# Rethinking Muslim Marriage Rulings through Structural *Ijtihād*

Mohsen Kadivar

Since the early twentieth century it has increasingly become apparent that Muslim jurists' understandings of what constitutes 'Islamic law' are no longer in line with the demands of the lived realities of Muslims. What were accepted as religious rulings have been contested by modern standards of justice and the notions of rationality. By the second part of the twentieth century, *fiqh* rulings pertaining to almost the entire area of human and social interactions (*muʿāmalāt*) had been thrown into question.

In this chapter, I revisit some juristic (*fiqh*) rulings on marriage that have become problematic and unacceptable in light of contemporary standards of justice and social realities. Muslim scholars have approached these rulings from their own perspectives, which encompass at least four characteristics: denomination (for instance, Sunni or Shiʿa), legal school, theological school and a specific methodological approach. My analysis is from the standpoint of a reformist Shiʿi Usūli[1] jurist (*faqīh*) advocating 'structural *ijtihād*', which entails revising the principles and foundations of *fiqh* (*al-ijtihād fi al-uṣūl wa al-mabānī*). By the term *uṣūl*, I refer to juristic methodology (*uṣūl al-fiqh*) including linguistics (*mabāhith al-alfaẓ*); by *mabāni*, I refer to the principles of other areas of Islamic sciences, notably theology (*kalām*), ethics (*akhlāq*), Qurʾanic exegesis (*tafsīr*) and the science of Hadith (*ʿilm al-hadīth*), as well as revisiting epistemological, cosmological, physiological, sociological and anthropological premises of Islamic sciences. I contend that the task of the *faqīh* is to ascertain that the laws defended in the name of Islam are just and ethical and that, to do so, we need to revisit the principles and foundations underpinning the traditional juristic methodology (*uṣūl al-fiqh*).

This chapter is in the genre of *al-fiqh al-istidlāli* (argumentative jurisprudence)[2] and consists of two main parts. In the first part, I outline contemporary approaches to rulings in classical *fiqh*, and then set out the key premises and requirements of structural *ijtihād*. In the second part, I apply structural *ijtihād* in four areas of marriage law where the classical *fiqhi* rulings have been increasingly contested since the early twentieth century: marriage of minors; rights and duties in marriage; unequal rights of spouses to divorce; and men's right to polygamy. I argue that, for rulings in these four areas to remain valid as Shariʿa rulings, and thus applicable as 'Islamic law', they should meet the four criteria: justice, ethics, reasonability and effectiveness according to the standards of the time.

## 1. STRUCTURAL *IJTIHĀD* AND ITS REQUIREMENTS

*Ijtihād,* which literally means 'effort/exertion', has been the source of dynamism within Islamic legal tradition for many centuries. It denotes the process of reaching judgements on points of law, referred to as Shariʿa rulings (*aḥkām al-shariʿa*), via *uṣūl al-fiqh* (principles of jurisprudence). These rulings encompass commandments, prohibitions, precepts and laws that jurists interpret to be mandated within Islam.

Broadly speaking, Muslim theologians and jurists (Sunni and Shiʿa) can be divided into four categories: traditionalists, fundamentalists, semi-reformists and reformists.[3] Traditionalists, sometimes called conservatives, are those jurists who adhere to classical *fiqh* rulings and methodology; they constitute a strong majority in religious centres of learning. Fundamentalists are those who resort to violence to enforce a rigid interpretation of these classical rulings as 'state law'; in both Sunni and Shiʿi Islam, they constitute a much smaller group than traditionalists. Semi-reformists are those who seek to reform classical *fiqh* rulings without rethinking their traditional foundations. Although they constitute a small minority in the seminaries, they are in the majority in modern universities and among educated Muslims around the globe. Reformists are those jurists and scholars who advocate a holistic and comprehensive reform based on the core foundation and principles of Islamic thought and jurisprudence. In contrast to semi-reformists who concentrate on piecemeal reforms, reformists argue that it is not enough to simply reinterpret rulings within the traditional framework, that is, traditional *ijtihād*; what is required is rethinking the underpinnings of classical juristic methodology. They contend that meaningful reform in *fiqh* rulings is the fruit of two deep reforms: that of the juristic methodology (*uṣūl al-fiqh*) and that of its foundations (*mabāni*), which involves other areas of Islamic intellectual thought; in other words, structural *ijtihād*. It is only then that modern issues, such as the emergence of nation-states and the expansion of discourses of citizenship, human rights, gender equality and democracy, can be addressed from within an Islamic framework.

In what follows I outline the premises on which structural *ijtihād* rests, that is, the three salient features by which it differs in approach from traditional *ijtihād*. These are: 1) having a minimalist rather than maximalist expectation of religion (*al-tawaqquʿ min al-dīn*) as the source of norms and law, which leads to a minimalist *fiqh*; 2) considering human rationality to be a source of ethics; and 3) evaluating rulings (*aḥkām*) as either timeless or time-bound.

### 1.1 Expectations of religion

The boundaries of religion, or what we can expect of religion, is a subject in modern theology and philosophy of religion.[4] In pre-modern times, the realm of religion was much broader and covered many aspects of social life, such as the fields of medicine and law. For instance, today, so-called *ṭibb al-nabī* (prophetic medicine) or *al-ḥudūd wa al-taʿzīrāt* (penal rules) are no longer considered essentials of Islam, but instead are seen as practices of the past that are now part of medical and legal knowledge.

We need to ascertain what subjects and issues belong exclusively to divine knowledge (revelation, scripture and prophetic tradition) or at least where religion plays the key role. We must also recognize what subjects and issues cannot be answered by revelations, scripture and traditions of the Prophet, and thus are exclusively the realm of human reasoning. In other words, we need to define what religious essentials are and what our expectation of religion should be. This does not mean that religious discussions must be restricted to the essentials and expectations in the divine revelation, scripture and prophetic tradition. Non-essentials or the issues beyond these expectations can be discussed, but should be seen as secondary and accidental, at least in our time (if not from the beginning).

'Structural *ijtihād*' draws on and further develops the concept of 'expectations of religion'. I argue that keeping the expectation of religion in our minds can have deep effects and benefits in *uṣūl al-fiqh* and the process of *istinbāṭ* (inference); it prepares the ground and clarifies the premises for the deliberations of Shariʿa-based proofs (*adilla al-shariʿa*). For instance, in deriving Shariʿa

 

rulings for many modern issues (*mustaḥdatha*), traditional jurists presume that the Lawmaker (that is, God) has intended there to be a ruling for every new issue. But the concept of 'expectations of religion' shows us this presumption is not self-evident and needs argumentation.

Within the framework of structural *ijtihād*, I argue that we should restrict our expectations of Islam to eight areas: 1) the meaning of life; 2) knowledge about God; 3) knowledge about the Hereafter (*al-akhira*); 4) knowledge about the unseen world (*al-ghayb*); 5) supporting and safeguarding morality and ethics (*al-akhlāq*); 6) acts of worship (*al-ʿibādāt*); 7) quasi-rituals ( *shibh manāsik*), which means restrictions on eating, drinking and sexual relationships; and 8) a very few aspects of human interactions (*muʿāmalāt),* such as the prohibition of usury (*ribā*). The first four of these eight are the main fields of Islamic philosophy and theology, while the last four are major fields of practical Islamic teachings, or Islamic ethics and jurisprudence (Kadivar, 2017). As I shall explain later in the chapter, the application of structural *ijtihād* will lead to minimalist jurisprudence.

### 1.2 Human rationality as the source of ethics

Another important premise of structural *ijtihād* is that ethics and morality are derived through human reason, and not exclusively from revelation. According to Cydney Grannan (n.d.):

> Generally, the terms *ethics* and *morality* are used interchangeably, although a few different communities (academic, legal, or religious, for example) will occasionally make a distinction … Both morality and ethics loosely have to do with distinguishing the difference between 'good and bad' or 'right and wrong'. Many people think of morality as something that's personal and normative, whereas ethics is the standards of 'good and bad' distinguished by a certain community or social setting … Ultimately, the distinction between the two is as substantial as a line drawn in the sand.

In Islamic literature, the term for both ethics and morality is '*akhlāq*'. Islamic moral theology or Islamic ethics is a theological discipline concerned with identifying and elucidating the principles that determine the quality of human behaviour in the light of Islamic scripture and prophetic tradition.[5]

There are two main approaches to ethics and morality in Islam. The first approach was adopted by the Muʿtazilites, who once constituted the majority, and in contemporary times by reformist Usūli Shiʿas. For them, morality and ethics are absolutely rational, universal disciplines that have common ground in all traditions. The role of religion is to support morality and ethics with the guarantee of reward and punishment in the next world. In other words, ethical and moral principles are not among *al-aḥkām al-taʾsīsīya wa al-mawlawiyya*, that is, positive rulings that were created or founded by Islam, but are classified as *al-aḥkām al-imḍāʾiya wa al-irshādiyya*, that is, existing pre-Islamic rulings that Islam ratified. In ratified rulings, it is human reason – which is God's gift – that plays the primary role, and religion plays only a confirmatory role.

In the other approach, moral values are defined by divine revelation. This is the predominant approach of the major theological schools of Sunni Islam, such as Ashʿāira, Māturidiyya and Hanābila. According to this approach, ethical values and moral norms as well as Shariʿa rulings are given by God – the Lawgiver – and Muslims discover them through scripture. The methodology for deriving ethical principles is not rational, but textual.

 

'Structural *ijtihād*' operates within the framework of the first approach, which is rational ethics. Of course, Muslim scholars may highlight some moral values and ethical rulings in some situations, and prefer others at a time of probable conflict between them. There is a fundamental question here: Do we have any moral and ethical principles exclusive to Islam that do not have parallels in other traditions? If the response is 'No', we must admit that moral and ethical rulings are not among those matters that are governed by divine revelation; they are neither *taʿabbudi* (devotional) nor *tawqifī* (beyond rational) rulings that we should obey without question.[6] In other words, the Qurʾan and the Sunna are not the primary sources for morality and ethics; they are necessary but secondary sources that play a great role in clarifying moral and ethical principles.

### 1.3 Timeless or time-bound?

The primary principle (*al-aṣl al-awali*) in traditional *uṣūl al-fiqh* is that all textual injunctions are timeless unless proved by definite evidence to be time-bound. The main function of religion is defined as delineation of the duties of humankind by 'the law' as found in Islam's textual sources (the Qurʾan and Sunna). The original Lawmaker is God or His Prophet. Deriving legal rulings from Islam's textual sources is the role of jurists (through *ijtihād*), and their products are Islamic rulings that cover rituals, civil law, financial law, criminal law, public law and international law – in other words, all aspects of law. There is no difference between these areas in the derivation of rulings. All of them are parts of *fiqh* and the jurist does not need any special knowledge or expertise for discussing each of them. One can derive rulings on each of these areas from scripture as long as one is an expert in *fiqh*.

By contrast, structural *ijtihād* starts from the premise that all legal rulings in the Qurʾan, Sunna and *fiqh* are time-bound unless we can find valid evidence/proof (*dalīl*) that they are timeless and permanent. This is an argument that is determined by our expectations of religion, and the *dalīl* (evidence/proof) for this primary principle is not based on textual but on rational sources – a position that is not tolerated by those who believe that religion is purely a matter of the text.

On the basis of the above, I argue that the very term 'Islamic law' needs to be problematized. Law in its essence is time-bound. There is a direct relationship between law and the situation of time and place. Values and virtues could be timeless and permanent, but it is difficult to accept the concept of timeless rulings and laws. This principle of the philosophy of law is unanimously accepted in modern legal systems. Of course, we can merge human-made law with our Islamic values and virtues and call it 'Islamic' regarding those values and virtues, but we cannot preserve the rulings of past centuries in the context of Arabia, especially in their traditional forms and patterns, and consider them sacred.

The Qurʾan never called itself a 'Book of Law'; instead it is a 'Book of Light' or 'Book of Guidance'. Light or guidance can be found in divine ethical virtues or moral values, but it is meaningless to seek light or guidance in verses relating to penal codes or polygamy or slavery. How could the Qurʾan be a book of law, when its legal verses are less than 1 per cent of the whole (if matters of *ʿibādāt* are excluded)? There are about fifty legal verses in the Qurʾan.[7] The content of these verses can be divided into two: permanent Islamic values, and temporal rulings fitted to the time of revelation and to Arabia. For example, verse 5:38 ('Cut off the hands of thieves, whether they are man or woman, as punishment for what they have done – a deterrent from God: God is almighty and wise') expresses a permanent value that theft is a sin and crime that should be punished by governments. But cutting off the hands of a thief, without any doubt, is a temporal ruling.

 

Prophet Muhammad did not introduce himself as Lawmaker, and did not identify his mission as completing a legal system. Instead, he said, 'I was sent to complete the noble morality.'[8] What we can find of legal terms in his spiritual legacy as prophetic tradition can be divided into two. First are his administrative rulings, coming from his role as ruler, not his prophethood. There is no evidence that such rulings are permanent and timeless. Second are rulings that are due to his prophethood, which undoubtedly are our respected Sunna, prophetic tradition. There is no Shariʿa-based evidence or proof that his teachings on human interactions (*muʿāmalāt*) are intended as permanent and timeless rulings.

To elaborate, let us take for example the rulings on women's rights in the Qurʾan and Sunna. These rulings were directly relevant to the economic, political, social and cultural situation of early Islam. We can find patriarchal patterns of family and society reflected in these rulings. Men's domination and superiority over women were justified on the basis of men's greater physical power, a fact that could not be neglected at the time. The gender ideology and the position of women in the modern era are different from those of the pre-modern era. The rulings for these two eras could not be the same. Those who want to impose the rulings of the pre-modern era on to the modern era, without any meaningful change or with just a few minor revisions, and think this is the implementation of sacred Shariʿa or divine law, are completely mistaken. What they preserve is only the early customs of seventh-century Arabs, or abrogated Islamic rulings. What should be preserved are divine permanent values and timeless standards, nothing else.

In addition, the exegetes of the Qurʾan, the compilers and interpreters of Hadith, and the jurists were almost all male, and their masculinity influenced their understandings of religious texts, their compilations and interpretations. All of these legal texts were written from a male perspective. It is natural that most of these texts and their interpretations do not satisfy Muslim women in modern times, and are inconsistent with egalitarian legal values. At the time of the revelation, as I have demonstrated in my work, rulings were all, according to the standards of the time, more just, rational, moral and functional than other existing laws (Kadivar, 2021, pp. 273–304).[9]

Keeping these points in mind, I argue that if we do not find evidence or proof (*dalīl*) of the permanence of family rulings in Shariʿa, it means that they are time-bound. For a *fiqh* ruling to remain valid for our time, it should meet all four aforementioned criteria based on textual evidence or proof. Among these four criteria, the most important is justice, which acquires a particular significance in the area of women's rights and is where the Qurʾan puts the emphasis.

## 2. APPLYING STRUCTURAL *IJTIHĀD* TO JURISPRUDENCE ON MUSLIM MARRIAGE

Before revisiting rulings on the family and marriage with different approaches and types of *ijtihād*, three preliminary notes are in order.

First, I have set forth my general standpoint on the question of gender equality in my earlier work, arguing that the Qurʾan and Sunna should be reread in light of the fundamental equality between men and women (Kadivar, 2013). Both reason and the revelation require that women be treated with justice and according to what is commonly accepted as good or right (*maʿrūf*). The gist of my argument there is as follows: in line with Aristotle, the classical jurists approached the issue of women's rights on the basis of a notion of justice that recognizes rights for individuals in proportion to their 'deserts'; since they saw women to be 'inherently lesser than men', they were entitled to lesser rights. Such a notion of justice, which I call deserts-based justice (*al-ʿadāla al-istihqāqiyya*), leads to proportional justice, which has become indefensible and unjustified in

 

modern times. Contemporary rationality recognizes humans as rights-holders, and thus upholds fundamental equality and egalitarian justice. We need to revisit *fiqh* rulings on women's rights in light of a notion of justice that is based on equality (*al-ʿadāla al-musawatiyya*), including equality between men and women, which is more consistent with the Qurʾanic spirit and Islamic ethical standards.

Second, I believe that there are at least three Islamic ethical values at play in family affairs. The first is the requirement of chastity and modesty for both men and women. Second, one of the priorities in Islamic ethics is the institution of the family and the protection, safety and financial and spiritual needs of its members. Third is the respect for the individuality of the spouses; one aspect of both men's and women's lives is their role in the family, but this is not the only one.

Finally, I want us to return to the domain of minimal *fiqh* that, as I argued earlier, embraces rulings on rituals (*ʿibādāt*) and only a small part of those relating to social life (*muʿāmalāt*). *ʿIbādāt* (for example, prayer, fasting, hajj and zakat) are matters between the believer and God, and rulings relating to them do not constitute what is called 'law'. Those relating to *muʿāmalāt*, which are matters of social relationships (contracts, for example), can be called law as they are open to rational argument. But there is a third category of acts that are either required or prohibited, such as bans on drinking alcohol and eating pork, that can be referred to as *shibh manāsik* (quasi-ritual). They are neither fully devotional, like *ʿibādāt*, nor exclusively social and rational, like *muʿāmalāt*.

Sexual activity and relationships fall under this third category of ritual-like acts. Marriage is necessary for any type of sex; divorce is necessary for its termination; and a number of sexual acts are prohibited. Of course, marriage is more than sex. Marriage and its consequences and correlations constitute large portions of any book of *fiqh* or Islamic jurisprudence. Marriage as a contract is governed by the general principles of human contracts, but sexual relations are a different matter. We should not mix rulings relating to the former with the latter. So-called 'Shariʿa-based family law' is inconsistent in many respects with modern civil laws. This is exactly the focus of our subsequent discussion: four areas of rulings on marriage that have become particularly problematic in contemporary times.

### 2.1 The marriage of minors

According to the *ijtihād* of traditional jurists, the marriage of a minor girl is permissible, even before puberty. The renowned jurist Muhammad b. Ahmad b. Abi Sahl al-Sarakhsi (1009–1090 CE) built on the following textual evidence to support of the marriage of minors: a) the Prophet married ʿĀʾisha when she was six years old, and brought her to his house when she was nine; b) verse 65:4 mentions the waiting period (*ʿidda*) for minors: 'those who have not menstruated as yet' (al-Sarakhsi, 1989, vol. 4, p. 212). On the basis of such arguments, a variety of traditional jurists issued rulings over many centuries regarding the father's compulsory guardianship of, and ability to marry off, a minor daughter; the ability of the girl to annul the marriage; and the permissibility of having sexual relations with a minor (see, for example, al-Qaraḍāwī, 2017, pp. 88–93; al-Najafi, 2012, vol. 30, pp. 209, 783–4; Yazdi, 1999, vol. 5, pp. 509–10; Makarem Shirazi, 2011, vol. 1, pp. 36–7, 39). In sum, the majority position in traditional *fiqh* holds that: a) forced marriage of a minor girl by her guardian is permissible; b) she does not have the right to annul this marriage when she reaches puberty, except in the Hanafi school; c) all sexual pleasure with a minor wife (apart from penetration) is allowed; d) under Shiʿi *fiqh*, full sexual intercourse

 

with a minor wife before she reaches puberty or the age of nine is absolutely prohibited, while Sunni *fiqh* permits it with the agreement of her guardian if the minor wife has the physical capacity.[10]

As already discussed, in structural *ijtihād*, a Shariʿa ruling should be tested by four criteria: justice, ethics, reasonability and functionality in comparison with alternative solutions. If a ruling, even if supported by explicit textual sources (the Qurʾan and Hadith), is not confirmed by all four of these criteria, it means that this ruling is not a valid Shariʿa ruling.

According to structural *ijtihād* and the application of four necessary criteria, the marriage of underage girls is forbidden. It is not just, ethical, reasonable according to the values and standards of our time, and it is not functional because in most legal systems it is a crime.

In other words, it is necessary to take account of modern sciences such as the psychology of minors, the psychology of marriage, comparative family law, and so on, subject to the requirements of reasonability, justice and ethics. To enter a marriage is a major decision that can be made only by two adults, not the guardians of minors. These are self-evident axioms and do not need any textual source. On the contrary, any textual source that opposes these self-evident axioms should be abrogated or dismissed as temporal evidence that is no longer valid.

In sum, marriage of underage girls is an affront to contemporary notions of childhood and ethical and moral sensibilities, and is harmful to the girl. Therefore, it must be prohibited. This prohibition is the result of independent reasoning. Marriage is by definition a contract between two adults with the consent of both parties. This minimal condition is not available in the marriage of underage girls, especially before puberty. Textual evidence such as verse 65:4 should be interpreted in the context of referring to females who are not minors but do not menstruate for some reason. Likewise, the case of ʿĀʾisha and hadith evidence must be understood in context, including confirming accuracy of the reports; such evidence cannot be generalized. Rulings based on such evidence are restricted to their times.

Based on the above, structural *ijtihād* and the reformist approach hold the following:

1. The minimum age of marriage – that is, the beginning of adulthood, which depends on local conditions and culture – is determined by the parliament of each country after consultation with a professional committee including gynaecologists, youth psychologists, sociologists, lawyers and theologians. It is not exclusively a religious issue, but a multidimensional one. We should keep in mind that puberty is only one criteria of adulthood; adulthood is more complicated than simple bodily or sexual puberty.
2. Any kind of sex with minors (even with their consent or the permission of their guardians) should be defined as a crime.[11] This criminality is greater before puberty.
3. This type of marriage cannot be treated as valid by permission of guardians or courts.
4. The marriage contracts of underage or minor girls are null and void.

### 2.2 Equal rights and duties in marriage

In all classical schools of Islamic jurisprudence (*fiqh*), all expenses of marital life or maintenance ( *nafaqa*) are exclusively on the shoulders of the husband. Because of this, he is the head of the family. If the wife has any business and income, she can save her money and does not have any responsibility for the expenses of marital life. She is not responsible for housework and does not have any other duties, even taking care of babies or breastfeeding. She is entitled to demand wages

 

from her husband for performing any of these services. The only duties of the wife are protecting her chastity, total obedience and availability for sex whenever her husband requests, which is termed *tamkīn* in traditional *fiqh*.

I confine the discussion to the views of Shiʿa jurists. In *Wasila al-Naja* (*The Instrument of Salvation*), the well-known book of fatwas, Abolhassan Esfahani (1860–1946), the Iranian Shiʿite authority in Najaf, states:

> *Nushūz* (discord and animosity) of the wife means the absence of the required obedience, including unavailability for having sex (*tamkīn*), not removing abhorrent conditions that are obstacles to his pleasure and enjoyment of her, relinquishing cleansing and beautifying herself if the husband requests; as well as leaving his home without his permission, etc. Refusing to perform services such as cooking, washing the dishes, cleaning the house, sewing, etc., that do not affect availability for sex (*istimtāʾ*), does not count as *nushūz*. …
>
> The maintenance (*nafaqa*) of the wife is the duty of her husband if the marriage is permanent (*dāʾima*), not temporal, and if the wife has been obedient to her husband in those issues that obedience is required by the wife. Therefore, for a disobedient wife (*nāshiza*), there is no maintenance …
>
> If the wife has *sharʿi* acceptable excuses, such as menstruation, *ihram* on hajj, or required fasting, or disease, or travel or leaving the house with the husband's permission, she is eligible for *nafaqa* even in the case of failure of *tamkīn*. (2013, pp. 478, 467–8, 478–9)

One can say that in marriage the spouses exchange *tamkīn* and *nafaqa*, that is, the wife's availability for sex and the husband's provision of maintenance. The contemporary Shiʿa jurist Naser Makarem Shirazi (born 1924) has done further study of the subject, and confirmed that *nafaqa* is for marital life (*zawjiyya*), *tamkīn*, pregnancy and breastfeeding, and that there is a consensus among Muslim jurists that the husband's responsibility for *nafaqa* is one of the essentials of Islam (2011, vol. 3, pp. 428–9). After exploring all the verses of the Qurʾan related to the subject, he stated that: 'We did not find any verse in the Qurʾan that proves the requirement of *nafaqa* except in two periods: pregnancy and breastfeeding.'[12] This goes against the general consensus that *nafaqa* is a requirement throughout marital life. At the same time, according to Makarem Shirazi's study, the hadiths indicating that a husband must provide *nafaqa* for his wife are clear and undeniable (2011, vol. 3, p. 435). The consensus is that the necessary conditions for *nafaqa* are the permanence of the marriage and the wife's *tamkīn* (al-Najafi, 2012, vol. 32, pp. 524–5). Makarem Shirazi accepted the consensus on the former, but on the latter (*tamkīn*), after exploring all the evidence, he concluded that 'although some of this evidence is challengeable, it is possible to rely on the others' (2011, vol. 3, p. 440). It is clear that the argument regarding *tamkīn* is not strong.

According to structural *ijtihād*, both spouses could be responsible for the expenses of marital life, not only the husband. Whether working inside or outside the home, both spouses may contribute to the costs and expenses of their marital life with their income and personal property. When both spouses share the expenses, it is not acceptable to require that the husband be the maintainer, and the wife be secondary and dependent. Each of the spouses may carry out care and housework; if the wife does this without wages, she is eligible for maintenance. The husband's duty to pay maintenance is restricted to the time of pregnancy and the first two years after childbirth, which is the requirement of substantive justice. There is no head of the family.

 

The position established by structural *ijtihād* requires reasonability, justice and egalitarian ethics. This position is much stronger than the argument of traditional *fiqh* that *nafaqa* is the exclusive duty of the husband. I have not yet found any reliable evidence to support this exclusive claim. The Qurʾan explicitly supports only the requirement for the husband to pay the wife's *nafaqa* at the time of her pregnancy and breastfeeding. Second, the hadiths regarding *nafaqa* as the exclusive duty of the husband are reflections of specific situations and cannot be generalized. Third, egalitarian justice demands that spouses share their care and economic responsibilities in marriage in general in ways that work for the well-being of the family.

### 2.3 Equal rights to divorce

According to traditional *fiqh*, the dissolution of marriage takes three forms: *ṭalāq*, that is by the request of the husband; *khulʿ*, that is by the request of the wife; and *mubārat*, where both sides request separation. *Ṭalāq* is the husband's right and is defined as a unilateral act (*īqāʾ*). It requires neither the consent of the wife nor that she be informed. Although *khulʿ* takes place on the initiative of the wife (who must pay compensation, which is usually part or all of the dower), the husband's consent to divorce is required. His consent is also necessary for *mubārat*. In other words, in traditional *fiqh* no form of dissolution of marriage (*ṭalāq*, *khulʿ* or *mubārat*) can happen without the husband's consent; he is the only one who can end a marriage (Esfahani, 2013, pp. 523–9).

As is evident, women do not have an equal right to divorce: first, men have the absolute right to divorce under *talaq*, and can divorce their wives whenever they want, and for any reason. Women do not have any legal right to reject the divorce; it is a unilateral act (*īqāʾ*). Second, divorce initiated by women is possible, but depends on two conditions: payment of compensation to the husband, and his consent. This means that if the husband does not want to divorce his wife, the wife cannot separate except through the court and a long and complex procedure of proving the impossibility of reconciliation. This is the majority (*mashhūr*) position of the Shiʿi jurists (al-Najafi, 2012, vol. 34, pp. 5–164). As in the Shiʿa school, I did not find any Sunni jurist who supported *khulʿ* without the agreement of the husband (Ibn Qudāmā, 1997, vol. 10, pp. 267–323; al-Zuhaili, 1985, vol. 7, pp. 480–508). In other words, the right ultimately rests with the man as well.

In his 2001 book on divorce, Yousef Sanei (1937–2020) followed the consensus of the distinguished Shiʿi jurists of the past,[13] but in 2007 he expressed a new idea with regard to *khulʿ*: 'There is no choice for the husband except to accept his wife's request for divorce' (Sanei, 2007a). So, if his wife requests a divorce and is willing to pay the compensation, it is required (*wājib*) for the husband to implement the divorce. If the husband refuses, the court will implement it (Sanei, 2007b). This would be a big step forward.

According to structural *ijtihād*, divorce, like marriage, should be a consensual process. The termination of a marriage contract *always* needs the consent of both parties. The wife has the same right as the husband to divorce, as in marriage. Any discrimination in divorce cannot be justified or accepted. After one or both of the spouses officially requests a divorce, the court begins the process, decides on the financial settlement, and will eventually issue the official divorce certificate to terminate their marital life. At the time of divorce, the husband should provide compensation to the wife (for housework and care of the children), if he did not pay it before.

More clearly, neither spouse – especially the husband – has the right to terminate the marriage without the consent of the other. Second, the wife is not required to pay compensation to the

 

husband in exchange for divorce. She has the same rights to divorce as her husband. Third, the final divorce formula (*inshaʾ sighat al-ṭalāq*) is implemented by a judge in court, after hearing from both sides and concluding that reconciliation is impossible, and that the divorce was not pronounced by the husband.

The argument of structural *ijtihād* for egalitarian divorce is the requirement of 'justice' that is supported by ethical values and rational proofs (*al-dalīl al-ʿaqli*). The relevant Qurʾanic verses are not *naṣ* (clear or certain, without any other probable indication), so their apparent meanings could be interpreted as supporting egalitarian divorce. The authentic hadiths that do not support egalitarian divorce have lost their credibility because of their deep conflict with the criterion of contemporary notions of justice; in other words, they led to the rulings of past ages. The requirement of justice is much stronger than all textual evidence.

### 2.4 Polygyny

The primary form of marriage in Islam is monogamy. The Prophet's marriage with Khadīja, his beloved wife, was monogamous. Almost all Muslims in almost all countries today are monogamous, even in the few Muslim-majority countries where polygyny is legal. There is no doubt that a form of restricted polygyny *was* accepted in Islam. Was this restricted polygyny essential to Islam or was it one of the temporal rulings of Islam belonging to a specific situation? Here, I explore two positions in contemporary Islamic thought on this subject, one Sunni and the other Shiʿi. Both reflect traditional *ijtihād* and a traditional perspective: It is a man's right to have up to four wives simultaneously. The only condition for polygyny (that is not exclusive to female orphans) is justice, interpreted in this way: the husband must deal with his wives equally in their beds and in maintenance.

Yūsuf al-Qaraḍāwī (born 1926), a Sunni jurist, argues that polygyny is allowed clearly in the Qurʾan and the Sunna of the Prophet, and condemns its unconditional and permanent prohibition. According to him, the correct meaning of Qurʾanic verse 4:129 ('You will never be able to treat your wives with equal fairness, however much you may desire to do so …') is not the prohibition of polygyny. He argues that the verse indicates that human nature makes absolute justice in a husband's treatment of multiple wives impossible in matters of the heart and sexual desire. Therefore, the husband must try as much as he can to treat his wives with equal justice, and allowance is made for men's emotions and passions (al-Qaraḍāwī, 2017, pp. 269–72).

The 1967 Iranian 'Family Protection Law' (amended in 1973) allowed polygynous marriages with the first wife's official permission and a court judgement. This law was not only left intact after the revolution of 1979, but it was included as a stipulation (*sharṭ ḍimn al-ʿaqd*) in 'official marriage contracts'. In addition, this law enables the wife to become a representative of her husband in order to divorce herself on his behalf in specific situations, including polygyny.[14] This could not be inserted without the approval of Ayatollah Khomeini (1902–89), leader of the Islamic Republic of Iran. Yet neither he nor any other Shiʿi jurist (to my knowledge) published this important restriction on polygyny in their books of fatwa or their *al-fiqh al-istidlāli* books, where the textual proofs and rational arguments for rulings are elucidated. Therefore, we can say that Shiʿa jurists tolerate this ruling, even though they are reluctant to acknowledge it in their own work.

According to structural *ijtihād*, the primary form of marriage in Islam is between one woman and one man. Polygyny is a secondary form, for times of necessity (*ḍarūra*), provided that its practice does not entail injustice and harm to any of the parties involved. In other words, it is an exception for specific situations, with the strict permission of the court. After the court's

 

permission, the necessary condition for polygyny is the first wife's official permission, without which a marriage with another wife is not only null, but also a crime.

## CONCLUSION

Rulings on marriage and its consequences and correlations constitute a large portion of any *fiqh* book. Today, most of these rulings cannot be regarded as just, reasonable or moral, and are less functional than other laws. We must ask ourselves: Are these rulings Islamic? I argue that they *were* Islamic because they *were* reasonable, just, moral and more functional than other existing laws at one time; they were in line with the values and standards of the people at the time of revelation, and that is why people accepted them. But they can no longer be accepted today. And while well-intentioned, the patchwork twentieth-century efforts to reform these rulings, led by semi-reformists, do not go far enough to address today's needs and contexts.

Traditional jurisprudence does not fit the mentality of modern times. Traditional *ijtihād*, whether applied by traditionalist or semi-reformist jurists and scholars, embodies a patriarchal perspective on women in the family and society. It is based on deserts-based notions of justice (*al-ʿadāla al-istihqāqiyya*) and scriptural justification.

We need a new paradigm. This is what structural *ijtihād* aims to achieve. Its approach to marriage is based on egalitarian notions of justice (*al-ʿadāla al-musawatiyya*), an approach that reflects the mentality of our times. It sets out the common ground of all arguments (*al-adilla*) for rulings on marriage: the requirements of reasonability, justice, ethics and better functionality according to the mentality of this time.

Shariʿa is the Islamic way of life, and encompasses the permanent standards, principles, ethical values and rites of Islam. We should not return to the past. We should bring our tradition to the mentality of today, preserving our principles and standards and rereading the rulings on Islamic marriage in this context.

## REFERENCES

Al-Albani, Mukammad Nasir al-Din. 1993. *Silsilat al-Ahādith al-Sahīha*. Riyad: Maktaba al-Maʿarif lil-Nashr wa al-Tawziʿ.

Denny, Frederick Mathewson. 2005. 'Muslim Ethical Trajectories in the Contemporary Period'. In *The Blackwell Companion to Religious Ethics*, edited by William Schweiker, pp. 268–77. Malden, MA: Blackwell.

Esfahani, Abolhassan. 2013. *Wasila al-Naja*, with commentaries of Ruhollah Mousawi Khomeini. Tehran: Muʾassesa-ye Tanzim wa Nashr-e Āthār-e Emam Khomeini.

Grannan, Cydney. n.d. 'What's the Difference Between Morality and Ethics?' *Encyclopedia Britannica*. Online version.

Ibn Qudāmā, Abdullah ibn Ahmad. 1997. *Al-Mughnī*, edited by Abdullah b. Abdul-Muhsin al-Turkī and Abdul-Fattah Muhammad al-Hulw. Riyadh: Dār ʿĀlam al-Kutub.

Kadivar, Mohsen. 2009. 'Human Rights and Intellectual Islam'. In *New Directions in Islamic Thought: Exploring Reform and Muslim Tradition,* edited by Kari Vogt, Lena Larsen and Christian Moe, pp. 47–73. London: I.B. Tauris.

Kadivar, Mohsen. 2011. 'From Traditional Islam to Islam as an End in Itself'. *Die Welt des Islams* 51 (3): pp. 459–84.

Kadivar, Mohsen. 2013. 'Revisiting Women's Rights in Islam: "Egalitarian Justice" in Lieu of "Deserts-Based Justice"'. In *Gender and Equality in Muslim Family Law: Justice and Ethics in the Islamic Legal*

 

*Tradition*, edited by Ziba Mir-Hosseini, Lena Larsen, Christian Moe, and Kari Vogt, pp. 213–34. London: I.B. Tauris.

Kadivar, Mohsen. 2015. '*Ijtihad* in *Usul al-Fiqh*: Reforming Islamic Thought through Structural *Ijtihad*'. *Iran Nameh* 30 (3): pp. xx–xxvii.

Kadivar, Mohsen. 2017. '*Intizar az Din va Nou-andishi-ye Dini*' ('Expectation of Religion and Reformist Thinking'), Part 1. https://kadivar.com/16093

Kadivar, Mohsen. 2021. *Human Rights and Reformist Islam*, translated by Niki Akhavan as part of the series *In Translation: Modern Muslim Thinkers*. Edinburgh: Edinburgh University Press in association with Aga Khan University Institute for the Study of Muslim Civilisations.

Makarem Shirazi, Naser. 2011. *Anwār al-Fiqaha fi Ahkām al-ʿItra al-Tāhira, Kitāb al-Nikāh*. Qom: Dār al-Nashr al-Imām Ali ibn Abi Tālib.

Mir-Hosseini, Ziba. 2012. 'The Politics of Divorce Laws in Iran: Ideology versus Practice'. In *Interpreting Divorce Laws in Islam*, edited by Rubya Mehdi, Werner Menski and Jørgen Nielsen, pp. 65–83. Copenhagen: DJØF Publishing.

Moosa, Ebrahim. 2005. 'Muslim Ethics?' In *The Blackwell Companion to Religious Ethics*, edited by William Schweiker, pp. 237–43. New Jersey: Blackwell.

Moosa, Ebrahim. 2018. 'Recovering the Ethical: Practices, Politics, Tradition'. In *The Shari'a: History, Ethics and Law*, edited by Amyn B. Sajoo, pp. 39–58. London: I.B. Tauris.

Al-Najafi, Mohammad Hasan. 2012. *Jawāhir al-Kalām fī Sharḥ Sharāʾiʿ al-ʾIslām*, edited by Haydar al-Dabbagh. Qom: Muʾassisa al-Nashr al-Eslāmi.

Al-Qaraḍāwī, Yūsuf. 2017. *Fiqh al-Usra wa Qadāya al-Marʾa*. Turkey: al-Dar al-Shāmiyya.

Reinhart, A. Kevin. 2005. 'Origins of Islamic Ethics: Foundations and Constructions'. In *The Blackwell Companion to Religious Ethics*, edited by William Schweiker, pp. 244–53. Malden, MA: Blackwell.

Sachedina, Abdulaziz. 2005. 'Islamic Ethics: Differentiations'. In *The Blackwell Companion to Religious Ethics*, edited by William Schweiker, pp. 254–67. New Jersey: Blackwell.

Sajoo, Amyn B. (ed.). 2018. *The Shariʿa: History, Ethics and Law*. London: I.B. Tauris.

Sanei, Yousef. 2006. *Bolugh-e Dokhtarān, Feqh wa Zendegi ('Fiqh and Life') series, no. 7.* Qom: Meutham Tammār.

Sanei, Yousef. 2007a. *Fiqh al-Thaqalain (al-Talāq)*. Transcribed by Diyā' al-Murtadawi. Tehran: Mu'assesa-ye Tanzim wa Nashr-e Āthār-e Emam Khomeini.

Sanei, Yousef. 2007b. *Wujūb-e Talaq-e Khulʿ bar Mard* (The Requirement of *Khulʿ* Divorce for the Husband), *Feqh wa Zendegi* ('Fiqh and Life') series, no. 8. Qom: Maytham Tammār.

Sanei, Yousef. n.d. *Majmaʾ al-Masāil: Istiftāt*. Qom: Webbook.

Al-Sarakhsi, Muhammad b. Ahmad b. Abi Sahl. 1989. *Al-Mabsūt*. Beirut: Dār al-Maʾrifa.

Schweiker, William (ed.). 2005. *The Blackwell Companion to Religious Ethics*. New Jersey: Blackwell.

Soroush, Abdolkarim. 2008. *The Expansion of Prophetic Experience: Essays on Historicity, Contingency and Plurality in Religion*, translated by Nilou Mobassar, edited with an introduction by Forough Jahanbakhsh. Linden: Brill.

Yazdi, Mohammad Kazem Tabatabaʾi. 1999. *Al-ʿUrwa al-Wuthqā*, with commentaries of permanent jurists. Qom: Muʾassisa al-Nash al-Eslami.

Al-Zuhaili, Wahba. 1985. *Al-Fiqh al-Islāmi wa Adilitahu*. Damascus: Dār al-Fikr.