The Good Muslim

Reflections on Classical Islamic Law and Theology

Mona Siddiqui

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In this unusual, thought-provoking, and beautifully written book, Mona Siddiqui reflects upon key themes in Islamic law or theology. She has selected these topics, which range through discussions about friendship, divorce, drunkenness, love, slavery, and ritual slaughter, in part because they are of particular interest to her, and in part because they reveal fascinating insights into Islamic ethics and the way in which arguments developed in medieval scholarly discourse. These pre-modern religious works contained a richness of thought, hesitation, and speculation on a wide range of topics, which were socially relevant but also presented intellectual challenges to the scholars for whom God's revelation could be understood in diverse ways. These subjects of course remain very relevant today, both for practicing Muslims and for scholars of Islamic law and religious studies, and the book shows just how these debates resonate in contemporary Islamic thought. Mona Siddiqui is an astute and articulate interpreter who relays complex ideas about the Islamic tradition with great clarity. These are important attributes for a book which, as the author acknowledges, charts her own journey through the classical texts and reflects upon how the principles expounded there have guided her own thinking and impacted on her teaching and research.

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In fondest memory of my friend Norman Calder

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Mona Siddiqui

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)[1]

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.[2] Written materials in the form of collections of data and 'lecture scripts' were

[1] Nikki R. Keddie, 'Symbol and Sincerity in Islam', *Studia Islamica*, 19, 1963, pp. 27–63.

[2] 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.'[3]

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)[4] 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 peceve an original, inner development of Muslim thought.[5] 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.[6] Philosophy developed

[3] Günther, 'Assessing the Sources', p. 78.

[4] 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.

[5] 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.

[6] See Binyamin Abrahamov, 'Theology', in Andrew Rippin, ed., *The Blackwell Companion to the Qur'ān*, Oxford: Blackwell, 2006.

under the ʿAbbāsids with the translations of Greek philosophy and science, and while it retained its non-Islamic origins, ʿAbbāsid 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 *sharīʿa* 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'.[7] 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 (*ijmāʿ*) 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.[8]

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

[7] Joseph Schacht, *An Introduction to Islamic Law*, Oxford: Clarendon Press, 1964, p. 1.
[8] 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'ān and *ḥadīth*? Furthermore, what exactly does Schacht mean when he refers to a 'living tradition'?[9] 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* (*furūʿ 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-Shāfiʿī (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, Shāfiʿī and Ḥanbalī, rather that it was the pupils of the founders who established the basic elements of the school (*madhhab*).[10] There is no real evidence of any historical consensus as to why only four schools of Sunnī law were accepted, but there were also Shīʿī schools such as the Zaydīs and Ithnā ʿAsharīs 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

[9] Zeʿev Maghen, 'Joseph Schacht and the Origins of "Popular Practice"', *Islamic Law and Society*, 10:3, 2003, pp. 276–347.

[10] 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.

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*.[11] 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

[11] 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.

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 *furūʿ* 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.

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 Qur'ān 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'ān 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'ān, 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'ān rather than a legal text as the main textual base.

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'ān 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.[12]

[12] Hans-Georg Gadamer, *Truth and Method*, ed. and trans. Garrett Barden and John Cumming, London, 1975, pp. 252–3.

1

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 ʿAlamgīrī* 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.[1] 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

[1] 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*.

desirable and permissible remedy for natural passions. There is a Qur'ānic verse that is explicit in urging restraint in circumstances, 'Let those who cannot afford to marry keep themselves chaste until God enriches them from his bounty.' A prophetic *ḥadīth* also emphasises the importance of marriage as a relationship for fulfilling sexual needs, 'Whoever is able to marry should marry for that will help him lower his gaze and guard his private parts [from committing illict sexual intercourse].'[2]

Sexual need, particularly male sexual desire, is considered a dominant reason for marrying as sexual desire is too powerful an impulse and too great a distraction from service to God. In his section on the benefits of marriage, al-Ghazālī writes that one of the benefits of marriage is that it protects against the 'dangers of lust' (*ghawā'il al-shahwa*).[3] In al-Ghazālī's view man has been created weak and cannot be patient when it comes to women. The sexual need can be so powerful that 'Fayāz b. Nājiḥ says when a man's penis stands [erect], a third of his intelligence goes away and some have said, a third of his faith [goes away].'[4] Al-Ghazālī refers to Junaid the Ṣūfī who is reported as having said, " 'Sexual intercourse is as necessary for me like food is necessary for me" and indeed the wife is strictly speaking nourishment and the reason for the purity of the heart.'[5]

Despite long discourses about marriage in theological works, marriage is encouraged though not obligatory in the Qur'ān. Prophetic *ḥadīth*s have however elevated this relationship to achieving the equivalent to one half of faith and the Prophet as saying that one who does not marry is not 'from him' [his followers].[6]

When one looks at the combined ethos of marriage in scriptural and legal texts, marriage is the basis for a legal, moral, and loving relationship between a man and woman or between a man and his wives. Although the primary consequence of a marriage contract is that sexual intercourse between the two becomes licit so they are protected from committing sexual sin, marriage is encouraged because it establishes and nurtures companionship and emotional ties between husband and wife. In this sense the marriage contract is not just a legal agreement but is also a solemn covenant (*mithāqun ghalidūn*

[2] Muḥammad ibn Ismā'īl Bukhārī, *Ṣaḥīḥ al-Bukhārī: The Translation of the Meanings of Ṣaḥīḥ al-Bukhārī, Kitāb al-nikāḥ*, vol. 7, Saudi Arabia: Maktaba Darrussalām, 1997, p. 20.

[3] Abū Ḥāmid Muḥammad b. Muḥammad al-Ghazālī, *Kitāb Adāb al-Nikāḥ* in *Iḥyā 'Ulūm al-Din*, vol. 2, Damascus: Ālim al-Kutub, 1992, p. 25. Further references to this work will appear in the footnote beginning with *nikāḥ*.

[4] Ghazālī, *Nikāḥ*, p. 26.

[5] Ghazālī, *Nikāḥ*, p. 26.

[6] Bukhārī, *Ṣaḥīḥ*, Kitāb al-Nikāḥ, p. 19.

Q 4:21), which presumes more than just sexual intimacy from the two parties. Perhaps the Qur'ānic verse that best encapsulates this is:

> And amongst his signs is that he created for you spouses from among yourselves in order that you may live in tranquillity with them and he has put love and mercy between yourselves. (Q 30:21)[7]

The word *mawadda* in this context denotes conjugal love, and conjugal love itself is present because God places it between men and women. Despite the recognition of marriage as a personal commitment between a man and woman to a contractual relationship, the Qur'ān contains very little narrative about marriage. Various verses refer to different aspects of marriage and divorce such as whom one can and cannot marry, the duties and obligations upon the spouses, and the various kinds of separation should a marriage come to an end. The Qur'ān is affirming of marriage but there is no idealisation of marriage nor any exposition as to whether love or any other emotional connection between the two people is required at the point of the actual contract.

Considering the importance of marriage as a social institution and as a foundation for righteous societies, the Qur'ān does not go into any procedural details about marriage as a civil agreement between two people, whereas procedures relating to divorce (*ṭalāq*) are mentioned several times. The primary purpose of a marriage contract is the recognition and legitimisation of sexual intercourse between the two sexes. This contract, however solemn, is one that can be broken, and there are different ways of severing the contract. A survey of Qur'ānic verses shows an acceptance of divorce as a consequence of dissent or conflict between the married couple. Just as God places love between the two in marriage, God can also reconcile (*yuwaffiq*) the two in conflict, but only if they are willing:

> If you fear dissension between the two of them, then appoint an arbiter from his family and an arbiter from her family; if they wish to make amends, God will reconcile them. (Q 4:35)

The Qur'ān provides procedures for divorce including terms and conditions for the equitable release of a woman from the contract. It regards separation between husband and wife as a necessary consequence in certain irreparable circumstances and does not condemn separation outright.

[7] Qur'ān translations are taken mainly from Yusuf Ali, *The Holy Qur'ān*, Beltsville, MD: Amana Publications, 2003. I have modified translations slightly where it was appropriate to simplify the language while trying to remain faithful to the wording of the original Arabic.

Entering the marriage contract and ending the marriage contract can only be done through a particular form of verbal agreement or declaration. Elsewhere, I have published various aspects of the marriage contract including an analysis of the form and sense of the spoken words that bring about marriage. Here I will look at words that affect *and* end the marriage contract by looking at three Ḥanafī works that stand out as major contributions to the rich field of Ḥanafī jurisprudence, namely, *Fatāwā ʿAlamgīrī*, known also as the *Fatāwā Hindīyya*, the *Hidāya*, and *Fatāwā Qāḍīkhān*. The *Hidāya* is a classic book of Islamic jurisprudence by Sheikh al-Islam Burhān al-Dīn ʿAlī b. Abū Bakr al-Marghīnānī (d. 1197).[8] It is a commentary on the *Jamiʿ al-Saghīr* and the *Mukhtaṣar* of Qudūrī and is considered a highly authoritative guide to *fiqh* amongst Muslims in Central Asia. The *Hidāya* was also adopted by the British government as the standard authority for its courts of civil justice. While many Ḥanafī works of jurisprudence bear the title '*fatāwā*', perhaps the most well-known are the *fatāwā* of the Transoxanian jurist Qāḍīkhān (d. 1196), known as *Fatāwā Qāḍīkhān*. The *Fatāwā ʿAlamgīrī* is a collection of judicial opinions compiled under the rule of the Moghul emperor Aurangzīb ʿAlamgīr during 1662–1672 CE. It covers six volumes and was put together by a group of legal scholars with the aim of achieving an authoritative body of Ḥanafī law.[9]

It is worth noting here that despite the use of the term *fatāwā* to describe two of the collections used here, both these books are predominantly works of *furūʿ al-fiqh*, to be part of the wider literary type of the *mabsūṭ*. Norman Calder is correct in claiming the following:

> The use of the term *fatāwā* in the titles of a lengthy sequence of works within the Ḥanafī tradition should not delude us into thinking that this type of literature is closer to the literary form of the fatwa, or the collection of fatwas. This is not the case. They are works of *furūʿ al-fiqh*, and the later works of the type – for example, the *Fatāwā Hindīyya* – have the literary characteristics of late *mabsūt*s (e.g., composition by juxtaposition of citations form earlier authorities) while lacking any noticeably 'practical' aspect.[10]

In *fiqh* works, contracts are defined as oral in nature: they come into being by being spoken rather than written. The word generally used for contracts is

[8] A new translation of the *Hidāya* by Imran Ahsan Khan Nyazee was published in 2006, by Amal Press. It is a translation of the original Arabic in two volumes.

[9] For a more detailed description of the *Fatāwā ʿAlamgīrī*, see Mona Siddiqui, 'The Juristic Expressions of the Rules of Marriage as Presented in the Fatāwā ʿAlamgīrī', unpublished Ph.D. thesis, Manchester University, 1992.

[10] Norman Calder, *Islamic Jurisprudence in the Classical Era*, ed. Colin Imber, Cambridge: Cambridge University Press, 2010, pp. 72–3.

ʿaqd but there is no theoretical discussion of the word contract in *fiqh* works. What we know from these works is that contracts were largely oral in formation so that what was spoken was fundamental in deciding whether a contract became valid (*ṣaḥīḥ*), defective (*fāsid*), or void (*bāṭil*). Thus the spoken word carried a primary significance in the making of a legally binding agreement. In this context the intention of the two parties to complete a contract is paramount. Without the intention to complete, the contract cannot be a bilateral agreement:

> The intention of a contract is completion whether it be a marriage contract or otherwise comprising the offer of one of two speakers followed by the acceptance of the other.[11]

The words of offer and acceptance where both or one are expressed in the past tense are the essential verbal elements for beginning and completing a contract:

> It takes place with offer and acceptance where both are expressed in the past or where one of them is expressed in the past and the other in the future like the imperative or the present.[12]

This agreement is not just a promise or intention, but is about the two parties entering into an agreement with consequences. This agreement assumes a priori the significance of performative utterances whereby to say something is to do something.[13] The utterance of the right words becomes synonymous with effecting a change of events. Performative sentences can be contractual or declaratory but what defines them, as Austin says, is that 'the issuing of the utterance is the performing of an action – it is not normally thought of as just saying something'.[14] Thus the person saying the words is also doing something at the same time. The contractual approach to marriage relies on the utterance of relatively simple formulae for any agreement to come into effect. Different tenses can be used including the imperative:

> And if the man should say "Marry yourself to me" and the woman accepts the contract, it is put into effect provided he did not intend future time by his words.[15]

[11] *Fath al-Qadīr* in Nizām Burhānpūr, *Fatāwā ʿAlamgīrī*, 3rd edition, vol. 3, Beirut, 1973, p. 270.
[12] Burhānpūr, *Fatāwā ʿAlamgīrī*, p. 270.
[13] John L. Austin, *How To Do Things with Words*, Oxford: Clarendon Press, 1965, pp. 6–7.
[14] Austin, *How To Do Things with Words*, pp. 6–7.
[15] Burhānpūr, *Fatāwā ʿAlamgīrī*, p. 270.

The intention to marry at any future time (*istiqāl*) cannot be the basis of a valid contract. Although a future tense may be used for a contract, a future sense renders it ineffective. This is discussed in the context of *muḍāf* and *muʿallaq* contracts. In Islamic law the concept of *muḍāf* is generally discussed in relation to divorce, but when connected to marriage it is a contract to which there are words added that imply future time:

> The *muḍāf* contract where a person should say, "I have married you to her tomorrow" is not valid.[16]

This utterance remains invalid because a future time is intended. A *muʿallaq* contract is one that is dependent on a condition which may or may not be in the future. In such a marriage if the condition has not yet been met and refers to an action or even in the future, the contract would be invalid. If the event has already passed, the contract is considered valid. It is perfection rather than intention of a deed that concerns the jurists. The example given:

> If a person whose daughter has been asked in marriage should falsely inform the applicant that he has already married her to such a one and say, "If I had not married her to him, I would have married her to your son." In such a case if the father of the son should thereupon accept in the presence of witnesses, and it should subsequently transpire that the daughter has not been married to anyone, the marriage would be valid.[17]

As the daughter has not actually been married to anyone else, the condition becomes irrelevant and the contract acquires validity because of the declaration in the past tense and the subsequent acceptance by the other party in the presence of witnesses. Although two parties have 'offered' and 'accepted', the daughter's presence or agreement to the declaration made by the father is not mentioned here.

Such declarations do not include issues of mental state or serious intention in the making of an offer or promise; what is important is to recognise that in the absence of any impediments, offer and acceptance would normally constitute a valid contract. Although other conditions such as *kafā'a* between the man and woman would normally be required as constituting the right conditions and circumstances for a valid contract, the verbal declaration is discussed as separate to the issue of right conditions. Ameer Ali distinguishes the verbal declaration from the 'conditions preceding and conditions

[16] Burhānpūr, *Fatāwā ʿAlamgīrī*, p. 272.
[17] Burhānpūr, *Fatāwā ʿAlamgīrī*, pp. 272–3.