SAYED MUSTAFA MUHAQQIQ DAMAD &
SYED WAJEE UL-HASAN SHAH

# Juristic Principles Governing Family Life

Muslim legal jurists (*mujtahid*s) believe that the function of Islamic law (Sharīʿa law)[1] is to govern and regulate the lives of Muslims and answer questions related to their daily practice. This became all the more relevant with the finality of the Prophet Muḥammad, and therefore whatever the Prophet had declared permissible and impermissible remains as such indefinitely. As such, Muslim jurists in the present day must reinterpret the Qur'an and Sunna to help answer questions posed by the challenges of living in a modern society, where the latter two scriptural sources remain silent. Many Muslim jurists believed that through the process of *ijtihād*,[2] the scope of Sharīʿa can be extended to tackle new issues. Over the years, this task was performed (by *mujtahid*s) through the reinterpretation of the Qur'an and Sunna, as well as the use of reason (*ʿaql*), in order to help maintain an Islamic identity in an ever-changing society and provide legal rulings on what God's law would entail in any given society.

The central focus of this paper is on sexual intercourse within marriage and subsequently an argument against marital rape. This is a major issue within the current Shīʿī jurisprudential (*fiqhī*) discourse today, due to the overarching influence of the clerical authority (*marjaʿiyya* system),[3] and its discriminatory edicts issued against

1 Islamic (Sharīʿa) law includes legal doctrine and the judiciary. Hallaq describes the Sharīʿa as the 'religious law of Islam … [and it is] the reaffirmation of Islamic identity [and forms] the foundation of a cultural uniqueness'. He believes that for Muslims 'to live by Islamic law is not merely a legal issue, but one that is distinctly psychological'. Wael B. Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2005), 1. For a further in-depth study of the development of Sharīʿa law and its implications in modern society and law, see Wael B. Hallaq, 'The Quest for Origins or Doctrine? Islamic Legal Studies as Colonialist Discourse', *UCLA Journal of Islamic and Near Eastern Law* 2, no. 1 (2002–3): 1–31. See also Wael B. Hallaq, ed., *The Formation of Islamic Law*, The Formation of the Classical Islamic World, ed. Lawrence I. Conrad, vol. 27 (Aldershot: Routledge, 2003); and Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1950).

2 A process of legal reasoning and hermeneutics whereby a legal jurist (*mujtahid*) exerts his utmost effort to extrapolate Islamic legal rulings from the Qur'an and Sunna.

3 Millions of Shīʿī Muslims depend on this system for religious guidance and as a source of emulation (*taqlīd*).

women, whereby issues such as marital rape and a woman's autonomy in marriage are predominantly patriarchal and thus ignored. The edicts range from the absolute obligation of a wife's obedience of her husband in many aspects of her life, including asking permission to leave the house and remaining sexually available whenever the husband desires.[4] Also, in many cases the wife does not have the right to oppose her husband in such matters – such as the refusal of sexual intercourse.

However, we will argue here that the Qur'an dictates that respect and honour must be maintained by both spouses and any sexual contact must be out of freedom of choice rather than enforced. Thus, if the wife does not give consent to engage in sexual relations, this would be classed as sexual harassment and/or marital rape[5] and she has a legal right (under both state and Islamic law) to take legal action against her husband. This is based on a Qur'anic understanding in line with women's rights in modern society, whereby a woman has sexual autonomy and sexual intercourse is not an unrestricted right provided for the husband by Islam.

Therefore, in order to address conditions of modern life, jurists must attend to the general ethical Qur'anic guidelines and only accept those reported traditions which align with the ethos of the Qur'an and those which do not must be abandoned.

In dealing with the issues at hand, we will adopt a Qur'an-centric jurisprudential (*ijtihādī*) framework in order to critically analyse the reported traditions (*aḥadīth*) which many illustrious Shīʿī jurists have based their juristic edicts upon. This will allow scope for a new fatwa to be issued based on today's context. First, we will critique the methodology of the classical and contemporary scholars and demonstrate the flaws in adopting a *ḥadīth*-centric approach to issuing edicts based on women's issues. Secondly, we will examine certain classical opinions regarding women and the application of *tamkīn*[6] and prove how and why they are incompatible with modern society and are discriminatory. We will also discuss the implications of such views and provide an alternate opinion based on our own *ijtihād* where the Qur'anic message is at the forefront and through which many problems in family law can be resolved.[7] This alternative opinion will be presented in the following manner: firstly, we will provide a Qur'anic hermeneutical discussion on the word *maʿrūf* and demonstrate the way in which this word is interpreted to allow for a fluid and flexible understand-

4 al-Sayyid ʿAlī al-Ḥusaynī al-Sistānī, *Minhāj al-ṣāliḥīn: muʿāmalāt* (Qom: Saʿīd b. Jubayr, 2000), 103; Ḥusayn al-Waḥīd al-Khurāsānī, *Islamic Rulings* (*Islamic Laws*) (Qom: Madrasat al-Imām Bāqir al-ʿUlūm, 2015), 524; Zayn al-Dīn b. ʿAlī al-ʿĀmilī, *al-Rawḍa al-bahiyya fī sharḥ al-Lumʿa al-dimishqiyya*, 7th ed. (Qom: Dār al-Tafsīr, 2006), 2:365–66.

5 Notably, in both the classical and contemporary jurisprudential framework the concept of marital rape/sexual harassment between spouses does not exist.

6 Loosely translated as sexual willingness. This term is discussed further in the next section.

7 Specifically focusing on the jurisprudence of marriage (*fiqh al-nikāḥ*).

ing of spousal roles and how marital life should be conducted in different contexts. Secondly, we will highlight the Qur'anic conception of marriage and its core values, and in doing so, provide a sound basis for our reasoning. With our Qur'an-centric framework established, we will then apply it when analysing the evidences, that is, the *aḥādīth* some scholars have utilised in their own *ijtihād* when forming legal opinions regarding women.

## DISCRIMINATORY EDICTS AGAINST WOMEN AND THEIR EVIDENCES

Within the jurisprudential writings of many great Shīʿī jurists of the past and present, we find several discriminatory juristic edicts (*fatāwā*) against women. Arguably, one of the most controversial edicts stipulates that it is forbidden for a wife to leave the house without the permission of her husband.[8] This ruling has been made absolute (*muṭlaq*) and thus applies to all times. According to al-Muḥaqqiq al-Ḥillī's (d. 676/1277) *ijtihād*, 'the husband can prohibit his wife from visiting her parents when they are sick, and from leaving the house, except in situations where it is necessary.'[9] In addition, Muḥammad Ḥasan al-Najafī (Sāḥib al-Jawāhir) (d. 1849) states that 'if the wife travels without the permission of her husband, he does not have to provide her [financial] maintenance (*nafaqa*)'.[10] There are major implications of this view, one being that if the wife leaves the house without the permission of her husband, even if the husband is not at home, this is an example of disobedience (*nushūz*). The wife would be deemed disobedient (*nāshiza*), the legal repercussions of this being that the husband is not legally obliged to pay his wife's maintenance (*nafaqa*) for any of her daily needs.

Al-Ḥillī is in line with this view, as he is of the opinion that the obligation of maintenance for the wife is conditional on the wife's obedience to the husband in regard to satisfying all his sexual desires. Al-Ḥillī defines this disobedience as the unwillingness of the wife to offer herself to satisfy her husband's sexual desires whenever he so wishes – this is termed *tamkīn* in jurisprudence. On this point al-Ḥillī states that disobedience of the wife 'is to relieve herself from [having intercourse with] the husband irrespective of a particular place and time. If she offers herself [for intercourse] at one [specific] time and not another, or one [specific] place and not another, she

8 Muḥammad b. Ḥasan al-Ḥurr al-ʿĀmilī, *Tafṣīl Wasāʾil al-Shīʿa* (Beirut: Muʾassasat Āl al-Bayt, 2008), 20:157–58, *ḥadīth* no. 25300.

9 Abū Qāsim Najm al-Dīn Jaʿfar b. al-Ḥasan al-Muḥaqqiq al-Ḥillī, *Sharāʾiʿ al-Islām fī masāʾil al-ḥalāl wa-l-ḥarām*, 3rd ed. (Qom: al-Fiqāha, 2009), 2:558.

10 Muḥammad Ḥasan al-Najafī, *Jawāhir al-kalām fī sharḥ Sharāʾiʿ al-Islām* (Beirut: Dār al-Iḥyāʾ, n.d.), 31:314.

is [considered] disobedient."[11]

Al-Shahīd al-Thānī comments on this opinion that the word 'place' refers to the body parts of the wife. Therefore, the wife cannot prevent her husband from acquiring sexual pleasure from any part of her body.[12] According to these views, while there is no legal impediment, the wife should be ready to offer herself to satisfy her husband's sexual desires, even if she has no sexual need or desire at the time. Thus, for al-Ḥillī and al-Shahīd al-Thānī, *tamkīn* is absolute (*muṭlaq*) and entirely dependent upon the wishes of the husband.

However, the reverse is not true: the wife cannot make such demands of her husband, even if she has the sexual desire to do so and he does not. As a bare minimum she has a right to sexual intercourse once every four months. Sayyid Muḥammad Kāẓim al-Yazdī states:

> It is impermissible to abstain from intercourse with one's wife for more than four months; there is no difference [in this matter] between the permanent, temporary, young, or the old [wife]. This is based on the absoluteness of the narration (*ḥadīth*).[13]

Sayyid Abū al-Qāsim al-Khū'ī in his commentary of al-Yazdī's text states that 'this idea is a matter of consensus, and no one has opposed it'.[14]

Among the contemporary grand Shīʿī jurists who also hold such a view are the likes of Sayyid ʿAlī al-Sistānī and Waḥīd al-Khurāsānī.[15] Al-Sistānī states in this regard: 'the right of a husband over his wife is that she should offer herself to him whenever he requires for her to satisfy his sexual desires unless there is a legal impediment … and that she should not leave the house without the husband's permission if it coincides with him wanting intercourse."[16]

---

11 al-Muḥaqqiq al-Ḥillī, *Sharāʾiʿ al-Islām*, 2:585–86.

12 Zayn al-Dīn b. ʿAlī al-ʿĀmilī, *Masālik al-afhām ilā tanqīḥ Sharāʾiʿ al-Islām* (Qom: Muʾassasat al-Maʿārif al-Islāmiyya, 1995), 8:439–40.

13 al-Sayyid Muḥammad Kāẓim al-Ṭabāṭabāʾī al-Yazdī, *al-ʿUrwa al-wuthqā* (Qom: Jamāʿat al-Mudarrisīn, n.d.), 5:499.

14 al-Sayyid Abū al-Qāsim al-Mūsawī al-Khūʾī, *Mabānī fī sharḥ al-ʿUrwa al-wuthqā* (Iraq: Muʾassasat al-Khūʾī al-Islāmiyya, 2016), 32:1115. Al-Khūʾī reports that Ṣāḥib al-Jawāhir also believes this is a matter of consensus between the Shīʿī scholars.

15 Ḥusayn al-Waḥīd al-Khurāsānī, *Minhāj al-ṣāliḥīn: al-muʿāmalāt li-Samāḥat Āyat Allāh al-ʿUẓmā al-Sayyid Abī al-Qāsim al-Khūʾī maʿ fatwā Samāḥat Āyat Allāh al-ʿUẓmā al-Shaykh Ḥusayn al-Waḥīd al-Khurāsānī* (Qom: Madrasat al-Imām al-Bāqir al-ʿUlūm, n.d.), 3:294, 321–22; al-Khurāsānī, *Islamic Rulings*, 524. However, it must be noted that al-Khurāsānī's view is slightly more nuanced as he states, 'A man cannot refrain from intercourse for more than four months with a young permanent wife unless the wife consents to it.' Ibid., 525. But this seems to be an exception to his general rule that she must make herself sexually available (*tamkīn*) whenever the husband desires; otherwise, he does not have to pay her financial maintenance.

16 al-Sistānī, *Minhāj al-ṣāliḥīn*, 103.

## *ḤADĪTH* ANALYSIS

These juristic edicts are based on a specific type of interpretation of the reported traditions of the Prophet and Imāms. For instance, the following tradition indicates that the woman is forbidden to leave the house without her husband's permission: Muḥammad b. Muslim reports a lengthy tradition from Imām al-Bāqir which states that a wife is forbidden to leave her home without the permission of her husband.[17]

However, upon further analysis of the content of this narration we find that this is not an absolute (*muṭlaq*) ruling issued from the Imām; rather, this narration is referring to the fact that the wife cannot leave the house indefinitely (forever) without the permission of her husband. Therefore, we disagree with those edicts which categorically state that the wife is unable to leave the house without her husband's permission. Indeed, she is able to leave to do her daily tasks such as shopping, school runs, or to visit her parents. These are ordinary tasks which spouses/parents carry out daily that do not usually require prior consent in the modern age.

Furthermore, regarding al-Yazdī's opinion on the necessity to have intercourse once every four months as a minimum, this can be deduced from the following tradition:

> Ṣafwān b. Yaḥyā asked Imām al-Riḍā about a man who is married to a young woman. He abstained from sexual intercourse with her for one year … Ṣafwān asked whether this man was a sinner. The Imām answered: 'If he abstained from sexual intercourse for four months, he is a sinner.'[18]

The content of these narrations, which state that the wife is a sinner if she does not have intercourse with her husband at least once every forty days, not only opposes the Qur'anic ethos that mentions the principle of equality of the rights and duties of spouses but also opposes the principles of general human rights. Irrespective of the fact that it has been deemed as authentic by scholars of *'ilm al-rijāl* (biographical studies or the study of narrators), we believe that any rules pertaining to human rights of an individual cannot be deduced by solitary narrations (*akhbār al-āḥād*, sing. *khabar al-wāḥid*). Therefore, the narrations that stipulate that the wife must have intercourse every forty days irrespective of her contentment become problematic, especially considering the Qur'anic notion of *ma'rūf* (discussed below). In the present day, narrations such as these can be seen to promote marital rape among other human

17 al-'Āmilī, *Tafṣīl*, 20:157–58, *ḥadīth* no. 25300.

18 Ibid., 140, *ḥadīth* no. 25246. Al-Khū'ī believes that views such as al-Yazdī's and other jurists, that sexual intercourse should be performed once every four months as a minimum requirement, are based upon this reported tradition. al-Khū'ī, *Mabānī*, 32:115–17.

rights violations and thus cannot be accepted, neither according to the Qur'an nor in line with modern society.[19]

Another such reported tradition indicates the absolute obedience of the wife to the husband:

> It is reported that ʿAbd Allāh b. Sinān narrated from Imām Jaʿfar al-Ṣādiq that during the time of the Prophet a man from among the Anṣār was assigned a task by the Prophet. So, the man left his house to fulfil some of his needs and told his wife that she cannot leave the house until he returns. The woman wrote to the Prophet asking permission to leave the house because her father became unwell. The Prophet told her to remain in her house and obey her husband. This became burdensome to her, so she wrote to the Prophet a second time. The Prophet replied 'remain in your house and obey your husband'. Then her father passed away, so she wrote to the Prophet and told him her father had died and if he would permit her to attend the funeral. The Prophet replied 'remain in your house and obey your husband'. When her father was buried, the Prophet wrote to the wife and told her, 'God has forgiven you and your father due to your obedience of your husband.'[20]

We find the content of this narration highly problematic,[21] as the order of the husband to his wife to not leave the house could have only meant that she was not allowed to leave for unimportant matters. Even if she did leave the house to visit her terminally ill father, she could have said that she interpreted the command of the husband to mean not going out for leisurely pursuits. Therefore, she did not need to ask the Prophet. Also, beseeching the Prophet for permission while her father was on the verge of death is an unusual occurrence.

Overall, regarding *āḥādīth*, it must be emphasised that they are context bound. They were revealed in a particular time and place, hence during these times such narrations were the norm and were acceptable to that society. However, in light of the Qur'an, Islamic ethics, and spousal and gender roles in modern society, *ḥadīth* literature and

19 Qur'anic guidance (based on love, mutual understanding, and respect between all people) should be used to make edicts in reference to modern human rights conventions, and any legislation that contravenes this guidance must be rejected or re-examined. Thus, the Qur'an is epistemically more authoritative than modern-day human rights legislation and as such should govern such rulings.

20 al-ʿĀmilī, *Tafṣīl*, 20:174–75, *ḥadīth* no. 25350.

21 For a more in-depth discussion regarding this narration and its veracity, see Ḥaydar Ḥubb Allāh, *Dirāsāt fī al-fiqh al-Islāmī al-muʿāṣir* (Beirut: Dār al-Fiqh al-Islāmī al-Muʿāṣir, 2011), 2:286–92; al-Sayyid Abū al-Qāsim al-Mūsawī al-Khūʾī, *Muʿjam rijāl al-ḥadīth* (Najaf: Madīnat al-ʿIlm, 1978), 10:284; Aḥmad b. ʿAlī al-Najāshī, *Rijāl al-Najāshī* (Beirut: Sharikat al-Aʿlamī li-l-Maṭbūʿāt, 2010), 217.

juristic edicts which are discriminatory against women must be either reinterpreted or deemed anachronistic in the deduction of Islamic rulings for contemporary society.

## A QUR'ANIC APPROACH

The Qur'an is the greatest source of guidance for all Muslims, although many jurists have, in error, overemphasised the *ḥadīth* literature. When placing the Qur'an at the centre of such a jurisprudential topic as family law, we can focus on the general guidelines it provides when discussing marriage and its different elements and build a framework based on these guidelines.

When discussing the intricacies of family life and gender roles in Islam in the twenty-first century, we find that the Qur'an places great emphasis on respecting womenfolk and living with them in a kind and honourable manner. We have selected three verses where the Qur'an uses the word *maʿrūf* (regarding spouses) which can be interpreted in many ways according to different contexts. For instance, the following verse speaks about how women (i.e. wives) should be treated:

> O believers! It is not permissible for you to inherit women against their will or mistreat them … Treat them fairly [in an honourable manner] (*bi-l-maʿrūf*). If you happen to dislike them, you may hate something which God turns into a great blessing.[22]

The generality of this verse allows for many different interpretations. As the Qur'an does not designate a specific meaning for the word *maʿrūf* (here translated as fairly/honourably), it appears that it allows for Muslims from different societies and eras to interpret it according to their respective contexts. As the application of this word can change due to the passage of time, it can be reasonably assumed that it can also differ from one culture to another. The Qur'an here provides a fluid and flexible framework, so whatever is considered *maʿrūf* in reference to spousal rights in a particular society will be endorsed by the Qur'an and Sharīʿa as long as the essence of the Qur'an is preserved. Hence, if wives are being treated unfairly this would be Islamically unethical and impermissible.

Accordingly, we have extrapolated the following principles from the Qur'an which will form the foundation of how family law can be understood and how such verses can explain the role and position of the husband and wife in marriage. The principles we shall explore are those of equal rights with regards to marital duties; either

22 Q. 4:19. All Qur'anic translations are from Mustafa Khattab, trans., *The Clear Quran: A Thematic Translation of the Message of the Final Revelation* (Lombard: Book of Signs Foundation, 2016), though occasionally modified where the authors have deemed it necessary.

living on reasonable terms or separating with kindness; and finally, mutual love and marriage being the source of tranquillity.

## THE PRINCIPLE OF EQUAL RIGHTS REGARDING MARITAL DUTIES

The following Qur'anic verse indicates the rights and norms of wives within a marriage. The Qur'an states, regarding rights and obligations of both the husband and wife, that 'Women [i.e. wives] have rights similar to those of men equitably [in accordance with honourable norms] (*bi-l-maʿrūf*)'.[23] In our opinion, this verse is clear and explicit in emphasising equality between the duties and rights in family relations. It is important to consider that in the context of the revelation of the Qur'an, the way women live today is drastically different. Studies show that more women today are career focused, and many are attending colleges and universities to further their education. Therefore, it is important to bear this fact in mind in relation to this verse, whereby marital duties must take into consideration the work commitments, career goals, and family life of both spouses.[24]

## THE PRINCIPLE OF EITHER LIVING ON REASONABLE TERMS OR SEPARATING WITH KINDNESS

The Qur'an also deals with the topic of divorce and how it should be performed with respectable conduct between all parties involved. For instance, 'the divorce [shall be lawful] only twice. Then you [the husband], should either keep the wife on reasonable terms or release her with kindness (*bi-l-maʿrūf*).'[25] This verse highlights that a marriage should be based on terms which promote mutual consent and living in harmony with one another. Furthermore, it stipulates two conditions for the husband: either he must live honourably with his spouse or, if he cannot do this, he must divorce or separate with her in a respectable and merciful manner. One may conclude, then, that if the husband does not divorce his wife when/if the condition of living on reasonable terms is not fulfilled, when it is mandatory, the government or responsible authorities can intervene by asking the wife to separate from her partner amicably.

We have highlighted how in all three of the aforementioned Qur'anic verses, the word *maʿrūf* has been used to signify fairness and justice in whatever context it is mentioned. Linguistically, this term in the Arabic language can denote many different

23 Q. 2:228.

24 Katharine Sanderson, 'More Women than Ever Are Starting Careers in Science', *Nature*, 5 August 2021, www.nature.com/articles/d41586-021-02147-9; Kim Parker, 'Women More than Men Adjust Their Careers for Family Life', Pew Research Center, 1 October 2015, www.pewresearch.org/fact-tank/2015/10/01/women-more-than-men-adjust-their-careers-for-family-life/.

25 Q. 2:229.

meanings depending on the context of the verse and the specific target audience. We believe that God has left the word *maʿrūf* open to varying interpretations, and that because no definitive definition has been provided for it, this is an advantage for the many different audiences who wish to apply these Qurʾanic principles in their lives. This term can be defined or interpreted appropriately according to human reason or wisdom (*ḥikma*) in line with the relevant context(s). Therefore, we believe that the Qurʾanic conception of family life, more specifically, marital life, should be based on honour, companionship, mutual respect, love, and kindness.

### THE PRINCIPLE OF MUTUAL LOVE AND MARRIAGE BEING THE SOURCE OF TRANQUILLITY

The Qurʾan places emphasis on universal principles such as love, tranquillity, and amicability, with all three being the fundamental foundations of any marriage. This is evident according to the following verse, 'And one of His signs is that He created for you spouses from among yourselves so that you may find comfort in them. And He has placed between you compassion and mercy.'[26] This oft-mentioned verse regarding marriage highlights the core function of the institution of marriage, which is that it promotes love, tranquillity, and kindness. According to Islam, this is what should be sought and the primary motivation when seeking a partner or looking to get married, that is, a partner with whom one can live with in tranquillity and peace, ultimately leading to love and mercy in the relationship.

Such a Qurʾanic-centric approach unveils a two-tiered hermeneutical process, whereby fixed and static values of love, tranquillity, and mercy form the foundation and basis of any marriage. On such a basis, and in response to the many changing tides in culture and gender roles, there applies the principle of *maʿrūf* – that is, dealing with fairness, equity, and justice in all situations between spouses.

## REVISITING *IJTIHĀD*: A CONTEMPORARY APPROACH

Although the Qurʾan provides such guidance, we find the opinions of many classical and contemporary scholars in conflict with the Qurʾanic ethos and how people live in modern society. Firstly, these types of *fatāwā* are in contrast with the above-mentioned Qurʾanic guidelines such as consorting in an honourable manner. For instance, if a wife's parents are unwell, she may feel (morally) obliged to visit them to take care of them even if her husband is not at home or is away for a certain period. Therefore, if the husband prohibits his wife from leaving the house in order to care for her sick parents, this is a direct violation of the Qurʾanic verse of dealing with people in a respectable manner.

26 Q. 30:21.

Importantly, other contemporary jurists have also critiqued many jurisprudential rulings which are discriminatory against women. One such jurist is Nāṣir Makārim al-Shirāzī who opposes the orthodox edict (*fatwā*) concerning the preference of keeping women at home and says: 'This edict causes many problems as it isolates women and can be a prevention of knowledge and growth.'[27]

Moreover, there is an Islamic principle which emphasises maintaining relations with the family, known as *ṣilat al-raḥim*. One of the most important principles in Islamic ethics regarding family is devotion towards relatives. The Qur'an has emphasised this in many verses; for example:

> And those who violate God's covenant after it has been affirmed, break whatever ties [kinship] God has ordered to be maintained, and spread corruption in the land – it is they who will be condemned and will have the worst abode.[28]

In reference to this verse, Imām Ja'far al-Ṣādiq was once asked, 'Who are the relatives?' The Imām replied: 'Your family.'[29] Due to this, within Islamic family law, every person is expected to maintain respectful relations with their immediate and extended family members. Therefore, if a husband prohibits his wife from visiting her family, this can lead to an instance of her cutting off her family relations, which is among the great sins (*al-muḥarramāt al-kabīra*). The husband does not have the authority to do this, but even if he does make such a demand, the wife should not comply.

In addition, the view that the wife does not have to comply with such a demand regarding the welfare of her parents has precedent in the Qur'an. The Qur'an clearly emphasises one's duties towards one's parents. For instance, we read in the following verse: 'And be humble with them [i.e. your parents] out of mercy, and pray, "My Lord! Be merciful to them as they raised me when I was young."'[30] This verse highlights the respect parents deserve on account of how they looked after their own children. The same message is also explicated here, 'Worship God and associate nothing with Him, and do good to your parents [and] relatives.'[31] These verses are not conditional upon the husband's permission, but they are absolute (*muṭlaq*), meaning they are general rules that always apply to everyone. The only exception the Qur'an provides regarding obeying and respecting one's parents is if they call towards polytheism (*shirk*): 'But if they pressure you to associate with Me what you have no knowledge of, do not obey

27 Nāṣir Makārim al-Shīrāzī, *al-ʿUrwa al-wuthqā maʿ taʿlīqāt al-Shaykh Nāṣir Makārim al-Shīrāzī* (Qom: Intishārāt Madrasat al-Imām ʿAlī b. Abī Ṭālib, 2007), 2:755.

28 Q. 13:25.

29 Muḥammad b. Yaʿqūb al-Kulaynī, *Uṣūl al-Kāfī* (Beirut: Dār al-Taʿāruf li-l-Maṭbūʿāt, n.d.), 2:163.

30 Q. 17:24.

31 Q. 4:36.

them. Still keep their company in this world courteously.'[32] In sum, it is evident that one must always strive to maintain respectful relations with one's parents and the husband cannot force his wife to not visit her parents as this is a direct violation of the Qur'anic injunction to behave in an honourable manner. Also, his prohibition may even lead to a hostile relationship within the marriage.

## CONCLUSION

In modern society Muslims are faced with new and challenging issues which were arguably not present in previous eras. This is demonstrated in family life where gender roles are not as fixed as they once were, and thus, spousal roles have also shifted in modern times. Consequently, the discriminatory edicts issued by certain religious authorities must either be re-examined with modern society in mind, or they must be rejected. As such, the classical jurisprudential framework needs re-evaluating and further development with the Qur'an as the basis and the modern context in mind, or an entirely new jurisprudential framework must be constructed. Moreover, we believe that Muslim jurists of today must re-examine their conception of family law and consider the different contexts in which Muslims live before issuing a 'one-size-fits-all' opinion for their followers to abide by.

We want to highlight that although in both the traditional and majority of the current jurisprudential rulings, the concept of marital rape does not exist and *tamkīn* is still valid, in our framework marital rape is a serious issue, whereby the woman has both the freedom and legal authority to refuse sexual intercourse and expect mutual consent in any sexual activity. The result of a general, one-size-fits-all approach by Muslim jurists is that it renders Islam and its Sharīʿa, as viewed in the modern context, both primitive and discriminatory. Hence why the flexible and dynamic framework of *ijtihād* is crucial in today's world as it can help jurists answer such questions relating to family life as well as other issues which Muslims need guidance on. However, scholarly *ijtihād* must be Qur'an centred, with it primarily relying upon the Qur'an and secondarily on the reported traditions of the Prophet and Imāms. Therefore, if any reported traditions or rulings – both secular and juristic – oppose the Qur'anic guidance, they should not be considered. The Qur'an will always have legitimacy and supremacy in this area due to its flexible and fluid nature, especially in relation to the interpretation of what is considered *maʿrūf* in the present day from the aforementioned Qur'anic verses.

32 Q. 31:15.

## BIBLIOGRAPHY

al-ʿĀmilī, Muḥammad b. Ḥasan al-Ḥurr. *Tafṣīl Wasāʾil al-Shīʿa*. Beirut: Muʾassasat Āl al-Bayt, 2008.

al-ʿĀmilī, Zayn al-Dīn b. ʿAlī. *Masālik al-afhām ilā tanqīḥ Sharāʾiʿ al-Islām*. Qom: Muʾassasat al-Maʿārif al-Islāmiyya, 1995.

al-ʿĀmilī, Zayn al-Dīn b. ʿAlī. *al-Rawḍa al-bahiyya fī sharḥ al-Lumʿa al-dimishqiyya*. 7th ed. Qom: Dār al-Tafsīr, 2006.

Hallaq, Wael B., ed. *The Formation of Islamic Law*. The Formation of the Classical Islamic World, edited by Lawrence I. Conrad, vol. 27. Aldershot: Routledge, 2003.

Hallaq, Wael B. *The Origins and Evolution of Islamic Law*. Cambridge: Cambridge University Press, 2005.

Hallaq, Wael B. 'The Quest for Origins or Doctrine? Islamic Legal Studies as Colonialist Discourse'. *UCLA Journal of Islamic and Near Eastern Law* 2, no. 1 (2002–3): 1–31.

Ḥubb Allāh, Ḥaydar. *Dirāsāt fī al-fiqh al-Islāmī al-muʿāṣir*. Beirut: Dār al-Fiqh al-Islāmī al-Muʿāṣir, 2011.

Khattab, Mustafa, trans. *The Clear Quran: A Thematic Translation of the Message of the Final Revelation*. Lombard: Book of Signs Foundation, 2016.

al-Khūʾī, al-Sayyid Abū al-Qāsim al-Mūsawī. *Mabānī fī sharḥ al-ʿUrwa al-wuthqā*. Iraq: Muʾassasat al-Khūʾī al-Islāmiyya, 2016.

al-Khūʾī, al-Sayyid Abū al-Qāsim al-Mūsawī. *Muʿjam rijāl al-ḥadīth*. Najaf: Madīnat al-ʿIlm, 1978.

al-Khurāsānī, Ḥusayn al-Waḥīd. *Islamic Rulings* (*Islamic Laws*). Qom: Madrasat al-Imām Bāqir al-ʿUlūm, 2015.

al-Khurāsānī, Ḥusayn al-Waḥīd. *Minhāj al-ṣāliḥīn: al-muʿāmalāt li-Samāḥat Āyat Allāh al-ʿUẓmā al-Sayyid Abī al-Qāsim al-Khūʾī maʿ fatwā Samāḥat Āyat Allāh al-ʿUẓmā al-Shaykh Ḥusayn al-Waḥīd al-Khurāsānī*. Qom: Madrasat al-Imām al-Bāqir al-ʿUlūm, n.d.

al-Kulaynī, Muḥammad b. Yaʿqūb. *Uṣūl al-Kāfī*. Beirut: Dār al-Taʿāruf li-l-Maṭbūʿāt, n.d.

al-Muḥaqqiq al-Ḥillī, Abū Qāsim Najm al-Dīn Jaʿfar b. al-Ḥasan. *Sharāʾiʿ al-Islām fī masāʾil al-ḥalāl wa-l-ḥarām*. 3rd ed. Qom: al-Fiqāha, 2009.

al-Najafī, Muḥammad Ḥasan. *Jawāhir al-kalām fī sharḥ Sharāʾiʿ al-Islām*. Beirut: Dār al-Iḥyāʾ, n.d.

al-Najāshī, Aḥmad b. ʿAlī. *Rijāl al-Najāshī*. Beirut: Sharikat al-Aʿlamī li-l-Maṭbūʿāt, 2010.

Schacht, Joseph. *The Origins of Muhammadan Jurisprudence*. Oxford: Clarendon Press, 1950.

al-Shīrāzī, Nāṣir Makārim. *al-ʿUrwa al-wuthqā maʿ taʿlīqāt al-Shaykh Nāṣir Makārim al-Shīrāzī*. Qom: Intishārāt Madrasat al-Imām ʿAlī b. Abī Ṭālib, 2007.

al-Sistānī, al-Sayyid ʿAlī al-Ḥusaynī. *Minhāj al-ṣāliḥīn: muʿāmalāt*. Qom: Saʿīd b. Jubayr, 2000.

al-Yazdī, al-Sayyid Muḥammad Kāẓim al-Ṭabāṭabā'ī. *al-ʿUrwa al-wuthqā*. Qom: Jamāʿat al-Mudarrisīn, n.d.