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Excerpt

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## Introduction

Modern scholars have sometimes noted that attitudes towards the nature of truth and the extent to which truth is to be disseminated among society at large were very different in medieval Islamic society from what they are in the Modern West. Medieval Muslim thinkers of various schools, both orthodox and heterodox, tended to think that society was inevitably divided into an elite which was capable of understanding the full truth and a majority of persons who were not capable of such understanding.

(Nikki Keddie)<sup>1</sup>

An interesting question about the Islamic intellectual tradition is who were the scholars of the formative and classical period writing for? Maybe just for each other, maybe there was no one audience, or maybe this is a very modern question. Modern understanding of scholarship inquires after originality, sources, and influence. Very often the modern audience is assumed to be secular and liberal, rather than confessional or literalist. In the Western academic tradition we delineate disciplines of scholarship, as much as for establishing the parameters of scholarly excellence as for our own sense of epistemological direction and focus. In addition to this question, we must also ask how was the knowledge and learning of early Muslim scholars imparted? Since the 1980s there has been much progress regarding the question of oral and written transmission of knowledge in early Islam, that is, the first three centuries of Islam. Drawing upon the works of several Western scholars, Sebastian Günther explains how the scholarly sessions (*majālis*) held by Muslim scholars for the purpose of teaching their students, relied largely on oral and aural instruction.<sup>2</sup> Written materials in the form of collections of data and 'lecture scripts' were

<sup>1</sup> Nikki R. Keddie, 'Symbol and Sincerity in Islam', *Studia Islamica*, 19, 1963, pp. 27–63.

<sup>2</sup> Sebastian Günther, 'Assessing the Sources of Classical Arabic Compilations: The Issue of Categories and Methodologies', *British Society for Middle-Eastern Studies*, 32:1, 2005, pp. 75–98.

used as memory aids and, in the course of time, these collections came to be fixed in memory and writing. However, the concept of a book did not gain shape in early Muslims scholarship, although scholars exercised authorial creativity through their selection and arrangement of themes as well as displaying a sophisticated method of internal referencing in various written forms. They produced different kinds of written collections and notes, many of which were used by their students for the composition of their own works. Günther writes, 'Interestingly enough, these lecture scripts and written collections of data from the first three centuries of Islam seem to make up the majority of the "sources" used by authors of later times when composing their often voluminous compilations.'<sup>3</sup>

Faith always requires scholarly expression. The Qur'ān was not only to be read liturgically but also scholastically. The intellectual debates of the formative period flourished during the classical era of Islamic thought (c. 1000–c. 1500/c. 1600)<sup>4</sup> and reflected their intellectual interests through particular literary genres. These were notably exegesis (*tafsīr*), philosophy (*falsafa*), theology (*kalām*), mysticism (*taṣawwuf*), and jurisprudence (*fiqh*). *Kalām* is the word that comes closest to theology in Islam, meaning 'words' or 'discussion', and the science of *kalām* became the science of discussing all things divine. The scholarly search for the roots of Islamic theology continues to divide scholars. There are those who see certain themes in early Islamic thought develop largely in response to an encounter with Christianity. Others perceive an original, inner development of Muslim thought.<sup>5</sup> Many of the theological issues arose from religious and political issues faced by the early Muslim community including the relationship between free will and predestination, sin and salvation, the nature of ethical values such as right and just, and the concept of the creation of the Qur'ān. In addition, the whole epistemology of knowledge itself, divided broadly between divine knowledge and human knowledge, focused on the kind of knowledge God created in humankind. Theologians could be broadly divided into rationalist and traditionalist. The rationalists were those who stressed the primacy of reason over revelation in case of any contradiction between the two. The traditionalists were those thinkers who relied on the Qur'ān, the *sunna*, and the consensus of the scholars first and foremost as the basis of their theology.<sup>6</sup> Philosophy developed

<sup>3</sup> Günther, 'Assessing the Sources', p. 78.

<sup>4</sup> I have used these dates as reflective overall of the pre-modern world though the historical periods of classical and medieval are subject to difference of opinion.

<sup>5</sup> Josef Van Ess, 'The Beginnings of Islamic Theology', in John E. Murdoch and Edith Dudley Sylla, eds., *The Cultural Context of Medieval Learning*, Dordrecht/Boston: Reidel 1975, pp. 87–111.

<sup>6</sup> See Binyamin Abrahamov, 'Theology', in Andrew Rippin, ed., *The Blackwell Companion to the Qur'ān*, Oxford: Blackwell, 2006.

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under the ‘Abbāsids with the translations of Greek philosophy and science, and while it retained its non-Islamic origins, ‘Abbāsīd rule witnessed the appearance of distinguished Islamic philosophers such as al-Kindī (d. 870), al-Fārābī (d. 950), and Ibn Sīnā (d. 1037). They claimed a rightful stake in knowledge of the divine and became leading intellects of the philosophical world, combining theology, philosophy, and politics in their works.

The major Islamic science however was *fiqh*, knowledge or understanding, translated as jurisprudence and generally absorbed within the concept of Islamic law. Although the concept of God’s ideal law is encapsulated in the word *shari’a* it was the juristic discipline of *fiqh* that came to dominate the legal world and where one finds some of the greatest intellectual and literary achievements of Muslim scholarship. Joseph Schacht described Islamic law as the ‘epitome of Islamic thought’.<sup>7</sup> It is generally thought that while ethics and law are distinct disciplines in Islamic thought, the former was obscured by the growth of the latter. Ethics can be defined as a practical science that seeks to know right from wrong, how one arrives at ultimate principles, but law, which was also concerned with expressing divine will, was based on the premise of determining right action. Sunnī Islam recognises four sources through which Islamic law is derived. These are the Qur’ān, the *sunna* of the Prophet, the consensus (*ijmā’*) of the community, and analogical reasoning (*qiyās*), a method of discovering new judgments from what God had already commanded or forbidden. It is worth mentioning here, albeit briefly, that in recent years a number of scholars have questioned the origins of Islamic jurisprudence and broken with this traditional historiography. Key among these scholars was Joseph Schacht, whose theories are summarised aptly by the late Norman Calder, sceptical but broadly in agreement with Schacht:

Joseph Schacht, following the methodological and historical presuppositions of Goldziher, in his study of early Muslim jurisprudence (1950), broke the historical link between *ḥadīth* and *fiqh*. He argued, against the implications of the Muslim hermeneutical tradition, that the structures of *fiqh* were initially independent of (and so, in time, provoked) the major corpus of *ḥadīth* literature. The real origins of *fiqh*, for him, lay in the living tradition of local schools, ie in a juristic adaptation of real social norms, which was only gradually transformed into the structures of the classical hermeneutical nexus.<sup>8</sup>

The traditional linear understanding of the development of Muslim jurisprudence remains a critical and contested academic debate, with scholars both

<sup>7</sup> Joseph Schacht, *An Introduction to Islamic Law*, Oxford: Clarendon Press, 1964, p. 1.

<sup>8</sup> Norman Calder, *Studies in Early Muslim Jurisprudence*, Oxford: Clarendon Press, 1993, p. vii.

accepting and refuting this revolutionary claim by Schacht. Those questioning Schacht's theories have asked from where is Muslim jurisprudence derived if not from the Qur'an and *ḥadīth*? Furthermore, what exactly does Schacht mean when he refers to a 'living tradition'?<sup>9</sup> Human reason had to be applied for the elaboration of Islamic law. The best effort applied by each scholar jurist (*faqīh*) to assess and determine any one ruling from the texts of revelation to the norm of law was contained in the concept of *ijtihād*, and legal theory became known as *uṣūl al-fiqh*, the 'principles' or 'roots' of *fiqh*. By virtue of *ijtihād*, a vast body of positive rules came into being defined as the 'branches' of *fiqh* (*furū' al-fiqh*). The books that laid out the scholar's knowledge of the law encompassing in theory all aspects of life and worship, the types of jurists engaged in the thinking, application, and judgment of law (*muftī*, *qāḍī*) are all contributors to the development of 'religious law' in Islamic thought.

However, *fiqh* was never more than a human approximation of a sacred ideal, a product that was ultimately a pious, but human and therefore imperfect, effort. It saw limitless growth at the hands of the jurists whose writing style combined juristic speculation with literary ingenuity. While there were several schools of law in early Sunnī Islam, the groupings of these jurists eventually settled out at four schools (*madhhabs*). According to medieval Islam, these schools were named after their founders, Mālik ibn Anas (d. 796), Abū Ḥanīfa (d. 767), Al-Shāfi'ī (d. 822), and Ibn Ḥanbal (d. 855). Many Western scholars have argued that the founders of the schools were not responsible for establishing the 'schools' named after them – Mālikī, Ḥanafī, Shāfi'ī and Ḥanbalī, rather that it was the pupils of the founders who established the basic elements of the school (*madhhab*).<sup>10</sup> There is no real evidence of any historical consensus as to why only four schools of Sunnī law were accepted, but there were also Shī'ī schools such as the Zaydīs and Ithnā 'Asharis that developed separately. As the four schools became established, jurists of individual schools wrote according to the methods and disciplines of that particular school despite spatial and temporal differences. There were two ways by which the views of different writers from different eras were established. One was through the exploration of those problems that each generation of jurists inherited from their ancestors, and the other was through the process of citing past authorities. This was the way in which tradition was

<sup>9</sup> Ze'ev Maghen, 'Joseph Schacht and the Origins of "Popular Practice"', *Islamic Law and Society*, 10:3, 2003, pp. 276–347.

<sup>10</sup> See, for example, Joseph Schacht, *The Origins of Muhammadan Jurisprudence*, Oxford: Clarendon Press, 1967, and, more recently, Christopher Melchert, *The Formation of the Sunnī Schools of Law, 9th–10th Centuries*, Leiden: Brill, 1997.

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affirmed and embraced, surviving not through inertia but through the active preservation and participation by generations of scholars.

The richness of juristic speculation within each school and across schools is contained in the diversity of juristic opinion (*ikhtilāf*), the central stylistic feature of *fiqh*.<sup>11</sup> The principle of *ikhtilāf* allowed the jurists to put forward various perspectives on a single point of principle by the discussion of options and circumstances. As *fiqh* acquired a technical life in the creative ingenuity of the jurists, these principles often became buried under a mound of detail and formula. The diverse legal opinions are presented through a casuistical approach where priority is given to the creation rather than application of the law. The texts accommodate a selection of viewpoints on a given issue by citing a large number of different authorities. These authorities remain equally important for the formation of the argument and speculation over the issue at hand.

It is this fundamental concept of argument that I wish to portray in this book. I have tried to show the nature of *fiqh* and *kalām* writing through distinct themes. This book is not a conventional monograph. It is a collection of seven chapters, each of which is devoted to discrete topics of Islamic law or theology; the themes of the chapters reflect the author's personal choice. One could well ask the rationale for such a collection if there is no overarching theme or coherence in the conventional sense. The short response is simply that this book is a personal quest in which I wanted to explore these particular themes in greater detail. The longer response is that it is increasingly important in our modern world to be reminded that Muslim texts from the formative to the classical period presented multiple voices at variance with one another. The pre-modern religious works contained a richness of thought, hesitation, and speculation on a wide range of topics. These topics were not just socially relevant but presented intellectual challenges to the scholars for whom God's revelation could be understood in diverse ways and expressed through different intellectual forms. Each of the chapters reflects how debates were conducted in all branches of knowledge (*ilm*) in the Islamic world and that the discursive logic within these topics illustrates precisely this point. The chapters are not an exercise in some form of deductive analysis of theory or doctrine but illustrate the intellectual creativity that went into presenting an argument across a range of themes.

Too often in Islamic Studies, books are divided according to law, history, theology, politics, or gender studies with interesting overviews of the subject at

<sup>11</sup> It is not within the cope of this introduction to give more than this skeletal framework on Muslim jurisprudence and other intellectual genres but it is hoped that the reader will use this in addition to the glossary of terms to engage with the material in the book.

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hand. This book avoids overviews or big narratives about any given subject area. It certainly does not aim to reflect what many understand to be normative Islam. My interest is in discursive Islam. I have divided the chapters broadly into the 'legal' and the 'theological'. In both disciplines I have used to varying degrees non-Islamic sources and anecdotes to situate the subject matter in a broader framework allowing for some comparative reflection of the concept. Some of the chapters begin with a more personal anecdote, and indeed it was often these very anecdotes that gave the initial inspiration for a more detailed study. This book is aimed at an audience that has some knowledge of Islam and key theological and legal concepts. However, all Arabic terms are italicised and explained, if not in the main text, then in the glossary. The non-specialist will be aided by the extensive glossary, which provides meaning and context to some of the more technical vocabulary and names in the chapters.

The legal chapters provide a close reading of a selection of *furū'* texts. This has its own appeal in that *fiqh* like *tafsīr* was also a reading of scripture, an exercise in piety. Classical jurists, however, were not prone to being conclusive in the presentation of their arguments, fully aware that acquiring knowledge of God's law was a human exercise and only God knew the truth. Therefore, *fiqh* was always reflective of a certain hesitancy, structured to varying degrees on epistemological hurdles and the elaboration of alternative viewpoints. This was seen as a mercy from God. The more 'theological' chapters reflect a concern with those themes that need to be reassessed in dialogue with other traditions in the modern era.

#### A SHORT NOTE ON THE CHAPTERS

The aim of the book is to give the reader a glimpse into a kind of legal and theological inquiry that is both a personal reflection and rooted for the most part in traditional sources; the sources are predominantly Sunnī. The fundamental aim of this book is to show that differences of opinion have always been the essence of scholarship especially for the faithful; they are reflective of conversations that were never meant to finish. The scholars were in search of the truth as they saw it but expressed this truth in the intellectual discipline in which they found their literary and intellectual vocation. The chapters focusing on *fiqh* take you primarily through a single *fiqh* text with occasional references to other texts from the same school and try to show the development of arguments on the subject in question rather than providing a broad historical or social narrative around the issue. The textual detail is paramount here and dependent on the basic methodology of close literary analysis of the passages.

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The subjects of slavery, ritually slaughtered meat, wine drinking, and the significance of the oral formulae in divorce are not simply the subject of juristic speculation and casuistry. They serve to show how a scholarly community tried to understand the nature of different aspects of the human social and moral order. In the chapter on divorce, the jurists do this not through taking overt ethical stances or admonishing the husband for severing the *nikāḥ* contract. Rather, their interest lies in showing how relevant the verbal formulae were in deciding when a pronouncement could be considered a divorce, as *ṭalāq* itself is a serious legal and contractual matter. Matrimonial relations between husband and wife could not be sustained if the spoken word was understood as desiring and indeed causing divorce. In a religion that has created its own gendered and patriarchal structures, divorce does not seem to incur either stigma or shame on either husband or wife but rather the full financial consequences for both. Thus in the divorce formulae we are not exposed to the wrongs of divorce or the ethical norms of a marriage, but the 'terms and conditions' that are the legally binding effects in the demise of a contract.

Contractual relationships occur in various forms in Islamic law, and an example of a very different kind of relationship is that between master and slave. The historical and anthropological interest in slavery has in recent years become the focus of much scholarly attention. Western scholars are trying to understand the history of slavery and the abolition of slavery from various perspectives including the nature of slavery in the Islamic world. The Qurʾān sees slavery as a social need but an ethical dilemma. Slaves were not legally competent but had rights and exercised a level of personal autonomy. The chapter on slavery examines a wide range of issues in connection with this ancient form of bondage between human beings. The jurists tried to stretch what rights the slave had, especially when boundaries became blurred through marriage or childbirth, whilst recognising that fundamentally slaves were the property of their masters.

The complexities of dietary preferences have surfaced in recent years as a reflection of social freedom and personal choice in most developed societies. But for most Muslims as well as Jews, scriptural prohibitions affect what is eaten and how it is eaten. The prohibition on eating the 'flesh of pig' and meat that has not been ritually slaughtered has become more public knowledge in recent years. Mālikī legal permission and prohibition across a wide range of texts show, however, that the juristic reflection on pig, blood, and slaughtered animals was far more lax than the more puritanical popular sentiment that seemingly affects Islamic dietary laws today. Believers see in the observance of dietary laws a practised piety but also a social and political identity in an increasingly

fragmented world. This religious consciousness is not something new but presents itself as a challenge in many Western societies. This is partly because it creates, amongst other things, a real tension between the rights of religious minorities and the legal status of animals in rights discourse.

In a similar vein, the prohibition on consuming alcohol is commonly perceived as a defining feature of Muslim piety. A close reading of Ibn Rushd reflects the gradual unfolding of this outright prohibition. The awareness of the appeal of drinking alcohol in society along with the reluctance to ban all intoxicants emerges in the legal tension between defining intoxicants and intoxicated. This chapter reveals how the jurists relented ultimately to preserving the ideal of personal piety where wine drinking, and indeed all intoxicants, were eventually deemed subversive to the moral order.

One of the most curious yet appealing aspects of teaching Islamic Studies in the context of religious studies is in the choice of theological and philosophical concepts that one chooses to teach. Very often these subject areas emerge as pertinent and attractive not only because of personal research interests but also because of the comparative studies dimension of one's professional context. I have found that my choice of the 'theological' subjects in this book has been influenced to a great extent by two factors. Firstly, by my personal journey as a Muslim who has lived for most of her life in the United Kingdom, and secondly, by the nature of the department in which I work. My colleagues are predominantly Christian theologians or biblical scholars. Conversations with non-Islamicists can take you into different areas of research and reflection. Furthermore, my own growing interest in Christian-Muslim 'dialogue', a term I use as an umbrella for the various kinds of interreligious engagement, has been crucial in inspiring the seeds of a scholarly interest in Christian theology. As a result, concepts such as salvation, redemption, love, and evil, concepts fundamental in Christian thought, became significant in a way they may not have been had I been a 'purist' of Islamic Studies only.

The chapters on evil and love are a reflection of this ongoing engagement and inspiration from Christian theology. I try to explore how these words have been understood in the Qur'an and Islamic thought as well as in Christian and Western thought. Evil and love can be seen as two sides of the same coin and central in much of Christian theology to the very idea of how human beings have responded to God and how God responds to human beings. Indeed, in comparing how the word love has been used in the New Testament to its mention in the Qur'an, many Christians argue that this difference is fundamental to the way the two religions understand the very nature of God himself. The two chapters are different in style from the *fiqh* chapters using the Qur'an rather than a legal text as the main textual base.



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Finally, the chapter on friendship arose out of my interest in current political and sociological issues around identity and religion. The bulk of this chapter explores attitudes to friendship in the classical world and through the belletristic literature of prominent Western scholars. This provides a framework for classical and modern for thinking about friendship. However, it seems to me that some Muslims in the West regard the question of friendship as a divisive, theological issue. It is important to see how the Qur'an and other literary disciplines have regarded friendship. Who we befriend today says as much about our practice and understanding of religious faith as it does about the meaning and significance of friendship in our lives; this is of personal, religious, and political relevance. In short, all these chapters convey a theme that has a present and personal interest for me but with which I engage through the lens of a past discourse:

Our historical consciousness is always filled with a variety of views in which the echo of the past is heard. It is present only in the multifariousness of such voices: this constitutes the nature of the tradition in which we want to share and have a part.<sup>12</sup>

<sup>12</sup> Hans-Georg Gadamer, *Truth and Method*, ed. and trans. Garrett Barden and John Cumming, London, 1975, pp. 252–3.



## Spoken, Intended, and Problematic Divorce in Ḥanafī *Fiqh*

When I began my doctoral studies, many of my parents' friends who were of Indian and Pakistani origin were intrigued by my subject of study. After all, the *Fatāwā 'Alamgīrī* was an impressive body of work, familiar by reputation to some of them, and it seemed appropriate in their view for a young Muslim woman to be studying marriage laws. However, when I also mentioned the subject of divorce (*ṭalāq*) to them, there was a distinct sense of disapproval on their part.<sup>1</sup> Clearly this was not an appropriate subject for study; studying marriage laws had a rationale, but what was the gain in studying divorce? For most of them, the sense of unease was tied to their cultural prejudices, the stigma around the very word divorce within the Islamic context. In studying divorce laws, was I thinking of divorce as an option in my own life? When I think back to those years, I cannot remember any of my parents' friends or any of my own relatives being divorced. Divorce was like a taboo word; it was hardly mentioned, and when the word did occasionally come up, the atmosphere was solemn. It was as if respectable people neither divorced nor talked of divorce.

Yet, the Qur'ān does talk of marriage and divorce, and marriage and divorce laws touch upon some of the most significant aspects of human relationships. Indeed, in the Qur'ān many of the verses that refer to women refer to them largely within the context of marriage and divorce. The verb *nakaḥa* and its derivatives are the closest terms used to encapsulate marriage and the different purposes of marriage. Fundamentally the term *nikāḥ* implies a legal contract between a man and a woman, a social institution and the physical act of sexual intercourse. Marriage is referred to in various contexts in the Qur'ān and the Qur'ān orders men to marry 'women of their choice' (Q 4:3) as an option. The Qur'ān affirms human sexual needs and sees marriage as a

<sup>1</sup> I use the word *ṭalāq* to mean 'divorce', although it will be clear from this chapter that divorce is not the exact meaning of *ṭalāq*.