ This *khābar* is narrated by Ḥammād b. ‘Uthmān from the sixth Imām as follows:

I [namely Ḥammād b. ‘Uthmān] asked Abī ‘Abdallāh (the sixth Imām): “[what is the punishment for] a man who penetrates another man? He answered: “if the penetrator is married, [his punishment shall be] death, and if not married, then there shall be flogging for him.” Ḥammād b. ‘Uthmān said: “I asked: what about [the punishment for] the penetrated male?” Abī ‘Abdallāh said: “there shall be death on him in either case, whether married or unmarried.”⁴⁵

Or Muntazirī includes the following *ḥadīth* among the *aḥādīth* he provides to argue for the prohibition of *liwāṭ* in general:⁴⁶

43 al-Muntazirī, *Kitāb al-ḥudūd*, 143–44; al-Khūṭī, *al-Shahādāt wa-l-ḥudūd*, 2: 247–51. It is worth to note that Imāmī jurists have not claimed the existence of *khābar mutawātir* on the prohibition of *liwāṭ* and *siḥāq*. Therefore, as cited in the text, al-Khūṭī advocates for this topic based on *khābar wāḥid* or Muntazirī, while addressing the *aḥādīth* on this topic, does not view these *akhbār* as *mutawātir*. This point is significant because when there is no *khābar mutawātir* on a given topic, each *khābar* is required to be individually examined in terms of the credibility of its chain and content.

44 al-Khūṭī, *al-Shahādāt wa-l-ḥudūd*, 2: 250.

45 al-Kulaynī, *al-Kāfi*, 7: 198; al-Ṭūsī, *Tahdhīb al-aḥkām*, 10: 55; al-Ṭabāṭabā’ī al-Burūjirdī and al-Mu‘izzī al-Malāyirī, *Jāmi‘ aḥādīth al-shī‘a*, 30: 466, Ḥ: 46480. As will be noted later, although this *ḥadīth* is not reliable, it is interesting to examine the logic behind it stating different punishments for married and unmarried penetrator and penetrated men. Given several other *khābars* on this issue, it appears that such differences, more than being designed to protect the interests of the wife or female partner, concern the various situations of penetrator and penetrated men. As attested in Chapter 3, Muslim patriarchal culture has not even bothered to independently discuss female sexual gratification. Instead, in this culture masculine-male superiority was the central focus, and thus had to be protected (see El-Rouayheb, *Before Homosexuality*, Chapter 1). Therefore, it was important for this society to detect whether a man who penetrates a boy was married, and thus in no need of having sexual relationships with another man. Hence, such a married male penetrator was deemed a traitor to the masculine-male superiority mould of society. However, if such a person was unmarried, then, according to this culture, he was most likely viewed a forgivable traitor and thus was sentenced to a lesser punishment. On the other hand, a man who submitted his body to another man to be penetrated was regarded an unforgivable traitor, married or unmarried. Therefore, in their view, he ought to be punished harshly to cleanse Muslim society from such a threat and misery.

46 al-Muntazirī, *Kitāb al-ḥudūd*, 144.

Yūnus b. ‘Abd al-Raḥmān attributed [this *khābar*] to Abī ‘Abdallāh (the sixth Imām) through *some* of the Shi‘i companions and said: “I have heard [from Abī ‘Abdallāh] who said: ‘the prohibition of anus is greater than the prohibition of vagina/vulva (*farj*), and God destroyed a nation due to the prohibition of the anus but has *not* destroyed anyone for the prohibition of vagina/vulva.’”⁴⁷

It appears that both *ḥadīths* are uttered in an absolute manner which may include any kind of male same-sex sexual behaviours. For example, the *ḥadīth* of Ḥammād b. ‘Uthmān appears to be addressing all kinds of male same-sex sexual penetrative acts, and it is not restricted (*muqayyad*) to the kind that is distinguished as male passivity in this study. The *ḥadīth* narrated by Yūnus b. ‘Abd al-Raḥmān has apparently been uttered with overly broad implications, so that it may in fact include any sort of anal sexual practice, whether same-sex or opposite-sex anal penetration behaviours. Therefore, it seems that this *ḥadīth* should not be restricted to same-sex sexual penetration acts such as male pederasty or male passivity.

There are more such *aḥādīth* apparently conveying absolute statements on the prohibition of male same-sex sexual behaviours. Let us review two other *ḥadīths* of this kind:

Muḥammad b. ‘Alī al-Bāqir (the fifth Imām) from Jābir b. ‘Abdallāh al-Anṣārī who said: “The Prophet forbade people from practising *al-mukā‘ama* and *al-mukāma‘a*: *al-mukā‘ama* meaning a man who kisses another man on his lips and *al-mukāma‘a* which implies two men sleeping next to each other unnecessarily without having a cover between them.”⁴⁸

Ja‘far b. Muḥammad (the sixth Imām) said: “A male who is penetrated in his anus shall be stoned, both of the penetrator (*fā‘il*) and the penetrated (*maf‘ūl bihi*).”⁴⁹

Based on these *aḥādīth*, Shi‘i jurists might go against the core thesis of the current study. This research advocates the idea that male same-sex sexual behaviours in Imāmī *ḥadīth* often, if not always, refer to non-egalitarian and

47 al-Kulaynī, *al-Kāfī*, 5: 543; al-Ṭabāṭabā‘ī al-Burūjirdī and al-Mu‘izzī al-Malāyirī, *Jāmi‘ aḥādīth al-shī‘a*, 25: 462, Ḥ: 37618.

48 al-Ṣadūq, *Ma‘ānī l-akḥbār*, 300; al-Ṭabāṭabā‘ī al-Burūjirdī and al-Mu‘izzī al-Malāyirī, *Jāmi‘ aḥādīth al-shī‘a*, 25: 480, Ḥ: 37672.

49 al-Qāḍī al-Nu‘mān, *Da‘āim al-islām*, 2: 456; al-Ṭabāṭabā‘ī al-Burūjirdī and al-Mu‘izzī al-Malāyirī, *Jāmi‘ aḥādīth al-shī‘a*, 30: 463, Ḥ: 46468.

non-consensual same-sex sexual practices, such as male pederasty and male passivity, rather than modern homosexuality. These jurists might remark that, although a great portion of such *aḥādīth* on this matter addresses male passivity and pederasty, there is still a set of the *aḥādīth* conveying absolute statements regarding male same-sex sexual behaviours. Therefore, one could assert that, following such *aḥādīth*, not only are male same-sex sexual behaviours such as male pederasty and male passivity prohibited in Islam, but consensual and egalitarian same-sex sexual behaviours of adult males should also be prohibited in line with such reports. To successfully proceed, the current study is required to present a proper response to this objection.

This proof of Imāmī jurists is built on the idea that there exists a set of *aḥādīth* on this topic, such as the two *khābars* quoted above, conveying absolute statements concerning the prohibition of male same-sex sexual behaviours. Making a response to this critique based on Imāmī *ijtihād*, it is necessary to recall the two hermeneutical terms of absolute and restricted statements as discussed in Chapter 2. The revelatory texts are uttered either as absolute statements (*kalām muṭlaq*) or as restricted statements (*kalām muqayyad*). When there is any verbal, contextual, or rational restriction (*taqyīd*) in a given scriptural utterance, it appears to be a restricted statement. Otherwise, it should be deemed as an absolute statement. However, assuming Shi'ī legal theory, this *prima facie* absolute meaning (*itlāq badwī*) could be approved as an *intended* absolute meaning of the utterance, if it meets the following qualifications, which are called the premises of wisdom (*muqaddimāt al-ḥikma*):

- The lawgivers (God, the Prophet, or the Imāms) should be in a position to seriously express their whole intended meaning in a given topic.
- The lawgivers do not address any contextual or verbal restrictions concerning the topic (either attached to the text or anywhere else in the scriptural sources), although it is possible for the lawgivers to mention them if intended.
- There should not exist a specific meaning or referent for the topic in the context of speaking (*al-qadr al-mutayaqqan fī maqām al-takhāṭub*), meaning that it should not evoke a specific meaning in people's mind when they address this topic.⁵⁰

However, any utterance which seems to have an absolute meaning but may not meet any of these premises of wisdom should not be admitted to have an intended or established absolute meaning. For example, if the lawgivers are not in a position to seriously express their whole intended meaning, or if the

⁵⁰ See al-Khurāsānī, *Kifāyat al-uṣūl*, 247–48.

statement contains verbal or contextual or rational indicators for a restricted meaning, or if the *context of speaking* suggests a specific meaning or case to which that statement is referring, then in all such conditions, there would not occur an established absolute meaning for the utterance.

5.2 *Examining the Premises of Wisdom*

Let us now examine whether, in the case of male same-sex sexual practices, there occurs an established absolute meaning of the *aḥādīth*. It appears that a close reading of the whole *aḥādīth*, including those with *prima facie* absolute statements, does not support the view of an established absolute statement in this case, because it does not meet all three premises of wisdom at once. Such *aḥādīth* do seem to meet the first premise, meaning that the lawgivers are in the position of expressing the whole intended meaning in a serious way, but the other two premises do not apply here. This is because these *aḥādīth* are surrounded by at least several verbal and contextual indicators that restrict the meaning of the *aḥādīth* to specific conditions. For example, several of these *aḥādīth* address the acts of the tribe of Lot and, as has been confirmed in the previous chapter, the same-sex sexual behaviour of the people of Lot can appropriately be categorised as sexual assault of strangers who would arrive in the town of Lot's tribe.⁵¹ Therefore, such indicators act as barriers to generating any established absolute meaning from such *akhbār*. There are still several other *aḥādīth* which refer to the act of anal penetration or the males who wish to be penetrated.⁵² Nevertheless, in the context of early Muslim society in which these *aḥādīth* were composed, such males were conceived of as *ma'būn* who were afflicted with *ubna*. Therefore, these scriptural reports address men who can rightly be interpreted as pathological passive males according to the early Muslim culture.

Moreover, as explicated, a high percentage of the *aḥādīth* on male same-sex sexual behaviours explicitly address the two categories of pederasty and male passivity. Therefore, one may compellingly argue that the few *ḥadīths* that imply absolute statements should also be understood in light of this dominant context: that is, these *aḥādīth* should be interpreted as also referring to pederasty or male pathological passivity, rather than an absolute statement on male same-sex sexual behaviours.

51 al-Ṭabāṭabā'ī al-Burūjirdī and al-Mu'izzī al-Malāyirī, *Jāmi' aḥādīth al-shī'a*, 25: 466–67, Ḥ: 37627, 37631; 30: 462–63, Ḥ: 46466, 46467.

52 Ibid., 25: 469–70 and 475, Ḥ: 37637 and 37656; 30: 462, Ḥ: 46465.

In addition, the third premise of wisdom, I believe, is not met in this case. We have realised that there seem to be enough sources and documents to demonstrate that in the context of early Muslim society (in particular, from the ‘Abbāsīd period onwards), whenever male same-sex sexual practice was addressed—whether in vernacular language, medical terms, literature (poetry and prose), or *mujūn*—it commonly either meant *liwāṭ* as male pederasty or *ubna* as male pathological passivity. Therefore, it would seem that in the context of early Muslim society, there existed specific meanings or referents for the case of male same-sex sexual behaviours in the context of speaking (*al-qadr al-mutayaqqan fī maqām al-takhāṭub*), that is, pederasty and male passivity. It has been clarified that *aḥādīth* were generally issued based on actual incidents and events happening in Muslim societies. They were not statements on hypothetical situations. Therefore, the concepts and terms used by the Prophet or the Imāms should be understood in relation to the speaking context of the Muslim society of the time and the way in which they would have communicated and understood each other. Therefore, although a number of the *aḥādīth* on male same-sex sexual behaviours apparently include absolute statements on this behaviour, since they lack the third premise of wisdom, they do not have an *established* absolute meaning for this matter. This means such *aḥādīth* have to be understood based on their specific referents concerning male same-sex sexual behaviours in the context of early Muslim society. Thus, their established apparent meaning seems to convey restricted statements of male same-sex sexual behaviours as referring to pederasty and male pathological passivity.

Nonetheless, traditional jurists might still insist on their interpretation that these *aḥādīth* on male same-sex sexual behaviours convey absolute statements, either because they believe that there is not enough verbal or contextual evidence or there is no specific meaning in the context of speaking to prevent the occurrence of an absolute statement on this issue. In this case, it is necessary to move on to another level of argumentation as Shi‘ī *ijtihād* suggests. At this level, there is no choice but to directly examine the *aḥādīth* which allegedly convey absolute statements on male same-sex sexual behaviours. It has been noted that, given the methodology of Imāmī *ijtihād*, examining a *ḥadīth* requires two steps: first, investigating the sources of these *aḥādīth* and the chains of transmission of such *aḥādīth* to see whether they are authentic; and, second, examining the content of the *aḥādīth* and explore whether they convey a clearly established apparent meaning; or whether, conversely, they are ambiguous (*mujmal*), controversial, or contradicted by other sources, such as the Qurʾān, other *aḥādīth*, or reason; or perhaps whether they simply can be

understood differently in a way which is compatible with egalitarian consensual same-sex sexual relationships.

5.3 *Examining the Isnād*

As far as the *ḥadīth* sources and chains are concerned, it appears that the sources containing such *aḥādīth* are not as authentic as some traditional Imāmī jurists may assert. A quick review leads to the realisation that several of these sources are not reliable according to Shi'ī jurists' criteria. Among the sources containing these *aḥādīth* is *Da'ā'im al-islām* of al-Qāḍī al-Nu'mān which is not a reliable source for the Shi'ī *ijtihād*ic process because he did not provide the names of transmitters of the *aḥādīth* in his compilation. This is particularly the case when this source uniquely reports a *ḥadīth* which is not collected by other reliable Imāmī *ḥadīth* compilations.⁵³ Among the *aḥādīth* on male same-sex sexual practices, two *ḥadīths* have been collected only by *Da'ā'im al-islām*.⁵⁴ Therefore, following Shi'ī *ijtihād*, these *aḥādīth* cannot be considered reliable for deriving a legal ruling on male same-sex sexual behaviours.

Another source which has recorded several such *aḥādīth* is entitled *al-Ja'fariyyāt* or *al-Ash'athiyāt*; it was apparently compiled by Muḥammad b. Ash'ath al-Kūfī.⁵⁵ This is a highly contested source. Although the *ḥadīth* scholar al-Mīrzā Ḥusayn al-Nūrī argues for the reliability of this collection, Imāmī jurists often do not employ the *aḥādīth* of this source to their *ijtihād*.⁵⁶ They believe that this book is neither one of the widely known or credible *ḥadīth* treatises nor is its tie to the author guaranteed by various chains or even one reliable chain.⁵⁷ Moreover, as al-Khū'ī notes, although the early *rijāl* scholar al-Najāshī had a reliable connection to *al-Ja'fariyyāt*, the book as received by us contains a chain which does not correspond with the chain of the book which existed in the hands of al-Najāshī.⁵⁸ Therefore, what is received by us has an unreliable chain and what had a reliable chain has not been received by us. In addition, the contemporary jurist Murtaḍā l-Ḥā'irī holds that even if

53 al-Najafī, *Jawāhir al-kalām*, 4: 348; al-Khū'ī, *al-Tanqīh*, 4: 312; al-Khumaynī, *al-Makāsib*, 1: 56.

54 al-Qāḍī al-Nu'mān, *Da'ā'im al-islām*, 2: 455, 456; al-Ṭabāṭabā'ī al-Burūjirdī and al-Mu'izzī al-Malāyirī, *Jāmi' aḥādīth al-shī'a*, 25: 466, Ḥ: 37624 and 30: 463, Ḥ: 46468.

55 al-Ṭabāṭabā'ī al-Burūjirdī and al-Mu'izzī al-Malāyirī, *Jāmi' aḥādīth al-shī'a*, 30: 463–64, Ḥ: 46470.

56 al-Nūrī, *Khātimat Mustadrak*, 1: 15–37.

57 al-Najafī, *Jawāhir al-kalām*, 21: 398. It should be noted that the objection of various chains or a reliable chain to the author(s) being lacking has been mentioned by Shi'ī *ḥadīth* scholars and jurists with regard to several of these sources.

58 al-Khū'ī, *Mabāni*, 1: 226.

the chain of the book to this person, namely Ash'ath al-Kūfi, was reliable, the *aḥādīth* of the book should not be regarded reliable, as this person attributes the *aḥādīth* of his collection to the sixth Imām through two other individuals in the chain: Mūsā b. Ismā'īl and Ismā'īl b. Mūsā b. Ja'far. Although the latter, as al-Ḥā'irī notes, is assessed as reliable by the *rijāl* scholar, the former has not been described at all. Thus, his credibility is unknown (*majhūl*), and this book, according to al-Ḥā'irī, should be held unreliable.⁵⁹

There is another collection of *ḥadīth* written by al-Ṣadūq in a book entitled *Iqāb al-a'māl* which also uniquely contains a *ḥadīth* on male same-sex sexual behaviours.⁶⁰ However, it seems that the *aḥādīth* of this book have not generally been appraised as credible as those al-Ṣadūq collected in his master compilation, *al-Faḥīh*. This point aside, according to Imāmī *ḥadīth* criteria, this particular *khabar* cannot be reliable as Abū Hurayra, a famous transmitter of the Sunni *ḥadīth* scholarship, is in the chain of transmitters of the *ḥadīth*. He however has been described a weak person and a liar by Imāmī *ḥadīth* experts, and thus any *ḥadīth* transmitted by him is deemed weak and unreliable.⁶¹

Furthermore, yet another *ḥadīth* was collected by *Mustadrak Wasā'il al-shī'a* of al-Mirzā Ḥusayn al-Nūrī from an earlier *ḥadīth* book entitled *Lubb al-lubāb* of al-Quṭb al-Rāwandī (d. 573/1177).⁶² *Lubb al-lubāb* is not viewed as one of the highly credible *ḥadīth* sources which Imāmī jurists commonly use to exercise *ijtihād*. Moreover, this particular *ḥadīth* has a broken chain, as one or more transmitters are missing in the chain of the *khabar*. This kind of *ḥadīth*, which contains missing transmitters in its chain of transmission, is technically called *mursal*, so is not held reliable.

There is yet another *ḥadīth* collected by *al-Maḥāsīn* of al-Barqī; a *ḥadīth* compilation which, as explained earlier in this chapter, is not as authentic as the four major Imāmī *ḥadīth* compilations.⁶³ This is because the scholars of *Ilm al-rijāl* and *Ilm al-fihrist* often believe that, although al-Barqī himself was a reliable person, he used to transmit *akhbār* from weak and non-credible people and also relied on *aḥādīth* with broken chains (*akhbār marāsīl*, sing. *khabar mursal*).⁶⁴ Therefore, Imāmī jurists were mainly sceptical and cautious in their *ijtihād* not to rely on the *aḥādīth* uniquely collected by *al-Maḥāsīn*.

59 See Shabzindadār, "Sharḥ-i 'ilm."

60 al-Ṭabāṭabā'ī al-Burūjirdī and al-Mu'izzī al-Malāyirī, *Jāmi' aḥādīth al-shī'a*, 25: 467, Ḥ: 37629.

61 See Sharaf al-Dīn al-Mūsawī, *Abū Hurayra*.

62 al-Ṭabāṭabā'ī al-Burūjirdī and al-Mu'izzī al-Malāyirī, *Jāmi' aḥādīth al-shī'a*, 25: 467, Ḥ: 37630.

63 al-Ṭabāṭabā'ī al-Burūjirdī and al-Mu'izzī al-Malāyirī, *Jāmi' aḥādīth al-shī'a*, 30: 462, Ḥ: 46463.

64 al-Najāshī, *Rijāl*, 76; al-Ṭūsī, *al-Fihrist*, 62. However, al-Shaykh al-Ṭūsī in his *Rijāl* book (see al-Ṭūsī, *Rijāl*, 373, 383), while counting al-Barqī as a companion of *al-Jawād* (the ninth Imām) and *al-Hādī* (the tenth Imām), does not acknowledge his reliability in *ḥadīth*.

Moreover, the chain of this specific *ḥadīth* is assessed as weak (*ḍaʿīf*) because of its inclusion of Jaʿfar b. Muḥammad b. ʿUbaydallāh and ʿAbdallāh b. Maymūn al-Qaddāh both of whom have not been held credible (*thiqa*) by *rijāl* scholars. Nevertheless, let us examine the *isnād* of this *khbar*:

Aḥmad b. Muḥammad al-Barqī from Jaʿfar b. Muḥammad b. ʿUbaydallāh from ʿAbdallāh b. Maymūn al-Qaddāh from Abī Abdallāh (the sixth Imām):⁶⁵

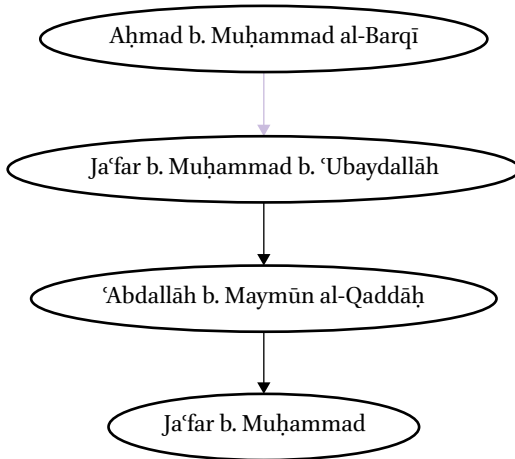


FIGURE 8
Isnād of a *ḥadīth* on males
same-sex sexual behaviour

In this *isnād*, ʿAbdallāh b. Maymūn al-Qaddāh, who has heard and directly reported the *khbar* from the sixth Imām, does not have strong credibility (*tawthīq*). Even though al-Najāshī describes him a reliable transmitter, al-Ṭūsī, while counting him as a companion of the sixth Imām, does not see him reliable.⁶⁶ Moreover, since al-Qaddāh was accused of being the founder of Ismāʿīlī Shiʿism and an extremist on this matter, both al-Khūʿī and al-Tustarī, prominent twentieth century Shiʿi *rijāl* scholars, needed to make an extra effort to defend that this person was not an extremist or the founder of Ismāʿīlī Shiʿism in order to arguably attest that he should be counted a credible person.⁶⁷

However, the weakness of this *khbar* is related even more to the second person in the chain of transmission: Jaʿfar b. Muḥammad b. ʿUbaydallāh.

65 To indicate that al-Barqī is the first person who recorded this *ḥadīth*, namely *al-Maḥāsīn*, the arrow from him (first chain) to the next person (second chain) has been highlighted in a different colour. The same structure will be followed in the following *ḥadīth* chains.

66 See al-Najāshī, *Rijāl*, 213; al-Ṭūsī, *Rijāl*, 231 and *al-Fihrist*, 168–69.

67 See al-Khūʿī, *Muʿjam*, 10: 378–82; al-Tustarī, *Qāmūs*, 6: 635–36.

Al-Najāshī, while addressing al-Qaddāh, indicates that Ja‘far b. Muḥammad b. ‘Ubaydallāh was his student but never mentions him independently. Nor does al-Najāshī describe him as a credible or trustworthy narrator.⁶⁸ In addition, while al-Ṭūsī does not address him in his *rijāl* book, he does briefly refer to him in his *al-Fihrist* and attributes a book to him.⁶⁹ Although al-Ṭūsī asserts that he had a specific *isnād* to this book, he does not explicitly or implicitly describe this person or his book as authentic.⁷⁰ Since this transmitter is not discussed by either al-Najāshī or al-Ṭūsī in their *rijāl* works, al-Tustarī concludes that this reporter is unknown or a stranger (*gharīb*) in *ḥadīth*, and thus cannot be held credible.⁷¹ Therefore, the chain of this *khābar* should be viewed as weak and unreliable.

Nevertheless, there are still several *ḥadīths* conveying absolute statements with regard to the prohibition and punishments of males’ intercrural or anal penetrative sexual behaviours which have been addressed by the reliable Imāmī *ḥadīth* compilations. For example, the two previous *ḥadīths* ascribed to the sixth Imām—namely the *khābar* transmitted by Ḥammād b. ‘Uthmān and the one narrated by Yūnus b. ‘Abd al-Raḥmān—imply the prohibition of male same-sex sexual behaviours via absolute statements, and both were collected by *al-Kāfi* of al-Kulaynī. Or consider the following *khābar* which also was collected by *al-Kāfi*:

Abū Yaḥyā al-Wāsiṭī attributes to an Imām without specifying the Imām’s name (*rafa‘ahu*) and said: “I asked *him* about [the punishment of] two men who practised intercrural sex (*yatafākhadhān*),” *He* answered: “their punishment should be similar to the punishment for fornication.”⁷²

The following *khābar* was collected by three of *al-Kutub al-arba‘a*: *al-Kāfi*, *al-Tahdhīb*, and *al-Istibṣār*:

68 al-Najāshī, *Rijāl*, 213.

69 al-Ṭūsī, *al-Fihrist*, 93.

70 Al-Khūṭī believes that al-Ṭūsī’s *isnād* to the book of Ja‘far b. Muḥammad is unreliable because there are two transmitters in this chain, namely Abū al-Mufaḍḍal and Ibn Buṭṭa, who are not described as reliable by Shi‘i *ḥadīth* and *rijāl* scholars (al-Khūṭī, *Muḥjam*, 5: 83–84).

71 al-Tustarī, *Qāmūs*, 2: 675–76.

72 al-Kulaynī, *al-Kāfi*, 7: 200; al-Ṭabāṭabā‘ī al-Burūjirdī and al-Mu‘izzī al-Malāyirī, *Jāmi‘ aḥādīth al-shī‘a*, 30: 465, Ḥ: 46473.

Sulaymān b. Hilāl from Abī ‘Abdallāh [who has been asked] on a man practising [sexual activities] with another man. Sulaymān b. Hilāl said: “Abī ‘Abdallāh (the sixth Imām) said: ‘if [the sexual practice is] less than anal [penetration], then the man should be flogged, and if [it is] anal [penetration], then he was made to stand straight and struck with a sword once ...”⁷³

Or consider the next *khobar*, recorded by al-Ḥurr al-‘Āmilī in *Tafṣīl wasā’il al-shī’a* from Sa’d b. ‘Abdallāh’s book entitled *Baṣā’ir al-darajāt*:

Yazīd b. ‘Abdalmalik said: “I heard from Abū Ja’far (the fifth Imām) who said: ‘there should be stoning for the penetrator and the penetrated, whether both males or a male and a female, if both are married; and there should be stoning for the penetrated male whether married or unmarried.’”⁷⁴

Yet, this does not mean that the *akhbār* collected by reliable *ḥadīth* compilations are generally and necessarily thought to be authentic by Shi’i jurists. In fact, the majority of Imāmī jurists believe that the *aḥādīth* of the reliable sources, such as *al-Kutub al-arba’a*, still need to be examined in terms of the chain of transmission (*isnād*). Therefore, we need to continue our discussion here on the *isnād* of such *aḥādīth* collected by these sources. Interestingly, several of the *akhbār* on this subject collected by such *ḥadīth* sources seem to have unreliable chains of transmission according to the Imāmī *ḥadīth* criteria. For example, the *khobar* from Yūnus b. ‘Abd al-Raḥmān has the names of one or more transmitters missing from the chain. Let us first consider the *isnād* of this *ḥadīth*:

Muḥammad b. Ya’qūb from ‘Ali b. Ibrāhīm from Ibrāhīm b. Hāshim from Ismā’īl b. Marrār from Yūnus b. ‘Abd al-Raḥmān from *some of our companions* from Abī ‘Abdallāh (the sixth Imām):

73 al-Kulaynī, *al-Kāfī*, 7: 200; al-Ṭūsī, *Tahdhīb*, 10: 52 and *al-Istibṣār*, 4: 219; al-Ṭabāṭabā’ī al-Burūjirdī and al-Mu’izzī al-Malāyirī, *Jāmi’ aḥādīth al-shī’a*, 30: 467, Ḥ: 46487.

74 al-Ḥurr al-‘Āmilī, *Tafṣīl wasā’il al-shī’a*, 28: 155; al-Ṭabāṭabā’ī al-Burūjirdī and al-Mu’izzī al-Malāyirī, *Jāmi’ aḥādīth al-shī’a*, 30: 466, Ḥ: 46479.

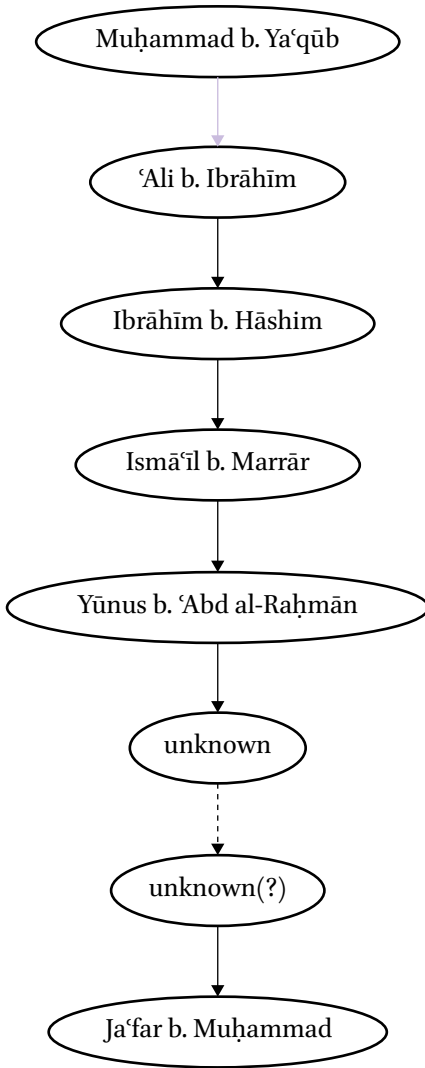


FIGURE 9
Isnād of a *ḥadīth* on the prohibition of
 anal intercourse

As Figure 9 shows, in the *isnād* of the *ḥadīth* after Yūnus, there should be one or more transmitters before it can be attributed to the sixth Imām. As al-Najāshī notes, Yūnus himself explicitly pointed out that, although he had met the sixth Imām in Mecca (between *Ṣafā* and *Marwa*), he could not ask him questions, and thus he could not directly ascribe any *ḥadīth* to him.⁷⁵ However, Yūnus did not mention his mediators to the sixth Imām, which is

⁷⁵ al-Najāshī, *Rijāl*, 446.

why al-Kulaynī refers to the missing transmitters between Yūnus and the sixth Imām with the wording “some of our companions”. Therefore, according to Imāmī *ḥadīth* criteria, this *khābar* should be counted as *mursal*, as it contains one or more broken chains in its *isnād*, and thus not authentic. Having said that, Yūnus b. ‘Abd al-Raḥmān is often held to be a reliable transmitter of *khābar*.⁷⁶ For example, al-Najāshī describes him as a respected person among the *ḥadīth* narrators with high religious status.⁷⁷ Al-Ṭūsī notes that, although Yūnus was accused by the *ḥadīth* scholars of Qum of not being trustworthy, he was a companion of the seventh Imām and a reliable transmitter of *ḥadīth*.⁷⁸ In addition, in line with these scholars, Yūnus was a transmitter of *ḥadīth* who never transmitted from weak or unknown transmitters. Therefore, if he transmitted a *ḥadīth* from a companion without specifying his name, this does not imply that the *ḥadīth* is not authentic. Thus, the *aḥādīth* with broken chains, if narrated by Yūnus, should be deemed reliable.

Nevertheless, even if one tends to agree with those scholars who hold that the *aḥādīth* with broken chains from Yūnus are authentic, this specific *khābar* should still be counted as unreliable because of the second chain, as the direct transmitter from Yūnus is a person called Ismā‘īl b. Marrār. This person is unknown in his reliability as a *ḥadīth* transmitter, meaning that there is no description of him in *rijāl* and *ḥadīth* scholarships.⁷⁹ Al-Ṭūsī only mentions this person’s name as a transmitter who has not narrated from one of the Imāms without any indications as to his credibility.⁸⁰ Therefore, the *khābar* should be viewed unreliable.⁸¹ Moreover, although ‘Alī b. Ibrāhīm is believed to be a credible person by *rijāl* scholars,⁸² his father, namely Ibrāhīm b. Hāshim, was not explicitly specified as a trusted transmitter of *ḥadīth* by the early Shi‘i *rijāl* and *fihrist* authorities.⁸³

The *ḥadīth* from Abū Yaḥyā l-Wāsiṭī (also collected by *al-Kāfi*) contains a defective chain, too. The chain of the *khābar* is as follows:

76 al-Khū‘ī, *Mu‘jam*, 21: 220–26.

77 al-Najāshī, *Rijāl*, 446.

78 al-Ṭūsī, *Rijāl*, 394–95.

79 al-Majlisī, *Biḥār al-anwār*, 86: 23; al-‘Āmilī (Muḥammad b. Ḥasan), *Istiqṣā’ al-i‘tibār*, 3: 76–77.

80 al-Ṭūsī, *Rijāl*, 412.

81 Although some scholars (see, for example, al-Khū‘ī, *Mu‘jam*, 4: 96–97) discuss this person and try to verify his reliability through complicated methods of *ḥadīth* scholarship, the authenticity of this *ḥadīth*, as the above discussion shows, is strongly contested, and thus it cannot readily be argued for the prohibition of male same-sex sexual behaviours.

82 al-Najāshī, *Rijāl*, 260.

83 al-Ṭūsī, *al-Fihrist*, 35–36 and *Rijāl*, 353; al-Najāshī, *Rijāl*, 16.

Muḥammad b. Ya‘qūb from Muḥammad b. Yaḥyā from Aḥmad b. Muḥammad from Muḥammad b. Hārūn from Abū Yaḥyā l-Wāsiṭī, Rafa‘ahu ...(?)

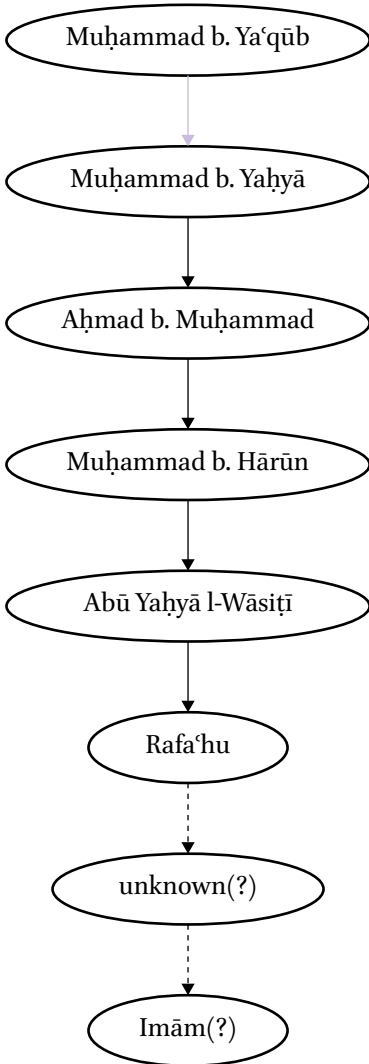


FIGURE 10
Isnād of a *ḥadīth* on males *intercrural* same-sex sexual behaviour

As Figure 10 illustrates, the first transmitter, namely Abū Yaḥyā l-Wāsiṭī (his name is Suhayl b. Ziyād) did not mention the name of the Imām to whom he was attributing the *khābar*, if he was ascribing it to an Imām at all. Technically, such a *khābar* is called *marfū‘*. This term has different meanings in *ḥadīth*

scholarship. However, concerning a suitable notion of the term in the context of this *khobar*, *marfūʿ* consists of a *khobar* which is apparently ascribed to an infallible Imām through the term “*rafaʿa*” (lifted up), whereby one or more transmitters are removed from the chain before the *khobar* could be attributed to the Imām. In this case, Abū Yaḥyā did not specify the Imām’s name as well. Therefore, this also offers the possibility of considering this *khobar* as a *khobar marfūʿ* not because there is any missing transmitter in the chain of the *ḥadīth* but because Abū Yaḥyā is directly narrating the *khobar* from or ascribing it to one of the Imāms without specifying his name. However, it appears that the Imām to whom Abū Yaḥyā was attributing this *khobar* could be the eleventh Imām, namely Ḥasan al-ʿAskarī, as al-Najāshī indicates that the man met this Imām. However, there is no way to be sure that he is ascribing the *khobar* to Ḥasan al-ʿAskarī.⁸⁴ Regardless of this objection, the person is highly controversial in terms of reliability concerning the transmission of *aḥādīth*. According to al-Najāshī, several *ḥadīth* scholars believed that Abū Yaḥyā was not precise in collecting and transmitting *aḥādīth*.⁸⁵ Al-Ṭūsī, in *al-Fihrist*, while addressing this person, does not explicitly assess him as reliable.⁸⁶ He also refers to several names that are similar to Abū Yaḥyā in his *Rijāl* but no words on their reliability are specified by al-Ṭūsī.⁸⁷ Al-Khūʿī also addresses several controversies about this person and ultimately upholds that there is no other *ḥadīth* collected by *al-Kutub al-arbaʿa* transmitted by this person from an infallible Imām directly or indirectly.⁸⁸ Therefore, it appears that this *khobar* should be counted unreliable and cannot be applied to argue against male same-sex sexual behaviours.

The investigation of the *isnād* of the *aḥādīth* can be continued to show that there are yet more *aḥādīth* on this topic which, according to Imāmī *ḥadīth* criteria, should be assessed as unreliable. For example, the above *ḥadīth* collected by al-Ḥurr al-ʿĀmilī appears to be a disputed report due to the controversy over the origin and validity of the *ḥadīth* collection attributed to Saʿd b. ʿAbdallāh, namely *Baṣāʿir al-darajāt*,⁸⁹ or the *khobar* collected by al-Ṣadūq in *Maʿānī l-akḥbār*, ascribed to the Prophet by the fifth Imām through Jābir b. ʿAbdallāh al-Anṣārī (a companion of Muḥammad), on two males doing *mukāʿama* and *mukāmaʿa* also appears to be defective because of the presence of Hishām b. Aḥmad al-Yarbūʿī in the chain of this *khobar*. This person is unknown, as he has not been described as reliable by *rijāl* and *ḥadīth* scholars. Moreover, the

84 al-Najāshī, *Rijāl*, 192.

85 Ibid., 192.

86 al-Ṭūsī, *al-Fihrist*, 142.

87 al-Ṭūsī, *Rijāl*, 427, 451, and 452.

88 al-Khūʿī, *Muʿjam*, 9: 375–76.

89 Anṣārī, “Māhiyyat-i kitāb-i Baṣāʿir al-darajāt.”

other transmitter in the chain of this *khavar* is ‘Alī b. Muḥammad b. Qutayba, whose credibility in the transmission of *aḥādīth* is disputed by Imāmī scholars. Therefore, al-Khū‘ī supports the view which advocates for the unreliability of this transmitter.⁹⁰ In addition, the last narrator in the chain of this *khavar* is ‘Abd al-Wāḥid b. Muḥammad b. ‘Ubdūs al-Naysābūrī al-‘Aṭṭār whose credibility is unknown (*majhūl*) according to al-Khū‘ī.⁹¹

However, it is not the aim of this study to examine every single *khavar* on this topic. Instead, it is important for this research to demonstrate that the *aḥādīth* are not as reliable and straightforward as some traditional jurists seem to believe. I hope that the examinations offered by this study thus far successfully elaborate on this point. Thus, I shall move on to the second level of debate examining the content of such *aḥādīth*. I will see if, regarding the Shi‘i legal scholarship, there is a convincing suggestion on whether the content of the *aḥādīth* conveys an absolute apparent meaning against male same-sex sexual behaviours.

5.4 *Examining the Contents*

Jurists move on to this level of debate when they believe that a given *ḥadīth* is sound or reliable in terms of its chain, and thus it can potentially be applied to its relevant topic. However, they still need to examine the content of the *ḥadīth* to see whether it can be used to argue for or against a given topic. As far as male same-sex sexual behaviours are concerned, let us assume that, at least, a number of *aḥādīth* collected by reliable Shi‘i sources, such as *al-Kutub al-arba‘a*, are sound (*ṣaḥīḥ*) or reliable (*muwaththaq*), and thus can potentially be applied to argue for the prohibition and punishments of male intercrural or anal same-sex sexual behaviours.

Although a comprehensive legal debate on the content of the *aḥādīth* requires a much larger space, it is beyond the scope of this study. Instead, I shall briefly examine the assertion that the content of the *aḥādīth* conveys an absolute apparent meaning against male same-sex sexual behaviours. In fact, one might even wonder whether such *aḥādīth* inclusively imply the prohibition of all kinds of male same-sex sexuality and there are no other plausible interpretations. I suggest that the *aḥādīth* are not inclusive on this matter because there is an alternative understanding which could be verified as the established apparent meaning of such *aḥādīth*, that is, males’ intercrural or anal same-sex sexual behaviours are only prohibited in Islam if these practices may not be located in Islamic marriage (*nikāḥ*).

⁹⁰ al-Khū‘ī, *Muḥjam*, 13: 171–72.

⁹¹ *Ibid.*, 12: 41–42.

To comprehend this view, it is useful to examine a *ḥadīth* referring to three possible kinds of anal intercourse: between a man and a woman, a man and a minor boy, and a man and another passive man.⁹² According to this report, such practices of anal intercourse are prohibited in Islam. However, a nearly unanimous approach in Shi'ī law is that anal sexual intercourse between a husband and wife, if agreed to by both parties, is not prohibited, although it is not encouraged.⁹³ Thus, the *ḥadīth* in regard to the prohibition of anal penetration between a man and a woman should be understood as applying only to practising anal penetration outside the marriage contract. Then, the question is: why can the same proof not be applied to the case of two males' anal sexual practice?

This question makes more sense when one bears in mind that there are several *ḥadīths* which connect *zinā* (heterosexual fornication/adultery) with *liwāṭ*.⁹⁴ Imāmī jurists often understand the similarity between these two phenomena as deriving from their similarity in punishment. Although this point has been addressed by a number of *aḥādīth*, it is not fully accurate as the punishments for *zinā* and *liwāṭ* are not exactly the same in Imāmī law. On the other hand, it appears that the similarity addressed by such *aḥādīth* could be understood differently. To make sense of this point, one needs to think about the understanding of fornication/adultery as being a sexual relationship outside the Islamic marriage contract. Therefore, why could one not say that (the prohibited) *liwāṭ*, too, is a sexual relationship outside of the Islamic marriage contract?

However, Muslim jurists have not addressed this question, apparently because they view marriage as exclusively a contract between a man and a woman, and thus, in their view, no other kinds of marriage, including same-sex marriage, are legitimised in Islam. Therefore, the potential discursive space on the prohibition of same-sex sexual intercourse which happens outside the marriage contract can hardly be accepted by traditional jurists, as, in their approach, there is no legitimate way to have same-sex marriage within the Islamic legal framework. Nevertheless, the traditional approach towards marriage is not necessarily the only plausible view on Islamic marriage. As shall be discussed in Chapter 8, this assumption is not necessarily correct. I shall demonstrate that there is no revelatory text which limits legitimate Islamic marriage only to opposite-sex mates while excluding same-sex unions.

92 al-Ṭabāṭabā'ī al-Burūjirdī and al-Mu'izzī al-Malāyirī, *Jāmi' aḥādīth al-shī'a*, 25: 467, Ḥ: 37629.

93 al-Ṭabāṭabā'ī al-Yazdī, *al-Urwa*, 2: 586.

94 al-Ṭabāṭabā'ī al-Burūjirdī and al-Mu'izzī al-Malāyirī, *Jāmi' aḥādīth al-shī'a*, 25: 466, Ḥ: 37625 and 30: 466, Ḥ: 46478 and 46479.

6 Conclusion

It was not this chapter's objective to comprehensively examine the *sunna* concerning homosexuality. There are various complications and layers of debate that need to be navigated to understand *aḥādīth* relating to a highly sensitive topic such as same-sex sexual behaviours. Therefore, it is understandable that such a complicated topic with a high number of collected *ḥadīths* cannot be fully debated in a short chapter. Rather, the goal of the discussion here was to provide scholars who study Islamic law with potential discursive spaces on the topics of Imāmī *ḥadīth* and homosexuality. I believe, and hopefully I am not delusional, that my reflections on Shi'i *ḥadīth* literature in relation to homosexuality outline various existing discursive spaces on *aḥādīth* and same-sex sexual behaviours which are surprisingly elastic and dynamic, despite powerful attempts of (neo-)traditional jurists to overlook them or assert otherwise through their patriarchal interpretation of the received Islamic tradition.

The cornerstone for such discursive spaces is the specific typology of same-sex sexual behaviours suggested by this study. Regarding this typology, there are five categories addressed in the *aḥādīth* on same-sex sexual behaviours: *takhannuth*, *tarajjul*, *liwāt*, *ubna*, and *siḥāq/sahq*. While this typology seems crucial for *ḥadīth* scholarship on this matter, as it opens the gates for understanding the relevant *aḥādīth* differently and perhaps more accurately with their various implications and consequences, it is striking that contemporary Imāmī jurists have neglected it entirely. Therefore, they seem to arbitrarily categorise all different kinds of same-sex sexual behaviours into two phenomena: *liwāt* and *siḥāq*. The discussion in this chapter shows that this categorisation is not refined enough to consider all the various phenomena which existed during early Muslim society to which the *aḥādīth* refer. Therefore, it would not be possible to successfully examine different conditions and implications of each phenomenon of same-sex sexual behaviour, and thus it appears to have failed to grasp consequences to which they might lead as well as to single out multiple Islamic legal rulings that could regulate these phenomena.

Among the various sets of *aḥādīth* examined in this chapter, there have been no legal rulings or punishments for some categories, such as *takhannuth* and *tarajjul*, although the Prophet Muḥammad, according to some reports, deported a number of effeminate men from the city or banned them from entering mosques or Muslims' houses. However, as elaborated, Muḥammad's actions towards these *mukhannathūn* were grounded in other reasons. For example, these *mukhannathūn* had deceived the Prophet and other Muslims by pretending that they had no sexual desire at all, when they actually had a sexual interest in women. In the category of pederasty, the active adult male

would be punished, while the teenage boy would not, though he would receive some discipline to not repeat the act. Moreover, in such relationships, the active adult penetrator, according to some *aḥādīth*, cannot marry the penetrated boy's sister or daughter, but not vice versa, meaning that there is rarely discussion on whether the penetrated boy can marry the sister or daughter of the penetrator. No such points have been the central focus of Shi'ī jurists, although here or there they have tacitly indicated some such implications and differences.

Finally, the examination of the *aḥādīth* on same-sex sexual behaviours displays that a great majority of the *aḥādīth* on this issue pertain to the aforementioned five categories which are irrelevant to homosexuality. There is yet a number of *aḥādīth* which might be conceived of as absolute statements regarding the prohibition of same-sex sexual behaviours. However, we have noted that, even if one accepts that these *aḥādīth* are uttered in absolute statements, they are often either forged, defective in the chain of transmission, or ambiguous in content. Moreover, it is also possible to provide an alternative understanding of these *aḥādīth*, that is, same-sex sexuality is prohibited if it happens outside the marriage contract; an understanding which can be consistent with homosexuality. Therefore, it is hardly possible to legitimise the prohibition of homosexuality based on these *aḥādīth*.

Consensus and Reason on Homosexuality

Following Shi‘i *ijtihād*, the third and fourth possible sources of reasoning for or against homosexuality are consensus (*ijmā‘*) and reason (*‘aql*). Before examining whether there is any consensus or reason against homosexuality, it is necessary to understand what consensus and reason imply in the Imāmī legal school. Thus, I will first briefly explicate these two potential sources and then examine whether consensus or reason may convincingly be used to argue against homosexuality.

1 The Place of Consensus in Modern Shi‘i *Ijtihād*

The concept of *ijmā‘* has been a matter of ongoing debate among Muslim scholars. Thus, there is in fact no consensus on the status of consensus in legal reasoning.¹ Some scholars hold that consensus on a topic implies agreement among all the followers of Muḥammad (both jurists and ordinary Muslims) on the legal ruling pertaining to it.² Others understand consensus to mean agreement between jurists of different legal schools at a specific time after the death of Muḥammad.³ Yet, another group of scholars conceptualise *ijmā‘* as agreement between those individuals who are qualified to understand Islamic laws; namely, “the people of resolution and contract” (*ahl al-ḥall wa-l-‘aqd*) among the followers of Muḥammad during a specific period of time after his death.⁴

In an Imāmī legal context, the meaning of *ijmā‘* is even more contested. Imāmī jurists often hold that consensus may not be an independent source of legal rulings. In their view, Sunni jurists invented the *ijmā‘*, and so it is a source for Sunni, not Shi‘i, *ijtihād*. Al-Anṣārī asserts that Sunnis “are the origin of *ijmā‘* and this is [a valid] principle for them.”⁵ Some Shi‘is even assert that Sunnis used *ijmā‘* politically to legitimise the position of Abū Bakr as the first Caliph

1 See Hamid Ali, “Scholarly consensus”; Zaman, “Consensus and Religious Authority.”

2 al-Ghazālī, *al-Mustaṣfā*, 1: 137.

3 al-Jizānī, *Ma‘ālim uṣūl al-fiqh*, 156.

4 al-Āmidī, *al-Iḥkām*, 1: 196. Still, other meanings of *al-ijmā‘* are proposed by scholars, all of which were extensively explored and categorised by al-Kāzīmī al-Tustarī, an Imāmī scholar of the late eighteenth and early nineteenth centuries (see al-Kāzīmī al-Tustarī, *Kaṣḥf al-qinā‘ fī ḥujjīyyat al-ijmā‘*).

5 al-Anṣārī, *Farā'id al-uṣūl*, 1: 184.

by counting the *ijmā'* as a source of Islamic law.⁶ In their view, Sunni Muslims needed to rely on consensus because there was no proof from other available sources—the Qur'ān, *sunna*, and reason—to support Abū Bakr as the first successor of the Prophet.

Thus, although in Shi'i legal theory the concept of *ijmā'* has been discussed for hundreds of years, the *ijmā'* per se, in Imāmī *ijtihād*, does not have validity because it, unlike the Qur'ān and *sunna*, is not an infallible source for deriving Islamic law: consensus would only be a valid source if it could be traced back to the revelatory sources.⁷ Therefore, Imāmī jurists seem to use the term *al-ijmā'* in a different way from how it is often understood by Sunni scholars.

From the formation period until today, *ijmā'* has only been considered to have probative force (*ḥujjiyya*) if it uncovered the view of an infallible Imām, in particular the Twelfth Imām.⁸ It can thus have probative force only if one of the Imāms is included among the individuals who claim consensus on a topic. Regarding this understanding of *ijmā'*, it is the presence of an infallible Imām among a given group of individuals who claim consensus, that is the reason why that specific consensus would have probative force. Therefore, the number of individuals who claim to be in consensus is not significant: whether there are few or many such individuals, if the *ijmā'* leads to a saying or endorsement of an infallible Imām, it will be *ḥujja*. Otherwise, even if all Muslims agree upon a specific subject, but not the infallible Imāms, such a consensus would not be held *ḥujja* in *ijtihād*.

Post-Akḥbārī Imāmī jurists, in particular the Anṣārī school of *uṣūl al-fiqh*, conceptualise this notion of consensus as *al-ijmā' al-dukhūlī*, meaning that one of the Imāms is included among those forming the consensus.⁹ This might happen either when all Imāmī jurists agree on the legal ruling on a specific topic, which provides assurance that the Imām agrees with the consensus, or a (small or large) group of jurists agree on the legal ruling on a particular topic without giving the reason or evidence they applied to understand this legal ruling. In the latter case, if one of these jurists is unknown, this consensus might lead to a saying or endorsement of the Imām in the belief that the unknown

6 al-Muḥaffar, *Uṣūl al-fiqh*, 2: 95.

7 al-Anṣārī, *Farā'id al-uṣūl*, 1: 188–90; al-Muḥaffar, *Uṣūl al-fiqh*, 2: 93–94.

8 See al-Sharīf al-Murtaḍā, *al-Dharī'a*, 2: 630; al-Ḥillī (Muḥaqqiq), *Ma'ārij al-uṣūl*, 126; al-Ḥillī ('Allāma), *Nihāyat al-wuṣūl*, 3: 131.

9 al-Anṣārī, *Farā'id al-uṣūl*, 1: 186; al-Muḥaffar, *Uṣūl al-fiqh*, 2: 104. There is a form of *al-ijmā'* in modern Shi'i legal theory called *ijmā' tasharrufī*. This occurs when a jurist seems to believe that he met the Twelfth Imām and received the legal ruling on a specific subject directly from him. Because of the absence of the Imām, the jurist passes on the Imām's message and claims an *ijmā'* on the legal ruling on this subject (al-Khurāsānī, *Kifāyat al-uṣūl*, 289).

person is possibly the (Twelfth) Imām. However, a major question has been raised: How in these two situations might one actually unfold the Imāms' opinions? Early Shi'ī scholars of *uṣūl al-fiqh* extensively discussed this problem and proposed several solutions.¹⁰ In contrast, modern Imāmī *uṣūl al-fiqh* often upholds that none of those solutions succeeds to convincingly demonstrate the presence of the Imām in either situation.¹¹ Therefore, although *ijmā'* may hypothetically uncover the infallible Imāms' opinions, there is no way to discern their opinions through consensus. Moreover, in practice, as al-Muẓaffar notes, it is impossible to become aware of such an agreement on a legal ruling among all Imāmī jurists throughout history or even among all Imāmī jurists of a certain time, because not every Shi'ī jurist has written his views in a book, nor have all the books written by Imāmī jurists survived to our time.¹²

10 See al-Ṭūsī, *al-Udda*, 2: 628–33; al-Sharīf al-Murtaḍā, *al-Dhari'a*, 2: 632–33; al-Ḥillī ('Allāma), *Nihāyat al-wuṣūl*, 3: 131–44. Al-Kāẓimī al-Tustarī listed twelve such solutions, but the most common ways through which Imāmīs attempted to vindicate the presence of an infallible Imām among those forming the consensus are the following: (1) through sense (*hiss*): according to this method, first there should be an individual (a *mujtahid*) who investigates the views of all Imāmī scholars (including those who lived in the time of the Imām) on a case and finds that all these scholars hold a similar view on this case. Second, the Imām should be regarded as a scholar. In addition, among the scholars forming the consensus, there should be a number of individuals who cannot be identified by name. Having these premises in mind, the *mujtahid* may argue that since all scholars, including those who lived in the time of the Imām, hold a similar view on this case and thus formed a consensus, the Imām should have been present among them because he was also a scholar. However, because it is not possible to identify the Imām by name among the scholars, the *mujtahid* concludes that most likely one of the unidentified scholars should be the Imām; (2) through the principle of benevolence/grace (*qā'idat al-lutf*): based on this approach, when scholars of all periods and, in particular, those of the time of the Imām form a consensus, it implies that the Imām must have agreed with them. Otherwise, he, following the principle of grace, had to guide those scholars to the right path and must have prevented the Muslim community from going astray; (3) through the intuitive presumption (*hads*): according to this solution, once there is a consensus on a case, it is plausible to presume that such consensus must have originated from the Imām. That is because scholars, on their own, find it hard to reach a consensus because of their strong tendency to disagree on every issue; (4) through the endorsement (*taqrīr*): in line with this approach, when a consensus occurred in the presence of the Imām and he did not deny it or stayed silent, it reveals that the Imām approved this consensus (see al-Kāẓimī al-Tustarī, *Kashf al-qinā'*).

11 See al-Anṣārī, *Farā'id al-uṣūl*, 1: 192–200; al-Khū'ī, *Miṣbāḥ al-uṣūl*, 2: 138–41; al-Khurāsānī, *Kifāyat al-uṣūl*, p. 291; al-Muẓaffar, *Uṣūl al-fiqh*, 2: 101–04.

12 al-Muẓaffar, *Uṣūl al-fiqh*, 2: 105. Early Shi'ī and Sunni scholars of legal theory extensively argued about the non-feasibility of the occurrence of *al-ijmā'*. For example, see al-Ḥillī ('Allāma), *Nihāyat al-wuṣūl*, 3:128–31; al-Fakhr al-Rāzī, *al-Maḥṣūl*, 4: 21–34.

This discussion concerns the consensus when a jurist himself investigates and discovers such an agreement of all Shi'i jurists on legal ruling on a certain case. Clearly, as per modern Imāmī *ijtihād*, there is no reliable method to reveal the opinions of the Imāms or their presence among the individuals who agreed on a topic through this *ijmā'*, which is called extracted/acquired consensus (*ijmā' muḥaṣṣal*). There is, however, another type of *ijmā'* called reported consensus (*ijmā' manqūl*), according to which a jurist reports to other jurists about an agreement of Imāmī scholars on a specific case. This type of *ijmā'* has no probative force in modern Shi'i legal theory, unless it is based on the narrator's sense (*ḥiss*), not his intuitive presumption (*ḥads*); that is, the narrator of such an *ijmā'* has to have heard or observed that this agreement originates from the Imāms—a condition that, as the advocates of this approach themselves admit, rarely occurs or could occur.¹³

2 The Place of Reason in Modern Shi'i *Ijtihād*

Although reason has been viewed throughout centuries of Shi'i legal theory as one of the means for obtaining Islamic laws, this concept, as al-Muẓaffar notes, was not always understood in the same way by classical and early post-Akhbārī Imāmī jurists.¹⁴ In fact, rational proof (*dalīl 'aqlī*) or simply reason (*'aql*) was carefully distinguished from other Islamic sources of legal reasoning in the eighteenth century by the Anṣārī school of the legal theory on which the modern Shi'i paradigm of *ijtihād* still operates.

Modern Imāmī *uṣūlīs* often address reason as a source of legal assessment. In other words, reason or rational proof, in their view, is believed to be a tool for deriving legal rulings.¹⁵ Its application is based on the principle of the “inherent reconciliation between rational and divine assessments” (*al-mulāzama bayn ḥukm al-'aql wa-l-shar'*), which is better known as the principle of *mulāzama* in modern Shi'i legal theory.¹⁶ Given this principle, whatever reason decrees as the goodness or vileness of an action or behaviour, the lawgivers necessarily embrace it, meaning that there should accordingly be an assessment (*ḥukm*) legislated by the lawgivers—God, the Prophet, or the Twelve Imāms. However, as alluded to earlier, there is a widely accepted epistemological rule in Imāmī

13 See al-Anṣārī, *Farā'id al-uṣūl*, 1: 202; al-Khū'ī, *Miṣbāḥ al-uṣūl*, 2: 137–38.; al-Khurāsānī, *Kifāyat al-uṣūl*, 289–90.

14 al-Muẓaffar, *Uṣūl al-fiqh*, 2: 115–19.

15 See al-Gharawī al-Iṣfahānī, *Nihāyat al-dirāya*, 2: 311–34; al-Muẓaffar, *Uṣūl al-fiqh*, 1: 197–01.

16 See al-Gharawī al-Iṣfahānī, *Nihāyat al-dirāya*, 2: 320–30; al-Nā'īmī, *Fawā'id al-uṣūl*, 3: 60–62.

ijtihād that requires a definitive opinion on legal rulings, not uncertainty. Based on this rule, the rational assessment must be definitive to be endorsed by the lawgivers as nondefinitive proofs or uncertain opinions do not have probative force in Imāmī legal school.¹⁷ Given this condition, it seems that the principle of *mulāzama* excludes all uncertain forms of rational assessment, such as legal analogy (*qiyās*), juristic preference (*istihsān*), and personal opinion (*ijtihād bi-l-ra'y*)—all of which are commonly used by various Sunni legal schools.

Shi'i *uṣūlīs* offered several accounts for the epistemic validity of the principle of *mulāzama*. One such account is based on the following point: God, the Prophet, and the Twelve Imāms are rational entities. In fact, they are the chiefs of rational beings. Therefore, if humans, as rational entities, use reason to assess the goodness or vileness of a certain behaviour or morally appraise a given action in a definitive way, then the lawgivers should conform to them, because the lawgivers are members, but the chiefs, of rational entities, and thus may not disagree with them.¹⁸

Imāmī legal theory often recognises two types of definitive rational proofs:

1. The first type consists of a proof in which all the premises are obtained from reason (*ʿaql*).¹⁹ It is called **independent** rational proofs (*muṣtaqillāt ʿaqliyya*). This type of proof is grounded in the widely accepted Shi'i theological principle of “the rational goodness and vileness” (*al-ḥusn wa-l-qubḥ al-ʿaqlī*). Following this principle, reason can apprehend the actual goodness or vileness of actions beyond divine commands. On the other hand, God, in their view, is perceived to be just (*ʿādil*). Thus, God treats humans solely based on justice. Therefore, the goodness of a given action logically requires God to command humans to do the good act. Likewise, the vileness of a given action logically requires God to prohibit humans to commit the vile act. Having this theological explanation in mind, Shi'i scholars, as al-Muẓaffar elaborates, often hold that the only cases of **independent** rational proofs are the principles of the goodness of justice (*ḥusn al-ʿadl*) and the vileness of injustice (*qubḥ al-ẓulm*).²⁰ Justice is good and must be practised according to a definitive rational assessment; whatever is good to be practised per a definitive rational assessment is also good to be practised in accordance with the divine law (the principle of *mulāzama*). Conversely, injustice is vile and must

17 See al-Muẓaffar, *Uṣūl al-fiqh*, 2:118–19.

18 al-Gharawī al-Iṣfahānī, *Nihāyat al-dirāya*, 2:320; al-Muẓaffar, *Uṣūl al-fiqh*, 2:120.

19 al-Muẓaffar, *Uṣūl al-fiqh*, 1: 199.

20 Ibid., 1: 205.

- not be practised according to a definitive rational assessment; whatever is vile to be practised per a definitive rational assessment is also vile to be practised in accordance with the divine law (the principle of *mulāzama*).
2. The second category of rational proof, which is called **dependent** rational proofs (*ghayr al-mustaqillāt al-‘aqliyya*), implies proofs in which one of the premises is derived from reason (*‘aql*) and the other from divine revelation (*shar‘*).²¹ For example, there is a rational rule implying the mandatory nature of a prerequisite act (*muqaddima*) for a given topic whenever the topic (*dhi l-muqaddima*) itself is mandatory (*wujūb al-muqaddima ‘inda wujūb dhi l-muqaddima*). Now, if there is a legal ruling implying that a given practice must be executed according to divine law, reason acknowledges that any prerequisite act (*muqaddima*) that leads to the practice in question (*dhi l-muqaddima*) should be mandatory as per divine law too. For example, if praying is mandatory following divine law, it rationally implies that its prerequisite act (say, ablution) should also be mandatory in line with divine law.

These two types of proofs arguably have probative force in Shi‘i *ijtihād*, meaning that they may be used to derive legal rulings on different topics through the principle of *mulāzama* when they can be assessed by reason in a definitive way.²²

3 Application of Consensus to Homosexuality

Although it appears that among Imāmī jurists a debate does not exist on consensus as a proof against homosexuality, a number of jurists, such as Muntazirī, have argued for the prohibition of *liwāṭ* and *siḥāq* based on *ijmā‘*.²³

In light of the previous discussion on consensus, let us consider the validity of these scholars’ assertions on the *ijmā‘* of Muslim jurists on the prohibition of *liwāṭ* and *siḥāq*. In brief, it appears that Muntazirī’s assertion does not comply with the established rule on consensus in legal theory. First, given the mass Islamic legal productions which are now spread through various libraries across the world, it is hard to see that a jurist such as Muntazirī himself investigated and revealed all Shi‘i, let alone all Muslim, jurists’ opinions on the prohibition of *liwāṭ* and *siḥāq*. Moreover, as al-Muzaffar notes, not all Imāmī jurists recorded their views in a book, nor have all the books written by Shi‘i

21 Ibid., 1: 200–01.

22 Ibid., 2: 119–26.

23 al-Muntazirī, *Kitāb al-ḥudūd*, 145 and 166.

jurists survived to our time. This is also the case for the Sunni scholarship. Accordingly, it was not possible for Muntazirī to demonstrate such an agreement about the legal rulings on *liwāt* and *siḥāq*. Regardless of this critique, even if such an agreement of Muslim jurists could be found by Muntazirī, it would not have probative force unless, according to Imāmī *ijtihād*, he could persuasively show that one of the infallible Imāms was present among the individuals who agreed on the prohibition of *liwāt* and *siḥāq*; or that this agreement convincingly uncovers the Imāms' opinions of the legal rulings on these two subjects. As demonstrated, following Shi'ī legal theory, there is no reliable method to obtain either of these two conditions.

However, it is possible that Muntazirī is only referring to a report or narration of consensus about *liwāt* and *siḥāq*. Then again, following modern Shi'ī legal theory, *al-ijmā' al-manqūl bi- l-khabar al-wāḥid* either is not authentic at all or it might be authentic if it is narrated based on the senses (*ḥawāss*). As elaborated, such a condition rarely occurred, and there is no compelling reason to hold that such a condition has occurred in the two cases of *liwāt* and *siḥāq*.

Nevertheless, there is no doubt that Imāmī jurists widely accepted the prohibition of *liwāt* and *siḥāq*, which can be argued to indicate an enormous agreement on this topic. One may say that Muntazirī is perhaps addressing this point by considering the *ijmā'* as proof for the prohibition of *liwāt* and *siḥāq*. However, it is not difficult to realise that Imāmī jurists often believe in the prohibition of *liwāt* and *siḥāq* based upon the *sunna* and *aḥādīth* which have been received to this time. Investigating the classic and contemporary *fiqh* books easily shows that the source for such legal ruling was and still is the *aḥādīth*. Therefore, it appears that such an agreement on the prohibition of *liwāt* and *siḥāq* is based on other sources rather than consensus. Jurists call this type of agreement "evidential consensus" (*ijmā' madrakī*, consensus based on additional evidence/proof).²⁴ Yet, "evidential consensus" is not technically a consensus as this agreement originates from a document which was in the hands of those individuals who agreed upon a given subject. Therefore, this kind of agreement is not valid per se, and instead, it is necessary to investigate the origin of the agreement, namely the source itself if it has survived.²⁵ However, if the source no longer exists and cannot be obtained, then this agreement is not valid for us. As al-Khū'ī notes, this is due to the fact that other jurists' acceptance of an alleged source does not imply that, if it had been received by us,

24 al-Muballighī, "al-Ijmā' fi l-sharī'a l-islāmiyya," 91.

25 al-Ṣadr, *Buḥūth*, 4: 316; al-Khū'ī, *Miṣbāḥ al-uṣūl*, 2: 140–41.

we would accept it as well. Therefore, we do not know for sure that if we had access to a given source, we would consider it authentic.²⁶

Nevertheless, if the source still exists and current jurists have access to it, then the jurists need to return to the source and explore whether it is valid. In the specific cases of *liwāt* and *sihāq*, the sources for the agreement between Shi'i jurists on the prohibition of these two subjects are the *sunna* and *aḥādīth*. In the previous chapter, the *aḥādīth* were extensively investigated. My study has illustrated that the *aḥādīth* do not imply the prohibition of *liwāt* and *sihāq* as these jurists categorise. Instead, the *aḥādīth* often convey the prohibition of other categories, such as pederasty, male pathological passivity or *ubna*, and *sihāq*, as they were non-consensual, power-based sexual relationships of adult males or females with vulnerable entities, namely beardless boys, small girls (free-born or slaves), or passive males.

4 Application of Reason to Homosexuality

The question here is whether Imāmī jurists have provided any proof based on reason against homosexuality. Since modern homosexuality has not yet been debated by contemporary Shi'i jurists, the answer is negative. Moreover, jurists often did not even feel it was necessary to argue for the prohibition of the two pre-homosexual phenomena of *liwāt* and *sihāq* by the means of rational reasoning (*dalīl 'aqlī*) as, in their view, there are enough *aḥādīth* on the prohibition of these categories, so that jurists, in fact, do not need to resort to reason on this matter. However, unlike the majority of Imāmī scholars, a few jurists still argue for the prohibition of *liwāt* and *sihāq* through rational reasoning. Muntazirī is perhaps the most prominent Shi'i jurist to argue for the prohibition of *liwāt* and *sihāq* through reason.²⁷ He provides four rational proofs against these two topics which can be categorised as the following: the problem of procreation, the problem of not cohering with the purpose of creation, the natural law argument, and the private and public morality proof.²⁸ Although he does not apply these proofs to the issue of homosexuality, one might hold that such proofs can be used against homosexuality as well.²⁹ Therefore,

26 al-Khū'ī, *Miṣbāḥ al-uṣūl*, 2: 140.

27 See al-Muntazirī, *Kitāb al-ḥudūd*, 145 and 166 and *Pāsukh bi pursishhā-yi dīnī*, 486–487.

28 Some similar proofs have been presented by Sunni jurists, such as al-Qaraḍāwī; see Dennerlein, "Sexual Rights and their Discontents," Kugle and Hunt, "Masculinity, Homosexuality and the Defence of Islam."

29 Muḥsin Kadiwar is a neo-traditional Shi'i jurist who has argued against homosexuality by applying some similar proofs. Elsewhere, I extensively discussed Kadiwar's

it is necessary to critically consider his proofs and see whether they can authentically prohibit homosexuality in Islam.

4.1 *Homosexuality and the Problem of Procreation*

One of Muntazirī's proofs for the prohibition of *liwāṭ* and *siḥāq*, which can potentially be used against homosexuality, is based on the issue that the continuation of human offspring or reproduction is essential, and according to this proof, *liwāṭ* and *siḥāq* (and potentially homosexuality) prevent human procreation. He remarks:

The rational proof [for the prohibition of *liwāṭ* is that] a person who engages in *liwāṭ* might not marry, which would result in preventing [human] procreation and this is a great evil or corruption.³⁰

Muntazirī also applies the same proof against *siḥāq*.³¹ Since he does not clarify the type of his rational proof nor carefully construct it, the question is how this proof should be categorised according to the two types of valid reasons in Imāmī legal theory, namely independent and dependent reasons. It seems that Muntazirī's proof is based on independent rational reasoning, though it can also be constructed as dependent reasoning. To address the construction of this proof, I shall analyse it according to both types of rational reasoning, which will allow for the assessment of its validity. Before reconstructing the proof, the following point should be noted. As indicated, Muntazirī provides this proof for the prohibition of *liwāṭ* and *siḥāq*. However, there does not appear to be a specific element in this proof which exclusively restricts it to these cases. Therefore, concerning the present study, I will reconstruct the proof regarding homosexuality.

– Reconstruction of the proof based on independent rational reasoning:

1. Homosexual individuals (both gay men and lesbian women) who engage in same-sex sexuality most likely will not marry a member of the opposite sex.
2. By not marrying a member of the opposite sex, they will abstain from procreation, and this could cause the extinction of humanity which in turn leads to corruption.

approach on homosexuality (Alipour, "Shī'a neo-traditionalist scholars and theology of homosexuality").

³⁰ al-Muntazirī, *Kitāb al-ḥudūd*, 145.

³¹ *Ibid.*, 166.

3. According to a definitive reason, any corruption must be forbidden.
4. Therefore, homosexuality, which may cause the extinction of humanity and thus corruption, must be forbidden.
5. Given the principle of *mulāzama*, there should accordingly be a legal ruling (regulated by the Islamic lawgivers) prohibiting homosexuality in Islam, too.

– Reconstruction of the proof based on dependent rational reasoning:

1. Concerning Islamic revelatory teachings, abstaining from procreation could cause the extinction of humanity which in turn leads to corruption. Thus it must be prohibited as of the Qurʾān³² and *sunna*.³³
2. Given the principle of *mulāzama*, a definitive reason decrees that any prerequisite act (*muqaddima*) which may cause the extinction of humanity and thus corruption (*dhi l-muqaddima*) should also be prohibited.
3. Homosexuality may cause the extinction of humanity and thus corruption, as homosexual individuals most likely will not marry a member of the opposite sex and thus will abstain from procreation.
4. Therefore, homosexuality should be prohibited in Islam according to reason.

The difference between the two reconstructions of Muntazirī's proof is that in the first form of the proof all the premises are from reason, while the second version of the proof is based on a premise (namely premise 1) which comes from the revelatory sources, not from reason. However, this point does not seem to be significant for the nature of the argument, unless one wishes to reject the accuracy of the premise pertaining to the prohibition of abstaining from procreation and the extinction of humanity (namely premise 2 in the first version and premise 1 in the second). This means that regarding the reconstruction of the proof according to dependent reasoning, to argue against the accuracy of premise 1, one is required to critique the traditional understanding of verses or *aḥādīth* applied to advocate for this premise in Islam and to propose an alternative interpretation for such Islamic textual evidence. However, according to independent reasoning version of the proof, the critic is required to provide counter-arguments from reason against premise 2.

32 See, for example, Q. 29:29. According to this understanding of verse 29:29, the Qurʾānic concept of "*taqṭaʿūn al-sabīl*" implies those people who abstain from procreation which causes the vile consequence of the extinction of humanity (see al-Ṭabāṭbāʾī, *al-Mizān*, 16: 123).

33 See, for example, al-Ḥurr al-ʿĀmilī, *Tafṣīl wasāʾil al-shūʿa*, 20: 333. Given such *aḥādīth*, *liwāt* and *siḥāq* would cause Muslims to abstain from procreation, and thus the extinction of humanity.

Premises 2 and 1 in the first and second formulations of the proof imply that abstaining from procreation, and the extinction of human race, cause corruption on earth, and thus the procreation of humans must be continued. It appears that these premises are not correct, at least as a rational premise. Several moral philosophers and environmentalists have argued against this assertion that human offspring must be continued.³⁴ These scholars and activists, whose approach is known as anti-natalism, advocate the fact that humans should refrain from procreation for both ethical and environmental reasons. Although I firmly believe in anti-natalism, I shall not examine Muntaziri's proof from this perspective. Instead, I assume that the desirability of the continuation of offspring and procreation of humans is a sound premise. However, the proof, in my view, is still inconclusive.

In fact, this proof, in both potential reconstructions, implicitly assumes that if homosexuality is allowed, all individuals would be attracted to same-sex mates rather than the opposite sex. Therefore, the human race would be endangered by homosexual behaviour. This assumption seems to be historically and scientifically incorrect. Various studies of the history of human same-sex sexual behaviour, whether of classical or medieval same-sex sexual relationships or of modern homosexuality, demonstrate that there was no period of time when all or the majority of humankind was only attracted to same-sex mates.³⁵ According to these studies, people who engaged in same-sex sexual practice or homosexuality have always been minority groups in their societies. It is hard to imagine a time in the future when all, or the majority of, individuals will turn to homosexual behaviour.

Moreover, in line with the scientific research, such as the Kinsey scale, Storms scale, and Klein scale, humans' sexual orientations vary enormously.³⁶ Homosexual desire is one of many different desires which can be seen among humans. Therefore, it is not feasible to hold that permitting homosexuality would suddenly lead to a massive change in scientific results by turning all individuals into homosexuals. Therefore, homosexuality does not seem to endanger procreation, and thus would not cause the extinction of the human race on earth.

34 See, for example, Benatar, *The Human Predicament*; Benatar and Wasserman, *Debating Procreation*; Cabrera, *A Critique of Affirmative Morality*; "The Voluntary Human Extinction Movement."

35 For classical studies see, for example, Boswell, *Christianity, Social Tolerance, and Homosexuality*; Dover, *Greek Homosexuality*; and Williams, *Roman Homosexuality*. For studies on modern homosexuality see Weeks, *Coming out* and *What is Sexual History*.

36 Kinsey, Pomeroy, Martin, and Gebhard, *Sexual Behavior*; Storms, "Theories of sexual orientation"; Klein, "Sexual orientation."

However, one might support Muntazirī's proof by noting that preventing human procreation, whether entirely or partially, is forbidden in Islam. Although homosexuality would not cause the extinction of the human race, it would reduce the possible number of humans living on earth. This is because homosexual individuals who are attracted to same-sex mates most likely would not marry the opposite sex, and thus would not participate in procreation. Therefore, they would partially prevent human procreation, which is forbidden in Islam.

This proof implies that all Muslim individuals (males and females) must marry and have procreative sexual relationships. However, Islamic teachings are not in accord with this implication. Concerning Islamic law, which is generally accepted by Imāmī jurists, including Muntazirī, although marriage is strongly encouraged in Islam, it is not obligatory.³⁷ This means individuals who, for whatever reasons, decide not to marry in their lives are not considered by Shi'ī jurists to be committing sinful behaviour. In addition, in the case of marriage, procreation is encouraged but not obligatory according to the *aḥādīth* from the Prophet and Imāms.³⁸ This is why a great number of Imāmī jurists, including Muntazirī, uphold that using contraceptives for abstaining from procreation is allowed in Islam.³⁹

Finally, thanks to modern technology, procreation outside of sexual intercourse has been made possible through gamete (sperm and egg) donation or third-party reproduction. This is an ongoing debate in contemporary Shi'ī legal scholarship whether this new technology for procreation is permissible. Several jurists have issued *fatwās* legalising it in some occasions.⁴⁰ For example, Āyatallāh Sīstānī in response to a query on this matter states: "this method [sperm donation and third-party reproduction] is permissible by nature (*fi nafsih*)".⁴¹ However, in his view, using this method is permissible if those individuals, who want to share their sperm and egg outside sexual intercourse, are already married. Āyatallāh Makārim Shīrāzī also issues a similar *fatwā* providing the same prerequisite. Āyatallāh Ṣāfi Gulpāyḡānī, too, permits using this

37 Muntazirī, *Risāla-yi tawḏīḥ al-masā'il*, 459.

38 al-Ḥurr al-Āmilī, *Tafṣīl wasā'il al-shī'a*, 14: 355–60.

39 Sīstānī, *Risāla-yi tawḏīḥ al-masā'il*; al-Gulpāyḡānī, *Majma' al-masā'il*, 2: 189; al-Khū'i, *Mūnḥaj al-ṣāliḥīn*, 2: 284; and Muntazirī, *Risāla-yi tawḏīḥ al-masā'il*, 483–84. On the Islamic position on contraception, see Musallam, *Sex and Society in Islam*.

40 To find several of such *fatwās*, see "Ḥukm-i shar'i-yi raḥīm." For Shi'ī perspectives on surrogacy, see Aramesh, "Iran's Experience with Surrogate Motherhood"; Abbasi-Shavazi, Inhorn, Razeghi-Nasrabad, and Toloo, "The Iranian ART Revolution." Also see Shabana, "Foundations of the Consensus against Surrogacy" and Muaygil, "Reexamining the Prohibition of Gestational Surrogacy in Sunni Islam" for Sunni attitudes on surrogacy.

41 See "Ḥukm-i shar'i-yi raḥīm".

technique on condition that it should not be accompanied by unnecessary touching and seeing the genitalia of a person who is not your husband or wife. Concerning the legitimacy of temporary marriage (*mut'a*) in Imāmiyya, it is practical for a gay man or lesbian woman to temporarily marry a person with whom they want to share sperm or egg without having engaged in any sexual intercourse. With this new method, not only would homosexuality not cause humans to refrain from procreation but homosexual Muslims, if they wish, also will be able to have their own biological children by using the new techniques. In this way, homosexual Muslims can indeed participate in the continuation of the human race on earth.

4.2 *Homosexuality and the Purpose of Creation*

Muntaẓirī provides a similar proof concerning human offspring, though with a slightly different conceptualisation of this issue using the notion of the *purpose of creation*.⁴² This proof appears to use independent rational reasoning and can be reconstructed as the following:

1. Each desire, including sexual desire, was created for a specific purpose.
2. The purpose of sexual desire is to engage in procreation, and thus to continue human offspring on earth.
3. Any deviation from the purpose of sexual desire ultimately causes corruption in human society, and thus must be forbidden according to a definitive reason.
4. Homosexuality does not fulfil the purpose of the creation of sexual desire, namely procreation and the continuation of human offspring on earth.
5. Therefore, homosexuality ultimately causes corruption in human society, and thus must be forbidden according to a definitive reason.
6. Given the principle of *mulāzama*, there should accordingly exist a legal ruling (regulated by the Islamic lawgivers) prohibiting homosexuality in Islam, too.

It should first be recalled that Muntaẓirī provides this proof for *liwāt*, but, as seen, it can readily be applied to the case of homosexuality. This proof would be conclusive on the prohibition of homosexuality if there were no problems in its premises. However, premises 1 and 2 in the proof do not seem correct. Premise 1 implies that every desire has a unique purpose in creation, and according to premise 2, the unique purpose of the creation of sexual desire is to engage in the procreation and continuation of humans on earth. There appears to be an agreement among humans, in particular between religious individuals, that one main purpose of sexual desire is procreation. However,

⁴² Muntaẓirī, *Pāsukh bi pursishhā-yi dīnī*, 486.

there is consensus neither in secular nor in religious discourses that procreation is the unique purpose of sexual desire.⁴³ Sexual desire in modern discourse has other functions in addition to procreation, such as representing passion and love as well as the pleasure of the two individuals who engage in sexual relationships.⁴⁴ In fact, procreation is not necessarily the most important function of sexual behaviour in modern human society, particularly since the invention of modern technology which allows procreation outside of sexual intercourse, as indicated in the previous proof.

In classical religious discourse, although procreation is counted as the main purpose of sexual behaviour, it is surely not regarded as the only purpose.⁴⁵ For example, in Christianity, Thomas Aquinas (d. 1274), perhaps the most prominent Christian theologian, upholds this approach that sexual practice in order to receive pleasure and express love and companionship is permissible.⁴⁶

43 For instance, in Christianity a range of perspectives on this issue can be observed. In fact, there is a significant shift in Christian teachings on marriage liturgies over time. In the *Church of England Book of Common Prayer*, the section on “The Form of Solemnization of Matrimony,” marriage was generally conceived as follows:

“First, it was ordained for the procreation of children, to be brought up in the fear and nurture of the Lord, and to the praise of his holy Name. Secondly, it was ordained for a remedy against sin, and to avoid fornication; that such persons as have not the gift of continency might marry and keep themselves undefiled members of Christ’s body. Thirdly, it was ordained for the mutual society, help, and comfort, that the one ought to have of the other, both in prosperity and adversity.”

By contrast, in the *Church of England Common Worship* section on marriage service marriage has been described as the following:

“Marriage is a gift of God in creation through which husband and wife may know the grace of God. It is given that as man and woman grow together in love and trust, they shall be united with one another in heart, body and mind, as Christ is united with his bride, the Church. The gift of marriage brings husband and wife together in the delight and tenderness of sexual union and joyful commitment to the end of their lives. It is given as the foundation of family life in which children are [born and] nurtured and in which each member of the family, in good times and in bad, may find strength, companionship and comfort, and grow to maturity in love (see *The Church of England Common Worship: “Marriage Service”*).”

44 See Soble, *Sexual Investigations*.

45 See Cornwall, *Un/Familiar Theology*, chap. 5.

46 See Milhaven, “Thomas Aquinas on Sexual Pleasure”; Pickett, “*Natural Law and the Regulation of Sexuality*”. It is significant to note that Aquinas also conditioned legitimate sexual pleasure and love between married couples to generative sex (see Pickett, “*Natural Law and the Regulation of Sexuality*,” 41). According to this condition, the only morally accepted sexual act would be vaginal sexual intercourse between a couple of the opposite sexes in order to be generative. This raises the question of what judgement should be made if a given couple of the opposite sexes practise sexual intercourse while using contraceptives or they are sterile. It seems that Aquinas’s approach and his proof on the

Although producing legitimate offspring in Aquinas's view is the main purpose of human sexual behaviour, it is not a unique function of having permissible sex. Therefore, it seems that, according to Aquinas, two married individuals could engage in vaginal sexual relationships in order to express their passionate love to each other and to receive pleasure out of their sexual practice. This is why the sexual practice of married couples (for pleasure or love) where one or both individuals is barren or sterile is thought to be morally and religiously legitimate in Aquinas's view.⁴⁷

In classical Islamic discourse, al-Ghazālī, one of the most respected Muslim theologians of the eleventh and early twelfth centuries, suggests that seeking pleasure from sexual practice is indeed permissible in Islam, even though legitimate sexual behaviour, in his view, should essentially aim for procreation.⁴⁸ Al-Ghazālī states,

I swear that there is another wisdom for [the creation of] sexual desire (*shahwa*) rather than the duty of procreation. According to this wisdom, sexual desire [and practice] provides a pleasure, which if continued, there would be no pleasure comparable with it. The [sexual] pleasure is a telltale sign of the promised pleasures of the Paradise.⁴⁹

purpose of sexual desire and behaviour have been a matter of dispute among Christian theologians ever since (see, for example, Boswell, *Christianity, Social Tolerance, and Homosexuality*; Finnis, "Law, Morality, and 'Sexual Orientation'"; George, *In Defense of Natural Law*; Weithman, "Natural Law, Morality, and Sexual Complementarity").

47 However, more recently a number of theologians have returned to the original Christian view (see Song, *Covenant and Calling*). That is, that marriage should be regarded differently from a mere relationship, as couples are open to procreating in the former, while in the latter, whether it happens between same-sex couples or heterosexual partners, there is no openness to procreation. Therefore, these scholars hold that the mere relationship should be identified differently but not as a marriage (an extensive discussion and critical reflections on this recent approach can be read in Cornwall, *Un/Familiar Theology*, in particular, chaps. 2 and 5). It should also be noted that Aquinas, seemingly based on the same kind of logic, argues that fornication, namely unmarried sex between a man and a woman, is a lesser sin than, say, masturbation or same-sex sexual behaviour, because procreation (allegedly the natural end of sexual intercourse) is, at least, possible in fornication while masturbation or same-sex sexual relationships are not potentially open to procreating (Aquinas, *Summa Theologiae* II-II: 154, a.12). Ali presents a similar analysis of al-Ghazālī on the issue of enslaved concubines (Ali, *Sexual Ethics and Islam*, xxvi). This, as some scholars argue, would lead to a distasteful situation whereby the rape of a woman by a man is a lesser sin than masturbation (see Cornwall, *Un/Familiar Theology*).

48 al-Ghazālī, *kīmīyā-yi sa'ādat*, 1:304.

49 al-Ghazālī, *Ihyā' 'ulūm al-dīn*, 4: 108.

The post-classical Shi'i scholar al-Fayḍ al-Kāshānī also made a similar note to al-Ghazālī's.⁵⁰ Moreover, as per the Shi'i position, he remarks that temporary marriage has been regulated in Islam solely for the sake of pleasure from sexual intercourse.⁵¹ Contemporary Imāmi jurists often pursue the same logic and agree with non-procreative purpose of sexual practice, such as seeking pleasure. As elaborated in the previous proof, they widely permit the use of contraceptives, which indicates that married couples may legitimately practise sex solely for pleasure. Moreover, as explained in the same proof, sterile couples can also have legitimate sexual relationships according to Shi'i jurists. This means that sterile couples' sex, which is only based on pleasure or passionate love is permissible in Islam. Given this point, although homosexual sexual behaviour does not fulfil the purpose of procreation, it can definitely express passionate love and sexual pleasure of same-sex couples. Thus, it is not a deviation from the purpose of sexual desire and sexual practice. Therefore, this proof also appears inconclusive.

4.3 *Homosexuality and the Natural Law Argument*

Perhaps the most popular proof against same-sex sexual behaviour throughout history is the natural law argument, according to which same-sex sexual practice is deemed unnatural. Several philosophers and theologians, such as Plato, Aristotle, Aquinas, and Kant, argued against same-sex sexual practice by virtue of natural law.⁵² Roman Catholic popes, such as Pope John Paul II, also argued through this line of reasoning to confine marriage as a relationship only between a man and a woman.⁵³ This proof can be detected in Shi'i legal debates. Although they do not always address it explicitly, a very few jurists have briefly referred to the natural law to argue either against *liwāṭ* or against homosexuality. However, they did not explain how the natural law argument can be applied against *liwāṭ* or homosexuality concerning reason in Imāmi legal theory.⁵⁴

50 al-Fayḍ al-Kāshānī, *al-Maḥajja al-bayḍā'*, 3: 63.

51 Ibid., 3: 76.

52 Meyers, *The Moral Defense of Homosexuality*; George, *In Defense of Natural Law*.

53 Pope John Paul II, "The Norm of *Humanae Vitae* Arises."

54 Muntazirī, *Pāsukh bi-pursishhā-yi dīnī*, 487; Kadiwar, "Pursish wa-pāsukh-i ḥuqūq-i bashar." To be fair to Kadiwar, it is necessary to mention that his approach towards homosexuality has changed several times, and what is mentioned in the text does not necessarily represent his current view on homosexuality (To find a comprehensive debate on Kadiwar's shifting approaches on homosexuality, see Alipour, "Shi'a neo-traditionalist scholars and theology of homosexuality").

The natural law argument has been presented in various ways by different philosophers and theologians. However, as far as this study is concerned, it is significant to note whether this proof can meaningfully be articulated as either version of the rational reasoning accepted in Imāmi legal theory, namely independent or dependent. It appears that this proof can be formulated as an independent reason. The following is a construction of this proof:

1. Homosexual behaviour is unnatural.
2. Unnatural behaviours ultimately cause corruption in human society, and thus must be forbidden according to a definitive reason.
3. Therefore, homosexuality ultimately causes corruption in human society, and thus must be forbidden according to a definitive reason.
4. Given the principle of *mulāzama*, there should accordingly also exist a legal ruling (regulated by the Islamic lawgivers) prohibiting homosexual behaviour in Islam.

Both premises 1 and 2 in this proof have been critiqued by scholars. In terms of premise 2, one might apply G.E. Moore's naturalistic fallacy which is concerned the "is-ought problem" of David Hume, and argue that, even if unnatural behaviour *is* bad/evil this does not rationally conclude that it must be forbidden.⁵⁵ The naturalistic fallacy has been a matter of dispute ever since it was introduced by Moore, and for this proof to be conclusive, it has no choice but to face the fundamental challenge that the naturalistic fallacy imposes.⁵⁶ However, I will not object to this proof by challenging premise 2. My main concern here is to examine premise 1 of the proof.

Premise 1 holds that "homosexual behaviour is unnatural." The question, as it has been frequently asked by critics, is what does the concept of "unnatural" imply in this premise. There are several possible meanings for "unnatural" that scholars who have argued against homosexuality by this proof have usually explicated. For example, it might mean that homosexuality is unhealthy, and thus should be considered as a sickness, or that it is an unusual or uncommon phenomenon, or that homosexuality has not been found among other species.⁵⁷

55 See Grant, "The Naturalistic Fallacy."

56 See Moore, *Principia Ethica*, chap. 1, 1–23.

57 If the term "unnatural" is understood as a sickness, then, unlike in premise 2, it cannot be asserted as morally bad. However, if we consider "unnatural" as "unusual", this can make sense as homosexual people, compared to heterosexual individuals, are the minority. In this case, however, premise 2 again would not be correct as there are other phenomena among humans which are unusual or in a minority position, such as asexual individuals or left-handed people, but they hardly can be considered as morally bad (Dynes, "Nature and the Unnatural," 2: 879–81). Finally, if unnatural in this proof means that homosexuality

However, it appears that the most sophisticated notion of the term “unnatural” in this argument, as several advocates of the proof, such as Aristotle, Aquinas, and Kant emphasise, is that every desire and practice has a specific purpose or function.⁵⁸ When such a specific purpose or function of a given desire and practice is fulfilled, it should be regarded as natural, otherwise it is unnatural. The purpose or function of sexual desires and behaviours is to result in procreation within the confines of marriage. Any sexual desire and practice which does not fulfil this purpose or function should be deemed unnatural and as leading to morally vile behaviour. According to Aquinas, sexual practice can be seen good if it is potentially generative and performed in legitimate marital relationships. Pickett notes that in contemporary natural law theories, which are a combination of Aristotle’s, Aquinas’s, and Kant’s approaches, the two factors of *marriage* and *integration of the self* are essential to the natural law position on sexuality.⁵⁹ This is because through marriage, meaningful sexual relationships may happen which are compatible with the purpose and function of sexual behaviour, namely procreation, and at the same time, this meaningful sexual behaviour leads to the integration and completion of those partners who engage in legitimate sexual relationships. Integration may only happen through heterosexual marriage, because, according to the Kantian notion of the categorical imperative (*kategorischer Imperativ*), the only way that sexual practitioners can consider themselves and their partners as the essential purpose, not only as a means, to fulfil their sexual appetites, is through a legitimate heterosexual marriage. Therefore, a heterosexual marriage results in a true integration of the self.

Pickett extensively argues against this new version of the natural law argument. He reminds the advocates of the natural law argument that, alongside procreation, they must not disregard other functions of sexual behaviour, such as receiving pleasure and expressing passionate love and companionship. Otherwise, childless heterosexual marriage, when one or both partners are sterile, should not be permissible, assuming this understanding of the natural

has not been found in other species, it is simply wrong, as scientific studies have confirmed that there are other animals, such as penguins and chimpanzees, which exhibit same-sex sexual behaviours (Denniston, “Ambisexuality in animals”; Bagemihl, *Biological Exuberance*). There are still other possible meanings for the concept of “unnatural” in this proof. For instance, it might mean it is a manufactured or an invented phenomenon, or it might mean human homosexuality cannot be found in nature. The latter meaning is refuted by observing homosexual behaviour among humans, which means this law about nature is wrong. Regarding the former, it is clear that not every manufactured phenomenon is morally bad (see Meyers, *The Moral Defense of Homosexuality*).

58 See Finnis, “Law, Morality, and ‘Sexual Orientation’”; George, *In Defense of Natural Law*.

59 Pickett, “*Natural Law and the Regulation of Sexuality*,” 42–43.

law, and they do not believe that such marriage is impermissible. Therefore, as Pickett remarks, they can accept homosexual marriage (given that these scholars only allow sexual practice within a marital boundary) and treat it in the same way as that of sterile couples. Moreover, as Pickett correctly notes, contrary to the Kantian assumption, homosexual couples can integrate themselves through their sexual relationships, meaning that homosexual couples can have passionate love so that they see each other as the essential end, not only a means for their sexual release. Therefore, although homosexual couples cannot have biologically generative sexual relationships, they can readily fulfil the two requirements of marriage and integration, and hence, the completion of sexual purpose or function can be fulfilled by same-sex couples as by generative and non-generative heterosexual couples.

Regarding the Islamic scholarship on licit sexual behaviour, in addition to the sexual behaviour of non-procreative sterile couples, the legitimate use of contraceptives by heterosexual couples, which is often accepted by Imāmī jurists as demonstrated in the two former proofs, provides another example of non-procreative legitimate sexual relationships. In both cases, the purpose or function of sexual behaviour in such married couples is to receive pleasure and express their passionate love. This function, as explained earlier, exists in same-sex sexual behaviour, too, although the legitimacy of homosexual marriage in Islam still needs to be argued. This discussion shows that premise 1, which assumes homosexual behaviour is unnatural, meaning that it is not used for its purpose or function, is simply not correct, and thus the proof again seems inconclusive.

4.4 *Homosexuality and Private and Public Morality*

Another proof which Muntazirī and Kadīwar have briefly provided against *liwāṭ* and homosexuality, respectively, is about how these should be seen as unethical behaviours and public immoralities.⁶⁰ This proof also appears to be a form of independent rational reasoning. Here is my reconstruction of the proof in regard to homosexuality:

1. Homosexuality results in unethical behaviours both privately and publicly.
2. Unethical behaviours are vile (*qabīḥ*), and thus must be forbidden according to a definitive reason.
3. Therefore, homosexuality must be forbidden according to a definitive reason.

60 Muntazirī, *Pāsukh bi pursishhā-yi dīnī*, 486–87; *Kitāb al-ḥudūd*, 145; and Kadīwar, “Ḥuqūq-i aqalliyyat-i jinsī.”

4. Given the principle of *mulāzama*, there should accordingly exist a legal ruling (regulated by the Islamic lawgivers) prohibiting homosexuality in Islam, too.

Several studies and the reality of the societies in which homosexuality is legalised convincingly illustrate that premise 1 is not accurate. Regarding this proof, Muntazirī's and Kadīwar's main concern on the subject of *līwāṭ* and homosexuality is that these phenomena can possibly damage private and public morality. Although these two scholars do not explicitly elucidate how they could do so, Muntazirī briefly indicates that *līwāṭ* may corrupt individuals and public moral behaviours by endangering the institution of marriage and the family.⁶¹ However, such concerns relating to the effects of homosexuality are apparently baseless. First, there are enough academic studies to persuasively demonstrate that homosexuality does not endanger private or public morality.⁶² This issue has been extensively discussed by Meyers.⁶³ He eloquently examines the proofs against homosexuality and homosexual rights on the grounds of their opposing public morality. Meyer convincingly advocates that no such reasonings are strong enough to stand against homosexual rights. Moreover, in societies such as the Netherlands and Canada where homosexuality is legalised, to my knowledge, there have been no validated reports that private or public values are in danger solely based on the legalisation of homosexuality. In contrast, these societies, to my understanding, are more likely to be making progress in increasing public morality, at least when it comes to commonly accepted public virtues, such as tolerance, justice, and equality. As such countries already tolerate homosexual people and accept their rights, particularly the rights for same-sex unions, it appears that these societies, at least legally, uphold the equal rights of homosexual and heterosexual people.

Furthermore, homosexuality, unlike in Muntazirī's proof, is dangerous neither for the institution of marriage nor for the family. In fact, by extending the scope of marriage to same-sex unions, as a number of studies, including

61 Muntazirī, *Pāsukh bi pursishhā-yi dīnī*, 487.

62 See, for example, Cocks, "Conspiracy to corrupt public morals"; Meyers, *The Moral Defense of Homosexuality*; Minter, "Sodomy and Public Morality." From this perspective, one may argue that Kadīwar is incorrect when he places homosexuality in the same category as violent sex, mass suicide, gang rape, and child sacrifice and goes on to conclude that since Islam does not accept any of the latter it does not accept homosexuality either. This is because, although there are clearly ethical reasons to forbid violent sex, mass suicide, gang rape, and child sacrifice, there are, as demonstrated in the present study, no such ethically justified grounds to prohibit homosexuality. Kadīwar also has not presented any proof on this matter from an ethical perspective other than those discussed in this chapter.

63 Meyers, *The Moral Defense of Homosexuality*, chaps. 8 and 9.

the present research, suggest, those homosexual Muslims who seek Islamic marriage potentially empower the institution of marriage.⁶⁴ Moreover, as elaborated in the first proof, modern technology has made it possible for homosexual couples to have and raise their own biological children if they wish. According to at least some Shi'i jurists, as addressed in the first proof, using the modern technology of reproduction is, in some occasions, permissible in Islam. If not, homosexual couples can adopt children. Therefore, an integrated modern family with two same-sex partners and with children can be shaped through same-sex unions. Hence, unlike the traditional understanding of marriage and family in Islam, homosexuality may expand the meaning of these two concepts, and thus empower, not endanger, them.

5 Conclusion

This chapter dealt with two types of the *ijtihād*ic proof—*ijmā'* (consensus) and *'aql* (reason)—which contemporary Imāmī jurists have applied or potentially could apply against homosexuality. It became clear that, according to modern Shi'i legal theory, *ijmā'*, unlike the Qur'ān, the *sunna*, and *'aql*, is not an independent means of argumentation for deriving Islamic legal rulings. It might only be of value if it uncovers a view of an infallible Imām on a given subject. Although the consensus in such case would be authentic, it would be viewed a case of *sunna* as it discovers or reports the opinion of an infallible Imām. However, as Shi'i legal theorists note, such consensus hardly happens, and it certainly did not occur in the case of homosexuality.

Although there are several proofs from reason which can potentially be applied against homosexuality, Imāmī scholars have not yet engaged in this debate. I hope that this current study provides Shi'i jurists with the basis they need to participate in this scholarship—a participation which might ultimately open a productive dialogue between Muslim reformists and (neo-)traditional scholars.

Nevertheless, a few Imāmī jurists such as Muntazirī and Kadīwar have briefly provided proofs against *liwāṭ* and homosexuality, respectively, from reason. The critical examination of such proofs, as presented in this chapter, verifies that none of these proofs can convincingly demonstrate that homosexuality is prohibited in Islam. Among the proofs that both jurists have provided against same-sex sexuality, there is a brief indication of homosexuality as a disease

64 See, for example, Jahangir and Abdullatif, *Islamic Law and Muslim Same-Sex Unions* and "Same-sex unions in Islam"; Kugle, *Homosexuality in Islam*.

or, more precisely, of same-sex sexual practices which may cause dangerous diseases. These are long-standing concerns which became even stronger when the issue of modern homosexuality heated up in the West in the late 1960s, and even more during the crisis and epidemic of HIV-AIDS in the 1980s and 1990s.⁶⁵ Muntazirī and Kadīwar, referring to allegedly scientific and medical studies, also assert that same-sex sexual behaviour causes epidemic diseases, endangering the individuals who engage in same-sex sexuality as well as others. Kadīwar even remarks that same-sex sexual practice may harm the body of a passive partner.⁶⁶

First, it should be noted that I did not discuss this point earlier while investigating rational proofs against homosexuality, as it can hardly be categorised as a definitive reason validated in Shi'ī legal theory. However, a brief response to this proof would be as follows. A great number of scientists, including psychologists, psychiatrists, and physicians, in most parts of Europe, North America, South Africa and in some parts of South America and Asia, have widely accepted homosexuality as one of many non-pathological sexual behaviours which can be seen among humans. Hence, they no longer consider it as a disease. The American Psychological Association (APA) admitted that categorising homosexuality as a disease was a mistake. Therefore, the APA removed homosexuality from the list of mental illnesses in 1974.⁶⁷ Moreover, currently there are enough academic studies to powerfully show that homosexuality per se does not cause any specific disease which may put homosexual people or public health in danger.⁶⁸ In addition, Kadīwar's concern that homosexuality may possibly harm the body of a passive partner can be eliminated by noting that, based on Imāmī *ijtihād*, preventing a subject from possible harm is necessary in Islam only when it is associated with the afterlife. However, it is highly disputed whether there is any Islamic ruling maintaining that worldly possible harms must necessarily be prevented.⁶⁹ Moreover, there is also no reliable scientific evidence that same-sex relationships per se harm the body of a passive male or female partner. Therefore, there should not be an Islamic obligation to avoid homosexuality due to this concern that it may possibly harm the body of a passive partner.

65 See Weeks, *The World We Have Won*.

66 Muntazirī, *Pāsukh bi pursishhā-yi dīnī*, 487; *Kitāb al-ḥudūd*, 145; and Kadīwar, "Ḥuqūq-i aqalliyyat-i jinsī."

67 See "Sexual Orientation and Homosexuality."

68 Buffie, "Public Health Implications of Same-Sex Marriage"; Cabaj and Stein, *Textbook of Homosexuality and Mental Health*; Meyer and Northridge, *The Health of Sexual Minorities*.

69 See al-Khū'ī, *Miṣbāḥ al-uṣūl*, 2: 287.

The study so far has demonstrated that there are no compelling proofs against homosexuality in Islamic sources at the first level of the argumentation established in the modern Shi'ī *ijtihād*, namely the Qur'ān, *sunna*, *ijmā'*, and *'aql*. Based on this methodology, as explicated in Chapter 2, when there is no evidence for or against a given topic at the first level of *ijtihād*, then Imāmī jurists need to move on to the second level of *ijtihād*ic argumentation called *adilla fiqhāhiyya*—that is, the level of procedural principles (*uṣūl 'amaliyya*) and legal maxims (*qawā'id fiqhiyya*)—and see whether they can find any proof for or against the topic, which, in the current study, is homosexuality. This issue will be investigated in the next chapter.

PART 3

*Homosexuality through
the Lenses of Modern Shi'i Ijtihād:
Investigating Practical Solutions*



Homosexuality, Procedural Principles, and Legal Maxims

1 Introduction

This study thus far has confirmed that homosexuality is not addressed in the primary Islamic sources. As explored in Chapters 4 and 5, there are neither explicit nor implicit statements in the Qurʾān or *sunna* against homosexuality. Moreover, Chapter 6 concluded that the potential rational proofs against homosexuality are either defective or inconclusive. As a result, it appears that Imāmī jurists are not necessarily able to derive the actual legal ruling on homosexuality at the first level of *ijtihādīc* process, namely the level of *ijtihādīc* proofs (*adilla ijtihādīyya*). Concerning the modern Shiʿī paradigm of *ijtihād*, when a given topic, such as homosexuality, has not been addressed in the *ijtihādīc* sources, then jurists should move on to the second level of *ijtihād*. This level includes various rules called procedural principles (*uṣūl ʿamaliyya*) or juristic proofs (*adilla fiqāhatīyya*). The goal of *ijtihād* on this level is to specify Muslim individuals' positions on a given topic and to explore the ways in which they should address this problem in practice. Therefore, a legal ruling derived from procedural principles at the second level does not imply an actual legal ruling (*ḥukm wāqīʿī*), but rather an apparent legal ruling in practice (*al-ḥukm al-ẓāhiri al-ʿamali*). The need for such principles, as al-Anṣārī notes, emerges when a *mujtahid*, after searching and examining all the primary sources, holds that an actual legal ruling for a given topic is still dubious/doubtful (*maʿa l-shakk*).¹ Thus, legal rulings derived from such principles may only be applied in topics where no actual legal rulings on those topics can be found.

As noted in Chapter 2, in current Shiʿī legal theory, apparent legal rulings in practice are based on four major procedural principles: *aṣālat al-barāʾa al-sharʿīyya* (priority of divine exemption), *aṣālat al-iḥtīyāt al-sharʿīyya* (priority of divine precaution), *aṣālat al-takhyīr* (priority of optional choice), and *aṣālat al-istiṣhāb* (priority of presumption of continuity). Al-Anṣārī argues that these four principles are the only applicable procedural principles.² To make sense of his position, he elaborates that when an actual legal ruling on

¹ al-Anṣārī, *Farāʿid al-uṣūl*, 2: 10–11.

² *Ibid.*, 2: 14.

a topic is doubtful, there are three possibilities: (1) the topic has either had a previous definitive legal ruling that is currently being reconsidered, (2) it has not had a previous definitive legal ruling, or (3) its previous legal ruling has not been considered at all. In the first case, the principle of *aṣālat al-istiṣhāb* should be applied. In the latter two cases, there are two possible options: either the application of the *aṣālat al-iḥtiyāt* is contingent, or this principle cannot be enforced. In cases where this principle cannot be enforced, the *aṣālat al-takhyīr* is applicable. However, with regard to the possible application of the *aṣālat al-iḥtiyāt*, there are again two possible options: either there are existing reasons or scriptural indicators implying a hereafter punishment (*'iqāb*) for those disobeying the actual legal rulings which are currently doubtful, or no such indicators exist. In the latter case, the *aṣālat al-barā'a* should be practised, whereas in the former, the *aṣālat al-iḥtiyāt* is applicable.

Generally speaking, there are two possible doubtful situations: an actual legal ruling on a specific topic is doubtful either because there is doubt about the *types* of the legal duty (*taklīf*) itself on this topic, or the *object* of duty (*muta'allaq al-taklīf* or *mukallaḥ bihi*) is uncertain, even though the type of duty on this case is already known. In brief, sometimes a *mujtahid* encounters a case where, after all due consideration, it is not possible to specify the type of legal ruling (whether obligatory, prohibited, encouraged, discouraged, or permitted) that might apply to it. This happens when a *mujtahid*, after having investigated the *ijtihādīc* sources, is still not able to come to any conclusion on the legal ruling of a given topic, say, the legal ruling on smoking tobacco. As such, the *mujtahid* still cannot conclude whether the smoking of tobacco is obligatory, prohibited, encouraged, discouraged, or just permissible. In other situations, the *mujtahid* may already know that a specific type of legal ruling on a topic exists. For example, the *mujtahid* knows that there is an obligatory prayer on Friday, but it may not be possible to determine what is the specific object (*muta'allaq*) of this legal ruling; namely, whether the obligatory ruling relates to mid-day prayer (*ẓuhr*) or Friday prayer (*Jum'a*). Therefore, the *mujtahid* may still be doubtful about the object of the obligatory prayer on Friday.³

Returning to the four procedural principles, when the type of legal duty is doubtful (*shakk fī l-taklīf*)—whether because of the lack of scriptural texts, ambiguous texts, or contradictory texts; or due to lack of knowledge about an actual case⁴—modern Imāmī legal theorists, unlike Shi'ī Scripturalists, often

3 Ibid., 2: 17.

4 Therefore, the *mujtahid* wonders whether this case is obligatory or prohibited; whether it is obligatory or encouraged, discouraged, or permitted; and whether it is prohibited or the other three non-obligatory options.

believe that the *aṣālat al-barāʾa al-sharʿiyya* (priority of divine exemption) should be enforced.⁵ Application of this principle means that such cases are permissible, though not obligatory or encouraged. For example, in the case of smoking tobacco, the legal ruling per se is unknown as there is no clear scriptural text on this matter. Therefore, the *mujtahid* has to decide whether the smoking of tobacco is prohibited or permissible. Given the *aṣālat al-barāʾa al-sharʿiyya*, the *mujtahid* would be able to specify the apparent legal ruling that smoking of tobacco is permissible in practice. However, as noted by these scholars, whenever the type of legal ruling is known but the object (*mutaʿallaq*) of the legal ruling is doubtful—namely, in cases belonging to the object of duty (*shakk fī l-mukallaḥ bihi*)—then the *aṣālat al-iḥtiyāṭ al-sharʿiyya* (priority of divine precaution) should be enforced. For example, in the case of Friday obligatory prayer, this principle should be applied because the existence of a legal duty itself—obligatory prayer on Friday—is known, whereas the object of the legal duty—whether the obligatory prayer is mid-day prayer or Friday prayer—is unknown. Presuming this priority, Muslim individuals should execute both mid-day and Friday prayers on Friday to make sure that they have certainly fulfilled the obligatory prayer which has been decreed for Friday. However, this is the case if the doubtful object of legal duty is limited to a few possibilities such as the aforementioned example. Otherwise, the next procedural principle should be enforced.⁶

In contrast, *aṣālat al-takhyīr* (priority of optional choice) is applicable when: a. the type of legal ruling is known but the object of the legal ruling is doubtful, while the doubtful object contains unconfined possibilities in which observing the priority of precaution is not contingent or highly difficult so that rational people (*ʿuqalāʾ*) do not follow such knowledge in practice. Imagine an individual who knows that one of the numerous glasses containing liquid in this room contains wine (assuming that consumption of wine is prohibited in Islam) but the person does not know which one exactly—;⁷ b. a given case potentially carries two possibilities of obligation and prohibition, and there is no received revelatory evidence determining which one should prevail. In this situation, pursuing this procedural principle, the lawgivers leave all the

5 al-Anṣārī, *Farāʾid al-uṣūl*, 2: 19–20; al-Khurāsānī, *Kifāyat al-uṣūl*, 338. Though it goes without saying, I emphasise that my account of the procedural principles here does not reflect the nuances of such a profound and highly disputed debates in modern Shiʿi legal theory, although it sufficiently serves the purposes of this study. To learn about this scholarship in detail, readers should study the original works of modern Shiʿi legal theory as there is hardly any literature on this topic in English.

6 al-Anṣārī, *Farāʾid al-uṣūl*, 2: 277–80; al-Khurāsānī, *Kifāyat al-uṣūl*, 358–60.

7 al-Anṣārī, *Farāʾid al-uṣūl*, 2: 257–73.

options in the hands of legal practitioners, and they are free to choose either possibility, but not both.⁸

Finally, the principle of *aṣālat al-istiṣhāb* (priority of presumption of continuity) applies to the topic that had a previous definitive legal ruling but now has become doubtful. Given the presumption of continuity, the person should maintain adherence to the legal ruling in practice regarding anything about which they were previously certain but then subsequently have come to doubt whether it still persists; for example, when a person is certain that she made ablution for morning prayer, but is uncertain whether she did anything between the ablution and the mid-day prayers, such as taking a nap, which would break the ablution. The presumption of continuity legally provides the person with the ability to maintain adherence to the same preceding condition of which she was formerly certain. Thus, in the case of ablution, the person can maintain adherence to the existence of ablution until the time of mid-day prayer in practice and pray without making a new ablution.⁹

In addition, there is another essential issue in legal theory concerning the debate on whether a general legal ruling itself on a given topic or a specific actual case in reality is doubtful. The former situation, that of a doubt pertaining to a legal ruling (*shubha ḥukmiyya*), emerges when there are either no revelatory indicators from the Qurʾān or *sunna* on a given topic or when there exist ambiguous or contradictory revelatory indicators on this topic. The latter situation, which is doubt pertaining to an actual case (*shubha mawḍūʿiyya*), emerges when one cannot specify what the actual case is in reality. This situation could be illustrated using the previous example. Consider a glass containing a liquid, and one does not know whether it is water and hence is permissible to drink, or wine, which would be prohibited according to Islamic law.¹⁰ Given Shiʿi legal theory, the situation of doubt pertaining to an actual case is not concerned legal theory; it is a matter of practice in reality and Muslim individuals are required to approach such cases by enforcing the appropriate procedural principles, using guidance from jurists. However, the former case of doubt pertaining to a legal ruling is associated with *ijtihād*, and thus it needs to be investigated in legal theory.¹¹

Bear in mind that in addition to the *ijtihād*ic proofs and procedural principles, there are other rules called legal maxims (*qawāʿid fiqhīyya*) that Imāmī jurists often practise to derive legal rulings on any cases. In fact, exercising

8 al-Anṣārī, *Farāʿid al-uṣūl*, 2: 298; al-Khurāsānī, *Kifāyat al-uṣūl*, 355–57.

9 al-Anṣārī, *Farāʿid al-uṣūl*, 3: 9–10; al-Khurāsānī, *Kifāyat al-uṣūl*, 384–85.

10 al-Anṣārī, *Farāʿid al-uṣūl*, 2: 18.

11 *Ibid.*, 2: 13–14.

ijtihād on a case, concerning modern Imāmī *ijtihād*, would not be complete if *mujtahids* did not seek the enforceable legal maxims in their investigation. Legal maxims consist of the general principles of *fiqh* that can comprehensively or predominantly be applied to all of their related specifics. There are many such legal maxims, some of which I will address in this chapter.

Legal maxims are principles derived from the expanded exercise of juristic rules on various legal subjects and thus can be applied to various topics.¹² Their broad application explains why these maxims play such a significant role in the establishment of Islamic law. According to Kamali,¹³ legal maxims are usually expressed in the form of very short statements expressing some principal aims of law. They are typically derived from the Qurʾān or *sunna* and have been expanded by jurists in different periods. There are numerous legal maxims, including the maxims of dominance (*qāʿidat al-taslīṭ*),¹⁴ purity (*al-ṭahāra*),¹⁵ no harm and no retribution (*lā ḍarar wa-lā ḍirār*), the necessary elimination of harm (*al-ḍarar yuzāl*),¹⁶ and necessity (*al-idṭirār*).¹⁷

Even though Imāmī jurists, like their Sunni counterparts, have commonly enforced various maxims in their legal debates, the theoretical discussion of legal maxims was not a high-priority concern of Imāmīs before the middle of the twentieth century. That is when these scholars began to study the nature of legal maxims more closely and to investigate the distinctions between such maxims and principles concerning legal theory. Current Shiʿi scholarship discerns the difference between legal maxims and legal theory as follows.

12 See, for example, Laldin, *Islamic Law*; Rabb, *Doubt in Islamic Law*; Saiti and Abdullah, “The Legal Maxims”; Zakariyah, *Legal maxims in Islamic criminal law*.

13 Kamali, *Shariʿah Law*, chap. 7, 141–61; and “Legal Maxims,” 80.

14 In accordance with this maxim, individuals have the right to or control over themselves or their soul and bodies (*anfus*) and properties (*amwāl*). Jurists consider this highly rational and a rule that the Islamic lawgivers do not deny. But it is important to know that this right in Islam is limited to all possessions that are considered as rational within humans or within Muslim societies (al-Irawānī, *Durūs tamhīdiyya*, 2: 104–10; Makārim al-Shīrāzī, *al-Qawāʿid al-fiqhīyya*, 2: 34–37).

15 This maxim implies that everything is pure or clean unless one knows definitely that something is otherwise unclean (al-Irawānī, *Durūs tamhīdiyya*, 2: 44; Makārim al-Shīrāzī, *al-Qawāʿid al-fiqhīyya*, 2: 417–22).

16 According to this widely accepted principle in Islamic legal scholarship, Muslims are not allowed to harm themselves or harm others; rather, they must take care of their own and others’ lives, health, and property (al-Irawānī, *Durūs tamhīdiyya*, 1: 89; Makārim al-Shīrāzī, *al-Qawāʿid al-fiqhīyya*, 1: 54–59).

17 This maxim, which in its complete format is articulated as *al-ḍarūrāt tubīḥu l-maḥẓūrāt*, implies that necessities render impermissible or unlawful acts or behaviours permissible or lawful (Muḥaqqiq Dāmād, *Qawāʿid-i fiqh*, 4: 123–24).

Legal maxims are in themselves legal rulings, whether actual or apparent, that are derived from the various Islamic sources, in particular the Qurʾān and *sunna*. These maxims manifest general principles that are directly applicable to their related particulars. The principles established in legal theory (*uṣūl al-fiqh*), in contrast, are general principles constructed by legal theorists to derive legal rulings from the primary sources of *ijtihād*. For example, the principle of purity (*qāʿidat al-ṭahāra*) is a legal maxim which conveys a general legal ruling stating that everything is pure according to Islamic law, unless there exists sufficient evidence to prove otherwise. This maxim can directly be applied to any particular case where it is not known whether this given case is pure or not. However, the single-strand *ḥadīth* is a principle established in legal theory and is not a legal ruling per se. Yet, by applying this principle to a topic, a *mujtahid* might derive a legal ruling on the topic from the primary source of *sunna*.¹⁸

Legal maxims are also different from the procedural principles. The procedural principles can be applied in cases where their actual legal rulings cannot be derived from the primary sources of *ijtihād*. These principles are general and can be used in all or most parts of *fiqh*. In contrast, legal maxims are usually related only to one or a few topics of *fiqh*. In addition, unlike general procedural principles, the application of legal maxims to their appropriate particulars does not need a *mujtahid* to mediate in the process. Instead, individuals can independently apply them when needed. Moreover, unlike the four general procedural principles, legal maxims do not necessarily imply apparent legal rulings in practice. Although some maxims do convey apparent legal rulings in practice, others imply either mere apparent or actual legal rulings.¹⁹

In fact, a maxim can be derived from Islamic sources in the following three ways: (1) it can be derived in a definitive way (*qaṭʿī*), which implies **actual** legal rulings; (2) it can be derived in an uncertain way (*ẓannī*) or via uncertain opinions (*amārāt*), which implies **apparent** legal rulings, though leaning towards actual legal rulings; (3) and it can be derived for a doubtful situation to tackle an issue in practice, which implies **apparent legal rulings in practice**. Scholars have discussed whether several specific legal maxims are definitive principles, particular uncertain opinions, or particular procedural principles.²⁰ For example, Khumaynī, in his discussion of the principle of lawfulness, argues that it is a *particular* procedural principle that implies an *apparent lawfulness in*

18 al-Irawānī, *Durūs tamhīdiyya*, 1: 13–14; Makārim al-Shīrāzī, *al-Qawāʿid al-fiqhiyya*, 1: 22–24.

19 Ibid.

20 See Makārim al-Shīrāzī, *al-Qawāʿid al-fiqhiyya*, 1: 140 and 235.

practice.²¹ However, Imāmī jurists, as indicated earlier, explicitly distinguish between such legal maxims and those uncertain opinions, as well as the four procedural principles related to legal theory.

Legal maxims are also divided into two types. First, there are those that can be applied only to defining rulings (*aḥkām taklīfiyya*) or to both defining rulings and declaratory rulings (*aḥkām waḍ'īyya*). This type includes the principles of permissibility and lawfulness, assuming one believes that these two are legal maxims.²² The second type includes those maxims that can only be applied to declaratory rulings, such as that of correctness (*qā'idat al-ṣiḥḥa*)²³ or of dominance (*qā'idat al-taslīṭ*), which are not directly concern any of the five Islamic defining rulings: obligatory (*wājib*), recommended (*mustaḥabb*), permitted (*mubāḥ*), discouraged but not unlawful (*makrūh*), and prohibited (*ḥarām*).²⁴

Legal maxims also differ in their applicability.²⁵ Some are only applicable in cases of doubt pertaining to an actual case (*shubha mawḍū'īyya*), such as the legal maxim concerning deception (*qā'idat al-ghurūr*)²⁶ and that associated with taking possession (*qā'idat al-yad*).²⁷ Others can be enforced to both cases of doubt pertaining to an actual case and doubt pertaining to a legal ruling (*shubha ḥukmīyya*), such as the legal maxim concerning the negation of hardship (*qā'idat naḥy al-ḥaraj*), that of no harm and no retribution (*qā'idat lā ḍarar wa-lā ḍirār*), and that of purity (*qā'idat al-ṭahāra*).

Before further discussing how and to what extent such procedural principles or legal maxims can be applied to the case of modern homosexuality, it would be useful to bear in mind Khumaynī's legal reasoning for his *fatwā* on the permissibility of gender confirmation surgery (GCS). We have learned that the legal ruling on any topic, following modern Shi'i legal theory, should first be investigated in regards to four original sources: the Qur'ān, *sunna*, *ijma'*, and *uql*. If a case does not have enough evidence from these sources, the legal ruling should be based on Islamic legal maxims or derived from procedural principles. Therefore, Khumaynī, who legalised GCS, should have first turned

21 al-Khumaynī, *Jawāhir al-uṣūl*, 1: 74.

22 al-Ṭabāṭabā'ī al-Yazdī, *Takmilat al-'Urwa*, 1: 21.

23 It implies that the behaviours or actions of Muslim individuals should be regarded as valid unless proven otherwise (See Makārim al-Shīrāzī, *al-Qawā'id al-fiqhīyya*, 1: 114; al-Muṣṭafawī, *al-Qawā'id*, 149).

24 al-Irawānī, *Durūs tamhīdīyya*, 1: 74, 2: 96.

25 al-Muṣṭafawī, *al-Qawā'id*, 11.

26 Given this maxim, a deceiver should be counted as responsible for the harm caused by his deceptive trade (al-Irawānī, *Durūs tamhīdīyya*, 2: 154–55).

27 This maxim confirms that things should be deemed as people's property if they have control (*istīlā'*) over them and make use of them (al-Irawānī, *Durūs tamhīdīyya*, 1: 188).

to the Qur'ān, *sunna*, *ijma'*, and *'aql*. However, since GCS is a new concept, there is nothing in the Qur'ān or *sunna* that clearly refers to it. No wonder that the topic remains controversial among Imāmī jurists. Moreover, at this first stage, there is no clear assessment from reason regarding the question of GCS. Therefore, there is no resolution to this issue, except by returning the topic to legal maxims or procedural principles to seek a second solution. At this level, Khumaynī could possibly enforce some different principles to derive a legal ruling on the permissibility of GCS. There are at least two main proofs through legal maxims that these jurists could have possibly considered: the two similar maxims of the principle of permissibility (*qā'idat al-ibāha*) or the principle of lawfulness (*qā'idat al-ḥillīyya*), if one considers these two principles as legal maxims, and the principle of dominance (*qā'idat al-taslīf*).

The general principles of permissibility or lawfulness mean that everything, including every action such as GCS, which cannot clearly be categorised as being forbidden or permissible, is allowed and lawful, except, of course, those behaviours or actions that are explicitly prohibited in an authentic Islamic source. Presuming the principle of dominance, everybody has a right to, or control over, their body and property. However, it is important to know that in Islam this right is limited to all possessions which are thought of as rational within human beings. If changing the body by surgery or GCS is seen as rational, as is the case in many modern societies, then based on this maxim everyone is entitled to use their rights to change their body through surgery.

From procedural principles, Khumaynī could consider the *aṣālat al-barā'a al-shar'īyya* (priority of divine exemption) to legalise GCS because the Islamic legal ruling on GCS is doubtful as there are no scriptural texts on this modern phenomenon. Thus, such a situation is a case of the priority of divine exemption.

2 Applying Procedural Principles to Homosexuality

It became clear that the legal ruling on modern homosexuality cannot be derived from the first level of *ijtihād*. So, the nature of the legal ruling on homosexuality remains doubtful. Therefore, a *mujtahid*, who wishes to exercise *ijtihād* on this topic, needs to move on and tackle the issue at the second level of *ijtihād*, that is, the level of procedural principles. Before examining the application of procedural principles to homosexuality, it should first be clarified what exactly is doubtful about this topic. Is the type of legal duty (*taklīf*) or the object of duty (*muta'allaq al-taklīf* or *mukallaḥ bihi*) doubtful? If the latter is true, then it would require an established legal ruling on the case of homosexuality in advance, and we do not know what the object of this legal ruling is.

However, as arguably confirmed in this study, there is no such established legal ruling on this case. Therefore, it is not a case associated with doubt pertaining to the object of duty (*shakk fi muta'allaq al-taklīf*); instead, it concerns a case of doubt pertaining to the type of legal duty (*shakk fi l-taklīf*). This means, after having carried out a comprehensive investigation into the primary sources of *ijtihād*, namely the Qur'ān, *sunna*, *ijmā'*, and *'aql*, the legal ruling on homosexuality is doubtful for jurists.

Nevertheless, homosexual relationships are not a case for a possible obligatory ruling, as any kinds of sexual relationships are permissible under the marriage contract, and marriage per se, if it contains same-sex unions at all, is not a subject to obligatory legal rulings concerning Islamic law. Thus, in the case of homosexuality in the lack of *ijtihād*ic reasoning, homosexual relationships would possibly have one of the following rulings, ranging from a harsh attitude to a more moderate or tolerant approach: prohibited, discouraged, permitted, or encouraged. For this study, it is sufficient to explore whether homosexuality is prohibited or solely permitted. The possibility of the legal encouragement of homosexuality is not significant for building a legal-juridical framework for licit egalitarian same-sex sexual relationships. This is also the case for possible discouragement, because, according to Islamic law, as long as a given topic is not prohibited, it is possible to take a licit legal stance about it. For example, as explained in Chapter 5, according to a widely accepted approach in Shi'i scholarship, the practice of consensual anal sexual penetration between a man and his wife is permissible, although discouraged. Therefore, this practice—consensual anal sexual penetration between a man and his wife—is not considered as an illicit sexual relationship in Imāmī law.

Following al-Anṣārī's terminology, homosexual relationships should therefore be a doubtful case of legal duty with doubt situated between prohibition and permissibility (*shakk fi l-taklīf ma'a dawarān al-amr bayn al-ḥurma wa-l-ibāḥa*). Contemporary Shi'i jurists often uphold that, in such cases, the *aṣālat al-barā'a al-shar'iyya* (priority of divine exemption) should be enforced. Given this priority, if clearly non-contradictory received evidence in primary Islamic sources cannot be found to forbid a behaviour or action, such as homosexuality or homosexual relationship, it should be considered permissible in practice.

Imāmī jurists have extensively discussed the various grounds for the enforcement of this priority in a situation where the legal ruling of a given case is doubtful because of the lack of scriptural or rational indicators, unclarity of the indicators, or contradictions between indicators.²⁸ Among the many

28 See, for example, al-Anṣārī, *Farā'id al-uṣūl*, 2: 20–118; al-Khurāsānī, *Kifāyat al-uṣūl*, 339–43; al-Nā'ini, *Fawā'id al-uṣūl*, 3: 330–71; al-'Irāqī, *Nihāyat al-afkār*, 3: 201–39.

proofs in favour of the *aṣālat al-barā'a al-shar'īyya* presented by such scholars, the following are the main ones: a verse of the Qur'ān and a *ḥadīth* from the Prophet Muḥammad. Q. 17:15 indicates that Muslims will not be punished without a received message. A similar *ḥadīth* from the Prophet also conveys that Muslims are relieved of that which they do not know by receiving a revelatory message.²⁹ Based on this principle, it can be concluded that as long as there is no clearly non-contradictory received indication against homosexuality or homosexual relationships, they should be deemed permissible. This proof can readily go along with Khumaynī's line of reasoning in the case of transgender GCS.

However, it seems that there is a plausible way of understanding the case of male homosexuality as a doubtful situation regarding the object of duty (*shakk fī muta'allaq al-taklīf* or *mukallaf bihi*) in which the type of legal duty (*shakk fī l-taklīf*) per se is not doubtful. To explain, Imāmī jurists might argue that the legal ruling on male homosexuality is known because male–male sexual relationships might imply the presence of anal sexual intercourse between two men, and according to *aḥādīth*, such sexual relationships are prohibited—at least in some cases as in anal sexual relationships between an adult man and a very young boy and in male pathological passivity. Now the question is whether anal sexual practice between two adult men who partake in a consensual anal sexual relationship is also prohibited. Presuming this understanding, the male homosexual relationship is a case where the legal duty (*taklīf*) is known while there is a doubt about the *object* of this duty. It was noted that Shi'i jurists hold that in such cases we have to apply the priority of divine precaution. This means that male homosexual relationships should be regarded as prohibited in practice, and thus Muslim individuals who identify as homosexual must take this position and not engage in such relationships and, in particular, in anal sexual behaviour.

This proof could be accepted if the prohibition of male pederasty and male pathological passivity had been grounded on the prohibition of anal sexual intercourse per se, not on the characteristics of the partners involved in the acts, namely boys and passive males who were thought to be afflicted with sickness. However, as has been elaborated in Chapter 5, it does not seem that anal sexual intercourse per se was the subject of the prohibition addressed in the *aḥādīth*. Instead, specific same-sex sexual relationships—namely pederasty and male pathological passivity, whether anal or not—are prohibited regarding these *aḥādīth*. If not, it would be pointless to see a great portion of these *aḥādīth* which explicitly and repeatedly refer to the relationships

29 al-Kulaynī, *al-Kāfī*, 2: 463; al-Ṣadūq, *al-Khiṣāl*, 417.

between adult men and boys or passive males with pathological conditions. Moreover, if the prohibition of anal sexual intercourse were the case in these *aḥādīth*, anal sexual practice between a man and his wife should also have been prohibited in Islamic law. However, Imāmī jurists often uphold that this practice is not prohibited if it occurs based on an agreement between the two parties, namely the wife and the husband. Therefore, it is hard to find a basis for considering this case as a doubtful situation regarding the object of duty.

To sum up, given the modern Shi'ī debates on procedural principles, homosexuality should be assessed as permissible in practice, as the doubt over legal rulings on homosexual relationships is a case of doubt in the type of legal duty (*shakk fī l-taklīf*). Therefore, *aṣālat al-barā'ā al-shar'īyya* is the procedural principle that should be applied to this case.

3 Applying Legal Maxims to Homosexuality

There are several legal maxims that one can contemplate to uphold for the permissibility of homosexuality or homosexual relationships. I shall examine a number of these maxims in the rest of this chapter.

3.1 *The Principle of Permissibility*

There is a principle called the principle of permissibility (*qā'idat al-ibāḥa*) which could be used to legitimise homosexual relationships. In Imāmiyya, this principle intends that the legal ruling on every subject, behaviour, or action is to be permissible (*mubāḥ*), unless, based on primary sources, it can explicitly or definitely be categorised or known as being impermissible.³⁰ Despite the extensive debate over this principle in legal theory, it seems that Imāmī legal scholarship on this topic needs more elaboration on whether this principle is a rational rule or a scriptural principle and, in either case, whether it is a legal maxim or a principle concerning legal theory, and also, in the latter case, whether it is a case of the procedural principle (namely the priority of divine exemption), an uncertain opinion (*amāra*), or a definitive reasoning (*dalīl qaṭ'ī*). Therefore, it is necessary to first explore the nature of this principle.

An overview of Shi'ī legal literature on this issue attests that this principle can be interpreted differently. It might be interpreted as a rational rule as follows: all things (*ashyā'*), including actions and behaviours, before the revelation (*qabl al-shar'*) are to be permitted (*mubāḥ*) in principle unless, based on reason, they can definitely be categorised as being vile (*qabīḥ*) or obligatory.

³⁰ See al-Khū'ī, *Miṣbāḥ al-uṣūl*, 2: 274.

This principle was later categorised as the following: all things (*ashyā'*) are free of Islamic legal ruling, that is, they are essentially permitted in the lack of direct or explicit regulation.³¹ Given this interpretation of the principle, it seems that scholars who hold that all things before the revelation are permitted probably intended that such things are *really* or *actually* permissible (*ibāḥa wāqī'iyya*) according to a definitive proof.

However, this principle was also understood in alternative ways. It seems that for some scholars at least, the principle of permissibility can be derived from scriptural indicators, such as verses of the Qur'ān or a number of *aḥādīth*.³² For example, Q. 2:29 implies that God created for humans all things that existed on earth, which apparently implies that in principle, everything is permissible (*mubāḥ*) for people to use. Or a *ḥadīth* ascribed to the sixth Imām, Ja'far al-Ṣādiq, suggests: "everything is permissible for you unless you have learned that it is forbidden per se, then avoid it."³³ In this case, we need to demonstrate the implication of such indicators and decide whether these verses or *aḥādīth* imply an *apparent* permissibility (*ibāḥa zāhiriyya*) or an *actual* permissibility (*ibāḥa wāqī'iyya*). It appears that these scriptural indicators are not evidently clear statements (*nuṣūṣ*). Thus, they can potentially imply only an *apparent* permissibility for the behaviours or actions, unless, based on primary Islamic sources, they can explicitly or definitely be categorised or known as being impermissible.

Concerning this concept, the question is whether this principle is a *particular* uncertain opinion (*amāra*) that conveys an *apparent* permissibility which leans towards an actual permissibility; or is a *particular* procedural principle which implies an *apparent* permissibility in practice (*al-ibāḥa al-zāhiriyya al-'amaliyya*). In this latter case, one might still wonder whether this principle

31 This topic was debated by various Muslim legal schools, including the Shi'ī school, at an early stage of Muslim legal scholarship under the title of *al-ḥaẓr wa-l-ibāḥa* (proscription and permission). In Imāmiyya, al-Ṭūsī, following his teacher al-Shaykh al-Mufīd, believes that it is not possible to hold that all things (*ashyā'*) are in principle or in nature proscribed or permitted without a revelatory indicator (al-Ṭūsī, *al-'Udda*, 2: 742). However, al-Sharīf al-Murtaḍā advocates giving fundamental permission for all things before revelation (*qabl al-shar'*), unless reason identifies something to be obligatory (al-Sharīf al-Murtaḍā, *al-Dharī'a*, 2: 809). This latter approach became a commonly accepted view among later Shi'ī scholars. It is important to note that this debate from al-Muḥaqqiq al-Ḥillī onwards has also been discussed under the principle of *fundamental non-assessment/exemption* (*barā'a aṣliyya*) in Shi'ī legal theory (see al-Ḥillī (Muḥaqqiq), *Ma'ārij al-uṣūl*, 213). For an extensive discussion on this issue, see Alipour, "Ethical Assessment of Acts"; Gleave, "Value Ontology and the Assumption of Non-Assessment"; Reinhart, *Before Revelation*.

32 al-'Irāqī, *Nihāyat al-afkār*, 3: 231.

33 al-Ḥurr al-'Amīlī, *Tafṣīl wasā'il al-shī'a*, 17: 89.

should be rendered to the procedural principle related to legal theory, namely the priority of divine exemption. The majority of Imāmī jurists, however, hold that the principle of permissibility is different from the priority of divine exemption.³⁴

To sum up, according to the criteria of legal maxims in Imāmiyya, one might provide compelling proof that the principle of permissibility should be categorised as a legal maxim deriving *actual* permissibility if it is held to be a definitive reason. It should also be articulated as a legal maxim implying *apparent* permissibility while leaning towards actual permissibility if it is regarded as a *particular* uncertain opinion. Finally, this principle should be seen as a legal maxim implying apparent permissibility *in practice* if it is thought to be a *particular* procedural principle different from the priority of divine exemption. However, if one connects this principle with the priority of divine exemption, then it should be defined as a principle associated with procedural principles and, thus, to legal theory. Despite their extensive debate on this rule, Shiʿi scholars, to my knowledge, have not addressed this specific issue.

Whether this is a rational or revelatory principle or whether it is a procedural principle linked to the priority of divine exemption or a legal maxim, the question is how one may address this principle to vindicate the permissibility of homosexuality in Islam. To answer, we first need to bear in mind that this study so far has shown that there are no definite or explicit indicators against homosexual relationships in primary Imāmī sources: the Qurʾān, *sunna*, *aql*, or *ijmāʿ*. Given this, one can argue that homosexual relationship is a case that lacks any explicitly received indicators from primary Islamic sources about the legal ruling on this case, and thus, given the principle of permissibility, homosexual relationship should be deemed permissible.

However, we should not forget that this permissibility with regard to homosexuality can be understood in four different ways. (1) It can be interpreted as a case of the principle of “fundamental non-assessment/exemption” (*barāʾa aṣliyya*) according to which a homosexual relationship should principally be viewed as a permissible phenomenon or free of Islamic legal ruling in the absence of direct or explicit regulation. This means homosexual relationship should *essentially* be permitted. (2) It might also be understood as a legal maxim associated with a *particular* uncertain opinion which can be applied to the case of homosexual relationships to *apparently* permit such relationships. (3) It can be interpreted as a legal maxim concerning a *particular* procedural principle that can be applied to the case of homosexuality to apparently permit homosexuality *in practice*. (4) It can finally be understood as a procedural

34 See, for example, al-ʿIrāqī, *Nihāyat al-afkār*, 3: 200; al-Nāʿinī, *Fawāʿid al-uṣūl*, 3: 328–29.

principle linked to the priority of divine exemption. According to the first conception of the principle, it seems that homosexual relationships should be deemed permissible as an actual legal ruling (*ibāḥa wāqīʿiyya*). Given the second meaning, homosexuality should be viewed permissible as an apparent legal ruling (*ibāḥa zāhiriyya*). Regarding the third notion, homosexual relationships should be held permissible as an apparent legal ruling in practice (*al-ibāḥa al-zāhiriyya al-ʿamalīyya*). However, given the fourth articulation, the *qāʿidat al-ibāḥa* is nothing but the priority of divine exemption, which has been discussed earlier; and thus would not be an additional principle which can be used independently for the permissibility of homosexuality.

3.2 *The Principle of Lawfulness*

There is another principle called the principle of lawfulness (*qāʿidat al-ḥilliyya*) which can potentially be employed to uphold homosexuality. According to this principle, everything, including every action and behaviour, is lawful, unless, based on primary Islamic sources, it can explicitly or definitely be categorised or known as being unlawful.³⁵ Although this principle, at least literally, is different from the principle of permissibility, there is a dispute over whether they are different in nature or should be regarded as similar, albeit asserted in different statements. For example, if this principle conveys a rational permissibility or “fundamental non-assessment/exemption” (*barāʿa aṣṭiyya*), then it would be an identical principle to the principle of permissibility. Given this conception, the *qāʿidat al-ḥilliyya* would not be an independent principle that can be argued for homosexuality. However, Shiʿi scholars often count the *qāʿidat al-ḥilliyya* as a Sharʿi principle derived from the scriptural texts.³⁶ Some of these scriptural indicators are as follows:

They ask thee what is lawful unto them. Say, “Lawful unto you are all good things ...” (Q. 5:4)

A *ḥadīth* attributed to the sixth Imām, Jaʿfar al-Ṣādiq, states: “Everything which contains both permissible and forbidden portions/chunks, is lawful for you forever unless you have learned that a specific portion/chunk is forbidden per se, then avoid it.”³⁷

35 al-Khurāsānī, *Kifāyat al-uṣūl*, 341.

36 See, for example, al-Anṣārī, *Farāʿid al-uṣūl*, 2: 21; al-Khurāsānī, *Kifāyat al-uṣūl*, 341; al-Khūʿī, *Miṣbāḥ al-uṣūl*, 2: 273; and al-Nāʾinī, *Fawāʿid al-uṣūl*, 3: 363.

37 al-Ḥurr al-ʿAmilī, *Tafṣīl wasāʾil al-shīʿa*, 17: 88.

A similar *ḥadīth* ascribed to the fifth Imām, Muḥammad al-Bāqir, too.³⁸

It appears that Imāmī jurists, who maintain this principle as a general rule which has been derived from revelatory indicators, hold that the lawfulness in this verse and the *aḥādīth* address an apparent lawfulness in practice, and thus it should be counted as a procedural principle.³⁹ Given this understanding of the *qā'idat al-ḥilliyya*, it seems that a number of scholars, such as al-Khurāsānī, lean towards connecting this principle with the priority of divine exemption.⁴⁰ However, the majority of Shi'ī scholars hold that, though seemingly similar, this rule is a different procedural principle from the priority of divine exemption.⁴¹ This group provides various proofs for their approach which are not essentially relevant to this study. However, it is significant to note that in case, if this principle is connected with the priority of divine exemption, then it would not add to the list of proofs on homosexuality, and thus cannot be used as an independent proof for the case of homosexuality.

However, there is another possible interpretation of the lawfulness in this principle which has rarely been noted by contemporary Imāmī jurists. That is the idea that lawfulness in this principle might imply a general legal ruling conveying actual or apparent lawfulness.⁴² According to this concept, the *qā'idat al-ḥilliyya* should not be regarded as a general procedural principle or an uncertain opinion related to legal theory. Instead, it should be viewed as a legal maxim, whether a definitive proof (implying an *actual* lawfulness), a *particular* uncertain opinion (implying an *apparent* lawfulness leaning towards an actual lawfulness), or a *particular* procedural principle (conveying an *apparent* lawfulness *in practice*). Interestingly, Khumaynī notes that this principle, unlike the priority of divine exemption, is not a matter pertinent to legal theory. Instead, it is a topic of *fiqh* (*mas'la fiqhiyya*).⁴³ Despite the fact that this principle has commonly been used in various topics in *fiqh*, it is difficult to describe a situation in which a procedural principle per se would be part of a discussion in *fiqh*. However, Khumaynī's point can be understood differently; that is, the *qā'idat al-ḥilliyya* is a legal maxim and needs to be debated in *fiqh*. This approach can be advocated by noticing that it coheres with the criteria of legal maxim, as the principle of lawfulness contains a general apparent

38 Ibid., 25: 118.

39 See, for example, al-Anṣārī, *Farā'id al-uṣūl*, 2: 178–79; and al-Khumaynī, *Jawāhir al-uṣūl*, 1: 74.

40 al-Khurāsānī, *Kifāyat al-uṣūl*, 341–42.

41 See, for example, al-Anṣārī, *Farā'id al-uṣūl*, 2: 178–79; al-Khumaynī, *Jawāhir al-uṣūl*, 1: 74; al-Rawḥānī, *Muntaqā l-uṣūl*, 5: 8.

42 al-Muṣṭafawī, *al-Qawā'id*, 123.

43 al-Khumaynī, *Jawāhir al-uṣūl*, 1: 73.

lawfulness which can be enforced to its particular cases in different topics in *fiqh* where needed.

Now let us examine whether the principle of lawfulness can convincingly be used for homosexual relationships. As alluded, if this principle implies a rational permissibility, then it would be identical to the principle of permissibility. In this case, although this principle would be suitable for legitimising homosexual relationships, it apparently does not add anything new to the list of the proofs that one might provide to advocate for homosexuality in Shi'i law. However, given that this principle is one of the procedural principles, it again needs to be noted that, in this case, if the *qā'idat al-ḥilliyya* can be linked to the priority of divine exemption, then it would not be different from the previous proof for homosexual relationships based on the priority of divine exemption. Nevertheless, by considering the *qā'idat al-ḥilliyya* as a legal maxim associated with a *particular* procedural principle, then it should be counted an independent proof. To explain, as there is no indicator in Islamic primary sources that forbids homosexual relationships per se, the actual legal ruling on this phenomenon remains doubtful after a comprehensive *ijtihādīc* investigation of the original sources. Therefore, enforcing the *particular* procedural principle of lawfulness implies that homosexual relationships are *apparently* lawful in practice (*al-ḥalāl al-ẓāhirī al-ʿamalī*).

Having said that, only a few Shi'i jurists hold that this principle includes both doubt pertaining to an actual case (*shubha mawḍūʿiyya*) and doubt associated with a legal ruling (*shubha ḥukmiyya*), according to which the principle of lawfulness can persuasively be argued for the case of homosexual relationships as it apparently concerns a doubtful legal ruling.⁴⁴ Modern Shi'i scholars often uphold different views regarding the scope of this principle.⁴⁵ They believe that this principle only applies in occasions where doubt pertains to actual cases. Therefore, it cannot be argued for homosexuality as it is a case of doubtful legal ruling, not a doubt pertaining to an actual case.

Nevertheless, despite the fact that it is more convenient to count the case of homosexual relationships as a case of doubtful legal ruling, it is possible, through using a more technical, complex approach, to interpret it as a doubt concerning an actual case. To briefly explain, suffice it to recall that, following Islamic law, there can be two types of sexual relationships between humans: either those which are explicitly illicit and prohibited, such as *zinā*, *liwāṭ*, and *siḥāq*, or those which are lawful, such as sexual relationships between

44 See al-Tabrizī, *Dursūs fi masā'il ʿilm al-uṣūl*, 4: 270.

45 See, for example, al-Khū'i, *Miṣbāḥ al-uṣūl*, 2: 273–78; al-Nā'inī, *Fawā'id al-uṣūl*, 3: 363–64; al-Rawḥānī, *Muntaqā l-uṣūl*, 5: 8.

married couples. This study has found that homosexuality per se has not been addressed as a forbidden topic in Islamic sources. Therefore, it is now doubtful whether this relationship is related to cases such as *zinā*, *liwāt*, or *siḥāq*, and thus illicit and prohibited, or whether it is associated with the cases which are lawful in Islam. Given this description of the case, homosexual relationships appear to be a doubtful situation concerning an actual case. Following the principle of lawfulness, any instance of doubt pertaining to an actual case, whether a newly arising case or those from the past, is lawful unless, based on primary Islamic sources, it can explicitly or definitely be categorised as being unlawful. Therefore, according to this legal maxim, the doubtful case of homosexual relationships should be considered as a case of a lawful relationship *in practice*.

Finally, if one deems this principle as a legal maxim linked to a *particular* uncertain opinion (*amāra*), the application of this general maxim to the case of homosexual relationships should not be very difficult to understand. That is, since there are no revelatory indicators or any other evidence that homosexual relationships are unlawful, the legal maxim of lawfulness implies that this behaviour is *apparently* lawful (*ḥalāl ḡāhirī*).

3.3 *The Negation of Hardship*

The negation of hardship (*qā'idat nafy al-ḥaraj*) is another legal maxim which might be applied to argue for the case of homosexuality. Interestingly, this maxim is one of the principles which Shi'i jurists often believe has strong revelatory indicators from the Qur'ān and *sunna*.⁴⁶ Makārim al-Shirāzī has collected most of these indicators.⁴⁷ One of the clearest and most-cited indicators is the following verse of the Qur'ān:

[God] has placed no hardship for you in the religion (Q. 22:78)

It appears that the negation of imposing religious hardship is nothing but the negation of the establishment of regulation leading to adversity for Muslims.⁴⁸ According to this principle, no legal rulings have been regulated which might cause hardships for Muslims, or if such laws exist, they are negated and Muslims are not obliged to follow such laws as they cause difficulties for them. For example, in case the weather is so cold and the only water that exists for religious ablution is frozen water, making it difficult for a person to use for

46 al-Irawānī, *Durūs tamhīdiyya*, 1: 173; al-Muṣṭafawī, *al-Qawā'id*, 296–97.

47 Makārim al-Shirāzī, *al-Qawā'id al-fiqhiyya*, 1: 163–76.

48 al-Irawānī, *Durūs tamhīdiyya*, 1: 172–73.

ablution, based on *qā'idat nafy al-ḥaraj*, this person is not obliged to use the frozen water for ablution, and, instead, can make the ablution with clay. As scholars have noted, what is important here is that the hardship which is meant by this maxim is an extra adversity, not a normal difficulty which every legal duty somehow contains. However, as these jurists explicate, the hardship in this maxim does not imply the concept of something harmful, whether physical or mental. This is because the negation of harmfulness, which is stronger than hardship, has been addressed by another maxim, namely 'no harm and no retribution', which will be followed next. In addition, the hardship in this maxim also does not mean that the given act should be impossible to fulfil as God may not command Muslims to do impossible duties which are beyond their ability to fulfil.⁴⁹

With this knowledge of the maxim, let us examine the application of this principle to homosexual relationships. First, we need to recall the fact that homosexual people identify as entities whose orientation is based on same-sex sexual desire. They also wish to fulfil their sexual needs only with same-sex partners, not with the opposite sex. Moreover, in many cases, gay and lesbian Muslims assert that not only they do not wish to fulfil their sexual demands with the opposite sex but they in fact also cannot pursue this, as they are only attracted to same-sex partners.⁵⁰ Given this, it seems that the prohibition of same-sex sexual relationships implies that God should have set a regulation or commanded a significant minority group of Muslims, namely gay men and lesbian women, to obey a legal ruling which imposes hardship or adversity upon them. However, according to the *qā'idat nafy al-ḥaraj*, God has not set or commanded legal rulings imposing hardship. Therefore, even if one upholds that such a legal ruling, namely the prohibition of same-sex sexual relationships, has been regulated in Islam, it then should be limited to the cases which do not lead to hardship. Therefore, if such an existing law imposes adversity on homosexual people in general or on a homosexual person in particular, this law should be refuted based on the *qā'idat nafy al-ḥaraj*, even if the adversity in question does not rise to the level that causes physical or mental harm to homosexual people.

49 See, for example, al-Irawānī, *Durūs tamhīdiyya*, 1: 175–76; and Makārim al-Shīrāzī, *al-Qawā'id al-fiqhīyya*, 1: 160–61.

50 Afdhere Jama collects several fascinating stories of gay and lesbian Muslims, mainly living in Muslim majority societies, who strongly express this feeling that, despite the pressures from their families and respective societies, not only they do not wish to fulfil their sexual needs with the opposite sex, but they in fact cannot pursue this demand. This is because they are only attracted to same-sex partners, as these individuals emphasise (Jama, *Queer Jihad*). On this topic, also see Kugle, *Living out Islam*.

3.4 *No Harm and No Retribution*

Another such maxim is the maxim of no harm and no retribution (*qā'idat lā ḍarar wa-lā ḍirār*). Concerning this maxim, no harmful regulation has been established in Islam.⁵¹ As Makārim al-Shīrāzī remarks, the harmfulness addressed in this maxim includes all physical, mental, or economic harms.⁵² However, the important point is that this maxim implies the negation of *actual*, not possible, harms. Therefore, any given legal rulings which impose actual physical, mental, or economic harms on Muslim individuals are negated. Concerning this maxim, similar to the proof made under the maxim of the negation of hardship, there arguably exists a potential discursive space indicating that the prohibition of homosexual relationships physically or mentally harms those Muslim individuals who are gay or lesbian and wish to fulfil their sexual desire by practising same-sex sexuality. Therefore, such a legal ruling, namely the prohibition of homosexual relationships, either has not been regulated in Islam in the first place, or it is negated as it might harm gay and lesbian Muslims.

Nevertheless, the maxim of no harm and no retribution might also mean that Muslim individuals must not harm anyone or any other Muslims and must not be harmed or accept harms.⁵³ This perhaps led a number of Shi'i jurists to provide proofs against same-sex sexuality by citing evidence from scientific and medical studies and claiming that same-sex sexual behaviours causes epidemic diseases, such as HIV-AIDS—thereby suggesting that the individuals who engage in same-sex sexual behaviours are endangering themselves and others.⁵⁴ Kadiwar further asserts that same-sex sexual practice may possibly harm the body of a passive partner. Therefore, given the maxim of *lā ḍarar wa-lā ḍirār*, homosexual relationships can possibly harm the body of the partner who plays the receptive or passive role in anal sexual intercourse. Thus, it should not be permissible in Islam.

However, it appears that several assumptions implicated in this assertion which do not seem to be accurate or scientifically verified. As demonstrated in Chapter 6, a great number of scientists, including psychologists, psychiatrists, and physicians, in most parts of Europe, North America, South Africa and in some parts of South America and Asia, widely accept homosexuality as one of many sexual orientations which can be seen among humans. Hence, they no

51 Makārim al-Shīrāzī, *al-Qawā'id al-fiqhiyya*, 1: 58; al-Muṣṭafawī, *al-Qawā'id*, 43.

52 Makārim al-Shīrāzī, *al-Qawā'id al-fiqhiyya*, 1: 55.

53 Ibid., 1: 59.

54 See, for example, Muntaziri, *Pāsukh bi pūrsishhā-yi dīnī*, 487 and *Kitāb al-ḥudūd*, 145; Kadiwar, "Ḥuqūq-i aqalliyyat-i jinsī."

longer consider it as a disease. The American Psychological Association (APA) admitted that categorising homosexuality as a disease was a mistake. Therefore, the APA removed homosexuality from the list of the mental illnesses in 1974. Moreover, currently there are enough academic studies to convincingly verify that homosexuality per se does not cause any specific disease or harm which may put homosexual people (whether the passive/receptive or active/penetrator in anal sexual intercourse) or public health in danger.⁵⁵

In addition, Kadīwar's concern that homosexuality may possibly harm the body of a passive partner is not relevant to this maxim, because, as explained earlier, it only implies the negation of *actual*, not possible, harms. In fact, what Kadīwar indicates concerns another principle called the necessity of refuting *possible* harm (*wujūb daf' al-darar al-muhtamal*); a principle which some scholars perceive as a legal maxim⁵⁶ and others view as a rational principle related to legal theory.⁵⁷ However, Kadīwar's concern can be eliminated by noting that, based on Shi'i *ijtihād*, the principle of preventing a subject from possible harm is only necessary in Islam when it concerns the life in the hereafter; there is no ruling or legal maxim maintaining that *possible* this-worldly harms must necessarily be prevented.⁵⁸ Therefore, as Shi'i jurists often hold, this maxim only applies when the issue is associated with the punishment (*'iqāb*) hereafter, not worldly matters.

4 Conclusion

If this chapter has successfully opened up a discussion on potential procedural principles and legal maxims that can be enforced to reconcile homosexuality with Islam, it would be fair to state that the present study has achieved its chief aim: to elaborate the existing discursive spaces in the modern Shi'i paradigm of *ijtihād* and to demonstrate how Shi'i *ijtihād* can potentially apply its repertoires to deal with a modern topic such as homosexuality. However, what has been discussed in this chapter is only an initial offering related to one of the most technical debates in modern Shi'i scholarship. Therefore, despite my efforts to briefly address the essential and major debates in modern Shi'i legal theory on procedural principles and legal maxims, one should not conclude that my

55 See, for example, Buffie, "Public Health Implications"; Cabaj and Stein, *Textbook of Homosexuality*; Meyer and Northridge, *The Health of Sexual Minorities*.

56 al-Muṣṭafawī, *al-Qawā'id*, 306.

57 See, for example, al-Rawḥānī, *Muntaqā l-uṣūl*, 4: 448.

58 al-Khū'ī, *Miṣbāḥ al-uṣūl*, 2: 287; al-Muṣṭafawī, *al-Qawā'id*, 306.

study is comprehensive with regard to these two topics or that it manifests a nuanced debate on all aspects of such profound and sophisticated issues. In addition, this study has only provided a number of the potential discursive spaces relating to legal maxims which might be applied to argue for homosexuality. There are indeed other legal maxims which can potentially be used in this regard. This includes the following legal maxim.

There is a principle called the maxim of correctness (*qā'idat al-ṣiḥḥa*). As noted, this maxim implies that the behaviours or actions of Muslim individuals should be regarded as valid unless proven otherwise. It can potentially be used for homosexuality because, as this study has presented, there is no received evidence against homosexual relationships. Therefore, for Muslim homosexuals who act upon homosexuality or same-sex sexual desire, their practice should be deemed correct. However, one may argue that this practice might have its restrictions: for example, such desire should be expressed within a marriage contract. This point, namely that the permissibility of homosexuality needs to be articulated in a framework of Islamic marriage, will be addressed in the following chapter.

Same-Sex Unions and Islamic Legal Ethics

I have thus far examined homosexuality within the Imāmī legal context using the modern Shi'ī paradigm of *ijtihād*. I have also demonstrated that there exist notable discursive spaces in Shi'ī *ijtihād* that can be used to persuasively reconcile Islam and homosexuality.

However, even if one accepts that homosexuality per se is not prohibited in Islam, it does not follow that same-sex sexuality can be categorised as a licit sexual relationship following Islamic law. Therefore, a crucial question remains: How can one effectively develop a legal norm for homosexual relationships within the Islamic legal framework? As Muslim traditional *'ulamā'* often noted, sexual intimacies in Islam are permitted only if they occur within a contract of marriage (*'aqd al-nikāḥ*) or between a man and his concubines. Several scholars have argued against homosexual relationships because, in their view, the only licit norm of Islamic marriage is a marriage that is regulated upon a contract between mates of the opposite sex. Thus, they suggest that any other forms of marriage, including same-sex unions, should be deemed evil.¹

1 Licit Sexual Relationships and the Qur'ān

Some verses in the Qur'ān, such as Q. 23:5–7 (which are repeatedly addressed in Q. 70:29–31), can be used to support the approach that limits the legal norm of Islamic marriage to opposite-sex marriages. A number of Imāmī jurists have also applied these verses to argue that licit sexual relationships in Islam are limited to marriage between opposite-sex couples and to sexual relationships between a man and his concubines.² Therefore, both male and female same-sex sexual relationships are beyond these two categories of licit sexual practices, and thus should be perceived illicit. Since same-sex sexual relationships, following these scholars, cannot be legally accepted in Islam, righteous Muslims must not pursue such relationships. Let us review these verses before taking the debate further.

¹ See, for example, 'Abdul Ra'ūf, *The Islamic View of Women and the Family and Marriage in Islam*; Murad, "Fall of the Family."

² al-Muntaẓirī, *Kitāb al-ḥudūd*, 10 and 127.

Q. 23:5–7:

[A]nd who guard their private parts, save from their spouses or those whom their right hands possess, for then they are not blameworthy—and as for those who seek beyond that, it is they who are transgressors.

Given these three verses, the following proof against homosexual relationships can be constructed:

1. Righteous Muslims must guard their private parts; thus they must not practise sexual relationships, except with their *spouses* or *those whom their right hands possess*.
2. This implies that practising sexual relationships with *spouses* or *those whom their right hands possess* has not been condemned by God, and thus those relationships should be held licit sexual relationships in Islam.
3. Whoever conducts sexual relationships with other groups of people beyond these two types shall be regarded as transgressors who deserve to be condemned by God.
4. Therefore, exercising any sexual relationships beyond the two aforementioned types should be deemed unlawful in Islam.
5. Male and female same-sex sexual intimacies are beyond the two types of sexual relationships. Hence, they should be seen as transgressions of God's command and thus blameworthy.
6. Therefore, male and female same-sex sexual intimacies should be deemed illicit or unlawful sexual relationships in Islam.

This formulation of the proof does not seem to be conclusive unless some additional principles are imposed on premise 1. The patriarchal interpretation of Islamic tradition presupposes that Islamic marriage can only be conducted between opposite-sex couples. Moreover, concerning this understanding of the Islamic legal system, a free man may also legally practise sexual relationships with his female slaves whenever he wants to do so. These presumptions have led traditional scholars to interpret the two concepts of “their spouses” (*azwājihim*) and “those whom their right hands possess” (*mā malakat aymānūhum*) addressed in Q. 23:6 as referring to female mates and female slaves or concubines, respectively. Therefore, they interpret these Qur'ānic statements, “Except with their spouses or those whom their right hands possess,” to mean *except with their wives or female slaves*. Given this understanding, the only licit sexual relationships in Islam are between a “male–free female” and “male–female slave.”

However, it is necessary to examine more legal, hermeneutical, and historical debates to verify whether the two Qur'ānic concepts of “their spouses”

and “those whom their right hands possess” can be interpreted as referring to female mates and female slaves. Ali notes that classical jurists often apply the concept of “*milk al-yamīn*” in accordance with the Qur’ānic concept of “*mā malakat aymanuhum*” to refer to female concubines.³ However, I suggest that the concept of “those whom their right hands possess” per se does not imply the notion of slaves, let alone female slaves or concubines, in an evidently clear way (*naṣṣ*) or as an established apparent form (*zuhūr mustaqarr*). Therefore, this understanding of the text is open to question and thus needs to be contextualised in legal discourse, and one should provide further technical debates and potential evidence to verify this understanding.

Regarding the first concept of “their spouses” (*azwājihim*), *zawj* (pl. *azwāj*) in Arabic, just like the English word *spouse*, can refer to both males and females. The feminine form of this term in Arabic would be *zawjāt*, which the Qur’ān never applies: instead, wherever the Qur’ān exclusively addresses female spouses, such as in Q. 4:3, 4, and 11 and Q. 33:30, 32, and 59, the word *nisā’* (woman) is used. Therefore, in these verses, the Qur’ān seems to be referring to both male and female spouses and thus the licit sexual relationships based on traditional marriage. However, this verse does not specify the gender or sex of mates in marriage, and so the text may potentially refer to same-sex marriage as well. Thus, traditional jurists cannot argue for the illegality of same-sex marriage solely by referring to this verse.

Bearing this point in mind, it is plausible to understand Q. 23:5–7 in the following way: these verses command Muslims to only practise licit sexual relationships. Then as a further explanation, the Qur’ān illustrates two sorts of such licit sexual relationships: sexual practices between spouses (which are based on marriage contracts) and sexual intimacy with “those whom their right hands possess”. The meaning of the latter type, though ambiguous, is not significant for this study: it is the former type, which can potentially include same-sex unions, that is my focus.

Thus, according to these verses, any licit sexual relationship in Islam should be grounded on a marriage contract. However, they do not specify the gender or sex of the marriage partners, which makes it possible to interpret the spouses addressed by the Qur’ān to be both opposite-sex couples and same-sex peers. Hence, this Qur’ānic text alone offers no clear explanation about the partners of any given sexual relationship. Yet even though the legitimacy of same-sex marriage in Islam cannot be rejected by these verses, neither can it be approved. Using the language of legal theory (*uṣūl al-fiqh*), this text is not clear (*mubayyan*) about the nature of Islamic marriage and whether it

3 Ali, *Sexual Ethics and Islam and Marriage and Slavery*.

contains same-sex unions. Therefore, they at best should be considered ambiguous (*mujmal*) in this regard.

2 Beyond Opposite-Sex Marriage

The following question may then arise: Why have (Shi'i) Muslim jurists, without further investigation, traditionally perceived marriage as a relationship between opposite sexes, despite the fact that the Qur'an does not explicitly specify the gender or sex of mates in marriage? Ḥujjat al-Islām Karīmīniyā, a Shi'i cleric who has studied gender-related topics in Shi'i law, has tried to justify this attitude by pointing out that marriage, until half a century ago, has always been deemed a contract between opposite-sex couples throughout the history of humankind. Therefore, according to Karīmīniyā, Shi'i jurists accepted such a customary understanding of marriage and intuitively or self-evidently held marriage as a contract between opposite-sex mates; thus, they did not see any reason to vindicate this point from an Islamic point of view.⁴ If one regards this as an accurate explanation, Muslim jurists therefore now need to adjust their view towards marriage to encompass new customary understandings. If so, then these jurists should hold same-sex intimacy as a norm of licit sexual relationships in Islam because a same-sex union is now thought a legally accepted form of marriage in various societies worldwide.

Moreover, as demonstrated in the previous chapter, homosexual relationships can be reckoned permissible in practice based on a procedural principle called the priority of divine exemption (*aṣālat al-barā'a al-shar'iyya*) and on several legal maxims, such as the maxims of permissibility (*qā'idat al-ibāḥa*), lawfulness (*qā'idat al-ḥillīyya*), and the negation of hardship (*qā'idat nafy al-ḥaraj*). Given the above principle and maxims, one might also view homosexual marriage as permissible in practice, following Imāmī law. To briefly explain, the present study shows that the Islamic scriptural texts have not addressed homosexuality or same-sex marriage because it is a new phenomenon. Therefore, at the first level of Shi'i *ijtihādīc* process, one cannot derive a legal ruling on same-sex marriage, and thus the legal basis of same-sex marriage remains doubtful (*ma'a l-shakk*). Therefore, to tackle the issue in practice, one needs to move on to the second level of *ijtihādīc* process, namely the level of procedural principles and legal maxims.

At this level, as shown in Chapter 7, if non-contradictory received evidence or proof is not found in primary Islamic sources to forbid a behaviour or action,

⁴ Karīmīniyā, *Taghyūr-i jinsiyyat*, 260–61.

such as homosexual marriage, it should be deemed permissible in practice based on the priority of divine exemption and the legal maxims of permissibility and lawfulness. In addition, the negation of hardship also can be used to argue for the permissibility of same-sex marriage. As maintained by this legal maxim, no legal rulings have been established in Islam that might cause hardships for Muslims, or if such laws exist, they are negated and Muslims are not obliged to follow them. Currently, many gay and lesbian Muslims want to be faithful to their religion and their sexual orientation. Since sexual relationships in Islam are only allowed within marriage contracts, to be truthful to their faith and sexuality at the same time, Muslim gays and lesbians have no choice but to marry someone of their own sex/gender. The prohibition of same-sex marriage implies that God has established a regulation or commanded a significant minority group of Muslims—namely, gay men and lesbian women—to obey a legal ruling that imposes hardship or adversity upon them. However, according to the negation of hardship, God has not regulated or commanded any legal rulings imposing hardship. Therefore, same-sex marriage should be allowed in Islam.

3 Forming an Islamic Same-Sex Marriage

Following the present study, there are various discursive spaces in Shi'i legal tradition whereby same-sex marriage should be allowed. Nevertheless, how one might justifiably argue for same-sex unions within the Islamic framework of marriage is still a crucial question with which any successful proposal on Islamic homosexuality needs to grapple. A number of scholars have suggested alternative understandings of Islamic *nikāḥ* within the Sunni context.⁵ They have correctly observed that the Islamic codified law on marriage is based on a patriarchal norm that facilitates the domination of males over females sexually, socially, and financially. In addition, current Islamic marriage law has not sufficiently addressed equal, consensual, and caring marital relationships. Therefore, they constructed a notion of Islamic marriage in light of the modern discourse of civil partnerships based on passionate love and equality between peers or human dignity, affection, and the legal maxim of repelling harm. In their view, grounding or conceptualising marriage on these components makes it possible to extend the scope of Islamic marriage to homosexual unions.

5 See, for example, Jahangir and Abdullatif, *Islamic Law and Muslim Same-Sex Unions* and "Same-sex unions in Islam"; Kugle, *Homosexuality in Islam*.

These proposals correctly address a number of elements and legal principles with which *nikāḥ* could potentially accommodate same-sex marriage. The present study also discussed several of these principles and legal maxims from Imāmī legal standpoints. What is, however, important to note is that any proposal for same-sex marriage in an Islamic context needs to be grounded in wider research on *nikāḥ*, its scope, and its potential to enable a broader articulation and application to concepts other than opposite-mate marriages. In doing so, such proposals first need to explore the potentiality and openness of Islamic marriage to a wider interpretation within the framework of Islamic revelatory and primary legal sources. As previously explicated, classical Islamic law regulates marriage as a contract between a man and a woman, which results in an unequal relationship between them. In line with this law, a woman's sexuality is considered as a *property* or *commodity* of her husband. It also appears that the traditional legal system often devalues mutual consent as a necessary element of ethical and lawful sexual relationships in Islam.

Hence, it is essential to determine whether marriage in Islam is *inherently* a non-egalitarian, unequal, and non-consensual sexual relationship between peers. In other words, the question is whether Islamic marriage is a non-egalitarian relationship not only in the sense that patriarchal classical jurists have articulated but also in the way in which marriage has been addressed in Islamic primary sources of the Qur'ān and *sunna*. If one holds that marriage inequality is only one interpretation of Islam, which happens to be patriarchal, this means that Islamic marriage is not inherently non-egalitarian, and thus, Islamic texts are open to alternative interpretations of marriage based on a notion of equality. However, if one maintains that marriage is a non-egalitarian contract according to the Qur'ān and *sunna* too, then it implies that marriage in Islam is inherently based on inequality.

These points are crucial for any same-sex marriage proposal that frames homosexuality as an equal and consensual sexual relationship. Therefore, such proposals first need to carefully examine these issues and hold clear positions about them. Moreover, it is also important to remember that any scheme for same-sex marriage in Islam would need to be persuasive to Muslim traditional scholars and grassroots communities who often support seeing Islamic *nikāḥ* exclusively as a contract between a man and woman; they perceive that any attempt to justify same-sex sexuality in Islam is made under the influence of other (Western) cultures that, in their view, pose a threat to Muslim societies. Thus, any proposal for same-sex marriage in Islam should also be careful in the methodology and language it uses.

Considering these points, I found it necessary to allocate a chapter (Chapter 1) to contemplating marriage equality and gender justice in Islamic

law, before developing a scheme of homosexual marriage within Imāmī legal tradition. There I demonstrated that equality and justice in Islamic marriage are contested among scholars. A group of Muslim feminists argue that not only are the classical laws on marriage androcentric, but also the sacred texts, on some occasions, imply marriage inequality.⁶ Therefore, an appropriate pattern of same-sex marriage in Islam should adequately explain how it may balance the distinct roles, rights, and responsibilities that a married couple, based upon their genders, must exercise according to the dominant account of *nikāḥ*. Ali notes that in an Islamic marriage the male partner is responsible for *milk al-nikāḥ* and has the right to control the marriage tie, whereas the female partner has the right to a dower (*mahr*) and financial support (*nafaqa*) and, in return, is obligated to be available exclusively for the sexual needs of her husband.⁷ Given this understanding, from a legal point of view, one might wonder whether such rights and responsibilities are reversible or can be balanced according to Islamic law. More significantly, it is important to note how such an Islamic marriage can be adjusted to modern notions of same-sex marriage and the equal and mutual rights and responsibilities of same-sex partners in marriage contracts.

In response to the issue of inequality addressed in the scriptural texts, scholars such as Ali and Esack hold that Muslims either need to ignore those texts that imply inequality in marriage, move on from the literal meaning of these texts, or believe that these texts are abrogated. Muslims, Ali suggests, should not see the Qurʾān as an Islamic legal manual “to be applied literally in all times and places but as sources of guidance for Muslims in transforming their societies in the direction of fairness and justice.”⁸ In other words, the Qurʾān should be regarded as a revelatory source that “captivates and engages hearts and minds.”⁹ The texts guide Muslim individuals to the right path, and they remind them of the existence of God, who created the universe and has mercy and generosity. Based on this guideline, to establish modern notions of equality or justice in marriage, Muslim scholars should depart from the texts because, according to Ali, “the only possible response is to suggest that the Qurʾānic text itself requires Muslims to sometimes depart from its literal provisions in order to establish justice.”¹⁰

6 See, for example, Ali, *Sexual Ethics and Islam and Marriage and Slavery*; Azam, *Sexual Violation in Islamic Law*; Chaudhry, “The Problems of Conscience”; Esack, “Islam and Gender Justice.”

7 Ali, *Marriage and Slavery*, 6.

8 Ali, *Sexual Ethics and Islam*, 156.

9 *Ibid.*, 133.

10 *Ibid.*, 55.

In contrast, several scholars¹¹ argue that the sacred texts are “stubbornly egalitarian”¹² or “radically egalitarian and even antipatriarchal,”¹³ even though the classical exegetes’ and jurists’ understandings of these texts were androcentric or patriarchal. Following these scholars, the classical jurists’ articulation of marriage and the distinct roles, rights, and responsibilities that a married couple, based upon their genders, must exercise can be balanced or changed. That classical understanding of marriage is only one interpretation of Islamic marriage as addressed by the scriptural texts and reflects the socio-cultural conditions of the world in which these jurists lived—a world in which the only way to regulate relations between men and women was to order society based on inequality and the superiority of males. Therefore, marriage law and those sacred texts apparently implying inequality concerning marriage either should be reinterpreted in favour of justice and equality, which is the essential message of Islam, or, as Fazlur Rahman suggests, should be considered time-bound, not permanent, laws. This means that such laws were valid only for the specific time and culture of seventh-century Arabia. Thus, they should be modified or adapted to different times, places, and cultural conditions. According to this approach, inequality is not an essential or inherent element of marriage in Islam.

I hold that the second approach, which promotes the idea of marriage equality as the essential message of the Islamic scriptural texts, is the more compelling perspective. I further demonstrated that there is a similar approach to marriage in modern Shi’i legal discourse based on Khumaynī’s doctrine of the role of time and place in *ijtihād* as well as the principles of justice and equality. These principles have been cited by various contemporary jurists, such as Bujnūrdī, Ḥaydarī, and Šāni’ī, to regulate marriage in Islam based on equal and consensual relationships. Given that this study views homosexuality as an egalitarian and consensual relationship and aims to investigate Islamic law on this phenomenon within the Imāmī legal school, the second approach would better serve this purpose.

By embracing this view, it should be conceivable to legally regulate egalitarian same-sex marriages in Islam. On the one hand, given the procedural principle and legal maxims discussed in Chapter 7, Islamic marriage could be expanded to same-sex unions. On the other hand, contemporary Shi’i jurists’

11 See, for example, Ahmed, *Women and Gender in Islam*; Barlas, *Believing Women in Islam*; Mir-Hosseini, “Islam and Gender Justice” and “Sexuality and inequality”; Shaikh, “Transforming Feminism” and “Exegetical Violence.”

12 Ahmed, *Women and Gender in Islam*, 63.

13 Barlas, *Believing Women in Islam*, 93.

and feminists' approaches, which advocate the idea that marriage equality is attested by the Islamic revelatory texts, should also provide a legal basis to categorically mould homosexual marriage in accordance with equality, justice, and consent. Following this approach, partners in a marriage contract, including same-sex partners, are equal members of the contract and have equal rights and responsibilities towards each other emotionally, sexually, and financially. Thus, the marriage contract and its legal terms should be adjusted accordingly.

For example, the dower (*mahr*) is traditionally regarded as a gift upon marriage to be paid to the bride by the groom. However, Khumaynī's doctrine of the role of time and place in *ijtihād* provides a discursive space in Shi'i legal debates to propose an alternative interpretation. That is, providing a dower was a time-bound, not permanent, law which is confined to the time of the seventh-century Arabian Peninsula. Therefore, this regulation, one might suggest, is now either dissolved because of the differences in time and cultural circumstances or still stands but needs to be reinterpreted as gifts that both parties pay to one another.

Another example concerns the way marriage vows (*ʿaqd al-nikāh*) should be issued. In the current account of a marriage in Islam, the female partner or her representative issues the *ʿaqd*, and the male partner or his representative concedes it. Pursuing the same approach suggested by Khumaynī, one can argue that, since we live in a different time and culture that implies the institution of marriage should include marriages other than opposite-sex marriages, *ʿaqd al-nikāh* should be modified, so that both parties are in charge of issuing the *ʿaqd* and accepting it successively. It is also plausible to assert that, based on an agreement between the two partners, one partner, whether male or female, issues the *ʿaqd* and the other partner accepts it.¹⁴ Similarly, divorce may happen at the request of either partner, providing an agreement can be reached between both contracting parties that can be specified in the *ʿaqd*.¹⁵ In the

14 There is another discursive space in this regard in Shi'i legal debates, that is, unspoken marriage vow (*nikāh al-mu'āṭāt*). Following this rule, partners are not required to verbally speak of the *ʿaqd*. Instead, they can indicate their marriage by taking steps that customarily demonstrate their intention of living together as married couples. Although there is extensive literature on unspoken marriage contracts in the Shi'i legal discourse, jurists often deem this type of marriage invalid. To my knowledge, the only contemporary jurist who advocates for this type of marriage vow is Muḥammad Ṣādiqī (d. 2011). According to him, "The *ʿaqd* or marriage contract is valid in any language, and [it is valid] even if it happens without the specific word of "*ankahtu*" (I married). [In fact] any indicators which may represent the marriage between a man and a woman suffice, whether by writing, speaking, non-verbal pointing, or any ways by which one can demonstrate that the marriage contract has happened" (Ṣādiqī, *Risāla-yi tawḍīḥ al-masā'il-i nuwīn*, 280).

15 In Chapter 1, I explicated that, following Shi'i jurists, women, like men, have rights to divorce simply by addressing this term in the marriage contract. This means that in a

same way, reflecting modern economic circumstances, both partners should be seen as responsible for the family's financial needs; thus, both should be regarded breadwinners.

The list of modified regulations can go on further. However, this study is not in a position to regulate a set of modified rules for marriage or, in particular, for same-sex marriage in Islam: that is a task that should be carried out by Muslim jurists who have legal authority. The present study aims to demonstrate existing discursive spaces in Imāmī law concerning marriage that can be used to extend the contract of *nikāḥ* to cover same-sex unions too. This goal, I believe, has been fulfilled thus far. Therefore, scholars who wish to examine the potentiality of Islamic tradition and revelatory sources concerning same-sex unions can effectively rely on the outcomes of this study to further elaborate on the detailed structure of same-sex marriage in Islam. I also hope that this proposal encourages (neo-)traditional Shi'i jurists, such as Bujnūrdī and Ḥaydarī, to reconsider this topic and further advance debates on the possibilities of the expansion of marriage to same-sex relationships in Imāmī law.

4 Conclusion

Building upon the previous chapter, which surveyed several procedural principles and legal maxims of the Imāmī legal school that can be deployed to reconcile Islamic law and same-sex sexual relationships, this chapter examined the repertoire of Shi'i law on marriage to explore discursive spaces that can be used to expand Islamic *nikāḥ* to same-sex unions. Following several current Imāmī jurists who promote the idea of marriage equality in Islam, this chapter presented a sketch of a proposal for same-sex marriage in Imāmiyya, in which Shi'i gays and lesbians may licitly practise same-sex sexual relationships based on Islamic *nikāḥ*, whether permanent *nikāḥ* or a temporary one (*mut'a*).

Kugle suggests that temporary marriage (*mut'a*), which is regulated in the Imāmī legal school, should be seriously considered by Sunni gays and lesbians as an alternative to permanent *nikāḥ* or "formal marriage."¹⁶ *Mut'a* is an informal and simple model that can enable same-sex couples to legitimise their relationships and fulfil their sexual needs within Islamic law, without being subject to sinful behaviour or punishment for fornication or adultery. This is particularly important because many homosexual Muslims are not able to

heterosexual marriage based on an agreement between partners, both contracting parties can preserve the rights to divorce. The same rule may also apply to the partners of same-sex marriages.

16 Kugle, *Homosexuality in Islam*, 222–26.

meet the permanent marriage requirements either socially or financially. Since *mut'a* is regarded unlawful in major Sunni legal schools, Kugle gives grounds for the pursuit of this model by Sunnis by noting that the Shi'i legal school is respected by Sunni Muslims and can be followed if its decision "is more conducive to promoting benefit and reducing harm."¹⁷

Kugle correctly refers to temporary marriage as an available option for Muslim gays and lesbians. It is also more practical for Muslim gays and lesbians who wish to follow Islamic law and live with their partners licitly or legitimately in Muslim-majority societies or Islamic states in which same-sex marriage is not yet legal. Temporary marriage, compared with the permanent form, has simple rules and is flexible. Couples may agree to be together for a longer or shorter period of time, though the duration of time must be specified in the contract. Moreover, whenever the time of the contract is terminated, they simply can renew it. In addition, no witnesses are required to perform this marriage contract; thus, no one need to be informed of the relationships of such couples. Addressing this point, I believe, can be vitally important for same-sex couples because many couples in Islamic states seek confidentiality. In addition, *mut'a* does not entail the complications of divorce that exist in a permanent marriage simply because in a temporary marriage there is no divorce. The marriage will be nullified either by the termination of the time specified in the contract or by an agreement made by the contracting parties before the time ends. Because there is no divorce in this kind of marriage, there is no need to provide witnesses, which might put such couples' lives in danger in conservative societies where same-sex sexual relationships are not tolerated.

Another situation in which homosexual Muslims might benefit from temporary marriage is for those living in the West who, for whatever reasons, do not wish to marry someone permanently. Such Muslim individuals may find temporary marriage to be a way to licitly fulfil their emotional and sexual needs and be faithful to Islam.

Nevertheless, many Muslim gays and lesbians rightly wish to be seen as equal members of the Muslim community. This implies that Islamic law should treat them justly in every respect, including in marriage. Thus, if heterosexual Muslims are permitted to form their marriage contracts permanently, homosexual Muslims should equally have the same rights. Hence, licit temporary marriage should not be seen as an alternative but as something that is complementary to permanent marriage for homosexual Muslims.

17 Ibid., 224. This point can be affirmed by a *fatwā* attributed to al-Shaykh Maḥmūd Shaltūt (d. 1963), Shaykh of al-Azhar between 1958 and 1963. The *fatwā*, which was issued on July 6, 1959, confirms that the Twelver Shi'i legal school, as one of the Islamic legal schools, is permissible to be adhered to (Shaltūt, *Risālat al-islām*, 227–28).

Conclusion

Studies of modern topics pertaining to gender and sexuality in Islam are still developing. Khumaynī's *fatwās* on the permissibility of GCS, issued in the 1960s and 1980s were, in my view, turning points for such debates, at least in Shi'i legal context. Despite some critics, I have argued that the emergence of the *fatwās* are far from political biases for heteronormalising homosexual persons or curing a diseased deformity, though it might have been perceived as such by the post-revolutionary legal and medical authorities.¹ Khumaynī's first *fatwā*, which is quite comprehensive, was issued in the 1960s, almost two decades before the Iranian revolution of 1979, when neither he nor his opponents (the Iranian authorities at the time) could have envisaged that such a revolution would happen two decades later and that he would then be in control of the country as its first supreme leader, thus serving as both a religious and a state authority.

What is pivotal concerning the first *fatwā* is the time period in which it was issued. In the 1960s, Christian and Jewish theologians, as well as Muslim *muftīs*, whether Shi'i or Sunni, often held that it was not permissible for transgender people to undergo GCS.² This approach is still a common view among various Sunni legal schools, which consider GCS to be violating God's creation, which no one is entitled to alter.³ Thus, the question is: What legal principles did Khumaynī apply, despite the objections made by the opponents of GCS, that supplied him the fuel needed to issue the *fatwā*? In other words, one might ask what discursive space(s) existed in the Imāmī legal school that enabled Khumaynī to adequately derive his legal opinion that departed from the views of the majority of Shi'i and Sunni '*ulamā'*' at the time. In various publications, I have comprehensively examined Khumaynī's legal-hermeneutical reasoning leading to the GCS *fatwā*, finding it was based on four indispensable elements: (1) modern Shi'i *ijtihād* as a methodological tool, (2) "procedural principles" as practical solutions, (3) use of legal maxims, and (4) "the role of time and place" as an essential factor in *ijtihād*.⁴

1 See Alipour, "Transgender Identity."

2 See Sharzer, Jones, Alipour, and Pacha, "Religious Attitudes Toward Gender-Confirming Surgery," 237–57.

3 I examined several Sunni *fatwās* of this kind in the following article: Alipour, "The Nexus between Gender-Confirming Surgery and Illness."

4 See Alipour, "Islamic Shari'a law," "Transgender Identity," and "The Nexus between Gender-Confirming Surgery and Illness."

Clearly, modern Imāmī *ijtihād* has a focal role in contemporary Muslim societies. Its functioning is well illustrated in the following two cases. In 1979 Iran experienced massive political turmoil and change brought about by a revolution led by Āyatallāh Khumaynī. Khumaynī's understanding and use of *ijtihād* brought him to a doctrine called *wilāyat al-faqīh* (the governance/guardianship of the jurist) and ultimately shaped a political system in Iran that enabled it to have serious domestic, regional, and global impacts.⁵ The other case is Iraq after the collapse of Saddam Husayn's regime following the US-led invasion of the country in 2003. Ever since, the Shi'i-majority country of Iraq has been experimenting with a new religio-democratic transformation in which Āyatallāh 'Alī Sīstānī, as the most influential religious figure, is playing a crucial role in the development and deployment of this new system. Overruling the doctrine of *wilāyat al-faqīh*, Sīstānī, in his practice of *ijtihād*, holds that jurists are not entitled to independently establish a political system during the "Occultation" (*ghayba*) of the Twelfth Imām. Rather, they may provide general "guidance" or "advice" to people and the government in power.⁶ The vital role of Shi'i *ijtihād* can also be acknowledged in the reformation or modifications proposed by jurists on various societal and cultural issues, including their *fatwās* on topics concerning gender confirmation surgery and marriage equality, some of which were discussed earlier in this study.

The two contrary examples of Khumaynī's and Sīstānī's deployment of *ijtihād*, as well as various modified Shi'i *fatwās* on gender and marriage equality, show that Shi'i *ijtihād* is dynamic. This dynamism should not be considered a flaw in this methodology but rather a strength because it demonstrates its openness and flexibility, which enable it to engage with contemporary issues. Therefore, using the stockpiles of Shi'i legal rulings to tackle novel phenomena concerning gender and sexuality, the modern Imāmī legal school has moved beyond the classical and post-classical notion of *ijtihād* and expanded in scope. Yet, Western scholarship has paid little attention to this shift and expansion: it has barely examined this paradigm of *ijtihād* holistically as a

5 The following sources provide illuminative discussions on the doctrine of *wilāyat al-faqīh* in contemporary Shi'i scholarship: Moussawi, *Shi'ism and the Democratisation Process in Iran*; Kadivar, "Wilayat al-faqīh and Democracy"; Mavani, *Religious Authority*; Bayat, "The Making of Post-Islamist Iran"; Fujinaga, "Islamic law in Post-Revolutionary Iran."

6 See al-Ṣāfi, "Khuṭbat al-jum'a." To read more about Sīstānī's legal-political approaches, see Gulmohamad, *The Making of Foreign Policy in Iraq*. For comparison between Sīstānī's and Khumaynī's views on this topic, see Rivera, *Iranian Strategic Influence* (in particular, chap. 8, 107–51). Gleave presents a useful comparison between Kāzīm al-Ḥā'irī and Bāqir al-Ḥakīm, who advocate the doctrine of *wilāyat al-faqīh*, and Sīstānī on religious authority (Gleave, "Conceptions of Authority in Iraqi Shi'ism").

legal-methodological repertoire, nor how Shi'ī jurists often practise it to derive Islamic legal rulings.

Concerning procedural principles (*uṣūl 'amaliyya*), it is often believed that legal theory (*uṣūl al-fiqh*) is the most important field for current Imāmī *ijtihād*. However, there are few studies on several fundamental debates in this field. One such debate addresses the process of legal reasoning. In modern Shi'ī *uṣūl al-fiqh*, legal reasoning is divided into two fundamentally different types of proof: *ijtihādīc* proofs (*adilla ijtihādīyya*), which may result in actual legal rulings, and juristic proofs (*adilla fiqāhatīyya*), which consist of rules that do not serve as the basis for actual legal rulings but only guide jurists in tackling a given issue in practice.

Although “juristic proofs” were established in Shi'ī legal theory much later than *adilla ijtihādīyya*, it is striking that both carry equal weight in recent Imāmī *ijtihād*. Jurists have come to realise that an increasing number of complex modern topics need to be explored through an Islamic lens. However, no scriptural texts from the Qur'ān or *sunna* can be applied to most of these topics. Moreover, many such cases are not subject to reason or rational proof. As a result, these principles of the second level of *ijtihād* are highly constructive in providing guidance or solutions for Muslims to manage matters concerning their daily lives.

Despite the importance of procedural principles, there is a scarcity of academic studies in Western scholarship surveying them. Such studies are urgently required because there are similar principles established by Sunni and pre-modern Imāmī legal theory. However, scholars should not correlate procedural principles in modern Shi'ī legal theory with their classical and Sunni counterparts. As elaborated in Chapter 2, the modern procedural principles in the Imāmī context are related to the third type of legal reasoning, which does not lead to actual legal rulings but provides a basis from which to tackle given legal cases in practice. In contrast, the similarly named principles, such as *aṣālat al-barā'a* (*aṣālat al-naḥy*) and *aṣālat al-istiṣhāb* in Sunni and pre-modern Shi'ī legal theory, are thought to be either decisive reasons or uncertain opinions.⁷ Therefore, they are either associated with the first type of reasoning, which leads to actual legal rulings, or to the second type, similar to single-strand *ḥadīth*, which leans towards actual legal rulings, albeit via uncertain opinions.

Even though Shi'ī jurists, like their Sunni counterparts, have commonly applied various legal maxims (*qawā'id fiqhīyya*) in legal debates, the theoretical discussion of these maxims was not a high-priority concern for Imāmī jurists

⁷ See al-Ṣadr, *Buḥūth*, 5: 9–11.

before the middle of the twentieth century. That is when jurists realised the crucial role of legal maxims and began to thoroughly study their nature and distinctions with principles related to legal theory. The very nature of these maxims and their major role in contemporary Shi'i *ijtihād* have also remained unexamined in the secondary literature, and thus they are open to new academic investigations.

Finally, "the role of time and place in *ijtihād*" is yet another important doctrine in modern Imāmī *ijtihād*, in particular in Khumaynī's scholarship, which is followed by his disciples.⁸ Although this doctrine was first introduced by Fazlur Rahman in the Islamic world, Khumaynī apparently came to this idea independently while struggling with the Iranian political system before the revolution and leading the country after it as Supreme Leader. Despite various interpretations presented by his pupils, according to Khumaynī's explanation of the principle, *ijtihād* is dynamic when considering the two important factors of time and place. A topic that has a special legal ruling in a particular time or place might receive another legal ruling under different political, cultural, or societal circumstances. This means *ijtihād* can adapt to changing cultural conditions. This rule makes Islamic laws flexible over time and space or, in general, across cultures. Otherwise, understanding the sacred texts and Islamic law, or in general Islamic teachings, according to Khumaynī, would lead to obsolete results that could not be used in our modern time and civilization.

This doctrine in Imāmī legal scholarship is rather recent, and thus its notion and scope are matters of dispute. Its contested nature is manifested in extremely different interpretations of it: it is sometimes interpreted as a tool to assess the topics of legal rulings that may change over the passage of time and variations in place, and also has been conceptualised as related to the legal rulings *per se*—which implies that legal rulings are not always permanent but are subject to change because of variations in time and place. Finally, it might mean that both the topics and legal rulings are subject to changes.⁹ This doctrine, too, is currently underdeveloped in Western scholarship.

8 Khumaynī, *Ṣaḥīfa-yi imām*, 21: 289. Different approaches on this topic can be grasped from the following debates: Gurji, Kātūziyān, Ḥā'iri, Mar'ashi, Ma'rifat, and Mujtahid Shabistari, "Iqtirāḥ darbāra-yi mabāni-yi ijtiḥād," 2–105. Also see al-Āṣifi, "Naẓariyyat al-imām al-Khumaynī fi dawr al-zamān wa-l-makān fi l-ijtiḥād," 5: 10–32; al-A'rajī, "Falsafat al-zamān wa-l-makān fi l-adilla al-shar'iyya wa-l-uṣūl al-'amaliyya," 1: 184–240; Qanbarī, "Dark-i zamān wa-mawḍū'āt-i jadīd," 126–46; Lārījānī, "Naqsh-i 'ulūm-i basharī dar ijtiḥād," 100–25; Şifāti, "Naqsh-i zamān wa-makān az didgāh-i fiqhi-yi ḥaḍrat-i imām Khumaynī," 5: 160–79.

9 To find different oppositional interpretations of this doctrine, see various articles published in *Majmū'a-yi āthār-i kuṅgara-yi barrasi-yi mabāni-yi fiqhi-yi imām Khumaynī: naqsh-i zamān wa-makān dar ijtiḥād* in 15 volumes. Also, the journal of *Naqd wa-Nazar*, vol. 2(1), devoted a special issue on this matter in 1374Sh. The following two sources further

In brief, scholars who study the Imāmī school of law must examine the modern paradigm of Shi‘ī *ijtihād* and the aforementioned principles. Doing so will enable them to accurately apprehend and assess the contemporary religio-legal shifts and debates occurring in Shi‘ī societies. It will also assist them in unpacking modern *fatwās* on new topics issued by jurists such as Khumaynī, Ṣānī‘ī, Bujnūrdī, and Ḥaydarī. I began this study by noting that ‘*ulamā*’ have authority within Muslim societies and among lay Muslims: they are the ones most likely to be heard, listened to, and followed. Therefore, reformists who conduct research in the field of Islam and modern issues, including sexuality and gender diversity, should initiate dialogues with them after acquiring knowledge about the methodology and the language that these ‘*ulamā*’ apply in their debates.

Having examined Khumaynī’s *fatwās* on GCS, I found it useful to pursue the same route in order to investigate homosexuality in modern Shi‘ī legal-hermeneutical discourse, hoping to enhance a constructive dialogue between reformists and (neo-)traditional ‘*ulamā*’ on this topic. This book’s objective was neither to decisively present a conclusive view on homosexuality in Imāmī law nor to assert an inclusive *ijtihād* to derive a legal ruling on homosexuality as a *mujtahid* or a *muftī* would be expected to do. Instead, it endeavoured to identify potential discursive spaces in modern Shi‘ī *ijtihād* in which serious debates can be embedded and can negotiate between various groups of scholars on homosexuality in Islam. It thus elaborated the existing discursive spaces in the modern Shi‘ī paradigm of *ijtihād* on homosexuality and examined how this paradigm can potentially use its repertoires to engage with this topic.

Overall, the present research has made it clear the Qur‘ān and *sunna* (*aḥādīth*) do not address homosexuality because it was not an issue for the early Muslim community when the Prophet or the Imāms lived amongst them. Moreover, reason (*‘aql*), as a primary source of modern Shi‘ī *ijtihād*, also does not present compelling proofs against homosexuality. In addition, earlier categories of same-sex sexual behaviours cannot be reasonably correlated with modern homosexuality. Therefore, applying the legal rulings on any of the pre-homosexual categories to modern homosexuality would not be adequate since the legal analogy is not validated in Imāmiyya. Consequently, it is apparently not possible to derive a legal ruling on homosexuality at the first level of the argumentation established in the modern Shi‘ī *ijtihād* (i.e. the level of *adilla ijtihādīyya*). However, there are various procedural principles and legal

elaborate on Khumaynī’s doctrine about the role of time and place in *ijtihād*: Diyā‘īfar, *al-Imām al-Khumaynī: manḥajuhu fī l-ijtihād*, chap. 7, 167–207; al-Ḥaydarī, *Ma‘ālim al-tajdīd al-fiqhī*, chap. 4, 145–91.

maxims at the second level of *ijtihād* (i.e. the level of *adilla fiqhahatiyya*) that could be used to advocate for the permissibility of homosexuality in the Shi'i legal system.

The controversies and queries consulted in this study, I hold, can enhance (neo-)traditional jurists' awareness of this timely topic. Inspired by the present work, I hope that Shi'i jurists can move on from traditional legal stances on the pre-homosexual categories of *liwāt* and *siḥāq*, and instead revisit the topic of homosexuality independently. By applying modern *ijtihādīc* rules and potential discursive spaces, they could rectify the existing punitive regulation in Imāmī law on homosexuality. By and large, I urge both (neo-)traditional '*ulamā*' and Muslim reformists not to disregard or devalue such potential spaces in dealing with modern topics. Instead, they should hold constructive dialogues with one another to open new vistas in negotiating modern topics concerning sexuality and gender equality, including intersex topics, transgenderism, bi/pansexuality, and, in a wider sense, those who identify as "queer."

Typology of Shi‘i *ḥadīth* on Same-Sex Sexual Behaviours

Figure 5 (in Chapter 5) categorises 135 *ḥadīths* found in al-Burūjirdī’s collection. The following criteria were used to gain the highest numbers and percentages of the *aḥādīth* concerning each category.

i. The table is formed of five categories: *takhannuth* (effeminacy), *tarajjul* (mannishness), *liwāt* (pederasty), *ubna* (male pathological passivity), and *siḥāq* (female same-sex sexual behaviours). However, the *aḥādīth* convey other possible subjects or phenomena which do not fit into these five categories, such as rape or interpretation of verses of the Qur’ān on the act of the tribe of Lot (*‘amal qawm Lūṭ*), etc. All such topics shall be categorised as “other”.

ii. If a *ḥadīth* contains or implies more than one category, it shall be addressed in all relevant categories. For example, several *ḥadīths* provide interpretations on verses pertaining to the acts of the tribe of Lot. According to a direct denotation or explicit connotation of these *aḥādīth*, they describe the behaviour of the people of Lot as *rape*. However, some such *aḥādīth* refer to the fact that these people’s same-sex sexual practices were usually with young (stranger) boys. The same *aḥādīth* also address female same-sex sexual practices of the people of Lot. Therefore, such *aḥādīth* are addressed in all three following categories: other, *liwāt*, *siḥāq*.

iii. Unlike jurists’ articulations of the phenomenon of *liwāt* or *lūṭī* (a person who performs the act of *liwāt*), all *aḥādīth* which maintain these two terms are counted in the category of pederasty. This is because, as argued in Chapter 3, these *aḥādīth* were issued in the context of early Muslim society in which the term *lūṭī* was commonly understood as an adult free man who practised sexual relationships with very young free/slave boys. However, those *aḥādīth* containing the concept that there are males who believe that other males are sufficient for them, are categorised as “other” due to the lack of clarification about the exact meaning of this concept.

iv. Regarding female same-sex sexual behaviours, all *aḥādīth* containing *saḥq* or *siḥāq* or *al-lawāṭī* are counted in the category of *siḥāq*. However, those *aḥādīth* implying the following concept—that there are females who believe that other females are sufficient for them—are categorised as “other” due to the lack of clarification about the exact meaning of this concept.

v. All *aḥādīth* addressing the act of the tribe of Lot (*‘amal qawm Lūṭ*), without further explanation, are considered as “other.”

VI. The numbering of the *ahādīth* and page numbers addressed below are based on al-Burūjirdī's collection, volumes, 25 and 30.

1 Takhannuth

Vol. 25, the book of marriage (*kitāb al-nikāh*), chapters on forbidden marriage (*abwāb al-nikāh al-muḥarram*):

- chap. 11/*ḥadīth* numbers: 31 (pp. 472–73), 32 (p. 473), 33 (p. 473), 34 (p. 473), 40 (p. 474), (maybe) 47 (p. 477), *ḥadīth* Muḥammad b. Ḥumrān (p. 478), *ḥadīth* Abū Hurayra (p. 478), *ḥadīth* Jābir b. ‘Abdallāh (p. 478).
- chap. 15/*ḥadīth* numbers: 6 (pp. 483–84), 7 (p. 484), 8 (p. 484), 13 (p. 485, which is the same *ḥadīth* narrated by Muḥammad b. Ḥumrān which has been addressed in chap. 11).

2 Tarajjul

Vol. 25, the book of marriage (*kitāb al-nikāh*), chapters on forbidden marriage (*abwāb al-nikāh al-muḥarram*):

- chap. 11/*ḥadīth* numbers: 31 (pp. 472–73), 33 (p. 473), 34 (p. 473), *ḥadīth* Muḥammad b. Ḥumrān (p. 478), *ḥadīth* Jābir b. ‘Abdallāh (p. 478).
- chap. 15/*ḥadīth* numbers: 6 (pp. 483–84), 7 (p. 484), 8 (p. 484), 13 (485, which is the same *ḥadīth* narrated by Muḥammad b. Ḥumrān which has been addressed in chap. 11).

3 Liwāṭ

Vol. 25, the book of marriage (*kitāb al-nikāh*):

Chapters on forbidden marriage (*abwāb al-nikāh al-muḥarram*):

- chap. 11/*ḥadīth* numbers: 2 (pp. 459–61), 3 (pp. 461–62), 5 (p. 462), 11 (p. 466), 12 (p. 466), 14 (p. 467), 15 (p. 467), 18 (pp. 467–68), 19 (pp. 468–69), 21 (p. 469), (maybe) 24 (p. 470), 26 (pp. 470–71), *ḥadīth* al-‘A‘mash (p. 477), *ḥadīth* Ibn Shādhān (p. 477), *ḥadīth* Ibn ‘Abbās (p. 477), *ḥadīth* collected by Jāmi‘ al-akhbār (p. 477).
- chap. 12/*ḥadīth* numbers: 1 (pp. 478–79), 2 (p. 479), 3 (p. 479), 4 (p. 479), 5 (p. 479).
- chap. 13/*ḥadīth* numbers: 1 (p. 479), 2 (pp. 479–80), 3 (p. 480), 4 (p. 480), 5 (p. 480), (maybe) 6 (p. 480).

Chapters on what are prohibited due to the marriage contract (*abwāb mā yuḥarram bi-l-tazwīj*):

- chap. 5/*ḥadīth* numbers: 1 (pp. 558–59), 2 (p. 559), 3 (559), 4 (p. 559), 5 (p. 559), 6 (p. 559), 7 (p. 560).

Vol. 30, the book of punishments and discretionary chastisements (*kitāb al-ḥudūd wa-l-ta'zīrāt*), chapters on punishments of *liwāt* (*abwāb ḥadd al-liwāt*):

- chap. 1/*ḥadīth* numbers: 1 (pp. 460–61), 2 (pp. 461–62), 3 (p. 462), 10 (p. 463), 15 (p. 465), 16 (p. 465), 18 (p. 466), 19 (p. 466), 22 (pp. 466–67), 23 (p. 467), 24 (p. 467), 26 (p. 467), 27 (p. 467), 29 (pp. 467–68), 30 (p. 468), 33 (pp. 468–69), 34 (p. 469).
- chap. 2/*ḥadīth* numbers: 1 (p. 469).

4 Ḥbna

Vol. 25, the book of marriage (*kitāb al-nikāḥ*), chapters on forbidden marriage (*abwāb al-nikāḥ al-muḥarram*):

- chap. 11/*ḥadīth* numbers: (maybe) 23 (pp. 469–70), 35 (p. 473), 36 (p. 473), 37 (pp. 473–74), 38 (p. 474), 39 (p. 474), 41 (pp. 474–75), (maybe) 42 (p. 475), 43 (p. 475), 44 (pp. 475–76), 45 (p. 476), 46 (pp. 476–77), (maybe) 47 (p. 477), (maybe) *ḥadīth* Ibn Asbāt (p. 477), (maybe) *ḥadīth* Ḥumrān (pp. 477–78), (maybe) *ḥadīth* Abū Baṣīr (p. 478).
- Chap. 14/*ḥadīth* numbers: 1 (p. 481).

Vol. 30, the book of punishments and discretionary chastisements (*kitāb al-ḥudūd wa-l-ta'zīrāt*), chapters on punishments of *liwāt* (*abwāb ḥadd al-liwāt*):

- Chap 1/*ḥadīth* numbers: 4 (p. 462), 5 (p. 462), (maybe) 6 (p. 462), 9 (p. 463), 12 (p. 464), 17 (p. 465), (maybe) 21 (p. 466), (maybe) 25 (p. 467), 31 (p. 468), 32 (p. 468).

5 Siḥāq/Saḥq

Vol. 25, the book of marriage (*kitāb al-nikāḥ*), chapters on forbidden marriage (*abwāb al-nikāḥ al-muḥarram*):

- chap. 15/*ḥadīth* numbers: 1 (p. 482), 2 (p. 482), 3 (p. 482), 4 (pp. 482–83), 5 (p. 483), 6 (pp. 483–84), 7 (p. 484), 8 (p. 484), 9 (p. 484), 10 (p. 485), 11 (p. 485), 14 (pp. 485–86), *ḥadīth* Sa'd (p. 487).

Vol. 30, the book of punishments and discretionary chastisements (*kitāb al-ḥudūd wa-l-ta'zīrāt*), chapters on punishment of *saḥq* (*abwāb ḥadd al-saḥq*):

- chap. 1/*ḥadīth* numbers: 1 (p. 470), 2 (p. 471), 3 (p. 471).
- chap. 2/*ḥadīth* numbers: 1 (pp. 471–72), 2 (p. 472), 3 (pp. 472–73), 4 (p. 473), 5 (p. 473), 6 (p. 473).

6 Other

Vol. 25, the book of marriage (*kitāb al-nikāḥ*), chapters on forbidden marriage (*abwāb al-nikāḥ al-muḥarram*):

- chap. 11/*ḥadīth* numbers: 1 (p. 459), 2 (pp. 459–60), 3 (pp. 461–62), 4 (p. 462), 6 (pp. 463–65), 7 (p. 465), 8 (p. 465), 9 (pp. 465–66), 10 (p. 466), 11 (p. 466), 13 (466), 15 (p. 467), 16 (p. 467), 17 (467), 20 (p. 469), 22 (p. 469), (maybe) 23 (pp. 469–70), 24 (p. 470), 25 (p. 470), 27 (p. 471), 28 (pp. 471–72), 29 (p. 472), 30 (p. 472), *ḥadīth* Mu'āwiya b. Aḍula (p. 478).
- chap. 13/*ḥadīth* numbers: 6 (p. 480).
- chap. 15/*ḥadīth* numbers: 12 (p. 485), 13 (p. 485).

Vol. 30, the book of punishments and discretionary chastisements (*kitāb al-ḥudūd wa-l-ta'zīrāt*), chapters on punishments of *līwāt* (*abwāb ḥadd al-līwāt*):

- chap. 1/*ḥadīth* numbers: 6 (p. 462), 7 (pp. 462–63), 8 (p. 463), 9 (p. 463), 11 (p. 463), 13 (pp. 464–65), 14 (p. 465), 20 (p. 466), 21 (p. 466), 28 (p. 467).

Glossary

adilla fiqāhatīyya Juristic proofs. This is the second level in the argumentation process of modern Shi'ī *ijtihād*. It is based on procedural principles (*uṣūl 'amaliyya*), which consist of rules that do not lead to actual legal rulings but rather tell us how to tackle any given case in practice through what is called an apparent divine legal ruling (*al-ḥukm al-shar'ī al-ẓāhirī*). The key point here is that these principles can only be applied to legal rulings if the case does not have enough indicators within the primary sources of *ijtihād*ic proofs. The most frequently used procedural principles are the following: the priority of divine exemption (*aṣālat al-barā'a al-shar'īyya*); the priority of divine precaution (*aṣālat al-iḥtiyāt al-shar'īyya*); the priority of optional choice (*aṣālat al-takhyīr*); and the priority of presumption of continuity (*aṣālat al-istiṣhāb*)

adilla ijthādīyya *Ijthād*ic proofs. This is the first level in the reasoning process of modern Shi'ī *ijtihād*. It consists of proofs by which a *mujtahid* might derive an actual divine legal ruling (*al-ḥukm al-shar'ī al-wāqī'ī*). There are four sources for this type of proof: the Qur'ān, *sunna* (tradition), *ijmā'* (consensus), and *'aql* (reason).

aḥkām shar'īyya wāqī'īyya (sing. *ḥukm shar'ī wāqī'ī*) Actual divine legal rulings. See *adilla ijthādīyya*.

aḥkām shar'īyya ẓāhirīyya 'amaliyya (sing. *ḥukm shar'ī ẓāhirī 'amali*) Apparent divine legal rulings in practice. See *adilla fiqāhatīyya*.

ahl al-ḥall wa-l-'aql The people of resolution and contract. A conceptualisation of *ijmā'* that describes it as the agreement between those individuals who are qualified to understand Islamic laws among the followers of Muḥammad during a specific period after his death.

akhbārīs Scripturalists. See *akhbārīgarī*.

akhbārīgarī Scripturalism (*akhbārīgarī* – in Persian). It was a Shi'ī legal movement that originated in the early sixteenth century and soon became a dominant methodology for understanding and deriving Islamic laws. It actively survived in Imāmī scholarship until the early eighteenth century. Mullā Muḥammad Amīn al-Astarābādī (d.1036/1626–27) founded this movement after writing his masterpiece, entitled *al-Fawā'id al-madaniyya*. Astarābādī argued that the companions of the Imāms and the early Imāmī scholars had always rejected the use of *ijtihād*. Therefore, he strongly disavowed the innovation (*bid'a*) that, in his view, al-'Allāma al-Ḥillī in particular had introduced, urging a return to the original Imāmī approach of refuting *ijtihād*. Astarābādī believed that *ijtihād* was based on uncertain opinions (*ẓunūn*) regarding divine legal rulings and that uncertain opinions were insufficient grounds on which to determine Muslim practice. He

held that Shi'ī scholars are required to derive Islamic laws with certainty and furthermore that such certainty is possible to attain. During the time of the famous Akhbārī, Yūsuf al-Baḥrānī (d. 1186/1772), the sway of the Shi'ī Scripturalist school weakened, and the *uṣūlī* school, which promotes legal theory, under the leadership of Muḥammad Bāqir al-Bihbahānī (d. 1205/1790–1) came to dominance.

***amāra* (pl. *amārāt*)** See *dalīl ḡannī*.

'āmm General. According to legal theory, the texts of the Qur'ān and *sunna* are expressed in either a general or a specific form. Any revelatory text expressed in a general form must be investigated to ascertain whether there is a specific utterance related to that text. If so, the specific utterance should be considered an indicator (*qarīna*) that particularises the general text accordingly. If there is no specific utterance, the text can be interpreted based on its generality (*'umūm*). Current legal theory recognises several linguistic particles as signs of generality: *kull* (all), *jami'* (all), *ayyu* (every), *kull wāhid* (every single), and *al-* (the) identified as 'the' of inclusiveness (*istighrāqī*).

'aql* or *dalīl 'aqlī Reason or rational proof. It is one of the four primary sources of Shi'ī *ijtihād*. See *adilla ijtihādīyya*.

aṣālat al-barā'a al-shar'īyya Priority of divine exemption. One of the procedural principles. Following this priority, if there is no clearly received evidence or proof in the primary sources (including unequivocal statements in scriptures or rational reasoning) to forbid a phenomenon or behaviour, it would be considered permissible in practice. See *uṣūl 'amaliyya*.

aṣālat al-iḥtiyāt al-shar'īyya Priority of divine precaution. One of the procedural principles. This priority emphasises taking a cautionary position in cases of uncertainty (*shakk*) to make sure that legal duty has been complied with. See *uṣūl 'amaliyya*.

aṣālat al-istiṣhāb Priority of presumption of continuity. One of the procedural principles. This priority implies that if a given case or a given legal ruling was previously known by certainty, and its condition has now become doubtful/uncertain, the case or the legal ruling should be presumed to continue as before, and thus the current uncertain situation should be neglected. See *uṣūl 'amaliyya*.

aṣālat al-takhyīr Priority of optional choice. One of the procedural principles. This principle applies when a given case potentially carries two possibilities and there is no received indicator which gives preference to one side over the other. In this situation, following this procedural principle, the lawgiver leaves all the options in the hands of individuals, and they are free to choose either options as they wish, but not both. See *uṣūl 'amaliyya*.

***awāmīr* (sing. *amr*)** Commands. The Qur'ān and *sunna* contain imperative forms of the verb (*awāmīr*), which literally means "commands." The principal issue is whether imperative forms imply "mandatoriness" (*wujūb*) or merely imply

- “recommendation” (*nadb*). Modern *uṣūlīs* often uphold that the literal or real (*ḥaqīqī*) meaning of the imperative form implies “mandatoriness,” whereas “recommendation” is the figurative (*majāzī*) meaning of this form.
- Bāʾin** Irrevocable. A type of divorce in Islamic law in which there is no reconciliation period for couples. To remarry, the couple would require a new marriage contract.
- Barāʾa aṣliyya** Fundamental non-assessment/fundamental exemption. In legal theory, *barāʾa aṣliyya* is commonly categorised as the following: all actions are permitted by default unless prohibited by divine command.
- bighāʾ** In classical Arabic literature, it often refers to male pathological passivity, although it is sometimes regarded as offering sexual services for payment. See *maʾbūn*.
- ḍaʿīf** Weak. A *ḥadīth* whose chain of transmission (*isnād*) contains non-credible transmitters or bears an incomplete *isnād*, meaning that there are one or more missing transmitters within the chain of transmission.
- dalīl qaṭʿī** Definitive proof. *Dalīl qaṭʿī* is a type of proof that leads to certainty in a legal ruling on a given case.
- dalīl ḡannī (also amāra)** Uncertain proof. *Dalīl ḡannī* is a type of proof that leads to an uncertain opinion in a legal ruling.
- ḍarar yuzāl** Harm must be eliminated. Regarding this legal maxim, Muslims are not allowed to harm themselves or harm others; rather, they must take care of their own and others’ lives, health, and property.
- fāḥisha (pl. fawāhish)** Indecency – in the context of the Qurʾān.
- fatwā (pl. fatāwā)** Islamic legal opinion. It is often issued by a jurist in response to a legal inquiry.
- fāʾil** The active partner/one who penetrates in male same-sex sexual relationships.
- fiqh (furūʿ al-fiqh)** Islamic substantive law.
- ghayr al-mustaḡillāt al-ʿaqliyya** Dependent rational proofs. This category of rational proofs implies arguments in which one of the premises comes from reason (*ʿaql*) and the other from divine revelation (*sharʿ*). See *mustaḡillāt ʿaqliyya*.
- hazl** Bawdy. A genre of literature in premodern Arabic and Persian.
- ḥadīth (pl. aḥādīth)** Oral or written report of Muḥammad’s sayings, deeds, and endorsements (in Sunni legal schools) and of Muḥammad, his daughter Fāṭima, and the Twelve Imāms (in Shiʿi legal school).
- ḥaqīqī** Literal (meaning of a text). Jurists should always interpret a revelatory text based on the author’s intention, which is chiefly conveyed by its literal meaning unless there exist indicators that refer to the figurative meaning. See *majāzī*.
- ḥasan** Good. In (Shiʿi) *ḥadīth* science, it implies a report with a complete (unbroken) chain of transmission, ascribed to one of the fourteen infallible individuals by Twelver Imāmī Shiʿi transmitters who were praised but not considered just.

ḥudūd (sing. *ḥadd*) Lit. boundaries. *Ḥudūd* in Islamic law consist of offences whose punishments are specified in the Qur'ān or definitive *sunna*.

ḥujja Probative force or proof.

ḥujjiyya Probativity or probative force.

ḥukm shar'ī (pl. *aḥkām shar'īyya*) Divine legal ruling.

ḥukm taklīfī (pl. *aḥkām taklīfīyya*) Defining ruling. Jurists often describe defining rulings as legal rulings connected to Muslim individuals' deeds and directly targeting their behaviours in various aspects of their lives as people, as worshippers of God, as parts of families, and as members of Muslim communities. Defining rulings are divided into five categories: obligatory (*wājib*), recommended (*mustaḥabb*), permitted (*mubāḥ*), discouraged but not unlawful (*makrūh*), and prohibited (*ḥarām*). See *ḥukm waḍ'ī*.

ḥukm waḍ'ī (pl. *aḥkām waḍ'īyya*) Declaratory ruling. Declaratory rulings are often identified as legal rulings that do not directly target the Muslim individual's deeds and behaviours. They contain laws relating to particular situations that have indirect consequences on Muslim individuals' deeds and behaviours. For instance, Islamic marital laws directly govern a particular relationship between two partners while indirectly influencing their deeds and behaviours in terms of the five categories of Islamic defining rulings. See *ḥukm taklīfī*.

ḥusn al-'adl The goodness of justice. This doctrine is often described as an independent rational assessment by (Shi'i) legal scholars. It implies that divine justice exists, and therefore, God never behaves unjustly, nor does He accept that humans should do injustice to each other. See *mustaqillāt 'aqliyya*.

ibāḥa ḥāhiriyya Apparent permissibility. See *qā'idat al-ibāḥa*.

ibāḥa wāqi'yya Actual permissibility. See *qā'idat al-ibāḥa*.

ijmā' Consensus. One of the four primary *ijtihādīc* proofs. See *adilla ijthādiyya*.

ijmā' dukhūlī A sort of consensus. In Shi'i legal theory, it often implies that one of the Imāms is included among those forming the consensus. This might happen either when all Imāmī jurists agree on the legal ruling on a specific topic, which provides assurance that the Imām agrees with the consensus, or a (small or large) group of jurists agree on the legal ruling on a particular topic without giving the reason or evidence they applied to understand this legal ruling. In the latter case, if one of these jurists is unknown, this consensus might lead to a saying or endorsement of the Imām in the belief that the unknown person is possibly the (Twelfth) Imām.

ijmā' madrakī Evidential consensus. A sort of consensus based on additional evidence/proof.

ijmā' manqūl bi-l-khabar al-wāḥid Reported consensus. A type of consensus in which a jurist reports to other jurists about an agreement of Muslims or Muslim scholars on a specific case.

ijmā' muḥaṣṣal Extracted/acquired consensus. It is a type of consensus that may occur when a jurist investigates the legal ruling on a given topic and demonstrates the agreement of all Muslims or jurists regarding the legal ruling on this topic.

ijtihād In legal discourse, *ijtihād* is illustrated as the primary process to derive legal rulings. However, there are at least three conceptions of *ijtihād* in Muslim scholarship: (1) As a way to draw on personal opinion (*ra'y*) or legal analogy (*qiyās*) for those cases that are not covered by the Qur'ān or *sunna* (the sayings, deeds, and endorsements of Muḥammad in Sunni legal schools and of Muḥammad, his daughter Fāṭima, and the Twelve Imāms in Shi'i legal schools); (2) As exhaustion (*istifrāgh al-wus'*) of a jurist's endeavour to derive an uncertain opinion (*ẓann*) regarding a legal ruling; (3) As a method that jurists can apply to definitely attain or justifiably derive (*taḥṣīl/istikhrāj al-ḥujja'alā*) a legal ruling from reliable sources.

'ilm dirāyat al-ḥadīth The science of understanding *ḥadīth*. It is a field of Islamic knowledge examining the typology of *aḥādīth* and their (in)credibility.

'ilm al-fihrist The science of bibliography. In the Shi'i context, it refers to a field of knowledge that investigates *ḥadīth* collections pertaining to the formative period of Imāmī school.

'ilm iktisābī Acquired knowledge (versus intuitive or evident knowledge).

'ilm al-rijāl Lit. the science of men. The purpose of *'ilm al-rijāl* is to explore the reliability of the *ḥadīth* reports through the evaluation of the characters of their transmitters.

'ishq al-ghilmān Male love of boys. See *jamāl-parast*.

isnād Chain of transmission – in *ḥadīth* reports. A chain of a *ḥadīth* consists of a list of narrators who have claimed the authority to report the *ḥadīth* from Muḥammad (in Sunni Islam) or Muḥammad, his daughter Fāṭima, and the Twelve Imāms (in Shi'i Islam).

istiḥsān Juristic preference. In Sunni law, it is a legal tool to move on from a primary established legal ruling to a secondary legal ruling which provides more benefits.

jamāl-parast Aesthete, worshiper of beauty. It refers to a senior male who would pick a very young or beardless boy (*amrad*) as his object choice of love.

***Khabā'ith* (sing. *khabūth*)** Abominations – in the context of the Qur'ān.

khabar mutawātir A type of *ḥadīth* which is narrated through multiple chains of transmission and numerous transmitters, making it practically impossible for all those transmitters to collude in reporting false information. This type of *ḥadīth*, as Muslim scholars remark, provides certainty concerning the origin of the *ḥadīth* as being issued by the Prophet (or the Twelve Imāms – in Shi'i school).

khabar wāḥid Single-strand tradition. A type of *ḥadīth* that is narrated by one or few chains of transmission, such that it may not provide assurance on the authenticity of the *khabar* as being issued by the Prophet or the Twelve Imāms.

khāṣṣ Specific. See *‘amm*.

khul’ Lit. plucking off. A type of divorce in which the wife initiates divorce due to her dislike of the husband. This type of divorce requires the wife to return the dower (*mahr*) to her husband or grant him something more or less than her dower upon an agreement.

khunthā ‘Intersex’ individual. In Islamic law, a *khunthā* is a person who has both male and female genitalia, or who has neither. Jurists have distinguished between two types of *khunthā*. The first group of *khunthā* includes individuals identified as unambiguous/uncomplicated intersex (*khunthā ghayr al-mushkil*). Members of this group are believed to have a true gender or sex, either male or female, which can be designated through biological signs, before or after puberty. The second group of *khunthā* includes people who have physical features which, according to these jurists, cannot be assigned as male or female within the sex and/or gender binary, before or after puberty. This second group is called indeterminate/complicated intersex (*khunthā mushkil*). See *mamsūh*.

al-kutub al-arba’a The Four Books. It refers to the early major Imāmī *ḥadīth* compilations, that is, *al-Kāfi fī ‘ilm al-dīn*, collected by Muḥammad b. Ya’qūb al-Kulaynī (d. 329/940–1); *Man lā yahḍuruhu l-faqīh*, collected by Muḥammad b. ‘Alī b. Bābawayh, known as al-Ṣadūq, (d. 381/991–2); and *Tahdhīb al-aḥkām*; and *al-Istibṣār fī-mā ukhtulifa min al-akhbār*, both collected by Muḥammad b. Ḥasan al-Ṭūsī (d. 460/1067).

liwāt a. Male active pederasty (a historical-cultural concept which has frequently been deployed in Muslim poetry, prose, *mujūn*, and *ḥadīth* literature); b. intercrural or anal sexual intercourse between two men (a legal term often used by Muslim jurists).

lūṭī Often an adult man who practised intercrural or anal sexual intercourse with a minor boy.

ma’a l-shakk With doubtful/dubious condition. In legal theory, it refers to a condition in which the legal ruling on a given case is doubtful. The procedural principles are those principles that can be applied to derive legal rulings on cases with doubtful conditions. See *adilla fiqāhatīyya*.

Ma’būn A pathologically passive man. A man who has a desire to be penetrated by another man. In early and medieval Muslim vernacular and medical cultures, a *ma’būn* person would be regarded as being afflicted with a disease.

mafḥūm Implicated. In legal theory, it refers to an utterance within which the intended meaning might be tacitly implied in the text but is not presented verbally or explicitly.

majāzī Figurative meaning. See *ḥaqīqī*.

majhūl Unknown. A technical term in *‘ilm al-rijāl* implies a narrator of a *ḥadīth* which is unknown in terms of reliability.

- mamsūh** 'Intersex' person. In Shi'i legal context, it refers to those intersex people who have neither male nor female genitalia. See *khunthā*.
- manṭūq** Expressed. In legal theory, it implies an utterance in which the intended meaning of the text is verbally expressed.
- marfū'** Lifted. In (Shi'i) *ḥadīth* context, it is a type of *khābar* that is ascribed to the Prophet or an infallible Imām through the term "*rafā'ā*" (lifted) whereby one or more transmitters are removed from the chain before the *khābar* could be ascribed to the Prophet or Imām.
- al-mawḏū'āt al-mukhtara'a wa-l-manṣūṣa** Divinely created and designated subjects/topics. In Islamic law, this refers to those topics of legal rulings that were created and designated by the Qur'ān or *sunna*.
- mawḏū'āt 'urfīyya** Customary subjects/topics. In Islamic law, they address those topics of legal rulings that need to be taken from society, whether the general public or the professional community.
- mu'adhdhirīyya** Exculpatoriness – in front of God. In legal theory, it indicates that *mujtahids* are required to engage in exhaustive efforts to justifiably derive divine legal rulings from reliable sources; so that they must have justified exculpation for the path they have followed, if they are questioned hereafter by God.
- mu'ājir** A boy prostitute – in early and medieval Muslim culture.
- Mu'ākhāt** Brotherhood (*barādarī* – in Persian). In Muslim culture, it refers to male friendship or comradeship.
- mubādil** Partner in exchange. It is a phenomenon in premodern Arabic literature alluding to a male (often a boy) who agrees to be penetrated by an adult man in exchange for a turn as the active partner.
- mubayyan** Clear. In legal theory, it refers to a text that clarifies the preferred meaning, though at first glance it might have numerous meanings.
- muftī** A *mujtahid* who is qualified to issue legal opinions. See *fatwā*, *mujtahid*.
- muḥkamāt** Texts with decisively clear meanings – in the context of the Qur'ān. See *mutashābihāt*.
- mujmal** Ambiguous. In legal theory, it implies an utterance that may convey several meanings, but there is no evidence that one is preferred over the others.
- mujtahid** A jurist who is qualified to perform *ijtihād*. See *ijtihād*.
- mujūn** Profligacy or obscenity. A literary genre of premodern Arabic and Persian literature blatantly illustrating sexual images and describing hedonistic pleasure.
- mukhannath (pl. mukhannathūn)** Effeminate. See *takhannuth*.
- mulāzama bayn ḥukm al-'aql wa-l-shar'** Inherent reconciliation between rational and divine assessments. It is a principle in legal theory presuming that whatever reason decrees as the goodness or vileness of an action or behaviour, the lawgivers necessarily embrace it, meaning that there should accordingly be an assessment legislated by the lawgivers.

munajjiziyya Inculporiness. In legal theory, it implies that *mujtahids* are required to engage in exhaustive efforts to justifiably derive divine legal rulings from reliable sources; so that they must practise accordingly and thus are not excused for doing something contrary to this legal ruling.

muqaddimāt al-ḥikma Premises of wisdom. See *muqayyad*.

muqayyad Restricted. Concerning legal theory, the revelatory texts are uttered either as absolute or as restricted statements. When there is no evidence of a verbal, contextual, or rational restriction (*taqyīd*) in a given Qurʾānic or *sunna* utterance, one can consider that the absolute meaning is intended by this statement. However, an absolute meaning, according to modern Shiʿi legal theory, can be attained if it meets all of the following qualifications, which are called the premises of wisdom (*muqaddimāt al-ḥikma*):

- The lawgivers (God, the Prophet, or the Imāms) should be in a position to seriously express their whole intended meaning in a given topic.
- The lawgivers do not address any contextual or verbal restrictions concerning the topic (either attached to the text or anywhere else in the revelatory sources), although it is possible for the lawgivers to mention them if intended.
- There should not exist a specific meaning or referent for the topic in the context of speaking (*al-qadr al-mutayaqqan fi maqām al-takhāṭub*), meaning that it should not evoke a specific meaning in people's minds when they address this topic.
- When a given utterance meets all such qualifications or all the premises of wisdom exist in a specific utterance, then this utterance appears to convey an absolute statement that should also be considered its established apparent meaning.

mursal Interrupted. In (Shiʿi) *ḥadīth* context, it is a type of *khbar* that contains broken chains and thus it misses a number of transmitters in its chain of transmission.

mustaqillāt ʿaqliyya Independent rational proofs. This category of rational argument consists of proofs in which all the premises are obtained from reason (*ʿaql*). It is largely believed by Shiʿi legal theory that the only cases of this type are the principles of the goodness of justice (*ḥusn al-ʿadl*) and the evilness of injustice (*qubḥ al-ẓulm*). See *ghayr al-mustaqillāt al-ʿaqliyya*.

mutʿa Lit. gratification, pleasure. In the context of Islamic law, it refers to a form of marriage consummated with the mutual agreement of both parties for a specific period. The marriage will be nullified either by the termination of the time specified in the contract or by an agreement made by the contracting parties before the time ends.

***mutarajjil* (pl. *mutarajjilāt*)** Mannish woman. See *tarajjul*.

mutashābihāt Texts with allegorical or ambiguous implications – in the context of the Qurʾān. See *muhkamāt*.

- mutlaq** Absolute (statement). See *muqayyad*.
- muwaththaq** Credible. A *ḥadīth* with a complete (unbroken) chain, reported by individuals, male or female, who are considered entirely credible, although they are not all Twelver Imāmī Shi'is. This kind of *ḥadīth* is often considered reliable by Imāmī jurists.
- nahy 'an al-munkar** Forbidding wrong deeds. It is considered as a central injunction of Islamic laws which implies that Muslims must advise or forbid those who commit sinful acts or indecency in their respective societies.
- naskh** Abrogation. It refers to the doctrine of abrogation of the Qur'ānic verses or their legal effects by other verses of the Qur'ān or by *sunna* (tradition), although the latter case, i.e., abrogation of the Qur'ān by *sunna*, is disputed among Muslim scholars.
- nawāhī** (sing. *nāhī*) Prohibitions. In legal theory, it refers to the texts from the Qur'ān and *sunna* that are expressed by prohibitive forms of the verb *prohibition*. The main discussion here is whether prohibitive forms imply *forbiddenness* or just *discouragement*. Consistent with the standard approach to modern Shi'i legal theory, the prohibitive form literally means *forbiddenness*, and thus *discouragement* is the figurative concept of it, and hence requires further evidence to be verified as the meaning of a certain case of a prohibitive form.
- nazarīyyat ta'īl al-ḥudūd** The doctrine of suspension of divinely ordained punishments. This doctrine implies that, although divinely ordained punishments for offences may never be removed in Islam, all these punishments must be suspended during the time of the absence of the Prophet and the Twelve Imāms, because they are the only authorities who have the right to enforce such punishments.
- nazarīyyat taghlib al-mudhakkār** The doctrine of male dominance. This is a linguistic rule in Arabic implying that whenever there is a group of men and women, a male plural pronoun should be used due to the principle of male dominance.
- nikāḥ** Islamic marriage contract. Licit sexual intercourse.
- nushūz** Disobedience or disloyalty of a wife to her husband.
- nuṣūṣ** (sing. *naṣṣ*) Evidently clear texts. In legal theory, evidently clear texts convey their meanings as the intended meaning in an unambiguous way. See *zawāhir*.
- qāḍī** Judge.
- qarīna munfaṣila** Separated indicator. In legal theory, it refers to a verbal indicator which is not provided in that same part of a text but is mentioned elsewhere in the text.
- qarīna muttaṣila** Attached indicator. In legal theory, it implies a verbal indicator that is mentioned in the same part of the text or attached to it.
- qarīna ḥālīyya/lubbiyya** contextual/rational indicator. In legal theory, it addresses a nonverbal or nonliteral indicator.

- qarīna lafẓiyya** Textual/verbal indicator.
- qawā'id fiqhīyya** Legal maxims. Legal maxims consist of the general principles of *fiqh* that can comprehensively or predominantly be applied to all of their related specifics.
- qā'idat al-iḍṭirār** The legal maxim of necessity. This maxim, which in its complete format is articulated as *al-ḍarūrāt tubīḥu l-maḥzūrāt*, implies that necessities render impermissible or unlawful acts or behaviours permissible or lawful.
- qā'idat al-ghurūr** The legal maxim concerning deception. Given this maxim, a deceiver should be counted as responsible for the harm caused by his deceptive trade.
- qā'idat al-hillīyya or qā'idat al-ibāḥa** The legal maxim of lawfulness or permissibility. Concerning this maxim, everything, including every action or behaviour is lawful or permissible unless, based on primary Islamic sources, it can explicitly or definitely be categorised as being unlawful or impermissible.
- qā'idat al-ṣiḥḥa** The legal maxim of correctness. It implies that the behaviours or actions of Muslim individuals should be regarded as valid unless proven otherwise.
- qā'idat al-tahāra** The legal maxim of purity. Regarding this maxim, everything is pure, unless proven otherwise.
- qā'idat al-tasliṭ** The legal maxim of dominance. This rule indicates that everybody has a right to, or control over, their own body and property.
- qā'idat al-yad** The legal maxim concerning taking possession. This maxim confirms that things should be deemed as people's property if they have control (*istilā'*) over them and make use of them.
- qā'idat lā ḍarar wa-lā ḍirār** The legal maxim of no harm and no retribution. The harmfulness addressed in this maxim includes all physical, mental, or economic harms. Concerning this maxim, no harmful regulation has been regulated in Islam.
- qā'idat nafy al-ḥaraj** The legal maxim concerning the negation of hardship. Given this maxim, no legal rulings have been legislated which might cause hardships for Muslims or if such laws exist, they are negated, and Muslims are not obliged to follow them.
- qiyās** Legal analogy.
- Qur'ān** The speech of Allāh revealed to the Prophet Muḥammad. It is the first primary source of *ijtihād*. See *adilla ijtihādīyya*.
- raj'ī** Revocable. A type of divorce in Islamic law in which the couple can reconcile in compliance with the original marriage contract during a designated period.
- ra'y** Personal opinion of a *mujtahid* in case there are no scriptural texts from which to derive the legal ruling on a given subject.

ṣaḥīḥ Sound. In Shi'ī context, it refers to a *khābar* ascribed to one of the fourteen infallible individuals with a complete (unbroken) chain of transmission and with transmitters who were all regarded as credible, just, and Twelver Imāmi Shi'ī.

sayyī'āt (sing. *sayyī'a*) Sinful deeds.

shakk fī l-taklīf Doubt pertaining to the types of legal duty. In modern Shi'ī legal theory, it is widely believed that there are two possible doubtful situations: an actual legal ruling on a specific topic is doubtful either because there is doubt about the types of the legal duty (*taklīf*) itself on this topic, or the *object* of duty (*muta'allaq al-taklīf* or *mukallaḥ bihi*) is uncertain, even though the type of duty on this case is already known. In brief, sometimes a *mujtahid* encounters a case where, after all due consideration, it is not possible to specify the type of legal ruling (whether obligatory, prohibited, encouraged, discouraged, or permitted) that might apply to it. This happens when a *mujtahid*, after having investigated the *ijtihādīc* sources, is still not able to come to any conclusion on the legal ruling of a given topic; for example, the legal ruling on smoking tobacco. As such, the *mujtahid* still cannot conclude whether the smoking of tobacco is obligatory, prohibited, encouraged, discouraged, or just permissible. In other situations, the *mujtahid* may already know that a specific type of legal ruling on a topic exists. For example, the *mujtahid* knows that there is an obligatory prayer on Friday, but it may not be possible to determine what is the specific object (*muta'allaq*) of this legal ruling; namely, whether the obligatory ruling relates to mid-day prayer (*ẓuhr*) or Friday prayer (*Jum'a*). Therefore, the *mujtahid* may still be doubtful about the object of the obligatory prayer on Friday.

shakk fī muta'allaq al-taklīf or mukallaḥ bihi Doubt about the object of legal duty. See *shakk fī l-taklīf*.

shubha ḥukmīyya Doubt pertaining to a legal ruling. In legal theory, it refers to a debate on whether a general legal ruling itself on a given topic or a specific actual case in reality is doubtful. The former situation, that of a doubt pertaining to a legal ruling (*shubha ḥukmīyya*), emerges when there are either no revelatory indicators from the Qur'ān or *sunna* on a given topic or when there exist ambiguous or contradictory revelatory indicators on this topic. The latter situation, which is doubt pertaining to an actual case (*shubha mawḍū'īyya*), emerges when one cannot specify what the actual case is in reality. This situation could be illustrated using the example given above. Consider a glass containing a liquid, and one does not know whether it is water and hence permissible to drink, or wine, which would be prohibited according to Islamic law. Given Shi'ī legal theory, the situation of doubt pertaining to an actual case is not related to legal theory; it is a matter of practice in reality and Muslim individuals are required to approach

such cases by enforcing the appropriate procedural principles, using guidance from jurists. However, the former case of doubt pertaining to a legal ruling is related to *ijtihād*, and thus it needs to be investigated in legal theory.

shubha mawḍūʿiyya Doubt pertaining to an actual case. See *shubha hukmiyya*.

shuhra Widespread agreement.

sihāq/sahq a. Senior female same-sex sexual behaviours with her female slave or young virgin girl in classical Muslim cultures and *ḥadīth* tradition; b. Female same-sex sexual practice in Islamic juristic discourse.

sunna Tradition. It refers to the second primary source of *ijtihād*. It consists of the sayings, deeds, and endorsements of Muḥammad in Sunni legal schools and of Muḥammad, his daughter Fāṭima, and the Twelve Imāms in Shiʿi legal school.

ṭabʿa thālitha Third nature/category. A term used by Shiʿi jurists since at least the fourteenth century to discuss the possible assignment of a third sex and/or gender to indeterminate/complicated intersex people.

takhannuth Effeminacy. In premodern Muslim culture, *takhannuth* was usually defined as behavioural characteristics such as languidness of limbs, softness of speech, and a female style of dressing, which some individuals would express or choose to live by. See *mukhannath*.

tarajjul Mannish-ness. In premodern Muslim culture, there existed women who displayed male traits in their dress and behaviours. See *mutarajjul*.

taʿzīr Disciplining/discretionary punishment. It consists of offences that the Qurʾān or *sunna* have not specified punishments for; instead, it is at the discretion of a Muslim judge to determine the chastisement for such offences. However, the degree of such chastisement must never exceed the lowest *ḥadd* punishment and, in fact, should always be less than the lowest divinely ordained punishment.

thiqa Reliable. In *ʿilm al-rijāl*, it implies the reliability of a transmitter of a *ḥadīth*.

ubna Male pathological passivity – in premodern Arabic and Persian literature as well as vernacular culture. See *maʿbūn*.

ʿulamāʾ The (neo-)traditional jurists. Scholars who mastered several of the Islamic sciences.

***uṣūl* (sing. *aṣl*)** Principles. In Shiʿi *ḥadīth* context, it refers to various recorded *khbar* treatises from the formative period of Imāmiyya. It is believed that these *uṣūl* numbered up to 400 *aṣl*, although numbers as high as 700 have been mentioned.

uṣūl ʿamaliyya Procedural principles. See *adilla fiqāhatiyya*.

uṣūl al-fiqh Legal theory. It is a field of knowledge that studies the principles which may be applied to derive Islamic legal rulings. In modern Shiʿi discourse, it is often defined as a skill or profession on which one would recognise the rules that might be employed in the process of deriving legal rulings or that might be terminated to legal rulings in practice.

ẓawāhir (sing. *ẓāhir*) Apparent meaning of texts. The apparent meaning of texts conveys their contents with the intended meaning, though not definitely. Thus, *ẓāhir* texts are the subjects of more than one possible meaning. See *nuṣūṣ*.

zinā Fornication, adultery. Sexual activities between a man and a woman outside marriage.

ẓuhūr badwī Prima facie apparent meaning. In legal theory, any given text that conveys a prima facie apparent meaning at first glance will not have probative force if there is no evidence/indicator that establishes this meaning; namely, evidence that makes it into an *established* apparent meaning. See *ẓuhūr mustaqrr*.

ẓuhūr mustaqrr Established apparent meaning. See *ẓuhūr badwī*.

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Note: Presently, it is common in Shi'i seminaries for pupils to write down their teachers' lectures and then compile them for publication, often of course with the teachers' permission. Such books are commonly called "*taqrīrāt*" and the persons who compiled them are called "*muqarrir*." In this bibliography, I address such sources in the following format: the lecturer's name as the author, the book's title, and the person who compiled it as "written by."

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Studies in Islamic Law and Society

Mehrdad Alipour, Ph.D. is a post-doctoral research fellow at the University of Utrecht. His study and publications mainly focus on the transformation of Islamic legal and ethical traditions concerning gender, sex, and sexuality diversity in the premodern and modern eras.

To enrich the existing debates on Islam and sexual diversity, in the present book, I seek the potential discursive spaces on homosexuality in modern Imāmī legal debates. I have undertaken this research on the thesis that modern Imāmī legal tradition on homosexuality is more flexible and dynamic than one might expect. To address this essential issue, I build the study around the following constructive question: what are the discursive spaces on homosexuality in contemporary reflections within modern Shi'ī legal scholarship? Responding to this central query, the study is premised on the notion that Imāmī legal sources consist of a tradition of sacred (textual) sources, intellectual reasoning, a vast stockpile of (often contrasting) interpretations of these sources, and a distinguished methodological repertoire called *ijtihād*. Following the same methodology, in this work, I describe, analyse, and critique such textual-exegetical and intellectual-rational discursive aspects concerning homosexuality.

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