Dissertation theses

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Classical juristic opinions in service of contemporary family law reform in the Hashemite Kingdom of Jordan

A PhD dissertation presented to the
Doctoral School of Linguistics
at
Pázmány Péter Catholic University,
Faculty of Humanities and Social Sciences

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2024

Main goals

The study is intended to contribute to the scholarly discourse surrounding the relationship between classical Islamic jurisprudence and modern personal status laws, and the Islamic character of the latter.

Statutes governing family law in modern majority-Muslim states are called personal status laws. In the legal systems of these states, typically, personal status is the only area of law the provisions of which are derived from Islamic šarīʿa. However, unlike the classical Islamic practice, where selecting the most appropriate legal opinion to be applied in court was left to the judge's discretion, personal status laws are laid down in Western-style positive legal framework.

The independent Jordanian state inherited the 1917 Law of Family Rights of the Ottoman Empire as its first positive family code. For the most part, this law codified the juristic opinions of the Ḥanafī school of Islamic jurisprudence.

The current law of the Kingdom presents a significant departure form this foundation. In the study, I have isolated 37 legal dilemmas where the operative 2019 law codifies a position that is different from those found in its antecedents. Where I have found sufficient evidence to support this, I propose which classical juristic opinion each reform provision may be traced back to.

Expected results

The study demonstrates that of the 37 legal dilemmas examined therein, in 34 cases, the Jordanian law adopts a solution that conforms to the opinion of a classical Muslim jurist. Even though the text of the law confirms that its provisions reflect the opinion of a specific *maḏhab*, the Jordanian legislature does not disclose their origins. The dissertation is the first monograph-length study written about the 2019 law, therefore reconstructing the classical juristic origins of its reform provisions is filling a gap in Western scholarly literature.

The up-until-now most recent work on the subject is Dörthe Engelcke's *Reforming Family Law* on the then-operative 2010 temporary law. Rather than focusing on the process of lawmaking, Dr. Engelcke's work examines the public discourse surrounding the law and the calls for reform coming from organizations representing various social groups within Jordan. As such, this study is meant to complement rather than challenge her findings.

Secondly, my expectation is that through the comprehensive examination of marriage and divorce law, the study may shed light on the trajectories of future reforms as envisioned by the current Jordanian judiciary.

Thirdly, and I consider this to be the central claim of the study: if the presumed high degree of conformity between the reform provisions and classical *fiqh* is substantiated, then I argue that this makes Jordanian personal status code a *fiqh* manual. By this, I mean that the code was formulated with deliberate attention paid to the boundaries set by the sum of opinions expressed in classical *fiqh*, engaging critically with their relevance and their usefulness in modern times. The legislative process was informed not by a mere superficial alignment with the broader principles of Islam, but by a substantive engagement with the textual corpora of applied Muslim legal scholarship.

I consider this claim to be polemical in nature. In modern Orientalist scholarship, it is not a uniformly accepted view that personal status laws constitute an organic continuation of Islamic legal sciences. The first reason contemporary researchers cite for this is the abolition of *Richterjustiz*, the principle of the plurality of applicable legal opinions.[1] In the first chapter, I argue that the designation of a single, uniformly applicable legal opinion is not fundamentally incompatible with Islamic law. Rather, the canonization of a certain opinion within the Islamic legal tradition emerged preceding the state's later standardization efforts, and at least partly independently from it.

Given that the authority to enact laws lies with the state, it is also brought into question whether Islamic legal sciences can play any role in modern legislation, or whether they should be viewed as a purely academic discipline with little influence over lawmaking.[2]

The thirty-seven legal problems presented here are meant to demonstrate that the reform measures incorporate opinions from classical legal works.

Structure and methods

The analytical part of the study is divided into five chapters. Where the Jordanian law deviates from this, it follows the partition of classical legal works.

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[1] Judith E. Tucker, *In the House of the Law: Gender and Islamic Law in Ottoman Syria and Palestine*. Berkeley, University of California 1998, 184-185.

[2] Rudolph Peters, "Chapter 28: From Jurists' Law to Statute Law or What Happens When the Shariʿa is Codified". In *Shariʿa, Justice and Legal Order*, (Leiden, The Netherlands: Brill, 2020), 543.

At the start of each chapter, the relevant articles of the Jordanian law are presented in the author's translation, followed by the majority opinion of the four Sunni legal schools on the matter at hand. Where the Jordanian law deviates from the preponderant Ḥanafī position, I will then the earliest classical legal opinion supporting the Jordanian position, along with the arguments made for an against that position in classical *fiqh*. Family law reform in Jordan is introduced through the promulgation of a new personal status code. Where the law has changed since the introduction of the Ottoman family code, I keep track of the provisions of previous editions of the code on the question at hand.

For identifying the classical antecedents of each reform measure, I endeavored to set up a mechanically repeatable workflow.

Since prior to the issuance of family codes, courts in the region tended to adjudicate according to the Ḥanafī law, my first point of comparison was an early Ḥanafī compendium. Where the operative law deviates from this, I then searched for opinion supporting the Jordanian position in early compendia of the other three Sunni schools.

If I did not find one, only then did I turn to later manuals, their commentaries and to fatwā collections. For late opinions from the Ḥanafī school, following the recommendation of the honorable judges of the Jordanian Dāʾirat Qāḍī al-Quḍā, I first examined the *Ḥāšiyya* of Ibn ʿĀbidīn and al-Ibyānī's commentary on Qadrī pasha's family law manual.

Parallel to this, I mapped out the development of the currently operative article by comparing the earlier Jordanian codes in the order of the issuance.

Fiqh **based reforms enacted post-canonization**

The extent of the interconnection between the personal status law and Islamic jurisprudence is perhaps best demonstrated by those articles in which newer statutes that overrode the 1917 law were amended according to the opinion of a specific classical jurist.

In Islamic law, *dahaš* is a technical term for a temporary mental state in which the affected person is incapable of pronouncing a repudiation, it has no other legal consequence. It was introduced to Jordanian law in 1951, albeit without a definition. The 1976 law, consistent with the Ḥanafī opinion, defined it as a temporary, non-recurring loss of discernment. The 2010 law then redefined *dahaš* as a change in behaviour typically induced by anger that is not accompanied by an impairment of mental faculties. This reform was in line with the juristic opinion of the XIVth century Ḥanbalī Ibn Qayyim. With this decision, the husband's hastily pronounced unilateral divorce could be voided without seeking a medical expert's opinion.

A couple may, with mutual agreement, request the dissolution of their marriage before an arbitration court. In such cases, the parties are awarded compensation proportionate to the established degree of harm.

Based on a Mālikī opinion, the 1917 law regulating the process only permitted dissolution through arbitration if the court had already rejected the wife's request for dissolution due to harm suffered within the marriage. The 1976 law permitted either spouse to initiate the process. Based on a Ḥanbalī example, the 2010 revision introduced the concept of moral harm, defined as a conduct not explicitly targeting the other spouse, but which, by violating public morals, nevertheless causes harm to him or her. At the same time, another amendment, based on a Mālikī concept, recognized hearsay testimonies as admissible on cases related to the dissolution of marriage.

Islamic law as well as the 1917 Ottoman law grants the wife the right to petition for the dissolution of her marriage contract due to the husband's impotence before the consummation of the marriage. Against the Ḥanafī position, the 1976 law awarded the same right to the husband as well. From 2010, in congruence with a *fatwā* by the Ḥanbalī Ibn Taymiyya, the healthy, fertile age wife may, starting from the fifth year of her marriage, request the dissolution of her marriage on the grounds of her husband's infertility.

While according to the classical majority view, the spouses are only entitled to sexual contact, Ibn Taymiyya and the Jordanian law both proclaim that wife is also entitled to the right of childbearing.

Re-islamizing personal status law

In 2010, two new divorce forms, familiar from Islamic law but previously unregulated by the secular law, and generally absent from the laws of majority Muslim countries, were introduced to the Jordanian personal status code.

Against the Ḥanafī opinion, *īlāʾ* and *ẓihār*, vows proclaiming the abandonment or the spurning of the wife, were regulated in such a way that as long as the husband demonstrates through action that he is willing to resume marital life with his wife, the marriage contract is not annulled automatically.

In classical Islamic law, *ḫulʿ* is a divorce form that is initiated by the wife but is contingent on the husband's consent. In 2001, King Abdullah II, by bypassing the Parliament, enacted a law on the so-called *judicial ḫulʿ*, which permitted the wife to obtain a *ḫulʿ* type divorce without

the husband's consent. The 2010 law abrogating *judicial ḫulʿ* preserved the wife's right to a unilateral divorce, but tied it to a mechanism borrowed from Ḥanbalīs and renamed it as *iftidāʾ*. Both of the above examples show that the lawmaker sought to maintain conformity to the *šarīʿa* not only when reforms were made necessary by the needs of the society as they are perceived by the lawmaker. Restoring *šarīʿa* conformity was a goal of the reforms in and of itself.

Non-conforming reforms

Regarding the three reform articles not supported by classical opinions, we can rely on the views of contemporary jurists and indirect argument borrowed from classical law.

Although classical jurists refrained from a blanket prohibition on minor marriages due to the Prophet's marriage to ʿĀʾiša, all schools took measures that financially disincentivized the marriage guardian from concluding such a marriage. Moreover, the Jordanian Wāṣif al-Bakrī argues that ʿĀʾiša's marriage cannot serve as a precedent for the permission of minor marriages, as it was concluded before the revelation of the Qurʾān.

While in classical law, the marriage of foster siblings is automatically void, the Jordanian law considers them to be merely faulty. Contemporary jurist Hāyil Dāwud has found the Jordanian position to be worthy of consideration due to the lack of consensus among classical jurists.

According to the most favorable classical position to the wife, a working wife only loses her right to alimony for the hours she spends outside the marital home. The Jordanian law granting full alimony to the working wife has been harshly criticized by contemporary Jordanian jurists, while some modern jurists from outside the Kingdom find it justifiable.

Results

According to the methodology of *uṣūl al-fiqh*, the positions taken in the Jordanian law may all be classified as *taḫayyur*, the adoption of an opinion from outside the school, or as *talfīq*, the synthesis of opinions from different schools on multiple sub-issues.

The Jordanian law re-interprets several basic concepts of Islamic law. As an example, *ṭalāq* – generally considered to be an unconditionally valid, potentially irrevocable utterance that takes effect regardless of the husband's intent – has become a revocable legal act requiring valid grounds and genuine intent. These differences are clear to all who reads the law side by side with a classical *fiqh* manual. However, this study also demonstrates that while reinterpreting

these concepts, the Jordanian lawmaker made a conscious intent to remain within the boundaries set by classical juristic opinions.

By comparing specific issues, I have also identified some general principles that have guided the reforms in the past fifteen years.

Amendments on the dissolution of the marriage all aim to preserve the possibility for the continuation of the marital life as long as the wife shows a willingness to this. The institution of compulsory marriage guardianship was preserved in such a way that the wife suffers no delay or diminished autonomy regarding her choice of a husband. The wife's opportunities to obtain a divorce have also been broadened, she may now do so unilaterally. However, these mechanisms are still not identical to the private acts that classical Islamic law reserves for the husband.

One unexpected finding of the study was the pronounced Ḥanbalī influence on the reforms enacted in the past 15 year. The only opinion borrowed from the school in the preceding decades is the banning of triple repudiations. By contrast, nearly half of the reforms enacted in 2010 and onwards can be tied to one way or another to one of three prominent Ḥanbalīs who diverged even from their own school's mainstream.

It is noteworthy that the three jurists, Ibn Qudāma, Ibn Taymiyya and Ibn Qayyim all hailed from the Levant and they are all cited favourably by the *Ḥāšiyyat Ibn ʿĀbidīn*, the cornerstone of late Ḥanafī jurisprudence. It is perhaps worth considering wether such a partiality could be interpreted as the deliberate cultivation of a distinctly *šāmī*, local Ḥanafī-Ḥanbalī legal tradition.

It is in no way debatable that laws are shaped by many different factors, of which which adherence to a classical, religious legal tradition is only one. However, this study demonstrates that conformity to fiqh – at least in the case of the Jordanian law – was one stated and successfully realized objective out of these.

Ignoring considerations for fiqh conformity can only lead to a partial and flawed understanding of lawmaking processes in modern majority Muslim states.

Relevant publications:

Introduction to Books on *Uṣūl al-Fiqh*, *Fiqh*, and *Manāqib al-Aʾimma* ; List of Books on Uṣūl al-Fiqh; List of Books on *Fiqh* and *Manāqib al-Aʾimma.*

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