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Uses of the Past:
Sharī'a and Gender in Legal Theory
and Practice in Palestine and Israel

Edited by
Irene Schneider and Nijmi Edres

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Cover illustration: Page of the book *al-Aḥkām al-Sharʿiyya fī al-Aḥwāl al-Shakhṣiyya*
by Hanafi scholar Muhammad Qadri Pasha.
(Photo: Nijmi Edres).



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Preface

Irene Schneider, Nijmi Edres

This edited volume is one of the outcomes of the HERA (Humanities in the European Research Area) project “Understanding *Sharī‘a*: Past Perfect, Imperfect Present” (US-PPIP).¹ The project, that started in November 2016 and will conclude in December 2018, is a collaborative one, involving four institutions: the Universities of Exeter, Leiden, Göttingen and Bergen. Financed by the European Union’s “*Horizon 2020 Research and Innovation Programme*”, it aims at understanding the pivotal role of historical precedent in the construction of contemporary Muslim thought and practice. As part of HERA projects on “Uses of the Past”, the US-PPIP project looks at how the imagined pasts of the Islamic Tradition (scholarly reference in legal texts to Quran and Sunna, the ‘example of the Prophet’ or to ‘established tradition or custom’) shape contemporary Muslim legal discourses around four main areas of investigation, which are dealt with by the four academic research teams in the project: violence (Exeter University, Prof. Robert Gleave and Dr. Omar Anchassi), custom (Universiteit Leiden, Prof. Léon Buskens and Dr. Mahmood Kooria), gender (Georg-August-Universität Göttingen, Prof. Irene Schneider and Dr. Nijmi Edres) and governance (Universitetet i Bergen, Prof. Knut Vikør and Dr. Eirik Hovden).

As part of the US-PPIP project, the research team in Göttingen aims at examining how Muslim jurists, legal theorists as well as judges and legal practitioners in Palestine and Israel use past notions of gender relations and supposedly ‘ideal’ roles to adapt to international standards (e.g. the Convention on the Elimination of All Forms of Discrimination against Women, which both Palestine and Israel have signed), to amend existing legal codes and to give legal decisions and develop ‘authentic’ Islamic role models. Moreover, research at Göttingen focuses on how the past of Muslim tradition is invoked when dealing with gender issues and family law and how it is used to support legal change and reform in contemporary Muslim discourse. How is the past used? Is it deployed to assert gender equality as an authentically ‘Islamic’ norm, or is it used to advocate traditional hierarchies?

Research in Göttingen focuses on Islamic law and *sharī‘a* courts in Palestine and Israel as main areas of investigation. Both cases offer a particularly interesting vantage point for analyzing ‘uses of the past’. Both states’ legal trajectories follow from

¹ For more information on the project see the project website at <http://www.usppip.eu/> (last access 31 July 2018).

developments in the late Ottoman and British Mandate (1922–1948) periods, and some legal frameworks of Israel and Palestine are characterized by an interesting overlapping of legislations and legal traditions. This poses unusual challenges to Palestinian Muslim legal theorists and practitioners about how to face modernity and social change, leading to an interesting debate among scholars of legal pluralism, legal anthropology and Muslim law. At the same time, the different political and social contextual frameworks in which Palestinian Muslims operate (living in Palestine, i.e. West Bank and Gaza Strip, or inside Israel) have a profound impact on legal debates and the practical solutions devised by judges and practitioners.

These challenges provided a rich basis for a conference on “Gender and *Shari‘a* in Muslim legal theory and practice” organized by Schneider and Edres, which offered the starting idea for this edited volume. The event, held at the University of Göttingen on 12–14 October 2017, aimed at gathering some of the most relevant voices in the scholarly debate on gender and Islamic law among Palestinian Muslims. The conference offered an occasion for academics in the field to meet and discuss their research as well as to develop their perspectives regarding ‘uses of the past’ and reference to Islamic tradition in Muslim modern legal thinking and practice around gender topics in the referred context. The conference revolved around several main questions: how do Muslim scholars and judges draw on their legal tradition to assess modern gender roles and deal with women’s rights? How are gender roles in the Prophet’s time related to the requirements of a society of the 21st century? And: how are traditional models and concepts of femininity and masculinity explored, debated, accepted or rejected in the contemporary debate about nationalism? What are the pressing problems in both countries with regard to the amendment of existing legislation? Which actors beside jurists – scholars as well as judges and practitioners – are involved in debating these topics?

The conference was attended by scholars from different countries, who were asked to contribute to the debate providing insights from their own areas of expertise. Islamic law and gender is a subject which has captured a great deal of scholarly attention during recent decades, yet it is often studied within disciplines that seldom speak to each other. It is for this reason that the conference brought together scholars from across these disciplinary divides, such as those working in the fields of Law, Religion, Legal-Anthropology and Sociology to deal with the subject matter.

The event also provided a forum for exchange between scholars and practitioners. Practitioners from Palestine and Israel contributed their own perspectives on ‘uses of the past’ in their daily work. Justice Iyad Zahalka, a judge on the Appeals Court Bench of the *shari‘a* Judiciary of Israel, and Justice Somoud Damiri, Prosecutor in Family Law Matters and one of the few female judges working in *shari‘a* courts, from Palestine, were invited to share their experiences of how ‘the past’ is used and recalled in texts and daily practice and to reflect on their own impact with regard to women and gender specifically. Justice Iyad Zahalka personally attended the conference in Göttingen. Justice Somoud Damiri, who did not join us, sent a paper that was read by Irene Schneider.

The idea of a dialogue between practitioners and scholars, with the aim of bringing different perspectives on the ‘uses of the past’ to the discussion, is reaffirmed in the present volume. After the aforementioned conference, all participants were invited to contribute to this volume and many of them did this. In addition, the volume includes a contribution by Lara-Lauren Goudarzi-Gereke, who was asked to share her insights on the 2013 Palestinian draft code of personal status. Unfortunately, due to time constraints, Justice Iyad Zahalka was unable to contribute to this volume. Justice Somoud Damiri submitted an edited version of her conference paper, which has been included in both Arabic and its English translation.

Our special thanks go to the translator Ghada Issa and to Claudia Winter and the proofreaders for their support in the process of editing and publication.

Göttingen, August 2018

The Editors

Introduction

Nijmi Edres, Monika Lindbekk and Irene Schneider

In 2018 all Muslim majority countries with the exception of Saudi Arabia have codified laws in the area of family law; in Saudi Arabia discussions to codify the *sharī'a* are ongoing. Methods such as *takhayyur* (selection of one legal opinion, of a school of law, over another) and *talfīq* (“combination and fusion of juristic opinions, and of elements therefrom, of diverse nature and provenance”),¹ together with administrative orders, reference to public interest (*maṣlaḥa*) and reinterpretation of textual sources (*ijtihād*), have been used as a juristic basis for accommodating *sharī'a* via statutory legislation.² The result has been a legislation which has been characterised in contrasting ways, either as a reformed and modernized *sharī'a* not substantially departing from tradition, or as emerging from a “process of detachment from the *sharī'a* and even its ‘secularization’”.³

Yet, Islamic law remains doubtless the frame of discussion in the majority if not in all Muslim states with regard to legal debates, legislative amendments and the political and social rights of men and women.⁴ The past is invoked, Quranic verses are quoted to argue in favor or against women’s rights and the example of the Prophet is appealed to to introduce a new means of marital dissolution. In short: classical Islamic Law is used in the context of present debates by different actors with different aims and objectives. Thus the question arises: how is the past used, by whom and to what ends? This was the central question of the Conference. A burgeoning literature in the last two decades has focused on Muslim family law, its reform, public debate as well as its adjudication in courts. This reflects a shift in paradigm from focus on rules in doctrinal works of Islamic jurisprudence (*fiqh*) to ‘law in context’, in application and in debates. The volume builds on these insights and adds to existing scholarship by approaching the subject of ‘uses of the past’ in Israel and Palestine from two angles: Muslim jurisprudence, and legal practice. Underlying these themes is a concern with how the past is harnessed with the aim of offering solutions to social problems in the domain of contemporary Muslim family law. This is a deeply political task involving the contestation of moral values which, as pointed out by Diamantides

1 Coulson 1964: 185-201; Vikør 2005.

2 Coulson 1964; Layish 2004.

3 Layish 2004: 92.

4 Buskens 2003; Moors 2003; Schneider 2010.

and Gearey,⁵ usually falls on the shoulders of those who are often seen as a-political men of law and religion. However, beside ‘men of law and religion’, societal discourse about law in Muslim-majority states includes in the 21st Century a wide range of different actors: the state apparatus itself – in the form of parliaments, government ministries and bureaus – and the civil society organizations in which especially women become active.⁶ At the same time, as is reflected in this volume, women have recently enjoyed greater access to the realm of the religious and political elites,⁷ which therefore surely cannot be seen as a monolithic block of ‘a-political men of law and religion’.

To ensure a strong thematic unity, contributors to this volume were asked to pay attention to the following questions: is the Islamic past used? And if so, how is it used? And: how are gender relations (re)constructed and adapted to the needs of society in the 21st Century? Are these norms constituted on the basis of equality or gender hierarchy?

While most existing scholarship focuses on the constraining role of Islam as it exists in the form of legal codes, this volume provides a new perspective by looking at the ways in which the Islamic legal tradition is invoked as a normative resource in modern argument by contemporary legal scholars and practitioners in the context of Palestine and Israel. The volume addresses areas of hybridity and overlap where new forms emerge and where old patterns are asserted against the pressures of socio-political and legal change. This approach is suitable to capture inner dynamism in Muslim thinking. There is little doubt that by drawing upon Quranic verses, *aḥādīth*, and medieval *fiqh*, contemporary actors contribute to adapting Islamic Law to legal modernity.

Second, this volume also explores the gender implications of discursive engagement with Islamic tradition in areas such as maintenance, divorce, and custody at the level of legislation and court practice. The interplay between old and new in the Muslim family has created a discursive space in which legal reasoning moves back and forth between past and present with a view to ensuring the ‘authentic’ character of the Muslim family, the protection of its traditions and moral values. In the perspective adopted, gender hierarchy does not arise mechanically from a pre-existing essence which is ‘Islamic law’. Instead, it is constructed and reproduced in everyday practices.⁸ At other times hierarchy is disrupted. Hence, discursive engagement with the past have yielded contradictory gender effects, variously emphasizing contradictory hierarchical and egalitarian discourses.

The regional focus of the volume is Israel and Palestine (the West-Bank and Gaza). Both, Israel and Palestine’s legal systems are the inheritors of the Ottoman and British political authorities that administered the region before 1948. In the 19th Century the

5 Diamantides & Gearey 2012.

6 See Buskens 2003 for Morocco, Schneider 2010 for Iran.

7 See, e.g., Künkler 2010; Sonneveld & Lindbekk 2017.

8 See also Lindbekk 2013, 2016; Shaham 2010.