IJTIHAD THROUGH THE LENS OF CRITICAL THEORY

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I. Introduction

The modern era has posed a plethora of philosophical challenges for Islamic scholars and Muslim communities that were unrecognizable in the pre-modern period. Although the passage of time has brought about seismic shifts in societal values, the religious discourses on certain fundamental questions, especially conventions relating to marital law, are still based on pre-modern assumptions and methodologies.

This article will examine the methodologies of two prominent contemporary Muslim jurists, Ayatollah Ali Al-Sistani and Sheikh Yusuf Al-Qaradawi, in negotiating between the vast body of Islamic legal literature that discusses marital law within a commercial contract law framework, and modern liberal perspectives about gender equality in marriage. More broadly, this article will assess the trajectory of *ijtihad*[1], an

[1] Kamali, a prominent scholar of Islamic law and the author of a seminal English-language textbook on Islamic jurisprudence, defines ijtihad as "the total expenditure of effort made by a jurist in order to infer, with a degree of probability, the rules of Sharī'ah from their detailed evidence in the sources." MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 469 (2003). He also states the following:

> "*Ijtihād* is the most important source of Islamic law next to the Qur'ān and the *Sunnah*. The main difference between *ijtihād* and the revealed sources of the Sharī'ah lies in the fact that *ijtihād* is a continuous process of development whereas divine revelation and prophetic legislation discontinued upon the demise of the Prophet. In this sense, *ijtihād* continues to be the main instrument of interpreting the divine message and relating it to the changing conditions of the Muslim community in

Islamic juristic concept that can be roughly translated as "independent reasoning,"[2] in the modern and post-modern period through the lens of critical theory. Islamic jurisprudence as it pertains to family law, and in particular, marital law is an excellent case study for such an examination because of: (a) the vast differences in legal theory and legal practice, especially in the modern era; and (b) the chasm between certain Sharia-based rules and "modern" values and sensibilities.

II. Islamic Marital Contracts

Islamic marital law is arguably the most controversial aspect of the Sharia. Rapid changes in social structures and societal values have put the entire institution of marriage under tremendous pressure. Islamic practices have endured special scrutiny because of a number of practices that have been deemed permissible in Islamic jurisprudence, but which clash with modern ideals of marriage. The most prominent of these practices are polygamy[3], child marriage[4], prohibition of sexual contact between members of the same sex[5], and the permissibility of the "beating" of women."[6] The fixation on

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> its aspirations to attain justice, salvation and truth." *Id.* at 468.

[2] *Ijtihad*, OXFORD ISLAMIC STUDIES ONLINE, available at http://www.oxfordislamicstudies.com/article/opr/t125/e990 (last visited Mar. 4, 2018).

[3] Kamali, *supra* note 1, at 123.

[4] *See generally* Kecia Ali, SEXUAL ETHICS AND ISLAM 173-192 (2016).

[5] *See* Ali, *supra* note 4, at 96-97; *see also* Jonathan Brown, *Muslim Scholar on How Islam Really Views Homosexuality*, VARIETY (June 30, 2015), http://variety.com/2015/voices/opinion/islam-gay-marriage-beliefs-muslim-religion-1201531047/.

[6] This is a controversial concept derived from chapter 4, verse 34, of the Quran. There is substantial debate about the scope and purpose of

Islamic marital practices as somehow uniquely oppressive, however, without considering the cultural context or practical impact, paints an incomplete picture. For most Muslims, polygamy is neither relevant nor applicable.[7] Child marriage is widespread in certain Muslim-majority countries, but the practice "transcends regional and cultural boundaries" as evidenced by the fact that one-third of girls in developing countries are married before age 18.[8]

As for same-sex marriage, this is an issue that is still controversial in most non-Muslim societies and countries.[9] And the "beating" of women, which is sometimes justified on the basis of a verse of the Quran[10] that has a wide spectrum of interpretations, is not a problem that is unique to Muslims.[11]

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the verse. *See* Seyyed H. Nasr et al., THE STUDY QURAN: A NEW TRANSLATION AND COMMENTARY 206-208 (2015).

[7] *See, e.g.*, Andrea Useem, *What To Expect When You're Expecting A Co-Wife*, SLATE (Jul. 24, 2007), http://www.slate.com/articles/life/faithbased/2007/07/what_to_expect_when_youre_expecting_a_cowife.html. ("[L]ess than 1 percent of American Muslims engage in [polygamy]").

[8] *Child Marriage*, COUNCIL ON FOREIGN RELATIONS (Dec. 18, 2013), https://www.cfr.org/interactives/child-marriage?cid=otr_marketing_use-child_marriage_Infoguide%2523!/#!/.

[9] *Gay Marriage Around the World*, PEW RESEARCH CENTER (Aug. 8, 2017), http://www.pewforum.org/2017/08/08/gay-marriage-around-the-world-2013 (indicating that same-sex marriage is only allowed in twenty-seven countries worldwide).

[10] Nasr et al., *supra* note 6.

[11] *Violence Against Women*, WORLD HEALTH ORG., http://www.who.int/mediacentre/factsheets/fs239/en/ (last updated Nov. 2017) ("[A]bout 1 in 3 (35%) of women worldwide have experienced either physical and/or sexual intimate partner violence or non-partner sexual violence in their lifetime.").

Nonetheless, as will be detailed below, there are certain structural issues with how marriage is conceptualized in Islamic law that cause conflict between legal rulings and modern practice in both Muslim and non-Muslim communities.

Modern views on marriage in both Muslim and non-Muslim societies usually consist of the belief that love and kindness are essential for achieving a successful marriage.[12] This is a stark break from pre-modern conceptions of marriage. Broadly speaking, before the modern period, marriage in Western societies was viewed primarily as a way to build wealth and procreate.[13] In Muslim-majority lands, the notion of marital love (especially pre-marital love) was also usually sidelined in favor of economic and other practical considerations, although the Quran does mention that spouses should be compassionate and merciful toward each other.[14] Modern understandings of marriage as an institution that forges bonds beyond purely economic and practical considerations has created challenges in a marital jurisprudence that is primarily concerned with the exchange of monetary value for sex,[15] as will be detailed below. As Islamic jurisprudence has developed into a specialized field of knowledge, the discussion regarding marriage became highly technical. Over time, Islamic jurists came to understand marriage as the means to realizing a very specific purpose, one where marriage was "an exchange of lawful

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[12] *See, e.g.*, Emily Smith, *Masters of Love*, THE ATLANTIC (June 14, 2014), https://www.theatlantic.com/health/archive/2014/06/happily-ever-after/372573/.

[13] *See* Stephanie Coontz, Marriage, a History: How Love Conquered Marriage 18 (2006).

[14] Nasr et al., *supra* note 6, at 988 ("And among His signs is that He created mates for you from among yourselves, that you might find rest in them, and He established affection and mercy between you.").

[15] *See* Ali, *supra* note 4, at 13.

sexual access for dower, and continued sexual availability for support."[16] In the words of Imam Al-Shafi'i, the eponymous founder of one of the main schools of Islamic law, marriage was "the vulva's price."[17]

In Islamic law, marriage is a contractual agreement[18] whereby certain rights and obligations are delineated.[19] The terms of the contract can be negotiated (with certain limitations).[20] The extent of such negotiations in practice, if they exist at all, vary based on the individuals, although anecdotal evidence suggests that marriage is rarely dealt with as a purely contractual matter between a husband and a wife,[21] and that most people find the contract to be a formality.[22] Nevertheless, this article will delve into the rulings of Islamic jurists on the topic, who often have to delicately balance promulgating the letter and the spirit of the law on the one hand, and adapting to practical considerations of the modern world on the other.

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[16] *Id.*

[17] *Id.* at 4.

[18] *Id.* at 29.

[19] Kecia Ali, *Progressive Muslims and Islamic Jurisprudence* in PROGRESSIVE MUSLIMS: ON JUSTICE, GENDER, AND PLURALISM 163, 169 (Omid Safi ed., 2003).

[20] *See* Azizah al-Hibri, *Islam, Law and Custom: Redefining Muslim Women's Rights*, 12 AM. U. J. INT'L L. & POL'Y 1, 21 (1997).

[21] *See, e.g,* Ayesha Nasir, *I should Have Read My Islamic Marriage Contract* (Feb. 25, 2010), http://www.slate.com/articles/double_x/doublex/2010/02/i_should_have_read_my_islamic_marriage_contract.html.

[22] *Id.*

A. Early Treatment of Marriage

As mentioned above, Islamic jurisprudence on marriage developed such that marriage eventually came to be viewed as an exchange of money for sexual access.[23] Rulings on marriage and divorce were deeply intertwined with the jurisprudence of commercial law, and in particular, commercial law as it pertained to slaves.[24] As the Quran contains surprisingly little in the way of legal injunctions,[25] the juristic discourse on marital law heavily incorporated "the terminology of sales and purchases to discuss marriage"[26] and much of marital law is promulgated and described by analogizing to commercial law, commercial transactions, and contracts of sale.[27]

The writings of Ibn Rushd, or Averroes, a 12th century jurist from Andalusia, are a representative example of the classical jurisprudence in Islamic societies as it related to marriage. In "The Book of Marriage"[28] Ibn Rushd discusses how and whether Imam Al-Shafi'i, Imam Malik, and Imam Abu Hanifa, three foundational scholars of Islamic law, analogized various

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[23] Ali, *supra* note 19, at 164- 65.

[24] For an extended discussion, *see* Ali, *supra* note 19, at 169; *see generally,* Asifa Quraishi-Landes, *A Meditation on Mahr, Modernity and Muslim Marriage Contract Law* in LAW, FEMINISM AND RELIGION (Marie A. Failinger et al ed., 2013).

[25] *See* Hans Küng, ISLAM: PAST, PRESENT & FUTURE 149-150 (2007) ("[I]n family law . . . the Qur'an is primarily concerned with questions of the relationship between men and women, and of how children, orphans and relatives, dependents and slaves are to be treated – without addressing the technical legal consequences.").

[26] Ali, *supra* note 19, at 178

[27] *Id.*

[28] Ibn Rushd, THE DISTINGUISHED JURIST'S PRIMER VOLUME II (Imran Ahsan Khan Nyazee trans. 2000) at 60.

marriage-related contingencies and occurrences to a contract of sale. A few of the items he discusses include the following: (1) Whether a father has the authority to marry off his non-virgin daughter if the dower is below that worthy of her status,[29] (2) The option of separation when a husband is unable to pay the dower to his wife,[30] (3) The time-period within which a contractually negotiated dowry must be paid,[31] and (4) The case of a father giving his daughter away with the stipulation that the dower be presented to him in the form of a gift.[32] The responses of Imam Al-Shafi'i, Imam Malik, and Imam Abu Hanifa, which are provided to us by Ibn Rushd, vary depending on the legal methodology used by each respective scholar and the values overlaying their decisions.[33] Questions like these often became so technical that it was not possible to find a Quranic reference or a Hadith, which would address the issue.[34] Thus, recourse was needed to analogy, sometimes by comparing the marriage to sale.[35] Referring to commercial law was especially useful for

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[29] *Id.* at 18-19.

[30] *Id.* at 60.

[31] *Id.* at 59.

[32] *Id.* at 32-33.

[33] For example, whether they wanted to preserve marriage as much as possible, or whether they wanted to maximize the rights of a wife.

[34] Kamali, *supra* note 1, at 264 ("A recourse to analogy is only warranted if the solution of a new case cannot be found in the Qur'an, the *Sunnah* or a definite ijma."); *see also* IRA M. LAPIDUS, A HISTORY OF ISLAMIC SOCIETIES 157 (2002) ("In many cases the guiding principles of law were lost in favor of eclectic dependence on analogy from individual cases. The possibilities for individual interpretation and selection out of the repertoire of numerous jurists gave Islamic law almost boundless flexibility in practice.").

[35] Ali, *supra* note 19, at 178.

jurists because it gave them a way to systematize their rulings by providing a template for comparison.

Most people today would instinctively feel uncomfortable with using a sales contract as a model for regulating marriage, yet the rulings on marriage by many contemporary Islamic jurists are based on exactly such a paradigm. There is little to no engagement of modern scholarship on equality, mutuality, reciprocity, and egalitarianism within marriage. Furthermore, Islamic scholars often continue to write about marriage in terms of the rights and responsibilities of the husband and the wife, much like parties to a contract of sale might outline their understanding of delivery and acceptance of a particular product.[36] Such rigidity even (or perhaps especially) extends to sexual matters, where jurists are usually very clear about a husband's right to sexual access.[37] This is not to say that Muslims should not use a contract as part of the religious rites of marriage, or that committing to writing certain terms cannot be useful in providing clarity and direction to a marriage. The point here is that the laws of marriage as developed and disseminated by Islamic jurists should not be limited to a framework that considers spouses only as parties to a contract, the fulfillment of which surpasses all other considerations.

B. Legal Subjugation of Females

The consistent and constant legal subjugation of the female gender in Islamic law raises some interesting, if not troubling, theological and philosophical questions. Is a male-centric Islamic jurisprudence which privileges male rights and desires, even in intimate matters such as sexual consent and sexual autonomy, reflective of a theology that values females less than males? Is there space for rethinking certain oppressive

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[36] *See, e.g.,* Yusuf Al-Qaradawi, THE STATUS OF WOMEN IN ISLAM (Sheikh Mohammed Gemeaah trans. 1997), available at http://www.iupui.edu/~msaiupui/qaradawistatus.html ("[W]omen have as many rights as they have duties to perform.")

[37] Ali, *supra* note 4, at 13.

laws that are accepted as incontrovertible dogma by scholars and laypersons alike? Is Islam fundamentally incompatible with modernity? These are deep questions which require us to discern carefully the function of the law vis-à-vis religious practice and the relationship of the law to social values. As a baseline, readers should recognize, as Islamic jurists have done since the very beginning, that judicial decision-making is an imperfect science. The next step, recognizing that such decision-making must be constantly refined, is where *ijtihad* has not been employed to its full potential. The Sociological Jurisprudence and the Realist movements in the U.S. legal academy during the middle of the 20th century provide a useful frame of reference for understanding law outside of legal axioms and examining the economic and social forces undergirding their normative force. In the case of Islamic marital laws, this would mean the use of ijtihad by Islamic jurists to conduct a deep self-reflection on why certain laws continue to be advocated, and whether they are truly serving the interests of either Islam or society. The Sociological Jurisprudence school of thought eventually developed into a movement that attempted to use empirical data to analyze and formulate effective laws.[38] As of the publication of this article, no such similar movement exists in the Islamic law context. There are no studies or taskforces commissioned by prominent Islamic legal bodies or associations of Islamic jurists to examine the impact of their laws as they relate to marriage, or even to understand what basic issues most often affect couples in Muslim societies. As just one example, Islamic jurists could work with psychiatrists and psychologists to assess the psychological impact of marital rape among Muslim couples. This is an issue that is directly relevant to the work of jurists because in "many Muslim countries, [marital rape] is still not

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[38] *See* Laura B. Nielsen, *The Need for Multi-Method Approaches in Empirical Legal Research* in The Oxford Handbook of Empirical Legal Research 956 (Peter Cane et al. ed., 2012).

against the law."[39] Such laws fail to recognize that much of human experience is the product of what occurs beyond the confines of the law. Jurists must ask themselves: Can they really separate the creation of laws, and the orderly functioning of society, into two separate categories? Or does the responsibility of formulating laws extend beyond just interpreting classical texts and actually achieving the objectives of the Sharia?

One compelling answer as to why men were and are the focus and the main beneficiaries of Islamic jurisprudence, and an answer which gives the reader a much more interesting and rigorous understanding about the nature of law than reductionist stereotypes about the oppressiveness of the Quran and the Hadith, comes from Professor Leila Ahmed, a prominent scholar on Islam and feminism.[40] Professor Ahmed argues that "'textual Islam' has historically been the province of the male elite, and does not accurately represent the understandings of Islam embedded in the experiences of many Muslims, especially women.'"[41] In other words, the laws relating to marriage promulgated by prominent scholars of the past, and to a large extent the present, reflect the demographic makeup of the authors more so than a theology that requires such little regard for women. These laws were often formed almost exclusively by male scholars[42] who were writing in a patriarchal society[43] for a patriarchal audience. Thus, it should not be

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[39] *Crime and clarity*, THE ECONOMIST (Sept 1., 2012), http://www.economist.com/node/21561883.

[40] Ali, *supra* note 4, at xxviii.

[41] *Id.*

[42] Christie S. Warren, *Lifting the Veil: Women and Islamic Law*, 15 CARDOZO J.L. & GENDER 33, 46 (2008).

[43] See, e.g., Leila Ahmed, WOMEN AND GENDER IN ISLAM: HISTORICAL ROOTS OF A MODERN DEBATE 87 (1992), which provides a description of women in Abbasid society.

surprising that the laws that came about as a result often appear oppressive and unjust to the modern reader.

A second and related answer is that, as Dr. Behnam Sadeghi, a scholar of early Islamic law, has elegantly argued in *The Logic of Law Making in Islam: Women and Prayer in the Legal Tradition*:

> What is thought to be the outcome of jurisprudence, namely the laws, are actually the starting point for the jurist. The end product, on the other hand, is an interpretation that reconciles the law with the textual "sources," the Quran and the Prophet's sayings. The role of the methods of interpretation, therefore, is not to generate the laws, but rather to reconcile them with the textual sources.[44]

In other words, Islamic laws in classical jurisprudence are often a reflection of contemporary values, and it is not generally the case that values inform laws.[45] Under this hypothesis, we can extrapolate that the foundational Islamic texts do not necessitate that women be subjugated to men, since

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[44] Behnam Sadeghi, THE LOGIC OF LAW MAKING IN ISLAM: WOMEN & PRAYER IN THE LEGAL TRADITION xii (2013); *But see* Fazlur Rahman, ISLAM & MODERNITY: TRANSFORMATION OF AN INTELLECTUAL TRADITION 2 (1982) ("The medieval systems of Islamic law worked fairly successfully partly because of the realism shown by the very early generations, who took the raw materials for this law from the custom and institutions of the conquered lands, modified them, where necessary, in the light of the Quranic teaching, and integrated them with that teaching.").

[45] It should be noted that Dr. Sadeghi's book focuses specifically on the Hanafi school of jurisprudence.

the laws that were established in the classical period, and which are often the basis for modern fiqh (positive law) rulings, were merely a reflection of the values of that period. As the values of modern society have changed dramatically, it should not be controversial to use ijtihad to reform laws while remaining faithful to the essential principles of Islam.

A third answer explaining why men are favored within the jurisprudence is that a "tension exists between the values of Islamic law as a legal system and traditionalist Islamic religious discourse: The former protects and vindicates the individual rights of the parties to the marriage contract (even rights that go beyond those proscribed by law) while the latter promotes an ethic of sacrifice, trust, love and female subordination to their husbands."[46] Thus, even to the extent the jurisprudence allows for women to benefit from "the principal of mutual generosity (musamala or mukarama) pursuant to which the norms of magnanimity and sharing prevail over individual welfare-maximizing interpretations of the contract,"[47] this is often outweighed by the aforementioned tension subjugating women to multiple commitments.

The lack of female empowerment in the Islamic legal tradition, and the broad array of rights given to males, creates the impression of a religion that is fundamentally at odds with modern society and modern values. As discussed in this article, classical Islamic jurisprudence was generally unfavorable to women, and at times, was singularly focused on protecting the legal right of a husband to have sex with his wife.[48] How were

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[46] Mohammad Fadel, *Political Liberalism, Islamic Family Law & Family Law Pluralism: Lessons from New York on Family Law Arbitration* in MARRIAGE & DIVORCE IN A MULTICULTURAL CONTEXT: RECONSIDERING THE BOUNDARIES OF CIVIL LAW AND RELIGION 182-183 (Joel A. Nichols ed., 2011).

[47] *Id.* at 182.

[48] Ali, *supra* note 4, at 4.

such patriarchal laws perpetuated, and is there room for creativity in changing these laws? In the 10th century, it may have seemed appropriate to derive Islamic laws for marriage based on a contract for sale. In today's world, laws based on such a methodology clash with modern values and create practical problems in marital relations. This article argues that because of the flexibility allowed by ijtihad, Muslims should not feel bound by fiqh rulings that perpetuate the emotional, physical, and sexual domination of women by men. These rulings are based on a system that was designed for male privilege, and furthermore have been accepted as dogma because of a misunderstanding of the relationship between law and social values. As further explained below, a structural rethinking about the methodological tools of jurisprudence will allow for a reworking of the resulting rulings.

III. Contemporary Treatment

The contractual basis of Islamic marriage is well established.[49] Although Islamic laws and jurisprudence, due to their focus on contractual rights, do not entirely reflect how people usually understand marriage on a practical level, there is much apologist discourse that frames Islamic laws and models of marriage as progressive and compatible with modern values.[50] The dialogue surrounding the dower, for example, is used to illustrate the deep respect that Islam holds for women.[51] Similarly, a husband's obligation to provide for his wife is often

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[49] Ali, *supra* note 4, at 29.

[50] *See, e.g.*, Manar Hijaz, *Believe It Or Not, Islam Has Actually Extended & Protected Women's Rights*, MIC (Mar. 18, 2013), https://mic.com/articles/29739/believe-it-or-not-islam-has-actually-extended-and-protected-women-s-rights#.XflTlBuIh; *see also* ALI, *supra* note 19, at 175.

[51] *See* Christina Jones-Pauly et al., WOMEN UNDER ISLAM: GENDER JUSTICE AND THE POLITICS OF ISLAMIC LAW 79-80 (2011).

lauded as a sign of the esteem and veneration with which women are treated in Islam.[52] These discussions, however, fail to mention how dower can be used as a means of exchanging financial value for a sacred bond, or how obligating a husband to be the sole provider of a family, without any room for flexibility depending on the circumstances, can create undue financial pressure. Muslim scholars and laypersons are often quick to point out that Islam has always allowed for female property rights and divorce rights,[53] without detailing the rampant abuse which often prohibited females from fully accessing these rights.[54] There is also a robust literature on the sexual rights of women, although such "[a]pologetic discourses stress wives' sexual rights while downplaying the importance of wifely obedience."[55]

In short, many faithful Muslims try to reconcile modern concepts such as love with the contractual framework of Islamic marriage by highlighting "provisions of classical law that guarantee women certain protections."[56] Instead of developing an alternative model, or engaging and challenging the assumptions of the past, "[t]here has not been a coherent alternative to the classical understanding of marriage as a fundamentally gender-differentiated institution which presumes, at least at some level, male authority and control."[57]

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[52] *See, e.g.*, Al-Qaradawi, *supra* note 36 ("Islam supports femininity in view of its relative weakness, placing it in the hands of a supporting man, securing the costs of living and the provision for her needs."); *see also* Ali, *supra* note 19, at 164 (discussion regarding Azizah Al-Hibri).

[53] Hijaz *supra* note 50.

[54] *Id.*

[55] Ali, *supra* note 4, at 22.

[56] Ali, *supra* note 19, at 175.

[57] Ali, *supra* note 4, at 22.

This is problematic because the jurisprudential issues affecting Muslims are profound and need to be dealt with as such. Merely rationalizing the existing laws and methodologies transmitted by Islamic jurists without adequately addressing and engaging the problems created and/or left unanswered by their rulings fails to provide sustainable long-term solutions. The following sections of this article will attempt to engage some of the existing jurisprudence and suggest avenues for improvement.

C. Case Study – Ayatollah Ali Al-Sistani

Thus far, this article has provided a lengthy background discussing the assumptions behind classical Islamic law and detailed how such assumptions influence modern legal rulings. In this section, the article will discuss the fiqh promulgated by two prominent contemporary Islamic scholars.

The first case study is the rulings of Ayatollah Ali Al-Sistani, the most widely respected Shi'i cleric and Shi'i scholar of Islam whose fiqh rulings are followed by tens of millions of people worldwide.[58] Ayatollah Al-Sistani is a particularly interesting case because the clerical system among Shias is generally very hierarchical and regimented, which means that the group of people who can issue fiqh rulings is limited.[59] Thus, the views of Ayatollah Al-Sistani hold tremendous sway among the world's Shia population and should be considered mainstream.

The first ruling this article will discuss is the following quotation taken from the website of Ayatollah Al-Sistani, who

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[58] Sharon Otterman, *IRAQ: Grand Ayatollah Ali al-Sistani*, COUNCIL ON FOREIGN RELATIONS (Jan. 27, 2005), https://www.cfr.org/backgrounder/iraq-grand-ayatollah-ali-al-sistani.

[59] Moojan Momen, AN INTRODUCTION TO SHI'I ISLAM 203 (1985). In the Sunni context, there is less consensus regarding the criteria for who can issue such fiqh rulings, which poses its own set of challenges.

has published extensively on personal legal matters for Muslims:

> For a woman with whom permanent marriage[60] is contracted, it is haraam to go out of the house without the permission of her husband, though her leaving may not violate the rights of the husband. Also she should submit herself to his sexual desires, and should not prevent him from having sexual intercourse with her, without justifiable excuse. And as long as she does not fail in her duties, it is obligatory on the husband to provide for her food, clothes and housing. And if he does not provide the same, regardless of whether he is able to provide them or not, he remains indebted to the wife.[61]

The extent to which marriage is still viewed as a primarily contractual arrangement by jurists is evident in this ruling. The fatwa speaks in terms of rights, duties, obligations, and debts, all of which can be important in a marriage, but, as a practical matter, are rarely the most essential features of a successful marriage. Granted, this ruling is made under a section of the website titled "Rules regarding permanent marriage,"[62] and thus this may not be the appropriate space or forum to delve into a holistic discussion about marriage. It is nonetheless revealing that the ruling provides only positive law without any rationale, and furthermore allows for little complexity. Specifically, this ruling speaks very directly about permissibility and prohibitions without allowing for variations in individual situations. There is a lack of recognition of (1) female independence, (2) female

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[60] As opposed to "temporary marriage," which is a form of marriage recognized in the Shia jurisprudential tradition. *See* Majid Khadduri, *Marriage in Islamic Law: The Modernist Viewpoints*, 26 AM J. COMP. L. 213, 214 (1977).

[61] Ali Al-Sistani, *Rules Regarding Permanent Marriage*, THE OFFICIAL WEBSITE OF HIS EMINENCE AL-SAYYID ALI AL-HUSSEINI AL-SISTANI, http://www.sistani.org/english/book/48/2349/.

[62] *Id.*

sexual autonomy, (3) female financial self-sufficiency, and (4) marriage as a mutual endeavor. All of these factors will be dissected with the aim of explicating how Islamic laws can be refined through ijtihad to better reflect the objectives of Islam in contemporary society.

The restriction on a woman's ability to go outside of the house without the permission of her husband is fascinating precisely because it is so paternalistic, impractical, and antithetical to modern notions about women being as capable as men. In a pre-modern agrarian society, where a female would likely have performed most of her tasks inside of the home,[63] such a ruling may have served several practical purposes necessary for achieving successful marriages. It may also be the case that although such laws were practical in pre-modern societies, they were still driven by misogynistic or misguided views about women. Today, however, the empirical realities dictate that jurists no longer allow male-centric assumptions to guide their laws.

Some traditional scholars have argued that a husband's permission is required for a female to go outside of the house.[64] In a similar vein, some traditional scholars have also argued that females are more "emotional" and "passionate" than men, and thus require supervision in making their decisions.[65] These are

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[63] Alberto Alesina et al., *On the Origins of Gender Roles: Women and the Plough*, 128 THE QUARTERLY JOURNAL OF ECONOMICS 469, 475 (2013).

[64] Shaykh Muhammad Saalih al-Munajjid, *Ruling on her going out of the house without her husband's permission and travelling without a mahram*, ISLAM QUESTION & ANSWER, https://islamqa.info/en/69937.

[65] Ayatullah Ibrahim Amini, AN INTRODUCTION TO THE RIGHTS & DUTIES OF WOMEN IN ISLAM, AHLUL BAYT DIGITAL ISLAMIC LIBRARY PROJECT (Abuzar Ahmadi trans. 2011), https://www.al-islam.org/introduction-rights-and-duties-women-islam-ayatullah-ibrahim-amini/mutual-rights-and.

more stereotypes than compelling arguments that can withstand scrutiny. There is no inherent biological reason that a man should have more authority than a woman, nor is it empirically true that females are more easily "seduced", or for any reason require more supervision in any decisions, than men. Furthermore, in today's world, where cities have become highly urban and women are increasingly seeking work outside of the house, it is not practical for a wife to obtain the permission of her husband at all times. The purposes of such a restriction can be circumvented in any case with the widespread use of the internet and cell phones.

The requirements regarding a wife's obligation to fulfill a husband's sexual desires is similarly troubling. Regardless of the historical basis or context for such a law, modern social values and legal thought have progressed such that most people find such a ruling, which effectively endorses marital rape, to be unacceptable, even though marital rape was not a crime (or even recognized as a concept) in classical Islamic law.[66] Furthermore, such a ruling implies that a woman's body is not her own, and that her relationship to her husband is primarily vis-à-vis her body. This reductionist view of women as individuals with little meaningful contribution or means of selfhood other than through their sexual currency is not reflective of the strides taken by contemporary society, where women assume many roles beyond that of a wife. Instead of regurgitating views that subjugate women, a fruitful use of ijtihad would be for jurists to be at the forefront of highlighting women's rights as an important issue and raising awareness about female exploitation.

The obligation of a husband to provide food, clothing, and shelter to a wife, regardless of the intent behind the ruling,

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[66] Hina Azam, *Rape as a Variant of Fornication (Zina) in Islamic Law: An Examination of Early Legal Reports*, 28 J.L. & RELIGION 441, 443 (2013).

is again based on pre-modern assumptions about gender roles and divisions. However, such assumptions are outdated in a world where women are obtaining university-level education at higher rates than men,[67] and in the United States, are almost as likely as men to be the primary breadwinners of a household.[68] Thus, this ruling fails to reflect the rapid change in traditional gender roles. Although the Quran does state that a husband is responsible for providing the maintenance costs of the wife,[69] this should not necessarily prohibit a husband and wife to organize their financial lives differently if they desire. Additionally, the ruling fails to recognize that there may be compelling circumstances due to which a husband may not be able to provide for his wife. In such a case, the highly contractual and legalistic nature of the ruling creates a situation of indebtedness that may be undesirable for the married couple.

Thus, Ayatollah Al-Sistani's fatwa on marriage, which is representative of many other of his rulings with respect to spousal relations and marriage, is based on pre-modern assumptions about gender roles and social structures that no longer apply and is demonstrably out of date with the reality of modern life. Furthermore, the framework of contractual obligations under which Ayatollah Al-Sistani's ruling operates does not adequately reflect the modern view of marriage as a mutually beneficial relationship. The question, then, is how should jurists address such structural deficiencies in their legal analyses? Does an honest evaluation of the foundational

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[67] Nolan Feeney, *Women Are Now More Likely to Have College Degree Than Men*, TIME (Oct. 7, 2015), http://time.com/4064665/women-college-degree/.

[68] Samantha Cooney, *More Women Are Their Family's Sole Breadwinner Than Ever Before*, TIME (Dec. 20, 2016), http://motto.time.com/4607876/female-breadwinners-rise-report/.

[69] Nasr, *supra* note 6, at 206 ("Men are the upholders and maintainers of women.").

sources of Islamic law require the perpetuation of patriarchy, or is it possible to view laws as the product of human reasoning, which should be changed as the reasoning becomes more refined and compelling with the passage of time and the advance of knowledge?

Roscoe Pound, a distinguished 20th century American legal scholar, famously stated that "Law is no longer anything sacred or mysterious."[70] This is a maxim that may be instructive for practicing Muslims; there is no inherent reason that the rulings of a medieval Islamic scholar should be regurgitated by modern scholars living in different contexts. Despite the recognition of Sharia as "'the entirety of Divine commands concerning human actions'"[71] that can only be approximated through the efforts of human beings, many Islamic scholars, including Ayatollah Al-Sistani and Sheikh Al-Qaradawi, are still unwilling to critically engage important topics such as marriage. It is under these circumstances that ijtihad should be used as an important tool to achieve the purposes of the Sharia. This article will go even one step further and suggest that non-specialists can also make valuable contributions to the formulation of the Sharia through ijtihad, since their removal from total immersion in the Islamic jurisprudential literature provides them with space for clarity. Furthermore, Islamic jurists may benefit from looking to modern non-Islamic sources to gain a better understanding about developments in other legal traditions, including Western liberal democracies, in order to figure out how best to utilize the tool of ijtihad.

D. Case Study – Sheikh Yusuf Al-Qaradawi

The second case study is the rulings of Sheikh Yusuf Al-Qaradawi, an Egyptian-born cleric who is one of the most

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[70] Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607, 610 (1907).

[71] Annemarie Schimmel, ISLAM: AN INTRODUCTION 62 (1992).

prominent Sunni scholars in the world.[72] Although Sunni clerics are not organized in terms of "ranks" and authority in the same way that Shia clerics are, Sheikh Al-Qaradawi has a widespread following. In *The Status of Women in Islam*, Sheikh Al-Qaradawi declares, after stating a husband's responsibilities to pay a dower and provide for the maintenance of his wife, that:

> In return for these rights, a wife is obliged to obey her husband in everything except disobeying Allah. She is obliged to take care of his money, not to spend it except with his permission; and of his house, not to allow anyone in, even though they be a relative, except after asking him. Such duties are not too burdensome, nor unfair, in return for her rights.[73]

As with the fatwa of Ayatollah Al-Sistani,[74] this fatwa[75] speaks extensively about rights and obligations without discussing relationship-building, teamwork, or mutual sacrifice. The topic of the legal ruling is slightly different than Ayatollah Al-Sistani's ruling discussed above,[76] but the methodology and the principles are very similar. Marriage is portrayed as a deeply contractual commitment within which fulfillment of certain obligations and responsibilities are central to the purpose of the union. In fact, the last sentence even provides a rationale for the legal ruling, which confirms explicitly that the obligation to obey a husband is in fact directly related to the right to receipt of dower and maintenance.

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[72] Yusuf al-Qaradawi, HARVARD DIVINITY SCHOOL, https://rlp.hds.harvard.edu/faq/yusuf-al-qaradawi-0.

[73] Al-Qaradawi, *supra* note 36.

[74] Al-Sistani, *supra* note 61.

[75] Al-Qaradawi, *supra* note 36.

[76] Al-Sistani, *supra* note 61.

The first part of the fatwa states that a wife is essentially beholden to her husband in all things except for anything that requires her to disobey Allah, or in other words, contradict the Sharia.[77] To flesh out such a legal principle, one could imagine all sorts of absurd scenarios in which a wife is required to obey her husband merely because he has fulfilled his two contractual duties. This could lead to severe abuse by a husband, or even if the intentions are not bad, could cause much burden to a wife. In short, the law provides a general principle that is not responsive to individual needs or realities, nor does it protect women from potential abuses. More broadly, it is not clear that such a principle needs to be stated in a legal format. As has been suggested multiple times in this article, scholars should think deeply about whether marriage can or should be reduced to a strictly legal endeavor. As things currently stand, such a conception of marriage creates problems that at times directly contradicts the purposes of the Sharia.

It is also interesting to note that within the fatwa itself is embedded an assumption that money earned by a husband is "his" money rather than community property.[78] There is no recognition of the fact that the person who is earning the money through employment is not necessarily solely responsible for that income, since the companionship and support provided by a partner is also a valuable contribution that enables a party to earn that income.

Furthermore, a wife is required to take care of a husband's money, rather than participate with him in making joint decisions about the finances. This ruling presumably stems from arcane assumptions about gendered divisions of labor and forms of contribution to marriage that are empirically unsupported today and also contradict legal regimes of many jurisdictions worldwide. The ruling also makes a value

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[77] Al-Qaradawi, *supra* note 36.

[78] *Id.*

judgment as to how the financial lives of spouses should be organized which potentially has profound consequences on how spouses relate to each other on a day-to-day basis.

The fatwa, and in particular the commentary on the fairness of the ruling provided by the last sentence of the paragraph,[79] also raises several interesting questions: Are the right to a dower and maintenance, on balance, adequate to compensate for an obligation that essentially gives up all rights to female independence? Is there even a way to measure adequate compensation, and if not, would it not be more fruitful to promote laws that inculcate values of mutual responsibility between spouses rather than fulfillment of rights and obligations? Is a husband always given such wide latitude, as long as he is able to fulfill these two minimum obligations? This ruling, like the ruling of Ayatollah Al-Sistani, is too general to be useful in contemporary society, where individual situations vary widely. Furthermore, it assumes a strict separation of a husband and wife as separate parties to an agreement, rather than a team working toward achieving a common goal.

IV. Ijtihad in Action

What role can ijtihad play in reformulating a framework of analysis that depends so heavily on form over substance? What could an ijtihad-based approach to marital jurisprudence look like and what could it do to promote sensible solutions that are not bound by technical and legalistic methodologies?

The most basic explanations of the term ijtihad define it as "independent reasoning"[80] based on "intellectual exertion on the part of the jurist."[81] The role of ijtihad has transformed over the course of Islamic intellectual history from the best efforts of

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[79] *Id.*

[80] Ali, *supra* note 4.

[81] Kamali, *supra* note 1, at 469.

the Companions of the Prophet Muhammad[82] to a specialized discourse only understood by and accessible to Islamic jurists.[83] Scholars have even developed certain criteria to restrict the pool of candidates eligible to engage in ijtihad, such as intellectual competence,[84] knowledge of the Quran, and proficiency in Arabic.[85] This article argues that the scope of ijtihad must be widened to focus on broad conceptual, methodological, and structural principles of jurisprudence rather than individualized legal analyses.

The call to widen the scope of ijtihad should be viewed as an extension of the continuing discourse within Islamic law by Islamic jurists. The specialized field of Islamic jurisprudence has come up with some novel solutions historically and provided much benefit to Muslims.[86] Yet this does not mean that that jurisprudence must be stuck in the same place even as society changes and our knowledge advances. The foundational sources of Islamic law, the Quran and Hadith, do not prohibit Muslims from seeking knowledge from sources outside of Islam and Muslims. To the contrary, seeking knowledge is understood to

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[82] *Id.* at 486; *see* Ali, *supra* note 19, at 168 ("In the decades following his death, the Prophet's Companions gave *ad hoc* decisions in cases brought to their attention."); *see also* Ahmed El Shamsy, THE CANONIZATION OF ISLAMIC LAW: A SOCIAL AND INTELLECTUAL HISTORY 22 (2015) ("[T]he Companions of the Prophet had engaged in legal reasoning, in the sense both of applying general rules to specific cases and of extending existing rules to cover new situations.").

[83] Kamali, *supra* note 1, at 489.

[84] *Id.* at 476.

[85] *Id.* at 477.

[86] *See* Wael B. Hallaq, *Was the Gate of Ijtihad Closed?*, 16 INT'L J. MIDDLE E. STUD. 1, 4 (1984) ("[I]jtihad was indispensable in legal theory because it constituted the only means by which jurists were able to reach the judicial judgments decreed by God.").

be a means to glorifying and better understanding God.[87] In this vein, this article argues that the two scholars discussed in this article, whose scholarship and depth of knowledge cannot be doubted, and Islamic jurists generally, would advance the purposes of the Sharia if they looked to the social sciences, humanities, and the liberal arts to formulate their jurisprudence.

Take, for example, the work of Dr. Catharine MacKinnon, a legal scholar who has written extensively on issues of gender and the law, and specifically, the systematic subordination of women in the law.[88] Her work demonstrates how "the question of equality is at the root the question of hierarchy."[89] Whereas Islamic jurists often assign separate roles and legal requirements to men and women solely on the basis of their gender, she argues that upon critical examination, "gender changes from a distinction that is presumptively valid to a detriment that is presumptively suspect."[90] In other words, there is no reason that Islamic jurists should be bound by the work of past scholars if they can formulate a modernized Sharia on the basis of ijtihad that is still true to the foundational sources of Islamic law. If jurists do reformulate their methodologies by changing their assumptions based on the work of scholars such as Dr. MacKinnon, then they would realize that their rulings on issues such as marital laws need to be more nuanced. Furthermore, they would recognize that every marital jurisprudence regime carries with it inefficiencies and imperfections, and that no single philosophy of marital law will

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[87] *See* Seyyed H. Nasr, SCIENCE & CIVILIZATION IN ISLAM 26 (2001) ("Muslim metaphysicians say that rational knowledge leads naturally to the affirmation of the Divine Unity.").

[88] *See, e.g.*, Catharine MacKinnon, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987).

[89] *Id.* at 40.

[90] *Id.* at 44.

do complete justice to all parties. A more productive use of jurists' time would be to emphasize the value of the family as a social unit, and focus on preventative measures that create healthy marriages. By focusing on reducing conflict and divorce, jurists might aid more effectively in coming up with satisfactory solutions.

Ijtihad as a tool has been underused in contemporary society for achieving the purposes of the Sharia.[91] The fundamental issue with ijtihad today is that it is used as a bandage solution rather than as a means of changing the terms of discourse and analysis.[92] In the context of sexual access rights of a husband, for example, a jurist may reserve the right to prevent abuse by recourse to ijtihad. Yet the fundamental issue is that such a limited use of ijtihad fails to address structural problems with the derivation of legal rulings. The default should not be that ijtihad allows jurists to rectify a problematic ruling as a last resort. Instead, jurists must think carefully about how to create and operate a system that aligns with the purposes of the Sharia. In the context of an Islamic marriage, for example, without removing the form or substance of the importance of a contract, jurists could still engage with marital rulings such that a husband and wife are conceptualized as responsible for each other under the eyes of God, rather than parties whose sole responsibilities are to fulfill a contract. This is exactly where engagement with the social sciences, humanities, and the liberal arts is crucial.

V. Conclusion

This article has sought to examine a valuable tool of Islamic jurisprudence through the perspective of critical theory. Such an investigation is necessary because the monopoly of independent legal reasoning by traditional Islamic scholars, who

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[91] *See* Tariq Ramadan, RADICAL REFORM: ISLAMIC ETHICS AND LIBERATION 2 (2009).

[92] *See Id.* at 3.

are well-versed in the Islamic sciences but tend to lack sufficient grounding in contemporary moral and political discourses necessary to respond to the challenges of modernity, is a fundamental threat to the viability of the Sharia. General legal truths rarely exist in a vacuum, even if they are based on sacred texts and historical precedent. Instead, conceptualizing law as a product of human history, where economic and social forces play an important role in the exercise of ijtihad, allows us to develop a more rigorous and integrated vision of the law.