

Introduction

The present volume is a study of Muslim marriage in modernity. The essays that comprise the volume are written both by scholars of Islamic fiqh and by social scientists. As such, the collection stages an all-too-rare dialogue between practitioners of fiqh – those working with the source texts to derive new interpretations, to authorise rethinking, and thereby to create spaces of possibility for practices to change – and social scientists – who study practices of Islam. The question of marriage and intimate relationships is an important site of internal contestation, as the collection demonstrates. It demands both fidelity to the tradition and its historical modes of thought *and* adequacy to contemporary conditions. The contributors to this volume examine challenges to fiqh posed by the contemporary by critically analysing the practices and resources available to Muslims in a range of national and historical contexts. These critical approaches will enable a wide readership to understand how Muslims engage with the assumptions and epistemologies that underpin marriage and relationships in contemporary Islamic settings.

The volume begins by introducing the reader to several key internal debates about Muslim marriage, including the entailments of the marriage contract, the status of marital rape, and the relationship between spouses. Together, these essays provide insight into dominant Islamic legal and religious discourses about marriage. Discourses, as understood here, have a double valence: they are at once stable and can be challenged and changed.¹ Anthropologist Talal Asad has argued that tradition is discursive: the discourses that make it up aim to teach people how and why to engage in specific instituted practices.² Traditions only persist to the extent that they, and the discourses that comprise them, are at once linked to the past and able to change in response not only to present predicaments but also to aspirations for the future. Islam,

¹ We follow Michel Foucault's conception of discursive formations in this analysis. Foucault argued that a discourse entailed statements that together constitute a system through which subjects and objects are formed and at times transformed. See Michel Foucault, *The Archaeology of Knowledge*, trans. A. M. Sheridan Smith, 2nd ed. (London: Routledge, 2002), 41–43.

² Talal Asad, 'The Idea of an Anthropology of Islam', *Qui Parle* 17, no. 2 (2009): 20.

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as a discursive tradition is, accordingly ‘a tradition of Muslim discourse that addresses itself to conceptions of the Islamic past and future, with reference to a particular Islamic practice in the present’.³ Part I of the present volume both captures several dominant discourses within the Islamic tradition about marriage and presents loyal challenges to them, challenges that render the tradition dynamic and seek to bring Islamic discourses on marriage into closer proximity to the realities of contemporary everyday life. Thus, the discourses presented here constitute marriage as both an object of analysis and a site of intervention – they indicate how marriage is understood as well as how different scholars and jurists seek to change its normative entailments.

The essays in Part II present and analyse a different aspect of the discursive tradition, with special attention to the ways in which lay Muslims live and understand marriage. These essays are written by sociologists and anthropologists who explore the various ways in which Muslims engage with fiqh and social institutions that structure their daily lived experiences. The essays examine how individuals, jurists, political actors, and civil society organisations respond to the dynamics of specific socio-political domains on questions of marriage and relationships. A major intervention of the collection is that such practices and arguments are not separate from but spur reforms to fiqh. Indeed, presenting these sociological and anthropological essays alongside the fiqh interventions demonstrates that rather than an isolated theoretical and theological project, fiqh is where practical conundrums and lived problems meet legal theory. This is not a new phenomenon. Wael Hallaq has argued that ‘the [Ottoman] qadi mediated a dialectic between, on the one hand, the social and moral imperatives – of which he was an integral part – and, on the other, the demands of legal doctrine which in turn recognized the supremacy of the unwritten codes of morality and morally grounded social relations.’⁴ Hallaq’s argument is that fiqh has always been responsive to moral and social codes as well as to the sources of law. In this way, the work of making fiqh adequate to social conditions is not distinctly modern but instead an integral aspect of it. Yet fiqh is rarely understood to be an effect of daily life meeting legal theory or doctrine, perhaps because lay Muslims neither think of themselves as reformers nor set out to change dominant fiqh concerning marriage (unlike their counterparts in Part I). Instead, they inhabit the tradition in innovative ways that nonetheless have the effect of changing Muslim marriage practices.

3 Ibid.

4 Wael B. Hallaq, *Shari‘a: Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009), 169.

The Existential Perspective on ‘God’s Bestowal of *Faḍl* upon Men’ and Its Implications on *Qiwāma*

With the migration of the Prophet to Medina and the increase in the number of his followers, it became necessary to introduce societal regulations and devotional practices to facilitate the moral, spiritual, and rational growth of individuals and the community of believers. The societal regulations were initially provided by verses of the Qur’an and the accompanying oral Prophetic exegeses.² These regulations were revealed in response to questions asked to the Prophet or contextual circumstances that required instructions. An example of such a regulation was the bond of brotherhood between non-consanguine Meccan migrants and their Medinan hosts, which allowed for mutual inheritance between them.³ The majority of these regulations were not original but modifications of existing norms and practices formulated with a sense of fairness and the goal of limiting abuse as much as possible within the given context.⁴

These regulations appealed to the people of that time as being more egalitarian and pragmatic, which are important markers of regulations in any time and place. Regulations and stipulations governing gender-specific societal roles, spousal relations, rights, and responsibilities were supplied during the last ten years of the Prophet’s life

1 The author is grateful to Riaz Walji for kindly editing and referencing the paper, and colleagues at Al-Mahdi Institute for organising the workshop in which an early draft of this paper was presented and for their efforts in publishing it.

2 For reference to the Qur’an as the initial and main source of societal regulations, see Noel J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 2004), 10–13; Knut S. Vikør, *Between God and the Sultan: A History of Islamic Law* (London: Hurst and Company, 2005), 20; Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Oxford University Press, 1982), 10–14. For reference to the Prophet’s exegeses of the Qur’an as a source of normativity, see Q.16:44; and M. Mustafa Al-Azami, *On Schacht’s Origins of Muhammadan Jurisprudence* (Cambridge: Islamic Texts Society, 1996), 13.

3 For reference to the creation of the bond of brotherhood, see Martin Lings, *Muhammad: His Life Based on the Earliest Sources* (Cambridge: Islamic Texts Society, 2019), 128; Fazlur Rahman, *Islam* (Chicago: The University of Chicago Press, 2002), 19. For reference to the abrogation of the norm of mutual inheritance, see Q. 8:75; and Faḍl b. Ḥasan al-Ṭabarsī, *Majma‘ al-bayān fī tafsīr al-Qur‘ān* (Beirut: Mu‘assasat al-‘Alamī li-l-Maṭbū‘āt, 1995), 4:500.

4 See Coulson, *A History of Islamic Law*, 13–14; and Schacht, *An Introduction to Islamic Law*, 10–14.

in Medina. While not exhaustive and not covering every eventuality, their phraseology yields fundamental principles for understanding these roles and responsibilities, and the associated issues in different contexts.

Shari'a regulations and stipulations that enshrine societal gender roles and spousal relations, rights, and responsibilities, as espoused by the Qur'an and the Prophet, were not perceived to be unfair, prejudicial, or discriminatory by the primary audience. They remained optimal in facilitating the functioning and growth of Muslim communities for the duration of the pre-modern era and may still be effective in similar existential contexts in the contemporary world. However, these same regulations and stipulations may be considered inequalitarian and regressive in contemporary contexts where notions of inalienable human rights and human dignity are part of the mindset and worldview of their communities.⁵ This has led to various discourses on the conflict between Shari'a regulations and stipulations of the revelatory era and human rights and the notion of human dignity.

The basis of this conflict is the assumption that all Shari'a regulations and stipulations of the revelatory era are the intended regulations and stipulations of God for all times and places, which is premised on a fixed and static ontology. However, this conflict dissipates with the understanding of an ontology of flux and dynamism, for all such regulations and stipulations are recognised as 'Shari'a' regulations that were formulated in and for the contexts of the revelatory era and other similar contexts only.⁶

This paper embarks upon a comprehensive exploration of the multifaceted notions pertaining to *qiwāma* (governorship), *daraja* (degree), and *infāq* (provision) in conjunction with *faḍl* (existential merit). By means of the following analysis, I endeavour to elucidate that *faḍl* is far from being an immutable or universal phenomenon. Instead,

5 See Vikør, *Between God and the Sultan*, 20–21. For reference to the Qur'an and the Prophet modifying pre-Islamic norms and praxis, see Coulson, *A History of Islamic Law*, 14–18.

6 For reference to the verses of the Qur'an having general or universal principles, see Abdullah Saeed, *Interpreting the Qur'an: Towards a Contemporary Approach* (Abingdon: Routledge, 2006), 24, 127–28. The following quote is pertinent: 'It is often argued that the *shari'a* was not given in a finished form. The Prophet's method was a flexible dynamic adaptation of general principles to specific situations as they arose ... after the death of the Prophet Muhammad in 632 AD, his first four successors carried on the tradition of flexibility. They believed that laws had to be understood and interpreted to remain true to their purpose. During their time, laws were continually developed, and the successors to their secular authority were fully empowered to preside over and guide that process. Under Umayyad rule, the law became more rigid as it was employed by the rulers as a theoretical justification for state control. It was then that the religious scholars collected and organised the various rulings of the Prophet and his first successors and created a legal system – from which all four Sunni schools of law emerged and the main collections of the Prophet's sayings, *hadith*, were compiled.' Munira Fakhro, 'Gulf Women and Islamic Law', in *Feminism and Islam: Legal and Literary Perspectives*, ed. Mai Yamani (Berkshire: Ithaca Press, 1997), 251.