

Introduction

When I was growing up, I often heard the story of my great-grandmother, Hamida Begum, and her life of veiling and seclusion. My great-uncle, Akhtar Hameed Khan, a prolific author, poet, and social scientist, writes about his mother extensively in his book *Komila se Aurangi Tak (From Komila to Aurangi)*.¹ He describes his mother as a kindhearted and self-sacrificing person. She was also an avid reader who was deeply attached to books and invested in the intellectual conversations of her time. She was familiar with the works of leading Muslim Indian intellectuals of her time, people like Muhammad Iqbal, Shibli Nomani, Abdul Halim Sharar, Muhammad Ali Jauhar, and Abul Kalam Azad.² Family lore has it that because she was well-educated in English, she often composed and edited her husband's administrative letters and memos. Her husband, a police inspector, often practiced his English with her so that she might correct his pronunciation.

She was married at a young age (fourteen) and, like many other Muslim Indian brides in the early twentieth century, she received a copy of the Qur'an and *Bihishti Zewar* (Heavenly ornaments) in her dowry.³ *Bihishti Zewar*, authored by the eminent South Asian scholar Maulana Ashraf Ali Thanvi, is one of the most influential and widely read Islamic texts in South Asia. Written to impart religious education to Muslim women, it focuses on a wide range of issues—from teaching reading, to the etiquette of letter writing, to basic Islamic legal rulings on rituals and ritual purity. The book also discusses legal rulings pertaining to marriage and divorce and explicitly endorses a social hierarchy in which the wife maintains a subordinate role in relation to the husband. My great-uncle explains that his mother was very earnest and sincere in living out the teachings of this book and devoted herself entirely to serving her husband and caring for her children.⁴

Like many other Muslim women from middle-class families in Northern India, she also practiced seclusion and refrained from going out in public. On the occasion that she did, she would not only cover her entire body and face but also travel in a covered palanquin or horse cart.⁵ My great-uncle recounts that as a child, he struggled to understand his mother's seclusion. He felt his mother's practice of seclusion rendered her dependent, because her mobility restrictions made her incapable of doing anything on her own. She could neither go out to the market to purchase things she needed nor travel on her own without a male family escort. Her son's perception of her as dependent was perhaps a sign of social changes well under way in the late nineteenth and early twentieth centuries that made a life of seclusion increasingly difficult. Subsequent generations of women in the family no longer practiced seclusion and went out in public without covering and did not cover their faces or their heads. For my great-grandmother, however, her covering and mobility restrictions were not a sign of dependency but instead of high social status. As a woman from a family of high status (*shurfa*), she had the right not to toil in public and to be provided for financially. You can see the difference in perception of mother and son in a conversation that my great-uncle recounts in his book. He writes that when the family moved to Meerut in 1920, they were neighbors with a Muslim family of cowherders. The women of this family appeared uncovered in public and, for my great-uncle, this was a striking difference from his mother's practice of seclusion. He saw these women as freer because they worked alongside the men of their families, bought and sold in the market, and interacted with men to whom they were not related. His mother clearly saw the lives of these women not as freedom but instead as a disadvantage. When he inquired why they could be out in public but his mother could not, she explained that seclusion was the practice of women of a high social status: "my mother used to tell me that these [uncovered women] are women of low birth [*choti zat*] whereas we are people of noble and high birth [*unchay aur sharif log*]." ⁶

This family story powerfully demonstrates the layers of complexity built into social hierarchies. The ways that class and gender intersect in it remind us that women, both historically and around the world, are not united in a shared oppression. My great-grandmother's life of seclusion, a sign of her class status, necessitated the existence of other women who had to emerge in public and perform the labor that secluded women could not do. Seclusion had its own disadvantages, of course. The inability to go out in public frequently or to travel without an escort meant that elite women had to rely on others to fulfill their needs. Tying seclusion to elite status, however, meant that elite women could become invested in their own confinement. I was reminded of this exchange between my great-uncle and his mother as I began studying Islamic law. When I first came across the legal rulings around veiling and mobility restrictions on Muslim women, I was struck by the distinctions made between free and enslaved women. Whereas Muslim jurists insisted that free elite women must cover their entire bodies, remain in seclusion,

and not interact with men outside their family, they simultaneously insisted that enslaved women could not cover like free women and their mobility could not be restricted. An enslaved person's primary role was to labor at the command of their enslavers. To restrict the enslaved woman's mobility by requiring veiling as well as seclusion would impinge on the enslaver's rights.

As I read these discussions, the picture drawn of my great-grandmother's life became a window into a world where there was no assumption that legal rulings need apply universally to people because of a shared identity or biology. My great-grandmother's words made clear that veiling and seclusion were practices not of *all* women but of *particular* women. Her assertion was not just a reflection of the social hierarchies of her time but was also borne out in Islamic legal discussions. The distinctions between different categories of women in Islamic law were not confined to matters of mobility and veiling alone. These distinctions can be found in other aspects of the law as well. Free adult women had to consent to a marriage, but a free child or an enslaved woman could be coerced. Similarly, the free adult wife could petition for a divorce, a right that was not granted to a free wife who was a minor until she reached legal majority or an enslaved wife until she was emancipated. As I moved from one aspect of the law to the other, those distinctions based on gender, age, enslavement, social status, religion, and so on appeared everywhere. This observation led me to the realization that gender is neither the sole nor the primary factor in determining an individual's legal status in Islamic law. In fact, neither "man" nor "woman" are functional categories in Islamic law. That is, if we seek to understand what factors shape an individual's legal status and subsequently their ability to claim rights and obligations, we cannot rely on a simple assessment of men as privileged and women as disadvantaged. This male-female binary fails to capture the complexity of how power and status function in legal discourse. This has implications not only for how we understand Islamic law historically, but it also challenges us in the contemporary moment to move beyond a simple gender binary (or other fixed and predetermined categories) in our assessments of power, privilege, and oppression.

The question of women's status in Islamic law has been a burning issue in modern Muslim discourse. From academic to confessional Muslim literature, the arguments about women's status has ranged from proclaiming the progressive nature of Islamic law to a critique of its patriarchal nature and the need for reform. Many modern Muslim thinkers have argued for the progressive aspects of Islamic law and its affirmation of women's rights, particularly in relation to Christianity and Western law. These thinkers largely claim that Islam has already granted women rights such as property ownership and political standing, rights that have only recently been instituted by Western nations. In accounting for gender-differentiated rulings, they argue that these differences reflect a complimentary relation between men and women that is divinely ordained and necessary to maintain social order and harmony.⁷ The other argument regarding women's status in

Islamic law is perhaps best articulated by the scholar of Islam and gender, Leila Ahmed. In her highly influential book *Women and Gender in Islam: Historical Roots of a Modern Debate*, Ahmed argues that Islam continued and reinforced an increasingly patriarchal shift that was already under way owing to the Greek, Roman, and Christian periods that preceded Islam.⁸ Ahmed's historical account insisted on a tension between an egalitarian impulse in Islam and the developing orthodoxy that was not only hierarchical but also decidedly patriarchal. For Ahmed, the status and autonomy of women were increasingly restricted as Islamic law developed and matured as a legal tradition:

Orthodox Islam, on the contrary, gave paramountcy, as it elaborated its understanding of Islam into laws, to the practices and regulations Islam had enunciated, paying little heed in elaborating laws regarding women to the religion's ethical teachings, particularly its emphasis on the spiritual equality of women and men and its injunctions to treat women fairly. As a result, the religion's emphasis on equality and the equal justice to which women were entitled has left little trace on the law as developed in the Abbasid age.⁹

Other scholars of gender and Islamic law turned to the positive legal tradition (*furu'*), where jurists engaged in the construction of legal rulings rather than abstract theoretical and methodological conversations, with an eye toward its gender assumptions. In doing so, they nuance Ahmed's historical narrative by interrogating women's legal status and its implications for how jurists developed rulings and institutions.¹⁰ These scholars have explored the juristic assumptions as well as the historical context that informed the law. In interrogating the legal construction of marriage and divorce, Kecia Ali notes the relation between gender and slavery as categories of legal disability in Islamic law.¹¹ These two categories, she argues, were not independent of one another, as marriage and enslavement were deeply connected in the juristic imagination about human relationships. Both enslaved people and women "were overlapping categories of legally inferior persons constructed against one another and in relation to one another—sometimes identified, sometimes distinguished."¹² Despite the interconnectedness of these two categories, Ali argues that only gender is a permanent and enduring impairment to legal subjecthood in Islamic law, whereas other impediments, such as enslavement and legal insanity, are temporary in nature.¹³ Like Ali, Baber Johansen also recognizes the multiple social hierarchies that functioned in shaping an individual's agency in social exchange (i.e., the exchange of noncommodities for goods or monetary values, typified by marriage).¹⁴ Speaking of the distinction between commercial (exchange of commodity for commodity) and social exchange, Johansen argues that while commercial exchange was accessible to all who were deemed to have rational capacity, an individual's admission into social exchange depended on their (or their family's) location within five social hierarchies: religion, gender, kinship, generation, and freedom versus enslavement.¹⁵ While noting these different hierarchies,

Johansen also makes an argument similar to Ali's—namely, that gender stood out as a permanent impediment: “the importance of the gender criterion outweighs that of the difference between free male persons and male slaves.”¹⁶

In her study of women and family in Islamic law, Judith Tucker argues that *woman* as legal subject is a matter of “doctrinal tension.”¹⁷ While women's agency in economic matters was largely similar to that of men, in other aspects of the law they were more constrained. She concludes that men's and women's legal status shifted depending on the area of the law. Thus, while women could be independent property owners, as a member of a family a woman was hampered in her agency by the interests of the family and a patriarchal society. This is particularly evident in the diminished legal agency of the woman in matters pertaining to marriage and divorce. Thus, while a woman may contract sales on her own behalf, she does not possess the unrestricted right to contract a marriage or a unilateral right to divorce.¹⁸ Depending on the legal arena, Tucker argues, the tension between the full and impaired legal agency of the woman was resolved by allowing the interests of a patriarchal society to supersede:

Woman as family member (whose marriage will affect her male relatives and therefore must be vetted by them) and Woman as part of patriarchal society (whose behavior must be policed and restricted, thereby limiting her knowledge of and activity in the public sphere) trump the Woman as equal legal subject.¹⁹

These different studies have given us critical insight into gender-differentiated rulings in Islamic law and the tension between gender and other social identities. Yet these scholars have not fully explored the impact these intersecting identities had on gender as a determining factor in women's legal agency in Islamic law. The resultant effect has been a stability of the category “woman” in historical studies of Islamic law, even if differences between women are recognized. As Marion Katz has argued, while gender has a central role in juristic thought, “gender and its attendant legal implications are deeply modulated by reference to other markers of personal and social status.”²⁰ In early Islamic legal discourse, she argues, “woman” was not a homogenous category but was mediated by other factors. Jurists thus assumed that women of different ages and statuses would take on different legal rulings rather than a consistent ruling by virtue of them being women.²¹

In order to more fully investigate the relationship between the law and women as recipients of the law, I attempt to elucidate the archeology of juristic assumptions regarding personhood, the legal subject, and male and female natures.²² This book contributes to this ongoing scholarly conversation by offering a theorization of how the legal status of individuals was developed at the intersection of different social identities, and what that tells us about gender as a reliable indicator of individuals' legal status. Intersectionality has been a critical framework for thinking about the ways in which these identities shape legal status. In theorizing how gender and other social hierarchies intersect in shaping the

individuals' legal status, I also offer a theorization of legal personhood in early Hanafi discourse.

GENDER AND LEGAL PERSONHOOD IN EARLY HANAFI LAW

This book makes a simple but bold claim that neither “woman” nor “man” are legal persons in early Hanafi law. An individual's legal capacity instead depended on a number of social identities, of which gender was just one. These identities included age, enslavement, religion, lineage, and social status, among many others. I focus on three in particular here: gender, enslavement, and age. Concentrating on this particular set of social identities allows me to carefully trace the way they intersected in impacting legal personhood. I argue that legal personhood in early Hanafi law is intersectional and relational, making gender both an unstable category and an unreliable predictor in determining an individual's legal status. My theorization of legal personhood in early Hanafi law gives us a picture of the complex social hierarchy that populated the legal world. Many social identities simultaneously constructed an individual's status as a subject of the law and impacted their legal rights and agency.

In order to understand the construction of legal personhood, I engage in a close reading of a number of case studies that pertain to gender-differentiated legal rulings. These case studies come from varied aspects of the law and cover a number of different legal topics, including sexual intercourse, same-sex sexual intercourse, marriage of children and enslaved people, and bodily covering and gendered prayer postures. Such an approach allows me to trace how gendered legal subjects were formed and reformed within each case and also to demonstrate the intersectional and relational nature of legal personhood. This permits me to reveal the inconsistencies in the law's stated goal regarding gendered norms and the instability and incoherence of the gendered legal subject.

In reading these case studies comparatively within one legal school rather than across different legal schools, I found that gender functioned at different registers in legal texts. At times, Hanafi jurists articulated what appears to be an essentialist notion of masculinity as active and femininity as passive. This normative construction of gender, however, did not entail that gender identification determined an individual's legal personhood. On the one hand, there are stated beliefs about the gendered dispositions of men and women; on the other hand, there is the impact on these gender assumptions when they intersect with different social identities. Noticing the multiple ways in which gender was articulated and functioned in legal thought, I decided to put these case studies in conversation with one another. The case-studies approach not only demonstrates how normative constructions of gender functioned in legal reasoning but also throws into relief the dissonances and ruptures in these stated conceptions of

gender. The gendered narrative shifted as gendered subjects were reformulated in individual case studies.

The book makes three main arguments regarding gender and legal personhood in early Hanafi law. The first is that legal personhood was constructed at the intersection of a number of social identities rather than gender alone. Comparing the different case studies shows that some legal persons in early Hanafi law were unable to fully inhabit gendered norms. Enslaved men and male minors, for example, could not occupy the autonomy or social dominance that was a critical element of masculinity. Similarly, while the free woman, the enslaved woman, and the female minor were all characterized by passivity, the free woman possessed greater autonomy and legal agency than other female subjects as well as enslaved men and male minors. In noting the inability of different male and female legal persons to occupy the normative constructions of masculinity and femininity, we can see that these gender constructions serve a hermeneutical role in justifying particular legal rulings but do not map onto the law's designation of sexed bodies. Thus, focusing on gender as the sole determiner of individuals' legal status in Hanafi law would give us an incomplete picture of the complexity of legal personhood.

The second argument of the book is that legal personhood is relational. The legal person of early Hanafi law was neither abstracted nor singular; that is to say, there was no single, abstracted, universal person that the law assumed as its subject. There were instead a multiplicity of legal persons who acquired their status at the intersection of their different social identities. Legal personhood, then, was not defined by the gender identity of the individual but instead by their relations; that is, the rights and obligations that pertain to the legal person were tied to the social relations in which the individual was embedded. For Hanafi jurists, legal persons did not exist outside their social relations. The individual in Islamic law is a fundamentally social being. The relational nature of legal personhood meant that an individual's legal agency was fluid and constantly shifting. Thus, an individual acquired different legal rights and obligations or exercised different legal agency depending on different aspects of the law—from commercial to criminal or familial aspects of the law. An individual's legal status also shifted depending on their relation to other individuals. As a minor child moved into adulthood or a free adult woman became a free wife, their legal personhood was reconstructed, either increasing or decreasing their legal agency. The focus on relations also allows us to see that a particular individual could occupy multiple constructions of legal personhood owing to their multiple relations. A free wife did not carry her legal impediment owing to her status as a wife in all aspects of the law. As an enslaver, for example, she could exercise power and dominion over other individuals despite herself being subject to her husband's dominion. Similarly, an enslaved man acquired dominion (albeit a limited one) over his wife once he became a husband, despite his status as an enslaved person. The relational nature of legal personhood meant that individuals did not have a singular construction of

legal personhood that followed them throughout the law. Depending on their particular relations, as well as the particular aspect of the law, individuals could exercise different modes of legal agency.

Given the intersectional and relational nature of legal personhood, the third argument of this book takes on the utility of gender as a category of analysis in the study of premodern Islam. The juristic discussions around gendered legal rulings reveal that gender was neither the sole nor the primary determiner of an individual's legal personhood. The normative construction of gender along the active/passive binary was also not an overarching logic of the law. Normative gender emerged at particular moments to justify a ruling that established the school's legal precedent. However, at other times this normative gender construction was set aside, or even overturned, when it intersected with other social identities or conflicted with particular juristic concerns. These observations point to the instability of gender as a determiner of legal status, as well as its instability as a signifier. Gender did not carry a fixed meaning as a legal incapacity; that is, being a female legal subject did not mean all females carried the same impairments to their legal capacity owing to their shared gender identity or sexed body. The instability of gender as a signifier also meant that gender did not have a fixed legal capacity when it intersected with other social identities. Instead, we will see that each social identity—gender, freedom/enslavement, and age—took on particular signification at their intersections. As Ash Geissinger has argued in relation to the Qur'anic exegetical tradition, there was no singular gender script but instead a multitude of gender constructions that Muslim exegetes drew on.²³ Fatima Seedat has similarly argued that femininity as a signifier in legal discourse is inconsistent. It is instead a “mobile concept that seldom coincides in all respects with any singular physical woman.”²⁴ These observations demonstrate that gender in early Hanafi law was not tied to some juristic idea of biological sex. Rather than demonstrating a binary of male and female subjects, early Hanafi law was populated by a diversity of gendered subjects who took on a number of legal roles.

MAPPING GENDER AND SEX IN EARLY HANAFI LAW

A primary concern of this book is an investigation into gender and its role in constructing an individual's legal personhood. As such, both the terms “gender” and “sexed body,” as I use them in this book, require clarification. Scholarship on gender in the premodern Islamicate context has made critical interventions in the field of Islamic studies, a male-dominated field that is largely inattentive to gendered power dynamics. In employing gender as a category of analysis, however, this body of scholarship has largely left their own assumptions about gender—and particularly the universality and naturalness of the gender binary—unexamined. The resultant effect of such an approach has not only made invisible the diversity of gender and sexed bodies in the premodern world but has also naturalized the

very binary construction that scholars seek to dismantle. Gender has been interrogated alongside categories like slavery and social status; however, the relation between these identities and how they intersect has not been adequately considered or theorized. Given this, scholars largely analyze whether gender trumps or is subsumed by these other categories.²⁵

An increasing body of scholarship has challenged this binary conception of gender in the premodern Islamicate context. The studies cited below have looked at homoerotic relations, intersexuality, and nonbinary gender (those neither masculine nor feminine) to demonstrate the diversity of sexualities and gendered and sexed bodies that characterized the premodern world. The work of Everett Rowson, for example, has demonstrated that gender roles were not tied to sexed bodies in the premodern Middle East but instead to the performance of a gender role in public.²⁶ As such, the presence of men who appeared feminine (and subsequently took on the submissive role in sex with adult men) was tolerated because they had abandoned their position of dominance. The dissonance between the sexed body and the publicly performed gender role was of little consequence as long as the sex/gender/sexuality matrix aligned.²⁷ Dror Ze'evi's work on sexual discourses in the Ottoman Middle East also highlights the recognition of human sexual and gender diversity.²⁸ He argues that Ottoman medical treatises saw the human body as a one-sex body in which the sex organs identified as female were seen as inversions of the male. The difference between male and female, then, was about quantity rather than a diametrical opposition. In relation to sexual diversity, both Dror Ze'evi and Khaled el-Rouayheb have argued that the premodern Middle East had no conception of a binary that would distinguish people based on the object of their sexual desire (i.e., heterosexuality vs. homosexuality).²⁹ Indira Gesink's recent work extends the conversation on gender and sex in Islamic history by focusing on intersexuality in Islamic law and medical discourse.³⁰ Through a discussion of intersex people (*khuntha*) in Islamic legal and medical discourses, Gesink demonstrates that these discourses recognized sex ambiguity and were willing to consider and accommodate nonbinary sex embodiments.

This scholarship illustrates the sexual and gender diversity of premodern Islamicate societies and has been critical in demonstrating the complex nature of the historical relation between gender and the sexed body. Building on these studies, this book further problematizes the relation between gender and the sexed body by examining how the law imagined the relation between gender identity and corresponding gender roles—that is, did the law expect all individuals with a shared legal gender to perform similar gender roles? In exploring this connection, the book interrogates whether the law insisted on a congruence between the legally ascribed gender and the gender role that an individual was expected to perform. I argue that despite the law's recognition of intersexuality (*khuntha*) and nonbinary genders (*mukhannath*), it both recognized and relied on an idea of a male and female sexed body in certain rulings; that is, they established male and female as

two polar ends, with other genders sitting in a liminal space in between. This duality, however, did not mean that either man or woman were stable categories. They were instead disrupted by the intersection of gender with other social identities. In that sense, my reading of early Hanafi law is informed by Geissinger's argument that premodern Qur'anic exegetes constructed, negotiated, and reconstructed gender, demonstrating the fractured nature of these gendered norms.³¹

As I discuss in chapter 1, early Hanafi law certainly spoke of gender in dualistic language in some texts where jurists articulated masculinity as active, self-determining, and socially dominant. Femininity, its foil, was then constructed as passive and subordinate. This normative construction of gender, however, gets disrupted by other social identities like enslavement, age, and social status. Manuela Marin urges historians to look beyond any absolute category of "woman" in the Islamic textual tradition, arguing that even if Muslim authors articulate an essential category of "woman," historians must consider the many differences between categories of women that were also drawn out in these texts.³² Speaking to Islamic law in particular, Marion Katz has argued that "woman" does not act as a monolithic or stable category in legal discourse.³³ Judith Tucker has similarly noted that women's legal subjecthood shifts depending on the different areas of Islamic law.³⁴ This book likewise takes an intersectional approach to demonstrate that juristic articulations of a normative gender construction were disrupted when they converged with different social identities. That is, the normative constructions of masculinity and femininity that were sometimes expressed by jurists were not seen as an essential aspect of being identified as a man or woman.³⁵ What this reveals, then, is that premodern Islamic law's recognition of sex and gender diversity was not limited to intersexuality and nonbinary gender alone. Even within the categories of male and female, the jurists conceptualized a diversity of gender roles. Legal identification of male and female did not correspond to an essentialized idea of gender but instead marked multiple constructions of masculinity and femininity. This diversity makes apparent that there is no congruence between gender identities and gender roles in early Hanafi law. Rather, the law considered a number of intersecting social identities in establishing the gender role that an individual was expected to perform.

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A brief note on language and terminology: throughout the book, I use the terms "sex," "sexed bodies," and "gender." I recognize that these terms have long been complicated. Recent literature has made a compelling argument for the instability of the human body and the constructed nature of both gender and sex.³⁶ The book follows this genealogy of critique by showing the instability of these categories in a historic tradition like Islamic law. It is important, however, to recognize that the contemporary distinction between sex/gender emerges from a history and genealogy that is not shared by the early Hanafi legal discourse that is the subject of

this book.³⁷ Thus, I use the terms “sexed bodies” and “gender identity” to reflect the conversations that I encounter in the works of early Hanafi legal jurists who are my interlocutors in this book. My intent in using these terms is not to make a normative claim about a biological reality of sex or gender but instead to reflect early Hanafi legal discourse.

I also use the terms “sex” and “gender” interchangeably here because I find that early Hanafi jurists did not distinguish between them. While the terms “male” (*dhakar*) and “female” (*untha*) certainly appear in legal discourse, there is no master category of sex. The term *jins*, which has come to mean sex and sexual desire in contemporary Arabic, did not carry the same meaning in early Hanafi legal discourse. When early Hanafi jurists used the term *jins*, it meant “genus,” not a biological sex.³⁸ As I note in chapter 2, where early Hanafi jurists do employ the term *jins* in relation to sexual duality, they are not speaking of a biological essence but instead about a difference in legal status. The genus distinction also depends on the particular subject or ruling under discussion rather than a master category reflected across the various gender-differentiated rulings in Islamic law. At times, early Hanafi jurists assumed a correspondence between the body and gender roles. At other times, they recognized the instability of the body as a marker of gender and often ascribed a number of gender roles to bodies that were sexed the same in the law because of the intersection of a number of social identities. There is thus no distinction between sex and gender in early Hanafi legal discourse. While Muslim jurists recognized both the nuances and complexity of reading the human body for stable markers of sex, they did have a notion of the sexed body that was used to assign gender identity to the individual. Their recognition of intersexuality was always within a homosocial social order that necessitated the sexing of most individuals into male and female. I thus use the language of gender and the sexed body to reflect the assumption of Muslim jurists.

WHY LOOK AT LEGAL PERSONHOOD IN POSITIVE LAW?

This book examines how individuals were assigned legal rights and obligations in early Islamic law. As Judith Butler has argued, the subject of the law does not stand *before* the law but is instead *produced* by the law itself; this subject is then presented as natural in order to conceal the process of subjectivation by which this subject was produced: “Juridical power inevitably ‘produces’ what it claims merely to represent . . . In effect, the law produces and then conceals the notion of ‘a subject before the law’ in order to invoke that discursive formation as a naturalized foundational premise that subsequently legitimates the law’s own regulatory hegemony.”³⁹ To understand, then, how the law determines individuals’ legal capacity and agency, we must consider not just what rights and obligations are granted to the individual but instead how the granting of rights and obligations, or indeed exclusion from them, produces a subject of the law.

The idea that the legal person is a creation of the law is a central inquiry of feminist jurisprudence as well. Legal theorist Nagaire Naffine has argued that a feminist critic of law must analyze the very conceptual categories that the law uses to authorize itself. Such an approach allows feminists to step away from critique centered on individual male bias or the desire to maintain patriarchal privilege and instead consider the fundamental priorities and orientations of the law.⁴⁰ Interrogating the law's imagination of the abstracted legal person, Naffine argues, is critical for challenging the law's presentation of itself as objective, impartial, and fair. While Naffine is speaking to feminist legal theorists' critique of the modern liberal legal system, it offers important insights for feminist critiques of Islamic law. As Kecia Ali has argued, rather than focusing on what legal rulings might be beneficial for women, feminist critiques of Islamic law need to interrogate its internal logic and question its foundational assumptions regarding gender.⁴¹ While Ali is attuned to the gendered logic of Islamic law, I read her assertion as one that ties to Naffine's argument about the necessity of interrogating the very conceptual categories that organize legal discourse. In analyzing the construction of the legal person in early Hanafi discourse, this book asks who are the subjects of law imagined by Hanafi jurists? How are these individuals constructed as legal persons? What factors do the jurists consider in assigning rights and obligations to individuals? And lastly, what role does gender play in the construction of different legal persons?

The question of legal personhood in Islamic law is a complicated one that has not been extensively explored. While there are a few articles that look at legal capacity (*ahliyya*) in Islamic law,⁴² to date only Seedat has offered a careful theorization of the construction of the female subject of law.⁴³ I contend, however, that a focus on legal personhood is critical if we are to understand how individuals acquired legal rights and obligations that have been the subject of significant scholarly inquiry in the past several decades.

Perhaps the closest discussions on legal personhood in Islamic law are those related to legal capacity (*ahliyya*) that often appear in legal theoretical works (*usul al-fiqh*). In Islamic law, all people, by virtue of their humanity, are obligated to follow God's law (the creation of this obligation indicating their legal capacity). The Hanafis in particular divide legal agency into the agency of obligation (*ahliyat al-wujub*) and agency to act (*ahliyat al-ada'*).⁴⁴ This distinction allows them to grant legal agency to all human actors (agency of obligation) while maintaining that not all individuals are full legal agents in terms of acting on their obligation.

The Qur'an describes this covenant in the following verses:

And whenever thy Sustainer brings forth their offspring from the loins of the children of Adam, He [thus] calls upon them to bear witness about themselves: "Am I not your Sustainer?"—to which they answer: "Yea, indeed, we do bear witness thereto!" [Of this We remind you,] lest you say on the Day of Resurrection, "Verily, we

were unaware of this”; (172) or lest you say, “Verily, it was but our forefathers who, in times gone by, began to ascribe divinity to other beings beside God; and we were but their late offspring: wilt Thou, then, destroy us for the doings of those inventors of falsehoods?”⁴⁵

For Muslim jurists, this covenant conferred on all humanity the obligation to obey God’s law. This capacity was granted to each individual at the point of ensoulment (believed to happen at forty or one hundred and twenty days) and ended at a person’s death. While all humans, by virtue of their humanity, carry the capacity of acquiring this obligation, it is the capacity of execution that requires an individual to follow the divine law. This capacity of execution is acquired in stages and can be hindered by different impediments (*‘awarid*). Thus, this distinction between the capacity of obligation and the capacity to execute those obligations allowed jurists to recognize the full humanity of all individuals—a conception embedded in the primordial covenant—while granting them differentiated legal capacities.

Legal capacity was of particular concern because it determined who was morally and legally accountable for an individual’s actions. A full legal agent in legal theoretical texts is understood to be one who is free, sane, and of legal majority—that is, after the onset of puberty. The ability to reason is a fundamental aspect of acquiring legal capacity of execution. In *Usul al-Fiqh al-Islami*,⁴⁶ Wahba al-Zuhayli argues that a child acquires a partial legal capacity of execution when they reach the age of discernment (*tamyiz*).⁴⁷ At this age, the child is not required to perform any of the obligatory rituals and may not engage in any financial transactions that carry financial risk, regardless of their guardian’s approval. The child may, however, engage in financial exchanges that are of benefit to them as long as the transactions are ratified by the guardian. This diminished legal capacity ends at puberty, when the child acquires full legal capacity of execution.⁴⁸ The full capacity of execution, however, can also be hindered by impediments that are both natural (*samawi*) and acquired (*muktasib*). Among the impediments beyond an individual’s control are insanity, legal minority, unconsciousness, forgetfulness, illness, enslavement, menstruation, lochia, and death. Acquired impediments include ignorance, drunkenness, jest, foolishness, travel, and coercion.⁴⁹

The juristic discussions on legal capacity that I describe below speak in the abstract about the particular factors of impediments that might hinder or impair an individual’s ability to act. This book’s interrogation into legal personhood is in conversation with the juristic category of *ahliyya* but also considers how these discussions functioned in the creation of a legal person. I am particularly interested in the role that gender played in an individual’s legal status. Interestingly, Hanafi discussions on *ahliyya* do not consider “femaleness” to be a hindrance to an individual’s legal capacity. While legal minors, enslaved individuals, and the legally insane were categories of people who had impaired legal capacity, there is no comparable category of “female” impairment. As Seedat has argued, legal theoretical

discussions do not differentiate between male and female legal capacity.⁵⁰ The absence of femininity as a legal incapacity in legal theoretical texts, however, should not lead us to conclude that the legal person in Islamic law is ungendered. To fully understand the role of gender in the construction of the legal person in Islamic law, we must also consider positive law (*furu'*), where jurists engaged in the construction of legal rulings rather than abstract theoretical and methodological conversations. Much more voluminous than theoretical texts, positive legal texts are also a rich repository for mining the religious and social ideals held by the jurists.⁵¹ Positive law gives us a rich picture of how jurists constructed individuals' legal rights and obligations. As the case studies explored in this book demonstrate, however, gender's role cannot be understood apart from the numerous other social identities that jurists were attuned to. It is only through tracing the interactions between these different social identities and how they impacted legal capacity that we can begin to understand how Hanafi law produced its subjects.

READING ISLAMIC LAW THROUGH INTERSECTIONALITY

My reading of Islamic law is deeply informed by intersectional theory, which has given me a language and framing for the construction of social hierarchy through multiple intersecting social identities. The scholarship of Kimberlé Crenshaw, Patricia Hill Collins, and Jennifer Nash fundamentally reshaped the lens through which I read for gender in Islamic law.⁵² What Crenshaw describes as a single-axis approach—one in which subordination and discrimination are analyzed through a single category such as gender or race⁵³—fails to account for the experiences of individuals (in her study, Black women) and their subordination when it sits at the intersection of different categories. Crenshaw proposes an intersectional lens for analyzing how different systems of power interlock and intersect, offering the metaphor of traffic at a four-way intersection. If we think about discrimination as traffic, then we can recognize that an accident at an intersection will likely be due to cars travelling from many different directions rather than from just one. In this manner, if we analyze discrimination intersectionally, then we understand that an incident of discrimination can be the result of multiple intersecting factors rather than one alone.

Since the beginning of the twenty-first century, intersectionality has been taken up by scholars across different fields, as well as by activists and policy advocates. The term has also been the subject of significant controversy, with many articulating critiques of intersectionality in what Nash calls the “intersectionality wars.”⁵⁴ Despite its prominence, however, there is little coherence around what the term means and what constitutes an intersectional analysis. For the purposes of this book, I use Patricia Hill Collins's and Sirma Bilge's definition of intersectionality:

Intersectionality investigates how intersecting power relations influence social relations across diverse societies as well as individual experiences in everyday life. As an analytical tool, intersectionality views categories of race, class, gender, sexuality, class [*sic*], nation, ability, ethnicity, and age—among others—as interrelated and mutually shaping one another. Intersectionality is a way of understanding and explaining complexity in the world, in people, and in human experiences.⁵⁵

For Collins and Bilge, intersectionality's core insight is that the vulnerabilities of individuals and communities are created through different power relations that function together and build on each other.⁵⁶ As a tool for critical inquiry, intersectionality is useful for thinking about how Islamic law makes determinations about the legal capacity and agency of individuals.

I recognize that intersectionality most directly addresses the intersections of the categories of race and gender in modern scholarship. Yet intersectionality theory's critique of White feminism's sole attention to gender as the central category through which women experience discrimination has opened up my own readings of Islamic law. Rather than thinking about gender as the sole or even primary factor in determining legal personhood, an intersectional analysis gives us a complex picture of the multiplicity of social identities at play in the granting or curtailing of legal agency. Intersectionality is also open-ended with regard to the social identities through which power functions. This flexibility provides a space to attend to the particular social identities that create vulnerabilities and form the nexus through which power is exercised.

Beyond the intersection of different social identities, intersectionality has also been a helpful framework for "thinking about the problem of sameness and difference in relation to power."⁵⁷ If we consider, for example, the enslaved adult woman as a legal person in Islamic law, we can see that her vulnerabilities and the constraints on her legal personhood cannot be understood through femininity alone. Both the free adult woman and the enslaved adult man had varying levels of legal autonomy in relation to one another, but both had greater legal autonomy than the enslaved woman. Thinking intersectionally allows us not only to note the relation between age, gender, and enslavement in the construction of the legal personhood of the enslaved adult woman but also to recognize that the intersection produces a new subjectivity altogether.

As a metaphor, intersectionality allows me to chart the complex social world created by Hanafi jurists. As we see throughout the book, the legal world is populated by a multitude of legal persons existing at the intersection of a variety of social identities. If we consider the identities of gender, age, and enslavement alone, we can observe the proliferation of different legal persons who are created and recreated as various identities converge. The legal personhood of an enslaved adult woman is different from that of an enslaved female child. Similarly, the legal personhood of a free adult woman differs from that of an enslaved adult man or a free male child. The identities of age, enslavement, freedom, and

gender are also interdependent and mutually constructed. Enslaved status is worked out in relation to freedom, legal majority in relation to legal minority, and masculinity in relation to femininity. Employing an intersectional lens allows us to see the complex legal terrain in which legal persons were both produced and recognized. Such a complex and vast landscape of interconnected social relations can be mapped out and conceptualized through the metaphor of the intersection. As Patricia Hill Collins has noted, “using intersectionality as a metaphor provided a ready-made yet open-ended framework for making meaning of the social world.”⁵⁸

One might ask whether thinking of gender, age, and enslavement as social identities is an anachronism. Can we speak of identities in the construction of subjects in the premodern past? This question has gotten a lot of attention in the history of sexuality, a conversation animated by Michel Foucault’s claim that sexual identity is a modern construction.⁵⁹ Identity is also an important dimension of intersectionality, given the latter’s attention to how structures make identities the vehicles for exercising power. As Stuart Hall has argued, identity is neither a fixed attribute nor an unchanging essence of an inner self; identity is instead “a constantly shifting process of *positioning*.”⁶⁰ Thought of in this way, identity is not something that we are but instead what we are in the process of becoming. Intersectionality’s understanding of identity as both intersecting, performative, and constantly shifting has been helpful for me in mapping the shifting landscape of social identities in the construction of legal personhood.⁶¹ In the context of early Hanafi legal discourse, one notes that legal rights and obligations are defined through collective social identities rather than through or for an abstracted individual. To put it more clearly, a person acquires legal recognition not as an abstracted and universal individual (as with a liberal legal system) but as free adult men, enslaved adult women, free female children, and so on. My understanding of social identities as they play out in constructing legal personhood in Hanafi law is thus not a static and unchanging notion of identity but one that is shaped and reshaped by social relations. As an individual’s position in the life cycle shifted from legal minority to legal majority or from enslavement to freedom, that individual acquired different legal capacities, since these social identities were not essential or reflective of an inner self but instead relational and constantly shifting.

SOURCES AND PERIODIZATION

As I began my research looking at gender and other social hierarchies that affected legal personhood, I found myself focusing on many different aspects of the law. As I tracked cases where jurists were adjudicating legal personhood, I moved from the books on marriage and divorce to those on criminal law and rituals. In tracing these discussions, I found it most effective to focus on a single legal school in order to adequately address the depth and breadth of these conversations across

the legal texts. I have therefore focused specifically on the Hanafi school's construction of legal personhood in Islamic law.

Much of the feminist scholarship on Islamic law has taken a comparative approach across the different Sunni legal schools rather than focusing on a single one, allowing scholars to provide a close reading of different aspects of the law. Such an approach has given us a detailed account of gender norms at play in legal discourse. For instance, Kecia Ali's study looks at the construction of marriage in the formative years of the Sunni legal tradition.⁶² Her comparative approach demonstrates that despite their methodological differences, the three major Sunni legal schools shared a gendered cosmology that shaped their understanding of marriage. She additionally shows that these legal schools used slavery as a model for thinking about the marriage relationship. While they might differ on particular points about the rights and obligations of spouses within the marriage or on matters of divorce, they did not differ in their fundamental approach to the marital relationship. Carolyn Baugh similarly looks at three major Sunni legal schools in the formative period of Islamic law, tracing the development of legal discourse on the marriage of minors.⁶³ Marion Katz's work offers a comparative, longitudinal study that explores the view of Sunni jurists on women's mosque attendance. She demonstrates that despite jurists' shared suspicion regarding women's nature and right to mobility, they did not always share the same notion of gender. Katz contends that early jurists distinguished between younger and older women, restricting the mobility of younger women more severely than that of older women.⁶⁴ Judith Tucker looks at both Sunni and Shi'a legal discourse, arguing that Muslim jurists constructed woman as legal subject differently depending on the aspect of the law.⁶⁵ Hina Azam's study of sexual violation in Islamic law compares the Hanafi and Maliki legal schools, showing how the Islamic legal tradition combined older Near Eastern proprietary ethics regarding female sexuality with the emerging theocentric ethics upheld by the Qur'an and the Prophetic example. Her comparative approach allows us to see how these two competing ethical approaches to female sexuality led to differing attitudes towards regulating and punishing sexual violation.

The comparative approach of these different scholarly studies has offered us a rich understanding of gender across different legal schools, and shared juristic attitudes toward women but also places of divergence that could lead to very different legal rulings. This book also takes a comparative approach; but, rather than focusing on multiple legal schools, I compare cases across different aspects of a single school. Such an approach allows me to explore how jurists made different determinations around gender when confronted with different sets of social identities and to note dissonances and instabilities in the juristic construction of gender across varied aspects of the law.

I have also focused this study temporally, looking at Hanafi legal texts from the early formative period to the end of the classical period—that is, the eighth to twelfth centuries. The question of periodization is always a complicated one for

historians, with significant disagreement on the movement from one period of development to another. The same is true in the study of Islamic law. While some scholars have argued that the formative period of the Hanafi legal school ended in the early eleventh century, others have placed it almost a century earlier.⁶⁶ Despite these disagreements about the precise dates for shifts in legal discourse, we can see that the early centuries in the development of Islamic law were marked by significant diversity of legal opinions but no clearly established legal schools. By the early tenth century, however, the legal schools had begun to form; and, by the end of the century, the constitutive features of Islamic law had emerged.⁶⁷ At this point, the doctrines of the legal schools were systematized, methods clarified, and coherency given greater importance.⁶⁸ Talal al-Azem has argued that the eleventh to the thirteenth centuries in the Hanafi legal school were a period of *tarjih*,⁶⁹ a process by which the legal rules of the particular school were determined. The jurists between the tenth and twelfth centuries focused their attention on the justification of the school's already developed legal doctrine.⁷⁰ Speaking to the Hanafi legal school in particular, the early period began with the writings of the eponymous Abu Hanifa's two main disciples, Muhammad b. al-Hasan al-Shaybani (d. 189/804) and Abu Yusuf Ya'qub (d. 182/798). These were followed by a number of prominent books in the formative period, among them the writings of the Hanafi jurists Abu Ja'far al-Tahawi (d. 321/933), Abu Bakr al-Jassas (d. 370/981), and Abu'l-Layth al-Samarqandi (d. 373–75/983–5). The classical period in the development of the Hanafi legal school saw greater proliferation of writings by jurists such as al-Quduri (d. 429/1037), 'Ala' al-Din al-Samarqandi (d. 539/1144), Muhammad b. Ahmad al-Sarakhsi (d. 483/1090), 'Ala' al-Din al-Kasani (d. 587/1191), and Qadi Khan (d. 592/1196); it ended with Burhan al-Din al-Marghinani's (d. 593/1197) *al-Hidaya*, a book that continues to have significant prominence for contemporary Hanafi jurists.

For this study, I focus on the legal texts written by these prominent jurists in this four hundred-year period in order to clarify the legal conversations around gender and legal personhood as the Hanafi legal school moved from a diversity of opinions to greater standardization and authoritative judgments. I also consulted the *Musannaf* collections of 'Abd al-Razzaq al-San'ani (211/826) and Ibn Abi Shayba (d. 235/849), two early compendia of reports from the generation of Muhammad's companions and Meccan authorities. Taking this approach has allowed me to trace shifts in the legal positions of the Hanafi school and note changing justifications offered by jurists. I am thus able to offer some reflections on changing social conditions that adjusted the parameters of acceptable rationalizations of legal rulings. The two texts I have relied on most are the expansive, thirty-volume *Kitab al-Mabsut* by the eleventh-century jurist al-Sarakhsi and *Badai' al-Sana'i* by the twelfth-century al-Kasani.⁷¹ Both these texts are noted not only for their breadth but also for their extensive rationalization of legal rulings. Al-Sarakhsi's text is particularly interesting, since it is organized around points of

dispute in the law, regarding which al-Sarakhsi presents the positions of different authorities. He then reasons through the evidence to arrive at what he considers to be the authoritative judgment on the issue.⁷² Moreover, al-Sarakhsi and his teacher al-Halwani (d. 1056–57) were towering figures in the intellectual genealogy of the Hanafi legal school. Al-Sarakhsi's legal texts, as well as those of his students, were so influential that they came to define the Hanafi school in the centuries that followed.⁷³ Al-Kasani's *Badai' al-Sana'i'* is less concerned with intraschool disputes but is similarly focused on justifying the legal doctrines of the Hanafi legal school. Given the breadth of information, detailed legal argumentation, and extensive rationalizations for legal rulings that characterize both of these texts, I have relied on them significantly in unpacking the juristic considerations and sensibilities that shaped legal personhood.

STRUCTURE OF THE BOOK

This book argues that the legal status of individuals in Islamic law must be understood not through gender alone but at the intersection of a number of social identities and relations. As such, the chapters of the book build a cumulative argument, demonstrating the intersecting relationships between the social identities of gender, age, and enslavement. Throughout these chapters, I argue that despite juristic articulation of gender essentialism, this narrative did not form the hermeneutical framework for determining the legal status and legal agency of individuals. The jurists instead considered the particularities of an individual's social location and positionality, as well as their relations to other individuals.

Chapter 1 traces normative constructions of gender in early Hanafi legal discourse. Through a focus on legal discussions about illicit sexual intercourse, covering of the female body, and gendered prayer postures, this chapter argues that masculinity in Hanafi legal discourse is characterized as active, self-determining, and socially dominant. Femininity functions as a foil, characterized by passivity and subordination. This normative gendering along the active/passive binary often serves the role of justifying legal precedents. The chapter also notes where this binary construction breaks down by focusing on instances where Hanafi jurists make arguments that contravene this narrative. In demonstrating these dissonances in gender constructions, the chapter contends that this abandonment of the gender binary opens up the possibility of questioning the hermeneutical role occupied by gender in juristic discourse, a question that animates the rest of the chapters in the book.

Chapter 2 turns to enslavement as a category that impairs legal personhood in Hanafi law. The chapter focuses on two main case studies: legal coercion in the marriage of enslaved people and the forced bodily exposure of enslaved women. Through these case studies, the chapter demonstrates that enslavement impaired the legal personhood of enslaved persons by subjecting them to the dominion

of male and female enslavers alike. In exploring the intersection of enslavement and gender, we can see that the active/passive binary could be flipped not only in rendering certain male subjects passive and subordinate but also by granting some female subjects power and dominance over certain male subjects. Exploring the intersection of these two social identities also demonstrates that enslavement impaired the legal personhood of individuals differently depending on whether they were men or women. Enslaved men and women thus occupied different legal personhoods despite their shared status as enslaved individuals.

Chapter 3 turns to the intersection of gender and legal minority and their combined impact on legal personhood. Through a close reading of the legal discussion on the marriage of minors, it demonstrates that legal minority functioned to diminish the legal personhood of children, depriving them of autonomy, subjecting them to the will of the father as patriarch as well as to their legal guardians. This chapter reveals that minor male subjects could also occupy the status of passivity and subordination that Hanafi jurists otherwise associated with femininity.

Chapter 4 engages intersectional theory and decolonial feminist theory to argue that legal personhood in Islamic law was constructed at the intersection of multiple social identities. Through an intersectional reading, this chapter contends that legal personhood was not determined based on an individual's gender; that is, individuals did not share legal status based on a mutually assigned and legally ascribed gender identity. Gender thus carried no stable meaning in legal discourse. Instead, legal personhood was determined by the intersection of a number of different social identities. These identities took on particular meaning only in relation to one another. The rights and obligations acquired by an individual were also tied to their relation to other legal subjects. An intersectional legal personhood meant that individuals occupied multiple legal identities simultaneously and could exercise different forms of legal agency depending on the relation. Legal personhood in Islamic law was not confined to the gender binary but was instead fluid and constantly shifting. The chapter concludes that a biological, essentialist gender binary is neither natural nor universal and did not exist in premodern Islamic law.

The last chapter brings the six case studies discussed throughout the book together to theorize about gendered legal personhood in early Hanafi law. I have written this chapter with the intention of it being a stand-alone chapter. Chapters 1–3 are interconnected, and the book's argument is built through the exploration of case studies in these three chapters. These chapters are best read alongside one another. Chapter 4, however, is written in a manner that summarizes both the case studies and the argument and analysis built up throughout the book so as to be accessible without needing to read the other chapters. As such, the introduction and chapter 4 can be assigned together to give the reader a full sense of the book's argument and analysis.