# Defining and categorizing "rape": a study of some pre-modern and early modern Islamic legal sources

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## Abstract

My dissertation makes two main contributions to the study of Islamic legal history and sexual offences, especially those pertaining to women. The first is a reassessment of the legal and linguistic connotations of the term "rape." "Rape", broadly defined, was legally recognised as a complex differentiated offence. It did not appear to pre-modern jurists as a simple easily discernable offence, and as such, they classified it under different legal categories depending on the context of the crime and its underlying *mal* (wrong). Consequently, different definitions of the crime were devised and different terms were coined to refer to "rape." This legal and linguistic plurality carried significant ramifications concerning the conception of this crime, its context, means and redress for it.

The second contribution is the analysis of the structure of exemplary *fiqh* works and the way in which structure and methodology shape the socio-legal discourse on "rape." I argue that the structure of *fiqh* works plays an integral part in the methodology used to approach certain types of sexual offences, and in developing their meanings. These contributions, I hope, will be pertinent to scholars and students working on Muslim women and forcible sexual acts, as well as Islamic law, women, and sexual violations.

Accordingly, this study joins a growing body of scholarship in the field of modern jurisprudence which questions the classification and definition of rape as a simple offence. This study contributes to such scholarship by underscoring historical precedents that did not view rape as a simple offence that follows the sex versus violence binary. Rather, I demonstrate the presence of multiple definitions, technical terms and classifications of the crime that broached the civil and criminal legal divide. Rape was classified under the

categories of coercion, assault, violence and sex offences. Importantly, these different classifications existed simultaneously in the pre-modern and early modern sources consulted for this study. Consequently, rape was viewed as both a criminal and a civil offence depending on diverse factors such as context and means.

## Sommaire

Cette dissertation effectue deux contributions à l'étude de l'histoire légale islamique. La première contribution est que le "viol," défini de manière large, était légalement reconnu comme une offence complexe et différentiée. Le viol n'était pas considéré comme une simple offence, mais était classifié sous différentes catégories légales, dépendamment du contexte du crime et de son mal (tort) sous-jacent. En fait, plusieurs définitions du crime étaient utilisées, et plusieurs termes étaient introduits pour faire référence au "viol." Cette pluralité légale et linguistique a eu plusieurs ramifications concernant la classification de ce crime, son contexte, ses moyens et ses réparations.

La deuxième contribution de cette thèse est d'offrir une analyse de la structure de certains travaux de *fiqh* en relation avec le discours sur le "viol." Il sera avancé que la structure des travaux de *fiqh* joue un rôle intégral dans la méthodologie utilisée pour analyser certains types d'offences sexuelles et pour étudier leurs sens. J'espère que ces contributions seront utiles pour les chercheurs et étudiants travaillant sur les femmes musulmanes et sur les actes sexuels forcés, de même que la loi islamique, les femmes et les violences sexuelles.

Par conséquent, cette étude s'ajoute à un corpus croissant d'études dans le champ de la jurisprudence moderne qui remet en question la classification et la définition du viol comme une simple offence. Elle contribue à cette littérature en soulignant des précédents historiques où le viol n'était pas considéré comme une simple offence qui suit l'opposition binaire du sexe versus la violence. Plutôt, je démontre la présence de définitions multiples, de termes techniques et de classifications du crime qui évoquent la séparation légale entre le civil et le criminel. Le viol était classifié dans les catégories de la contrainte, l'assaut, la violence et les

offences sexuelles. Surtout, ces différentes classifications existaient simultanément dans les sources pré-modernes et moyennement modernes consultées lors de cette recherche. En conséquence, le viol était perçu comme étant à la fois une offence criminelle et civile, dépendamment de plusieurs facteurs, tels que le contexte et les moyens.

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# Introduction

## Aims

The aim of this dissertation is to offer an analysis of the various definitions of "rape" and forcible sexual acts in pre-modern and early modern Islamic *furūʿ* works.[1] I shall argue that unwanted and forcible sexual acts were recognised *de jure* under numerous legal headings such as *ikrāh* (duress/coercion),[2] *ghaṣb* (civil misappropriation/theft/abduction) and *ṣiyāl* (assaults), and that this plurality in categorisation allowed for the conception and treatment of unwanted sex as a complex, differentiated offence.[3] A differentiated offence, as defined in another context, is "an offence which can be completed in a number of different ways that cannot be captured in a simple definition."[4] In other words, rape (in its myriad forms) not only existed *de jure* in Islamic substantive works, but that it existed in the form of a differentiated offence.

Plurality in legal categorisation and definition was echoed by further diversity with regards to four important aspects, namely, the legal recognition of a sexual spectrum under the rubric of sexual duress; the recognition of multiple individuals as victims and perpetrators such as adults and minors, spouses and non-spouses, virgins and non-virgins, free and slave d

[1] I have adopted the chronology recently outlined by Oussama Arabi, David Powers and Susan Spectorsky eds., in *Islamic Legal Thought: A Compendium of Muslim Jurists* ( Leiden: Brill, 2013), 2-3. Thus by pre-modern I mean all legal works penned between the tenth and eighteenth century C.E., and by early modern, I mean works written during the early decades of the nineteenth century C.E. such as Ibn ʿĀbidīn's *Radd al-muḥtār*. I am aware that the labels, "pre-modern" and "modern" are not ideal, and that aspects of this periodization can be arbitrary. I utilize these labels, however, to emphasize the fact that *fiqh* is transformed in a fundamentally new way with the rise of modern, Western-inspired, reform movements during the late Ottoman period, and later through European colonialism.

[2] Khaled Abou El Fadl drew attention to the difference in meaning between both terms at Common law. Khaled Abou El Fadl, "Law of Duress in Islamic and Common Law: A Comparative Study," *Islamic Studies* 30, no. 3 (1991): 335. For the purposes of this dissertation, however, the two words will be used interchangeably.

[3] I am using the term "unwanted sex" in the manner expounded by Stephen Schulhofer as any kind of coerced, non-aggravated and unwanted sex that does not fit the narrow confines of the legal definition of rape as a forcible act obtained through violence against the will of the victim. Stephen J. Schulhofer, *Unwanted Sex. The Culture of Intimidation and the Failure of Law* (Cambridge, Mass.: Harvard University Press, 1998).

[4] Victor Tadros, "Rape Without Consent," *Oxford Journal of Legal Studies* 26, no. 3 (2006): 515.

individuals as well as males, females and the intersex/non-binary (*khunthī*);[5] the recognition of different forms of sexual violation involving both acquaintances and strangers and the elaboration of different means of justice involving both punitive and restorative means. Pre-modern jurists recognised a very broad continuum of forcible and/or unwanted sexual acts that encompassed sexual coercion with penetration, sexual assault/seduction without penetration, abduction for sexual purposes and sexual violence resulting in injury which they tried to resolve through a variety of socio-legal means. The presence of sexual coercion under numerous legal categories allowed for the elaboration of different perceptions of the *mal* of rape that encompassed both *mala in se* and *mala prohibita* within an expansive normative legal architecture. [6]

The investigation of the four aforementioned aspects of the question of "rape" forms the backbone of this dissertation, namely, sexual coercion with penetration, sexual assault and/or seduction with or without penetration, abduction for sexual purposes and sexual injury. Furthermore, this dissertation aims to investigate the profound link between the doctrinal content of the *furūʿ* (substantive legal works) and their structure. By "structure," I mean the organization and division of chapters, sections and sub-sections within *furūʿ* works according to a certain order. I shall argue that the way jurists organized their *furūʿ* works and moulded them according to distinct structures formed a part of their fidelity to the doctrines and methodology of their respective schools as well as, importantly, their classification of

[5] I am using the terms "intersex" and "non-binary" in the broadest sense possible, meaning individuals with physically atypical or ambiguous genitalia as well as individuals who do not wish to or cannot follow the male/female binary. I am not using it to indicate transgender individuals.

[6] *Mala in se* (sing. *malum in se*) was defined by Black's as: "Wrongs in themselves" while *mala prohibita* (sing. *malum prohibitum*) was defined as: "Prohibited wrongs or offences…. Generally, no general intent or mens rea is required and the mere accomplishment of the act or omission is sufficient for criminal liability." Henry Campbell Black, *Black's Law Dictionary*, 6th ed. (St. Paul, Minn.: West Publishing Co., 1990), 956. The classification of acts into *mala in se* and *mala prohibita* does not form part of the classification of acts in Islamic legal discourse. It is therefore used guardedly. A brief overview of the classification of acts in Islamic legal discourse will be proffered shortly.

crimes. By paying attention to the primary sources in terms of their overall normative legal architecture, both doctrinal and technical, I aim to provide a nuanced picture of the topic that takes cognizance of the complementary relationship between these two elements, the doctrinal and the technical/methodological as well as the role that each played within the larger discourse on sexual coercion as well as the methodology of the different *madhāhib* (schools of law). As such, an effort will be made to analyse the primary sources at both the doctrinal and discursive levels demonstrating some of the shifts and negotiations that affected legal substance as well as the manner through which legal doctrine was expressed.

In doing so, I shall delineate the process through which the various definitions of sexual violation as *ikrāh*, *ghaṣb* and *ṣiyāl* (and not just coerced *zinā*) emerged as both expansive and differentiated within the four *Sunnī* schools of law at both the synchronic and diachronic levels; thereby demonstrating that the theory on *ikrāh* was not always already formed but comprised continuities and discontinuities, as well as continuous amendments and expansions in meaning. My study as such raises the following questions: How were forcible or unwanted sexual acts defined in Islamic substantive works? How were these acts legally classified? What happened to the female victim in the aftermath of her rape, in terms of her legal status, the justice she received or did not receive and her pregnancy? What is the relationship between the form and content of the discourse on unwanted and illicit sex, particularly in terms of school methodologies?

## Review of the Literature

Scholarship on rape and forcible sexual acts based on Islamic substantive legal works (*furūʿ*) is rather limited. As Julie Norman observed, "one of the limitations of ...research has

been the lack of academic inquiry on the topic of rape in Islam."[7] This limited scholarship, however, can be divided into four main (though overlapping) categories.

In the first category, we find resounding statements on the non-existence of rape and forcible sexual acts in Islamic legal works. Rape is assumed not to exist *de jure*, or if it exists at all, it does so under the rubric of *zinā* thereby leading to the double victimisation of the raped. Cases in point include Léon Bercher and Georges-Henri Bousquet[8] as well as Colin Imber who had stated that:

> Perhaps the most important subject which the *sharīʿa* does not treat at all is sexual assault, whether on women or boys. If the assault causes bodily harm, the assailant might be liable to pay blood-money (*diyya*), but this is not recognition of rape as such. Indeed, rape falls logically into the category of *zinā*, and since the *sharīʿa* always assumes mutual complicity and treats both parties as guilty, it follows that the rape victim must be as guilty as the rapist. The only case in which the man alone incurs *ḥadd* punishment for *zinā* is when the woman is insane or a minor.[9]

Similarly, Imber maintained that rape, as a legal category, did not exist under both Ottoman *qānūn* and *fiqh*.[10] He stated:

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[7] Julie Norman, "Rape Law in Islamic Societies: Theory, Application and the Potential for Reform," CSID Sixth Annual Conference "Democracy and Development: Challenges for the Islamic World" Washington, DC – April 22-23, 2005, http://www.islam-democracy.org/documents/pdf/6th_Annual_Conference-JulieNorman.pdf (accessed February 15, 2014).

[8] Quoting Bercher *verbatim*, Bousquet stated in the section on *zinā* that: "La victime d'un attentat à la pudeur avec violence, ou un viol, a tout intérêt à ne point porter l'affaire en justice, car elle risque une condemnation, et a fort peu de chance d'obtenir une réparation. Cette iniquité, qui peut nous parâitre révoltante, s'explique cependant, aux yeux de la loi musulmane: le scandale causé par la divulgation de semblables faits qui touchent au redoubtable *tabou* sexuel, est un mal infiniment plus grave que le préjudice causé à la victim de l'attentat". Léon Bercher, *Les délits et les peines de droit commun prévus par le Coran: Leur reglementa* (Tunis: Societé anonyme de l'imprimerie rapide, 1926), 97. Quoted from Georges-Henri Bousquet, *L'Éthique Sexuelle de L'Islam* (Paris: G.-P. Maisonneuve et Larose, 1966), 67.

[9] Colin Imber made this statement in spite of acknowledging the presence of what he interpreted to be a minor case of sexual duress. He stated that, "the only instance of sexual intercourse under coercion which the *sharīʿa* envisages, is when a man performs the act under the duress of a third party which it identifies as the 'sovereign power' (*sulṭān*). In this case no punishment is due." Colin Imber, "*Zinā* in Ottoman Law," in Colin Imber, *Studies in Ottoman History and Law* (Istanbul: The Isis Press, 1996), 178.

[10] Imber, "*Zinā*," 195.

> Since the *ḳānūnnāme* treats housebreaking with intent to commit *zinā*, abduction and sexual molestation as criminal offences, one might logically expect to find a similar treatment of rape. Instead, the *ḳānūn*, like the *sharīʿa*, ignores the subject altogether.[11]

Imber, however, mentioned that the *fatāwá* (sing. *fatwá/responsum,* non-binding legal opinion) of the Ottoman chief *muftī* (juris consult) Ebūʾs Suʿūd were favourable towards victims of sexual assault; a stance which he attributed to the latter's personal initiative.[12] This, however, is far from the truth since Ebūʾs Suʿūd was following a long tradition of *muftīs* and *fatāwá* concerning this topic, as we shall see in the following chapters. The existence of a discourse on forcible sexual acts in *fatāwá* collections brings us to the second category of scholarship on this topic.

In the second category, we find scholarship on court records, particularly Ottoman court records, *kanunnames* (legal codes) and *fatāwá* collections which attest to the *de facto* presence of forcible sexual acts (in the sense of sexual assault with or without penetration, forced defloration, abduction for sexual purposes and sexual injury) in Islamic legal practice. Although this scholarly trend is relatively more recent than the previous one, examples of this scholarship abound. Scholars examining court records and *fatāwá* collections made a number of important contributions such as noting the presence of accusations of sexual attacks or abductions made against both males and females, adults and minors; that victims and/or their families readily presented themselves at court with such accusations; that these accusations rarely culminated in the imposition of the *ḥadd* penalty; that an indemnity was often negotiated between the concerned parties; that local community members and expert witnesses (such as the local midwife (*qābila*) and later the female doctor (*ḥakīma*) working with

[11] Ibid., 187.
[12] Ibid., 195, 197.

the local police station) played a role in the resolution of such cases.[13] Moreover, a number of scholars noted a perceptible shift beginning with the nineteenth century concerning the role of the modern state in the regulation of (women's) sexuality, the role of the *ḥakīma* as well as the negotiations and "bargaining"[14] strategies resorted to by litigants *vis à vis* other litigants and the legal system.[15]

In the third category, we find a number of scholars who have defined rape as a crime of *ḥirāba*[16](banditry/highway robbery), or have noted that rape was mentioned in the legal discourse on *ḥirāba*,[17] and/or call for the definition of rape as a crime of *ḥirāba*. A famous case

[13] Ronald C. Jennings, "Kadi, Court, and Legal Procedure in 17th Century Ottoman Kayseri," *Studia Islamica* 48 (1978): 171; Galal el-Nahal, *The Judicial Administration of Ottoman Egypt In The Seventeenth Century* (Minneapolis & Chicago: Bibliotheca Islamica, 1979), 30; Imber, "*Zinā*," 195-197; Amira El Azhary Sonbol, "Law and Gender Violence in Ottoman and Modern Egypt," in *Women, the Family, and Divorce Laws in Islamic History*, ed. Amira El Azhary Sonbol (Syracuse: Syracuse University Press, 1996), 285-289; Amira Sonbol, " Rape and Law in Ottoman and Modern Egypt," in *Women in the Ottoman Empire. Middle Eastern Women in the Early Modern Era*, ed. Madeline C. Zilfi (Leiden: Brill, 1997), 214- 231; Leslie Peirce, *Morality Tales. Law and Gender in the Ottoman Court of Aintab* (Berkeley: University of California Press, 2003), 351-374; Leslie P. Peirce, "Le dilemme de Fatma: Crime Sexuel et Culture Juridique dans Une Cour Ottomane au Début des Temps Modernes," *Annales. Histoire, Sciences Sociales* 53, no. 2 (Mar.-Apr., 1998): 291-319; Elyse Semerdijian, *"Off The Straight Path" Illicit Sex, Law, and Community in Ottoman Aleppo* (Syracuse: Syracuse University Press, 2008); Elyse Semerdijian, "Gender Violence in *Kanunnames* and *Fetvas* of the Sixteenth Century," in *Beyond the Exotic. Women's Histories in Islamic Societies*, ed. Amira El-Azhary Sonbol (Syracuse: Syracuse University Press, 2005), 180-197; Boğaç A. Ergene, "Why did Ümmü Gülsüm Go to Court? Ottoman Legal Practice Between History and Anthropology," *Islamic Law and Society* 17 (2010): 215-244; Fariba Zarinebaf, *Crime & Punishment in Istanbul 1700-1800* (Berkeley: University of California Press, 2010), 116-118; Liat Kozma, "Negotiating Virginity: Narratives of Defloration from Late Nineteenth Century Egypt," *Comparative Studies of South Asia, Africa and the Middle East* 24, no.1 (2004): 55-65; Mario M. Ruiz, "Virginity Violated: Sexual Assaul and Respectability in Mid- to Late-Nineteenth Century Egypt," *Comparative Studies of South Asia, Africa and the Middle East* 25, no.1 (2005): 214- 226; Dror Ze'evi, *Producing Desire. Changing Sexual Discourse in the Ottoman Middle East, 1500-1900* (Berkley: University of California Press, 2006), 48-76.

[14] I am using the term "bargaining" in the sense elaborated by Deniz Kandiyoti in "Bargaining with Patriarchy," *Gender and Society* 2, no. 3 (1998): 274-290.

[15] Khaled Fahmy, "Women, medicine and power in nineteenth-century Egypt," in *Remaking Women, Feminism and Modernity in the Middle East*, ed. Lila Abu-Lughod (Princeton: Princeton University Press, 1998), 59-61; Khaled Fahmy, "The Police and the People in Nineteenth-Century Egypt," *Die Welt des Islams* 39, no. 3, (1999): 359, 366-367; Ruiz, "Virginity"; Kozma, "Negotiating Virginity."

[16] Sherifa Zuhur, "Criminal Law, Women and Sexuality in the Middle East," in *Deconstructing Sexuality in the Middle East. Challenges and Discourses*, ed. Pinar Ilkaracan (Hampshire, England: Ashgate, 2008), 17.

[17] Khaled Abou El Fadl, *Rebellion And Violence In Islamic Law* (Cambridge: Cambridge University Press, 2001), 58, 86, 169, 214, 253, 260, 262; Christina Jones-Pauly with Abir Dajani, *Women Under Islam. Gender, Justice and the Politics of Islamic Law* (London: I.B. Tauris, 2011), 237.

in point is Asifa Quraishi.[18] Khaled Abou El Fadl also noted that Rashid Rida had "argued that rape or abduction for the purposes of obtaining a ransom is a form of *ḥirāba*."[19] The call for the definition of rape as *ḥirāba* aims to remove rape from the realm of *zinā* thereby lifting the draconian *ḥadd* punishment for *zinā* off women who had been wrongfully accused of it.[20]

The fourth and last scholarly category encompasses fairly recent scholarship and departs from the previous ones in significant ways. In this category we find a very limited number of scholars who had argued for the *de jure* existence of a discourse on rape and forcible sexual acts in Islamic legal discourse. Scholars in this category can be further divided into three sub-categories. In the first sub-category, we find a number of scholars who have stated that forcible sexual acts exist in *fiqh* works as forced *zinā* (*zinā bil-jabr/cebren zina*)[21] or as "*ightiṣāb*,"[22] sometimes without further elaborating their positions as far as the legal categories of the *furūʿ* are concerned.[23]

Amira Sonbol, for example, noted that rape was referred to as "*ightiṣāb*" in Egyptian Shariʿa courts[24] and that the predominant forms of punishment for rapists were either physical

[18] Asifa Quraishi, "Her Honour: An Islamic Critique Of The Rape Provisions In Pakistan's Ordinance On Zina," *Islamic Studies* 38, no. 3 (1999): 404, 418-419. Quraishi equally noted the presence of duress in the discourse on *zinā.* Ibid., 417-418.
[19] Abou El Fadl, *Rebellion*, 337.
[20] Quraishi, "Her Honour," 419, 421. For a review of this stance, please see Moeen H. Cheema and Abdul-Rahman Mustafa, "From the Hudood Ordinances To The Protection Of Women Act: Islamic Critiques Of The Hudood Laws Of Pakistan," *UCLA Journal of Islamic and Near Eastern Law* 8, no.1 (2009): 1-49, especially 30-31.
[21] Leslie Peirce, "The Ottoman Empire," in *Encyclopedia of Women & Islamic Cultures*, ed. Suad Joseph (Leiden: Brill, 2005), 2: 700; Elyse Semerdijian, "Overview," in *Encyclopedia of Women & Islamic Cultures*, ed. Suad Joseph (Leiden: Brill, 2005), 2: 698-699.
[22] Amira Sonbol, "Introduction," in *Women, the Family, and Divorce Laws in Islamic History*, ed. Amira El Azhary Sonbol (Syracuse: Syracuse University Press, 1996), 17; Sonbol, "Law and Gender," 287; Semerdijian, "*Off The Straight Path*," 18.
[23] Sometimes scholars are clear about their position concerning the (non)existence of rape in legal sources, whereas at other times some authors state that rape forms part of the legal category of *zinā* without indicating if a conception of forced sex exists (or not) under that category. A case in point is Dror Ze'evi who stated in Table 2 concerning rape and severe harassment that there is "no such category" in *Sharīʿa* works. Dror Ze'evi, "Changes in Legal-Sexual Discourses: Sex Crimes in the Ottoman Empire," *Continuity and Change* 16, no. 2 (2001): 223. For an example of the second stance, please see Elizabeth Kolsky, "The Rule of Colonial Indifference: Rape on Trial in Early Colonial India, 1805–57," *The Journal of Asian Studies* 69, no.4 (2010): 1097.
[24] Sonbol, "Introduction,"17; Sonbol, "Law and Gender Violence," 287.

(the *ḥudūd*) and/or civil (an indemnity).[25] Leslie Peirce expanded the definition of *zinā* to include both consensual and coercive sex stating that:

> A la fin de l'époque médiévale, la zina en tant que catégorie légale s'est étendue à partir de sa définition d'origine de relation sexuelle illicite, à la fois hétérosexuelle et avec consentement mutuel, jusqu'à inclure le viol et les relations homosexuelles aussi bien qu'hétérosexuelles.[26]

In addition to maintaining that rape was recognised as "*ightiṣāb*,"[27] Elyse Semerdijian probed the origins of *zinā* in both the Qurʾān and *ḥadīths* (sayings, acts and precedents), Prophetic and non-prophetic, examined a number of Ḥanafī *furūʿ* texts on the category of *zinā* as well as Ottoman *kannunnames*.[28] Furthermore, Semerdijian linked her theoretical research to legal practice in the courts of Ottoman Aleppo.[29]

In the second and third sub-categories, we find four scholars who had ploughed the *furūʿ* categories of *ghaṣb* and *ikrāh* (duress/coercion) for the concept of rape expressed therein. Abou El Fadl and Mairaj Uddin Syed placed rape under the rubric of *ikrāh*,[30] Delfina Serrano concentrated on the legal category of *ghaṣb*,[31] while Hina Azam bridged this analytical divide by examining both categories.[32] There is also Rudolph Peters who had noted that the raped

[25] Sonbol, "Law and Gender Violence," 287.
[26] Peirce, "Le dilemme de Fatma," 303-304.
[27] Semerdijian, "*Off The Straight Path*," 18.
[28] Ibid., 3-58.
[29] Ibid., 145-156; idem., "Gender Violence," 184-186.
[30] Abou El Fadl, "Law of Duress," 325; Mairaj Uddin Syed, "Coercion in Classical Islamic Law and Theology" (PhD diss., Princeton University, 2011), 226-234; Mairaj U. Syed, *Coercion and Responsibility in Islam: A Study in Law and Ethics* (Oxford: Oxford University Press, 2016), 186-199.
[31] Delfina Serrano, "Rape in Mālikī Legal Doctrine and Practice (8th-15th Centuries C.E.)," *HAWWA* 5, no. 2-3 (2007): 166-206.
[32] Hina Azam, "Competing Approaches to Rape in Islamic Law," in *Feminism, law and religion*, eds. Marie A. Failinger, Elizabeth R. Schultz, and Susan J. Stabile (Farnham, England: Ashgate, 2013), 327-341; Hina Azam, "Sexual Violence In Mālikī Legal Ideology: From Discursive Foundations To Classical Articulation" (PhD diss., Duke University, 2007).

woman was referred to as "*al-mustakraha*" (the coerced)[33] and Thomas Eich who had orally declared that rape is *ikrāh,* without further elaborating his position on this topic to the best of my knowledge.[34]

The earliest attempt to place "rape" *de jure* in Islamic *furūʿ* works was made by Abou El Fadl in his comparison of duress at Common law and Islamic law. As part of his general examination of duress, Abou El Fadl devoted three paragraphs to the issue of sexual coercion (*ikrāh*) demonstrating different scenarios of rape cases.[35] Of particular note in Abou El Fadl's study is his thorough analysis of the objective and subjective elements of duress as well as the legal attempts to strike "a balance between accommodating the weak and the oppressed and setting standards of conduct for society."[36]

Abou El Fadl's study of duress was further explored by his former student Syed who investigated the legal category of coercion, in general, paying special attention to the concept of agency portrayed therein. Syed focussed on the relation between the pre-modern legal portrayal of coercion and contemporaneous views by Muʿtazilī and Ashʿarī thinkers concerning human agency, free will and predestination.[37] His dissertation thus underscored the close links between law and theology in early legal works. As part of his dissertation on coercion, in general, Syed devoted nearly eight pages to the issue of sexual coercion within Ḥanafī discourse highlighting the legal plurality within that school in connection to the agency of the

[33] Rudolph Peters, *Crime and Punishment in Islamic Law. Theory and Practice from the Sixteenth to the Twenty-first Century* (Cambridge: Cambridge University Press, 2005), 62.
[34] Thomas Eich had made this statement orally following his paper presentation "*Abortion after Rape in Islamic Law: An Historical Perspective*" at MESA, Montreal, Canada on Sunday November 18th, 2007.
[35] Abou El Fadl, "*Duress*," 325.
[36] Ibid., 305.
[37] Syed, "Coercion," 60-156.

coerced.[38] Moreover, in his book, Syed expanded his search to include some Shāfiʿī thought on sexual coercion, particularly the legal liability of the coerced.[39]

In a similar vein, Serrano examined the legal category of "*ghaṣb*" in a plethora of Mālikī sources from the eighth till the fifteenth centuries. By examining *fatāwá* works, judicature (*adab al-qāḍī*) and *furūʿ* works,[40] Serrano drew a number of important conclusions such as the diffuse nature of legal thought concerning forcible sexual acts in the primary sources that she had analysed.[41] She noted that "rape" was dealt with under numerous categories such as *zinā*, *qadhf* (calumny), *ikrāh*, *aqdiya* (judgements) and *nikāḥ* (marriage),[42] and that a variety of terms were used to describe sexual assaults.[43] Similarly, Serrano noted the incremental nature of legal evolution with regards to her topic[44] and concluded that growth in legal doctrine resulted "directly from ...legal practice rather than from intellectual exercises devoid of any connection with reality."[45]

While Syed investigated mostly Ḥanafī and Shāfiʿī sources and Serrano drew on Mālikī *oeuvres,* Hina Azam and Abou El Fadl, on the other hand, bridged this divide by delving into *fiqh* works from a number of schools, chief among which were the Mālikī and Ḥanafī schools in the case of Azam.[46] Azam is to be credited with producing the first doctoral dissertation as well as

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[38] Ibid., 226-234.
[39] Syed, *Coercion and Responsibility in Islam*, 186-199.
[40] Serrano, "Rape," 168-169.
[41] Serrano, "Rape," 169.
[42] Ibid.
[43] Serrano, "Rape," 167.
[44] Serrano, "Rape," 201.
[45] Serrano, "Rape," 185. The strong link between the *fatāwá* and substantive works was also affirmed by Wael Hallaq in his "From *Fatwās* to *Furūʿ*: Growth and Change in Islamic Substantive Law," *Islamic Law and Society* 1, no.1 (1994): 29-65.
[46] Hina Azam, "Rape," in *The [Oxford] Encyclopedia of Islam and Law*. Oxford Islamic Studies Online, http://www.oxfordislamicstudies.com/article/opr/t349/e0075 (accessed April 19, 2013) and http://www.academia.edu/2083376/Rape_in_Islamic_Law; Hina Hina Azam, "Competing Approaches to Rape in Islamic Law" in *Feminism, law and religion*, eds. Marie A. Failinger, Elizabeth R. Schultz, and Susan J. Stabile (Farnham, England: Ashgate, 2013), 327-341.

the first book devoted to the subject of sexual violation in Islamic law.[47] She drew attention to the influence that concepts of sexual violence, existing in late Antique Oikumene and pre-Islamic Arabia, had on Islamic notions of sexual violation[48] and made a number of important contributions to the discourse on sexual violence in Islamic law. Chief among these contributions is her thorough analysis of the sexual violation of free women as portrayed in the Mālikī category of *ghaṣb* and the Ḥanafī category of *ikrāh*.[49] The comparison between Mālikī *ghaṣb* and Ḥanafī *ikrāh*, led Azam to the conclusion that two distinct sexual ethics can be gleaned from Islamic substantive works; a proprietary sexual ethic and a theocentric sexual ethic. The proprietary sexual ethic was advanced by numerous Mālikī jurists while the theocentric ethic was advanced by mostly Ḥanafī jurists.[50] Azam advanced the notion that Mālikī jurists viewed the body as property and that any sexual usurpation of the body entailed the payment of an indemnity to the victim or her owner, in the case of a slave woman.[51] By contrast the Ḥanafī school, according to Azam, promoted a theocentric approach to sexuality which saw sexual violation as a crime against the rights of God (*ḥuqūq Allāh*) more than a crime against the individual (*ḥuqūq ādamiyya* or *ḥuqūq al-ʿibād*) and hence promoted the *ḥadd* punishment for the *zanī* (fornicator/adulterer) rather than the payment of an indemnity to the rape victim.[52] She noted that:

> We have seen how the proprietary approach of the Mālikī school was reflected in a strong commitment to a commodified view of sexuality, which in turn led them to propose monetary compensations to free rape victims. We have seen how the theocentric approach of the Ḥanafī school, in contrast, was reflected in a

[47] Hina Azam, "Sexual Violence in Mālikī legal ideology"; Hina Azam, *Sexual Violation in Islamic Law. Substance, Evidence and Procedure* (Cambridge: Cambridge University Press, 2015).
[48] Azam, "Sexual Violence in Mālikī legal ideology," 34-114; Azam, *Sexual Violation*, 21-59.
[49] Azam, *Sexual Violation*, 114-237.
[50] Azam, *Sexual Violation*, 61-146.
[51] Azam, "Competing Approaches," 329-331; Azam, "Sexual Violence in Mālikī legal ideology," 143-263; Azam, *Sexual Violation*, 114-146, 201-237.
[52] Azam, "Competing Approaches," 331-334; Azam, *Sexual Violation*, 147-199.

> thoroughgoing rejection of monetary compensations for illicit cohabitation under any circumstances, the volitional state of the victim notwithstanding.[53]

Azam thus argued that Ḥanafī jurists had classified "rape" as a crime to be punished through corporal/ capital means rather monetary/material compensation.[54]

My study builds upon the work of these four scholars by delving into the categories of *ikrāh* and *ghaṣb*, and introduces the category of *ṣiyāl* to the discourse on rape and unwanted sexual acts. I have adapted Abou El Fadl's method of tracing this phenomenon in all four *Sunnī* schools of law, and drew upon Serrano's appreciation of the legal presence and ramifications of sexual violation in multiple categories. Unlike Azam, however, I do not view the discourse on sexual violation as one marked by competing and irreconcilable approaches but rather by complementary categories and strategies. But first, a clarification is in order concerning my usage of certain terms.

## Legal Terminology and Conceptual Framework

My attempt to define terms such as rape, forcible sexual acts and sexual violence in this work has faced various difficulties tied to linguistic, conceptual, and historical considerations. Among these difficulties is the fact that these terms have evolved and expanded greatly within the *Sunnī* legal corpus. Similarly, mediation, translation and interpretation all play a critical role in shaping distinct understandings of the legal terminology. Furthermore, I am aware of the limitations brought by the nature of the primary sources, namely, the *furūʿ* and that I did not explore other contiguous sources within or without the field of *fiqh*. Uncertainty as to whether my understanding of "rape" corresponds to that of the pre-modern jurists whose works I am examining, is yet another dimension of the difficulties that faces any scholar in

[53] Azam, *Sexual Violation*, 169.
[54] Azam, "Competing Approaches," 329.

defining these terms. Perhaps there are certain sexual states that I would recognise as "rape" or "sexual coercion", but which pre-modern jurists did not recognise as such. Informed by a modern *weltanschauung*, would I be imposing my understanding of these terms on the sources that I am analysing? Although I cannot offer an unequivocal definition of these terms, I can at least offer an explanation of how I understand them and I can try to remedy the above shortcomings by paying special attention to the definition of the *actus reus* (prohibited act) of the legal categories that I am examining in order to obtain an approximate understanding of these terms, as they were defined by their male authors.

I am using the phrase 'sexual violence' in the restricted sense of forcible or unwanted sexual acts (obtained through a variety of means and) resulting in physical injury to the victim. I am not using 'sexual violence' as a catch-all for rape that includes non-violent means and does not result in physical injury to the victim. I have made this choice in order to distinguish between the violent and non-violent means (such as sexual duress and seduction) used to obtain unwanted sex. Although forcible sexual acts often result in physical injuries to the victim (genital and non-genital), I have concentrated on genital injuries.

I chose to view "rape" as a multi-faceted phenomenon marked by a significant variety in terms of definition, motives and redress. I am not viewing the discourse on rape in terms of the strict sex versus violence binary, but as an assemblage of categories, which may intersect at times with this binary and depart from it at other times. I argue that "rape", broadly defined, was not a simple offence that fell neatly into a single legal category such as violence or sex but as a complex offence that straddled numerous legal categories such as assaults, coercion, seduction and violence. Such broad categorisation and conception of this complex

offence was mirrored in the coinage of multiple terms to denote it, the acceptance of different contexts as well as the creation of different means of redress for it.

I approach and use the term "rape", in this study, the way Navanethem Pillay, the former UN High Commissioner for Human Rights, had done.[55] She defined rape as a "physical invasion of a sexual nature committed in circumstances which are coercive."[56] I have adopted this definition for a number of reasons. First, it combines the elements of sex and coercion that I saw in the primary sources and is quite expansive allowing for a myriad of interpretations in terms of the nature of the said invasion/penetration, the gender of the invaded/penetrated and the circumstances involved. Secondly, in her roles as judge, scholar and activist, Pillay's definition reflects the evolution of this crime's definition by combining the two elements described above and omitting those of "force/violence" and "consent/will" and all that these two elements entail in terms of corroborating evidence of physical violence, the nature of (non)consent as well as the complainant's conduct, gender and sexual history. Pillay defined rape in such a manner as to allow for the undermining of the complainant's sexual autonomy without the direct use of force or the active assertion of the victim's (non)consent. In other words, Pillay's definition followed neither the force-based nor the consent-based models of legal definitions of rape, introducing instead a coercion-based alternative. She stated that, "[T]he need to examine consent is at odds with coercive situations, particularly in wartime."[57]

The study of "rape" in contemporary legal scholarship has tracked the various perceptions of rape as a crime of sex, a property crime as well as a crime of violence pointing

[55] Navanethem Pillay was the UN High Commissioner for Human Rights, a former president of the International Criminal Tribunal for Rwanda (ICTR) and a judge at the International Criminal Court.
[56] Navanethem Pillay, "Address—Interdisciplinary Colloquium on Sexual Violence as International Crime: Sexual Violence: Standing by the Victim," *Law & Social Inquiry* 35, no. 4 (2010): 847–853.
[57] Pillay, "Address," 851.

to the limitations that each perception or definition offers.[58] If I may paint with broad strokes, I would summarise these limitations as follows: the perception of rape as a property crime was based on the notion of the female as the property of her father or husband[59] (on the basis of coverture)[60] and employed a sexual economy that erased the crime once compensation (or the tort of seduction)[61] was duly paid.[62] Accordingly, the rape of virgins, penetration and defloration, in particular, played a major role in such a definition,[63] thereby putting at a disadvantage certain sexual acts that fell short of penetration (narrowly defined as penile-vaginal penetration) as well as certain categories of victims such as non-virgins, penetrated males, wives, women who were accused of having "nothing to lose" or who failed the legal chastity requirement.[64]

More recently, the property argument has been extended to include self-ownership and the infringement of the victim's property rights to her body and physical integrity.[65] As a

[58] For extremely useful surveys on the history of the study of rape as well as the different perceptions of the *mal* of rape, please see: Maria Eriksson, *Defining Rape: Emerging Obligations for States under International Law?* (Leiden: Martinus Nijhoff Publishers, 2011), 37-51; John Gardner and Stephen Shute, "The Wrongness of Rape," in *Oxford Essays in Jurisprudence*, ed. Jeremy Horder (Oxford: Oxford University Press, 2002), 193-217; Julie Dawn Lane, "Recognizing Rape" (PhD dissertation, The University of Texas at Austin, 2009), 3-26; Anna Clark, *Women's Silence, Men's Violence. Sexual Assault In England 1770-1845* (London: Pandora, 1987).
[59] Clark, *Women's Silence*, 129; Ruthy Lazar, "Negotiating Sex: The Legal Construct of Consent in Cases of Wife Rape in Ontario, Canada," *Canadian Journal of Women and the Law* 22, no.2 (2010): 335; Lane, "Recognizing Rape," 5.
[60] Jessica Klarfeld, "A Striking Disconnect: Marital Law's Failure to keep up with Domestic Violence Law," *American Criminal Law Review* 48, no. 4 (2011): 1826.
[61] Brian Donovan, "Gender Inequality and Criminal Seduction: Prosecuting Sexual Coercion in the Early 20th Century," *Law & Social Inquiry* 30 (2005): 66.
[62] Clark, *Women's Silence*, 51, 60.
[63] Gardner and Shute, "The Wrongness of Rape," 209-212; John Marshall Carter, *Rape in Medieval England. An Historical and Sociological Study* (Lanham, MD: University Press of America, 1985), 35-36, 38; Donald A. Dripps, "Beyond Rape: An Essay on the Difference between the Presence of Force and the Absence of Consent," *Columbia Law Review* 92, no. 7, (Nov. 1992) 1781. Sir Mathew Hale, for example, defined rape as vaginal penetration by a man of a female above the age of ten years against her will. Mathew Hale, *Historia placitorum coronae: the history of the pleas of the crown: published from the original manuscripts by Sollom Emlyn; with additional notes and references to modern cases concerning the pleas of the crown by George Wilson.* (London: T. Payne, 1800), v.1, Section 628. http://galenet.galegroup.com.proxy (accessed September 23, 2014).
[64] Clark, *Women's Silence*, 7, 47, 110- 127; Lewis Field, "The Fear of the Vindictive Shrew: Using Alternative Forms of Punishment to Change Societal Sentiment About Rape Laws," *The Journal of Gender, Race and Justice* 17 (2014): 524-526; Georges Vigarello, *A History of Rape. Sexual Violence in France from the 16th to the 20th Century* (Great Britain: Polity Press, 2001), 47; Lane, "Recognizing Rape," 9-10.
[65] Dripps, "Beyond Rape," 1785.

proponent of the self-ownership argument, Donald Dripps stated that "individuals have a property right to the use of their bodies. That right has priority over any but the most extraordinary competing claims, and in particular it secures the sexual object priority over the sexual subject."[66]

Definitions of rape as violence, particularly force-based models, readily recognise sexual acts that are obtained through brute physical force and are wary of rape claims that are not obtained through force.[67] Cases in point include the following definitions which stress the dual requirements of force and non-consent and which describe rape as "[t]he unlawful carnal knowledge of a woman by a man forcibly and against her will"[68] or "But the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."[69] Such definitions embody the most salient features and lacunae in the definition of rape, namely, that the sexual act has to be considered "unlawful" (thus excluding marital rape or acts that fall short of penetration or penetration in other orifices or by other means), with a woman (excluding males and the intersex) by force (excluding acts obtained through non-violent means) and against the will/consent of the victim (thus shifting the focus onto the victim, her level of resistance, demeanor, sexual history, background etc.). As such, it took a considerable amount of time and effort for legal definitions of rape, as violence,[70] to be

[66] Ibid., 1789.
[67] As Dripps mentioned, "nothing short of violence to break the victim's will can constitute a crime." Ibid., 1780.
[68] *Black's,* 1260. One may also add Blackstone's definition, which describes rape as "rape, raptus mulierum, or the carnal knowledge of a woman forcibly and against her will". Sir William Blackstone, *Blackstone's commentaries: for the use of students at law and the general reader: obsolete and unimportant matter being eliminated* (Boston: 1882), http://galenet.galegroup.com.proxy (accessed September 30, 2014).
[69] Hale, *Historia placitorum coronae,* v. 1, Section 629, https://babel.hathitrust.org (accessed March 18, 2018).
[70] For examples of definitions of rape as violence, please see: Patricia A. Crane, "Predictors Of Injury associated With Rape" (PhD dissertation, University of Pittsburgh, 2005), 3, 6-7, 15-16, 25; Clark, *Women's Silence*; Susan Brownmiller, *Against Our Will. Men, Women and Rape* (New York: Simon and Schuster, 1975). Brownmiller, for

expanded so as to include non-violent assaults, acquaintance, spousal and male rape. This process is still ongoing.

Within the discourse on rape as a crime of violence, several themes dominate such as the theme of force, its nature, extent and (subjective/objective) perception thereof;[71] the theme of power or the capacity to use physical force and inflict harm on the victim; the threats used against victims and their nature whether explicit, implicit or physical as well as threats against third parties;[72] the extent of physical injuries inflicted on the victim[73] and the latter's resistance whether reasonable or to the utmost of their ability;[74] the theme of victim consent and its nature whether explicit or implicit;[75] the reporting requirement (immediate or delayed),[76] the marital exemption to charges of sexual violence;[77] the age and gender of victims;[78] rape myths;[79] the different kinds of rape whether stranger or acquaintance rape such as date rape and seduction;[80] the fear of false accusations and the need for corroboration[81] or

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example, stated that rape is "nothing more or less than a conscious process of intimidation by which all men keep all women in a state of fear." Brownmiller, *Against Our Will*, 5.

[71] Susan Estrich, *Real Rape* (Cambridge, Mass.: Harvard University Press, 1987), 59-71; Tadros, "Rape Without Consent," 515; Field, "The Fear of the Vindictive Shrew," 521-523.

[72] Field, "The Fear of the Vindictive Shrew," 520.

[73] Crane, "Predictors Of Injury Associated With Rape," 2, 5-6, 23, 57-61.

[74] Field, "The Fear of the Vindictive Shrew," 521-523.

[75] Alan Wertheimer, *Consent to Sexual Relations* (Cambridge: Cambridge University Press, 2003); Jennifer Temkin, "And Always Keep A-hold of Nurse, for Fear of Finding Something Worse": Challenging Rape Myths in the Courtroom," *New Criminal Law Review: An International and Interdisciplinary Journal* 13, no.4 (2010): 711; Field, "The Fear of the Vindictive Shrew," 529-530; Lazar, "Negotiating Sex," 336.

[76] Field, "The Fear of the Vindictive Shrew," 523-524.

[77] Russell traced the marital exemption to Mathew Hale's argument concerning consent to the marriage contract. Diana E.H. Russell, *Rape in Marriage* (Bloomington: Indiana University Press, 1990), 358; Temkin, "And Always Keep A-hold of Nurse," 711; Klarfeld, "A Striking Disconnect," 1819- 1836; Lazar, "Negotiating Sex."

[78] Rita Shackel, "How Child Victims Respond to Perpetrators of Sexual Abuse" *Psychiatry, Psychology and Law* 16 (2009): 55-63; Clark, *Women's Silence*, 48-50; Crane, "Predictors Of Injury," 42-43.

[79] Temkin, "And Always Keep A-hold of Nurse," 710-734; Regina A. Schuller, Blake M. McKinnie, Barbara M. Masser, Marc A. Klippenstine "Judgements of Sexual Assault: The Impact of Complainant Demeanor, Gender and Victim Stereotypes," *New Criminal Law Review* 13, no.4 (2010): 761-762; Brownmiller, *Against Our Will*, 14-15, 209; Clark, *Women's Silence*, 7, 110- 127; Lane, "Recognizing Rape," 7-12.

[80] Donovan, "Gender Inequality and Criminal Seduction"; Field, "The Fear of the Vindictive Shrew," 527-528; Crane, "Predictors Of Injury," 41; Diana Russell, *Sexual Exploitation: Rape, Child Sexual Abuse, and Workplace Harassment* (Beverly Hills, CA: Sage, 1984), 34-37; Lane, "Recognizing rape," 8-9; Rebecca Lynn Winer, "Defining Rape in Medieval Perpignan: Women Plaintiffs Before the Law," *Viator* 31 (2000): 174; Stephanie L. Schmid, "Date

proof of ejaculation.[82] These themes were usually explored by scholars, jurists and activists in order to expand the legal definition of rape as a crime of violence, to reform current statutes and to bridge the gap between legal theory and legal practice by highlighting the lacunae that the definition of rape as violence creates whether through force-based or consent-based models.[83]

A famous critique of the force-based model is Susan Estrich's *Real Rape* in which she distinguished between the violent rape, which she termed 'real rape' and the non-violent rape which she termed 'the simple rape'. Estrich underscored the prevalence of the 'simple rape' in the form of acquaintance or stranger rape that does not resort to violence or physical injury to the victim.[84] Her study highlighted the fact that most rapes do not involve violence; thereby posing a serious challenge to the definition of rape as a crime of violence as well as the resistance and corroboration requirements found in legal statutes. She argued that, "[T]he threshold of liability-whether phrased in terms of "consent," "force," and "coercion" or some combination of the three- should be understood to include at least those non-traditional rapes where the woman *says* no or submits only in response to lies or threats."[85] Shifting the focus from violence to lack of consent, or the presence of lies, threats and coercion thus opened the

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Rape/Acquaintance Rape," in *Encyclopedia of Rape*, ed. Merril D. Smith (Westport, Connecticut: Greenwood Press, 2004): 54-56.

[81] Mathew Hale's seventeenth century pronouncements on the corroboration requirement and false accusations have cast a long shadow on the Common Law tradition. He stated that an accusation of rape is "easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent." Quoted from Field, "The Fear of the Vindictive Shrew," 519. See also: Kolsky, "The Rule of Colonial Indifference: Rape on Trial in Early Colonial India, 1805–57," 1096-1097.

[82] Clark, *Women's Silence*, 60-62.

[83] For a sample of such scholarship, please see, Susan Caringella, *Addressing Rape Reform In Law And Practice* (New York: Columbia University Press, 2009); Jennifer Temkin and Barbara Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Oxford and Portland, OR: Hart Publishing, 2008); Temkin, "And Always Keep A-hold of Nurse"; Field, "The Fear of the Vindictive Shrew."

[84] Estrich, *Real Rape*, 8-56.

[85] Ibid., 103.

door to a broader legal definition of rape in which the markers of non-consent rather than the corroboration of violence play a major role in the definition and prosecution of rape cases.

In a similar vein, Stephen Schulhofer criticised the narrow definition of rape as a crime of violence pointing to the limitations that the force requirement entails and arguing instead for the expansion of force and physical threats to include implicit threats as well as the capacity to enforce physical damage.[86] According to him, the existing criminal law fails to check or control abuses, which are not physically violent in its attempt to resolve the dilemmas of sexual autonomy. He adds that, "an imprimatur of social permission" appears then to be placed "on virtually all pressures and inducements that can be considered non-violent."[87] As a remedy, Schulhofer called for the recognition of sexual autonomy as an inalienable right; the violation of which merits punishment regardless of the presence or absence of force in the act of rape.[88] Furthermore, the usage of a single term like 'rape' to signify multiple unwanted sexual acts fails to distinguish between these acts in terms of gravity, nature and degree. As Schulhofer had argued, one of the main deficiencies of current regulation is the combination of too many acts under the same category.[89]

As seen from the above, the main disadvantages of the force-based model revolve around the restrictive insistence on the 'force' aspect of the crime. This is not to say that such a model does not have its distinct advantages. They are: the adequate reflection of the violent nature of the crime, attention is drawn to the culprit's conduct rather than the victim's and the precise manner in which the different degrees of violence embodied in the act are

[86] Schulhofer, *Unwanted Sex*, 17-46.
[87] Ibid., 15.
[88] Ibid., 15, 99-113, 274-282. For a critique of sexual autonomy, please see Dripps, "Beyond Rape," 1788.
[89] Schulhofer, *Unwanted Sex*, 20.

graded.[90] By contrast, the consent-based model pays ample attention to the negation of the victim's sexual autonomy through non-violent means thereby offering a more expansive definition of the *actus reus*.

Consent plays a major role in the discourse on rape. Seen as an antidote to the force and resistance requirements, establishing the non-consent of the victim was thought to be a better marker of rape than force. Jennifer Temkin, for example, maintained that "the essence of rape is the nonconsent of the victim, which need not be manifested by any display of resistance on her part."[91] However, by making the (non)consent of the victim the main criterion in rape definition, attention is moved towards the victim herself thereby making her actions, character and sexual history the focus of the investigation rather than those of the alleged perpetrator, as well as minimizing the violent aspect of the crime.[92] On the other hand, Julie Lane had argued that consent, is treated as the prevailing and guiding legal standard when in fact, the focus must shift to an assessment of "how force was subjectively experienced."[93] Catharine A. Mackinnon, in turn, questioned the validity and genuineness of consent extracted in states of overall subordination and inequality.[94] Going even further, Tadros questioned the nature of the consent-based model by arguing for a definition of rape that bypasses the consent requirement while Huigens argued for the defensibility of rape as a strict liability crime[95] and Dripps who called for the abandonment of "the conjunction of force

[90] Tadros, "Rape Without Consent," 516.
[91] Temkin, "And Always Keep A-hold of Nurse," 711.
[92] For those reasons, a number of states have adopted rape shield laws. Tadros, "Rape Without Consent," 517.
[93] Lane, "Recognizing Rape," v.
[94] Catharine A. MacKinnon, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence," *Signs* 8, no. 4 (1983): 655.
[95] Kyron Huigens, "Is Strict Liability Rape Defensible?" in *Defining Crimes. Essays on the Special Part of the Criminal Law*, eds. R. A. Duff and Stuart P. Green (Oxford: Oxford University Press, 2005), 196-217.

and nonconsent."[96] Pillay's definition, as quoted earlier, bypasses both the force and consent requirements altogether.

The portrayal of rape as a crime of sex often justified rape in terms of frustrated sexual urges whereby rapists were portrayed as "deviants"[97] or distraught criminal actors succumbing to a "natural urge"[98] and in need of therapy rather than prison, or that violent intercourse is precipitated by women who enjoy it.[99] The role of sex, as a primary motive for rape, was raised by a number of scholars such as David Bryden and Maren Grier[100] as well as Alan Wertheimer. Basing himself on the work of a number of evolutionary psychologists, Wertheimer called for the recognition of sexual gratification as an important motive for rape.[101] For the latter, it is the sex rather than the violence that should mark the definition of rape.[102] Defining rape as a crime of sex, however, has been criticized as being "largely false and that it encourages leniency toward rapists."[103]

Besides violence, sex, the infringement of property rights, and the vitiation of consent, John Gardner and Stephen Shute attributed the 'wrongness' of rape to the harm principle. Even though the harm accruing from rape is a private harm, it can still be considered a public

[96] Dripps, "Beyond Rape," 1806.
[97] Lane, "Recognizing Rape," 7, as well as 14.
[98] Clark, *Women's Silence*, 39, 132.
[99] Clark attributes this view to the thought of psychoanalyst Helene Deutsch. Clark, *Women's Silence*, 132; Lane, "Recognizing Rape," 7. For more on Deutsch, please see: Sara Murphy, "Deutsch, Helene," in *Encyclopedia of Rape*, ed. Merril D. Smith (Westport, Connecticut: Greenwood Press, 2004): 56.
[100] Bryden and Grier mention the work of evolutionary psychologists: Thornhill and Palmer. David P. Bryden and Maren M. Grier, "The Search for Rapists' Real Motives," *The Journal of Criminal Law and Criminology* 101, no.1 (2011): 248, 276.
[101] Wertheimer, *Consent to Sexual Relations*, 70-88.
[102] Wertheimer stated that, "To the extent that we deny the sexual component of that motivation and emphasize its "violent" character, we may inadvertently teach men that so long as their behavior is not violent, it is relatively unproblematic. I shall argue that this is wrong and incompatible with the experience of women." Ibid., 88.
[103] Bryden and Grier, "The Search for Rapists' Real Motives," 273.

harm, they argued, on the basis of the prevention of harm as well as the fact that in many instances of criminal law, public harm is achieved through the violation of individual rights.[104]

An important theme that numerous scholars have tackled is the vast gap between legal theory and legal practice as exemplified by extremely low conviction rates and extremely high attrition rates. In order to bridge that gap, scholars have adopted several approaches which were not mutually exclusive. While some attempted to offer practical solutions that would bring legal practice closer to the spirit of legal theory, others tackled the legal definition of the crime suggesting different venues for amendment and expansion. Cases in point include Estrich, Susan Caringella, Jennifer Temkin and Barbara Krahé as well as Tadros, Kyron Huigens, Gardner and Shute.[105] In addition, there is Diane Russell who was one of the first scholars to question the marital exemption and to call for the recognition of rape within marriage.[106]

It is important to note, however, that this justice gap seems to be a global phenomenon with scholars of different legal systems depicting the various shortcomings of the systems that they had studied.[107] In spite of the shortcomings and the dire need for improvement, I have not come across calls for the rejection of entire legal systems and their replacement by other systems. Rather, the stress has been on suggestions for amendment, the expansion of existing definitions and the creation of new categories.

There are several reasons for the above review of current scholarship on "rape", namely, to highlight the most salient themes that dominate the discourse on rape, to track the different definitions used for the socio-legal classification of unwanted sex and sexual

[104] Gardner and Shute, "The Wrongness of Rape," 216-217.
[105] Estich, *Real Rape*; Caringella, *Addressing Rape Reform*; Temkin and Krahé, *Justice Gap*; Tadros, "Rape Without Consent"; Huigens, "Is Strict Liability Rape Defensible?"; Gardner and Shute, "The Wrongness of Rape."
[106] Russell, *Rape in Marriage*.
[107] Afroza Begum, "Rape: A Deprivation of Women's Rights in Bangladesh," *Asia-Pacific Journal on Human Rights and the Law* 1 (2004): 1-48; Catherine Burns, *Sexual Violence and the Law in Japan* (London: Routledge, 2005); Nicole Westmarland and Geetanjali Gangoli eds., *International Approaches To Rape* (Bristol: Policy Press, 2011).

violence, to underscore the advantages and disadvantages that each definition embodies and to indicate the legal and semantic deficiencies raised by the term "rape."[108] Such an exercise is useful for this study because many of the themes and definitions alluded to are equally relevant to pre-modern Islamic legal discourses on forcible sexual acts, albeit in a different fashion.

## Rape in Medieval and Renaissance Europe

Scholarship on rape in pre-modern Europe has underscored the perception of rape as a property crime,[109] a crime of violence[110] or a crime of sex,[111] the close links between abduction/bride kidnapping and rape[112] as well as the theme of sexual ravishment obtained through seduction, guile, deceit, misrepresentation and/or false promises;[113] but not the legal definition of rape as a crime of duress to the best of my knowledge.

In analysing the definition of rape in pre-modern Europe, scholars seem to have adopted three approaches: they tracked the evolution of the various terms used to denote rape such as '*rapt/raptus*'; they analysed pre-modern laws and legal treatises (among other sources)

[108] The etymology of the term 'rape' and problems associated with it will be shortly examined.
[109] Clark, *Women's Silence*, 129; Vigarello, *A History of Rape*, 45-47; Winer, "Defining Rape in Medieval Perpignan," 167, 176.
[110] Carter, *Rape in Medieval England*, 37.
[111] Guido Ruggiero, *The Boundaries of Eros. Sex Crime And Sexuality In Renaissance Venice* (Oxford: Oxford University Press, 1985), 89.
[112] Ruggiero, *Eros*, 96; Vigarello, *A History of Rape*, 17, 47-48, 50, 52; Winer, "Rape in Medieval Perpignan," 168, footnote 10.
[113] Anna Clark, *Desire. A History of European Sexuality* (New York: Routledge, 2008), 127-128; Vigarello, *A History of Rape*, 50-54, 90-91, 137-139. Kathryn Gravdal, *Ravishing Maidens. Writing Rape in Medieval French Literature and Law* (Philadelphia: University of Pennsylvania Press, 1991), 134, 142. Moreover, scholarship on the 'libertine' is illustrative of this phenomenon. See for example, Clark, *Women's Silence*, 23; Vigarello, *A History of Rape*, 67-70; Winer, "Rape in Medieval Perpignan," 174.

and sought their origins in Roman or Canon law; and they pored over court records (both civil and ecclesiastical).[114]

In tracking the etymology of the term rape several scholars concentrated on the Latin term '*raptus'* and its derivatives and linked the latter to the notion of violence, abduction and property theft. For example, John Carter's research into the various terms used to describe rape in thirteenth and fourteenth century England such as "*rapio*", "*raptus*" and "*rapuit*" underscored the meaning of rape as being sexually "ravished" by force as well as being seized, carried off and overwhelmed.[115] Similarly, Georges Vigarello underscored the meaning of '*rapt'* and '*raptus'* as abduction for sexual purposes and demonstrated how the notion of rape was closely associated with that of theft and/or violence ("*rapt de violence*").[116] He argued that the association of rape to ownership and theft made rape a sexual act as well as one of ownership, ascendancy and power.[117] In the same vein, Henry Kelly maintained that the principal meaning of both "raptus" and "rapere" had been "seizing."[118] Seizure, he argued, was understood to include seizure before sexual violation as well as seizure before abduction and kidnapping. He thus concluded that "[i]n the Middle Ages, however, abduction was as common a meaning as sexual violation."[119] Similarly, in her "Archaeology of Rape", Kathryn Gravdal documented the various semantic shifts that '*rapt'* (and its derivatives) had undergone from being a term associated with force and violence to "abduction by violence or seduction for the purposes of forced coitus"[120] to sexual joy and then its replacement by *viol* in the seventeenth century.[121]

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[114] Gravdal, *Ravishing Maidens*; Carter, *Rape in Medieval England*; Ruggiero, *Eros*; Henry Ansgar Kelly, "Statutes Of Rapes And Alleged Ravishers Of Wives: A Context For The Charges Against Thomas Malory, Knight," *Viator* 28 (1997): 361- 419; Winer, "Rape in Medieval Perpignan"; Dripps, "Beyond Rape," 1781-1782.
[115] Carter, *Rape in Medieval England*, 46 footnote 1.
[116] Vigarello, *A History of Rape*, 47-48.
[117] Ibid., 49.
[118] Kelly, "Statutes Of Rapes," 361.
[119] Ibid., 361.
[120] Gravdal, *Ravishing Maidens*, 4.

Moreover, the coining of *viol* replaced the semantic ambiguity and various linguistic *glissements* concerning rape in Old French. The modern French *viol*, designating rape, Gravdal argued, did not have a correspondence in Old French, which favors periphrasis, metaphor, and slippery lexematic exchanges, as opposed to a clear and unambiguous signifier of sexual assault. Such periphrastic expressions include "*fame esforcer* (to force a woman) *faire* sa *volonté* (to do as one will), *faire son plaisir* (to take one's pleasure), or *faire son buen* (to do as one sees fit)."[122]

A number of scholars also examined the legal definition of rape in pre-modern laws and legal statutes. Carter, for instance, maintained that in pre-modern England, rape was defined primarily as a crime of violence.[123] Starting with Glanvill's thirteenth century definition of "the crime of rape [as] that in which a woman charges a man that he has violated her by force"[124]and Bracton who had declared that the "rape of virgins is a crime imputed by a woman to the man by whom she says she has been forcibly ravished"[125] on to Westminster I and Westminster II as well Hart who underscored the importance of penetration for a sexual act to be termed rape ("But if the least penetration maketh it rape… yea although there be not emissio seminis");[126] all of which underscore the perception of rape as a violent heterosexual

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[121] Ibid., 3-6.
[122] Ibid., 2. Gravdal's remarks concerning the ambiguity of pre-modern terms, their shifting connotations as well as the dual meanings of *raptus*, echo Schulhofer's concerns about the legal and semantic connotations of the modern term 'rape'; a term often used as a catch-all for a plethora of unwanted sexual acts. In a related vein, one may add that ambiguity and shifts in meaning, can be equally seen in the legal discourse on *ghaṣb* and *ṣiyāl*. For *ghaṣb* in particular, the meaning of sexual usurpation is sometimes not clear and one is left wondering if the author meant abduction, in general, or abduction for sexual purposes in particular. Or, if jurists employed general terms in order to indicate the possibility of elopement as well. By contrast, discourse on sexual coercion is generally less ambiguous with jurists clearly stating the kind of sexual coercion referred to as in *al-ikrāh ʿalá al-zinā* or *al-ikrāh ʿalá al-waṭʾ*.
[123] Carter, *Rape in Medieval England*, 37.
[124] Quoted from: Carter, *Rape in Medieval England*, 6.
[125] Ibid., 35-36.
[126] Ibid., 37.

crime of [vaginal] penetration. The definition of rape as a crime of violence was also attested to by Gravdal.[127]

In Renaissance Venice, however, Guido Ruggiero noted that two visions of rape (either as a crime of sex *or* a crime of violence) were debated by the authorities. "Some argued that the Signori di Notte should handle the matter [rape] because it involved "violence" (*fortia*). Others thought that the Avogadori were responsible because rape was held to be "a mixed cause of fornication" (*mixta causa fornicationis*). The latter argument carried the day" and rape was primarily treated as a crime of sex.[128]

The chasm between legal theory and legal practice, in terms of conviction and punishment, was well documented by various scholars. Whereas pre-modern European laws had prescribed such punishment as death, the gouging out of the eyes, dismemberment, castration, imprisonment, exile or excommunication, legal practice often told a different story altogether.[129] Medieval and Renaissance court records documented an extremely low conviction rate coupled with the payment of fines for rape, rather than the various forms of physical or capital punishment suggested in the law books. The fines varied according to the social status, age, (non)virginity of the victim as well as the circumstances of the crime.[130]

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[127] Gravdal, *Ravishing Maidens*, 3.
[128] Ruggiero, *Eros*, 89.
[129] Winer, "Rape in Medieval Perpignan," 167; Gravdal, *Ravishing Maidens*, 6-9, 122; Dripps, "Beyond Rape," 1782; Carter, *Rape in Medieval England*, 35-45, 93-134. Bracton (d. 1268 C.E.) stated that: "The rape of virgins is a crime imputed by a woman to the man by whom she says she has been forcibly ravished against the king's peace. If he is convicted of this crime, (this) punishment follows: the loss of members that there be member for member, for when a virgin is defiled she losses [loses] her member and therefore let her defiler be punished in the parts in which he offended," as well as "Let him [the rapist] thus lose his eyes which gave him sight of the maiden's beauty for which he coveted her. And let him lose as well the testicles which excited his lust," quoted from Carter, *Rape in Medieval England*, 35-36, 120-121. Bracton's words are eerily reminiscent of similar stipulations in the Ottoman Criminal Code quoted in Uriel Heyd's *Studies In Old Ottoman Criminal Law* ed. V.L. Ménage (Oxford: Clarendon Press, 1973), 95- 103.
[130] Scholars noted the presence of variations in the amount of indemnities and attributed such variation to the circumstances of the crime, the social status of both victim and culprit or the age of the victim. See for example, Ruggiero, *Eros*, 92, 97, 98; Vigarello, *A History of Rape*, 16, 17, 21-22; Winer, "Rape in Medieval Perpignan," 168. Carter noted that both Glanvill and Bracton had called for capital punishment or dismemberment for convicted

Quoting Hanawalt, Gravdal suggested that one of the reasons for the low conviction rate for rape was that medieval society perceived crimes against persons to be less serious than those against property.[131]

Several scholars also noted that female victims were sometimes imprisoned following their rape. Victim punishment was thought to be due to their involvement in illicit sexual relationships or for failing to provide sufficient evidence corroborating their claims. As such, a rape victim was sometimes fined for "allowing...men to have carnal knowledge of her," according to Gravdal;[132] a conclusion equally supported by Vigarello's research.[133] Similarly, Carter estimated that "49% of all alleged victims were arrested and imprisoned for false appeal."[134]

A number of similarities seem to have existed between the pre-modern European legal discourses on rape and its Islamic counterparts. One such similarity is the manner through which the crime was brought to justice. Sexual violence, in its myriad forms, was brought to court through victim appeal in many instances. In thirteenth century England, for example, "[t]he appeal method (from "appellare," meaning "to accuse") was initiated by the alleged victim."[135] The second method was through community indictment, although such a method was extremely rare according to the records that Carter had examined.[136]

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rapists, but that legal practice (as portrayed in eyre records) shows that monetary fines often replaced capital punishment. These fines were payable to the Crown if the crime had been considered a felony, or to the victim if the crime had been considered a trespass. Carter, *Rape in Medieval England*, 38-42, 119-134; Gravdal, *Ravishing Maidens*, 7.

[131] Gravdal, *Ravishing Maidens*, 126.

[132] Ibid., 127.

[133] Vigarello, *A History of Rape*, 35- 36.

[134] Carter, *Rape in Medieval England*, 112-113, 126. See also: Vigarello, *A History of Rape*, 35- 36.

[135] Carter, *Rape in Medieval* England, 3.

[136] Ibid., 4.

Further similarities include the requirement of raising the "hue and cry" by the alleged victim[137] as well as the prompt reporting of the case[138] without which the alleged victim could have been accused of false appeal.[139] Other similarities include the resort to a trustworthy female to examine the victim[140] as well as requiring the plaintiff to produce the burden of proof.[141] In addition, the marriage of the victim to her rapist following the reporting of the crime to the authorities can be noted.[142]

## Sources and Methodology

This study deals with the pre-modern and early modern Islamic substantive legal discourse on sexual violation. I tried to adopt a methodology that reflects the historical context, legal structure, and the pre-modern Islamic conceptualizations of sexual violation. The legal occupies pride of place in this study, particularly the criteria developed by scholars of Islamic law as well as the analytical tools used in the field of criminal legal theory. Attention is equally paid to scholarship on pre-modern notions of rape in European as well as Islamicate societies. I chose this approach in order to link my study to research within and without the field of Islamic law thereby situating my study within the larger field of rape research. A benefit of this approach was the appreciation of the enormous similarities (and differences) between the pre-modern notions of sexual violation in pre-modern Islamicate societies and

[137] Carter, *Rape in Medieval England,* 24; Winer, "Rape in Medieval Perpignan," 167 footnote 8.
[138] Carter, *Rape in Medieval England,* 24; Winer, "Rape in Medieval Perpignan," 173.
[139] Carter, *Rape in Medieval England,* 24.
[140] Gravdal, *Ravishing Maidens*, 129.
[141] Winer, "Rape in Medieval Perpignan," 173; Gravdal, *Ravishing Maidens*, 19, 130.
[142] Carter, *Rape in Medieval England*, 125, 127; Ruggiero, *Eros*, 98-99, 106; Winer, "Rape in Medieval Perpignan," 167 (especially footnotes 6 &8), 168. "The marriage on the rape" was also mentioned by Sir Mathew Hale in his *The history of the common law of England: And, An analysis of the civil part of the law* 6th edition (London: Henry Butterworth, 1820), 36 http://galenet.galegroup.com (accessed September 23, 2014).

their pre-modern European counterparts, on the one hand, as well as the vexed question of how to define, classify, name and situate the *mal* of rape, on the other hand.

I would like to begin by offering a few remarks about the sources used for this study before proceeding to the method through which they were approached. In writing this dissertation, I have relied primarily on *furūʿ* works utilizing the full range of *furūʿ* texts such as *mabsūṭs*, *mukhtaṣars*, *shurūḥ* and *ḥawāshī* as well as works on *khilāf* (or *ikhtilāf*).[143] In doing so, I tried to recognise and appreciate the complex relationship between the *mutūn* (lemmas/lemmata) and their commentaries.[144] Although frequent recourse has been made to *fatāwá* collections, it is the *furūʿ* texts that inform the bulk of this study. Numerous *fatāwá* were embedded in the *furūʿ*, as Wael Hallaq had demonstrated.[145]

Although I would not go as far as Aron Zysow in declaring that the "study of Islamic law along school lines often has nothing to recommend it but convenience,"[146] I felt that for the topic of forcible and/or unwanted sex, such limitation would lead to a very incomplete analysis indeed. My analysis of this topic is already incomplete because I am not extending my sources to other legal genres but limiting them to the *furūʿ* and some *fatāwá*. Hence, I relied on texts from the four *Sunnī* schools, with occasional reference to the Ẓāhirī school. Although, the number of primary sources used is generous, it is by no means exhaustive and the choice of

[143] For more on the different types of *furūʿ* works, please see: Susan A. Spectorsky, *Women in Classical Islamic Law. A Survey of the Sources* (Leiden: Brill, 2010): 17-19; Mohammad Fadel, "The Social Logic of *Taqlīd* and the Rise of the *Mukhtaṣar*," *Islamic Law and Society* 3, no. 2 (1996): 193-233; Ahmed El Shamsy, "The *Ḥāshiya* in Islamic Law: A Sketch of the Shāfiʿī Literature," *Oriens* 41, no. 3-4 (2013): 289-315.
[144] For more on this complex relationship but in the context of philosophical and exegetical works, please see Walid A. Saleh, "The gloss as intellectual history: The ḥāshiyahs on al-Kashshāf," *Oriens* 41, no. 3-4 (2013): 217-259; Robert Wisnovsky, "Avicennism and exegetical practice in the early commentaries on the Ishārāt," *Oriens* 41, no. 3-4 (2013): 349-378, especially pp. 354-357.
[145] Hallaq, "From *Fatwās* to *Furūʿ*," 61.
[146] Aron Zysow, *The Economy of Certainty. An Introduction to the Typology of Islamic Legal Theory* (Atlanta: Lockwood Press, 2013), 196.

sources was often dictated by the issue of availability. Unfortunately, I did not extend my sources to include *Shīʿī* ones due to my ignorance of that formidable tradition.[147]

I chose to delve into the *furūʿ* for a number of reasons. Firstly, it is the *furūʿ* that contain the substantive material on the different legal categories related to forcible sexual acts such as *ikrāh*, *ghaṣb*, *ṣiyāl*, *zinā* and the *diyyāt*. The substantive corpus of *furūʿ* works was usually classified according to "a hierarchy of doctrinal authority"[148] within the particular school of law to which the work of *furūʿ* belonged. As such, *furūʿ* works "represent...the standard legal doctrine of the schools," as Hallaq has stated.[149] Secondly, the different genres within the *furūʿ* served "different functions for the teaching and for the application of the law," according to Baber Johansen.[150] Whereas the *mutūn* embodied the dominant doctrines of their schools (*ẓāhir al-riwāya*),[151] the *shurūḥ* expanded these doctrines by commenting on them in light of current conditions, juxtaposing divergent opinions within and between schools, introducing new doctrines and legitimating these new ideas.[152] As for the *fatāwá*, they offered clear *responsa* (answers) to religious or legal queries thereby reducing the complexity of the *shurūḥ* through the choice and legal tailoring made by a *muftī* to the case at hand.[153] As such, the study of the different genres enables the study of both legal evolution and legal plurality.

Moreover, the *furūʿ* offer a rich vignette into a vast and little-studied time period in the history of Islamic legal works (namely, the period between the origins of the law and the early

[147] For more on the primary sources used as well as their author-jurists, please refer to the appendix attached to this dissertation.
[148] Hallaq, "From *Fatwās* to *Furūʿ*," 39.
[149] Ibid.
[150] Baber Johansen, "Legal Literature and the Problem of Change: The Case of the Land Rent," in *Islam and Public Law. Classical and Contemporary Studies*, ed. Chibli Mallat (London: Graham & Trotman, 1993), 31.
[151] Johansen, "Legal Literature," 35.
[152] Ibid., 30-32.
[153] Ibid., 32.

modern period); a time period that has not received the attention it deserves from modern legal scholarship with regards to forcible sexual acts. Indeed, we find scholarship concentrated on either end of the pre-modern timeline. For example, the question of the origins of the law in terms of the Qurʾanic verses and relevant *ḥadīths* concerning *zinā*, their genealogy and veracity,[154] the *ḥudūd* [155]and their modern re-introduction[156] as well as the pre-Islamic legal traditions/ background of Arabia have been well analysed;[157] just as court records have been extensively scrutinised.[158] However, the legal features of the centuries between the origins and the court records have not been sufficiently explored regarding forcible and/or unwanted sexual acts. Notable exceptions are the studies of Abou El Fadl, Serrano, Azam and Syed.

Furthermore, by focussing on substantive material *vis à vis* jurisprudence or the study of the *fatāwá* or court records, I aim to highlight a different aspect of Islamic legal discourse; an aspect that occupies an intermediate position between the jurisprudence of the *uṣūl* and the

[154] Semerdijian, "*Off The Straight Path*," 4-15; Spectorsky, *Women*, 198-199; Pavel Pavlovitch, "The ʿUbāda B. Al-Ṣāmit Tradition at The Crossroads Of Methodology," *Journal of Arabic and Islamic Studies* 11 (2011): 137-235; Pavel Pavlovitch, " The Islamic penalty for adultery in the third century ah and Al-Shāfiʿī's Risāla," *Bulletin of the School of Oriental and African Studies* 75, no. 3 (2012): 476-477, 482-483; Pavel Pavlovitch, "Early Development of theTradition of the Self-Confessed Adulterer in Islam. An Isnad and Matn Analysis," *al-Qantara* XXXI, no. 2 (2010): 371-410; Quraishi, "Her Honour," 408-411.

[155] Intissar A. Rabb, "Islamic Legal Maxims as Substantive Canons of Construction: *Ḥudūd*-Avoidance in Cases of Doubt," *Islamic Law and Society* 17 (2010): 63-125; Scott C. Lucas, "Perhaps You Only Kissed Her? A Contrapuntal Reading of the Penalties for Illicit Sex in the Sunni Hadith Literature," *Journal of Religious Ethics* 39, no. 3 (2011): 399-415; Maribel Fierro, "Idraʾū L-Ḥudūd Bi-L-Shubuhāt: When Lawful Violence Meets Doubt," *Hawwa* 5, no. 2-3 (2007): 208-238; John Burton, "Law and exegesis: the penalty for adultery in Islam," in *Approaches to the Qur'ān*, eds. G.R. Hawting and Abdul-Kader A. Shareef (London: Routledge, 1993): 269-284.

[156] Margot Badran, "Shariʿa Activism and *Zina* in Nigeria in the Era of the *Hudud*," in *Gender and Islam in Africa,* ed. Margot Badran (Stanford: Stanford University Press, 2011); Ziba Mir-Hosseini, "Criminalising Sexuality: Zina Laws As Violence Against Women In Muslim Contexts," *SUR International Journal On Human Rights* 8, no.15 (2011): 7-33; Rudolph Peters, "The Re-Islamization of Criminal Law In Northern Nigeria And The Judiciary: The Safiyyatu Hussaini Case," in *Dispensing Justice in Islam*, eds. Muhammad Khalid Masud, Rudolph Peters and David S. Powers (Leiden: Brill, 2005), 219-241; Abdel Salam Sidahmed, "Problems in Contemporary Applications of Islamic Criminal Sanctions: The Penalty for Adultery in Relation to Women," *British Journal of Middle Eastern Studies* 28, no.2 (2001): 187-204, http://dx.doi.org/10.1080/13530190120083077 (accessed July 15, 2014); Valerie Ceccherini, "Rape and the Prophet," *Index on Censorship* 28, no.19 (1999): 19-26; Jones-Pauly *Women Under Islam*, 229-237.

[157] Walter Young, "Stoning and Hand-Amputation: the pre-Islamic origins of the *ḥadd* penalties for *zinā* and *sariqa*" (M.A. thesis, McGill University, 2005); Sarah Salaheddin Eltantawi, "Stoning in the Islamic Tradition: The Case of Northern Nigeria" (PhD diss., Harvard University 2012), 71-107.

[158] *Supra* notes 12 and 13.

legal practice of either the *fatāwá* or the pre-modern courts. As such, I am reading the *furūʿ* as works occupying an intermediate position between the theoretical *uṣūl* and *qawāʿid* on the one hand, and the legal practice of the *fatāwá* and the courts on the other. The earlier claim that Islamic legal works were intellectual exercises divorced from social praxis has been questioned by more recent scholarship.[159] Cases in point include the scholarship of Hallaq, Johansen and others,[160] as well as scholarship on *takhrīj*,[161]*maṣlaḥa*[162] and *iftāʾ* which, as Powers stated, "represent[s] a meeting point of legal doctrine and social practice."[163]

The intermediate position of the *furūʿ* is also reflected in the attention paid to both the *forum externum* (*al-ẓāhir*) and *forum internum* (*al-bāṭin*) in terms of human acts, beliefs and perceptions. Whereas the *forum externum* is concerned with outward human acts which others can observe and testify to and which a judge can base his judgement upon;[164] the *forum internum* is concerned with "the interior (*bāṭin*) aspects of a human being" [165]and which a *muftī* might inquire about and take into consideration in his *fatwá*. As such, one observes in the discourse on *ikrāh* a clear attempt on the part of jurists to take cognizance of both aspects in terms of the objective and subjective perceptions of duress, force and capacity to inflict harm; the required standards of proof and the effort to reach an equitable outcome in cases (often)

[159] See for example, Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Oxford University Press, 1964), 76-85, 205-206; Noel J. Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (Chicago: The University of Chicago Press, 1969), chapter four particularly pages 75-76.
[160] See for example: Baber Johansen, "Casuistry: Between Legal Concept and Social Praxis," *Islamic Law and Society* 2, no. 2, (1995): 149; Johansen, "Legal Literature"; Hallaq "From *Fatwās* to *Furūʿ* "; Serrano, "Rape"; David S. Powers, "Fatwās As Sources For Social And Legal History. A Dispute Over Endowment Revenues From Fourteenth-Century Fez," *Al-Qantara* 11, no. 2 (1990): 295-340.
[161] Wael Hallaq, "*Takhrīj* and the Construction of Juristic Authority," in *Studies in Islamic Legal Theory*, ed. Bernard G. Weiss (Leiden: Brill, 2002), 317-335; Ahmad Atif Ahmad, *Structural Interrelations of Theory and Practice in Islamic Law. A Study of Six Works of Medieval Islamic Jurisprudence* (Leiden: Brill, 2006).
[162] Felicitas Opwis, "*Maṣlaḥa* in Contemporary Islamic Legal Theory," *Islamic Law and Society* 12, no.2 (2005): 182-223.
[163] David S. Powers, "The Art of the Judicial Opinion: On *Tawlīj* in Fifteenth-Century Tunis," *Islamic Law and Society* 5, no. 3 (1998): 379.
[164] The masculine form is used, without prejudice, throughout this study.
[165] Baber Johansen, *Contingency in Islamic Law: Legal and Ethical Norms in The Muslim Fiqh* (Leiden: Brill, 1998), 35.

based on subjective perceptions of duress. There is this interplay in the *furūʿ* between the stipulation for performative consent (not just orally affirmative consent), objective markers of force and resistance such as wounds, blood, chains, torn clothing and screams heard by others on the one hand, as well as the acceptance of subjective perceptions of fear, harm and humiliation on the other. Although jurists did not disregard the subjective elements or call for their elimination altogether, they did not place them on a par with the objective elements either by enforcing the *ḥadd* for a claim of rape not corroborated by tangible evidence, especially eyewitnesses. Hence, one finds different forms of civil redress suggested for the (alleged) victim in the absence of knowledge beyond doubt (*ʿilm yaqīn*) and in the presence of strong probability (*ghālib al-ẓann*).[166]

The earliest work of *furūʿ* consulted in this study is Shafiʿī's (d. 820 C.E) *al-Umm*, while one of the latest is Ibn ʿĀbidīn's (d.1836 C.E) *Radd al-Muḥtār*. I opted for historical research of a *longue durée* in order to gauge the evolution and expansion of the legal categories under purview. Consequently, I limited the number of categories that I decided to pursue and limited their analysis to the definition of the *actus reus* within each as well as those elements that bear direct relevance to my topic.

My study is concerned with the theoretical articulation of forcible and coercive sex (broadly defined) and sexual violation in Islamic substantive works. It is not concerned with the translation of these theoretical tenets into practice.[167] Although legal practice often flows from legal theory, practice and theory often do not go hand in hand. As contemporary

[166] For more on the *forum externum* and *forum internum*, please see: Johansen, *Contingency*, 33-36.
[167] For a meaningful comparison between legal practice and legal theory, any study would have to examine both the attrition and conviction rates of sexual offences; scrutinize court records; pore over police reports and so on. Unfortunately, this study shall not undertake such tasks and hence cannot comment on the relationship between law in action and law in the books.

research on rape and sexual violence (both past and present) amply demonstrates, the gap between theory and practice is often quite substantial in terms of legal interpretation, investigation, judicial discretion, procedural formalities and punishment.[168]

Due to the fact that this study deals primarily with legal theory, several important questions have been left out, such as how legal theory was translated into action? How did judges interpret the theory? Did they read the theory in a narrow or expansive manner? Who had the power to decide which evidence was admissible and which was not? How was the evidence weighted and by whom? How did the process of mediation work? What was the role of rape myths and what were these myths in different places at different times? How did the coerced (male or female) strategize within the set of legal and social constraints they were faced with? How did litigants bargain with the legal system in order to maximise their security, avoid the *ḥadd* and perhaps obtain financial compensation as well? In other words, several important questions concerning the process of adjudication, procedure and power dynamics will not be dealt with.

In terms of the legal categories examined and their limits, I chose to adopt the views of Johansen. *Pace* Schacht, Johansen had argued for the importance of casuistry as an integral element in expanding the limits of legal categories on the basis of social and practical considerations.[169] Hence, I tried to portray the expansive nature of the categories I examined while taking account of the textual limits that jurists seem to have set for themselves. The

[168] Contemporary scholarship on rape has repeatedly underscored the vast gulf between law in the books and law in action as demonstrated by dismal conviction rates and extremely high attrition rates in various parts of the world. For a sample of the vast literature on rape and the gap between legal theory and practice, please see: *supra* notes, 101 and 102.
[169] Johansen, "Casuistry," particularly pp. 154-156.

textual limits concern the exposition of categories as separate textual units within certain schools and not within others.

The study of the structure of the different categories forms an integral part of this dissertation. It reveals the extent of difference between the *madhāhib* in terms of their respective methodologies and classification of crimes as well as the textual architecture of their works. Johansen had observed that legal categories engendered different results in different spheres of the law.[170] I tried to explore this idea by demonstrating how the different categories dealing with coerced, unwanted or illicit sex (*zinā*, *ikrāh* and *ghaṣb*) were extended beyond the *ḥudūd* to provide civil and restorative justice for female victims thereby protecting their subjective rights as individuals.

This dissertation is framed, in many ways, as a study of legal evolution, plurality and contingency. Numerous scholars have contested previous assumptions on the immutability of Islamic law demonstrating both doctrinal and hermeneutical growth.[171] At the doctrinal level, scholars demonstrated growth and evolution through casuistry,[172] *iftāʾ* (the issuance of *fatāwá*),[173] or the examination of particular *furūʿ* topics,[174] for example, while at the

[170] Ibid., 152.
[171] For views on the immutability of Islamic law and the supposed closure of the "gate of *ijtihād,*" please see: Schacht, *An Introduction to Islamic Law*, 70-71; Coulson, *Conflicts and Tensions in Islamic Jurisprudence*, 43; J. N. D. Anderson, *Islamic Law in the Modern World* (New York: New York University Press, 1959), 14. Lutz Wiederhold and Johansen attributed this notion of the closure of the gate of *ijtihād* to C. Snouck Hurgronje: Lutz Wiederhold, "Legal Doctrines in Conflict. The Relevance of *Madhhab* Boundaries to Legal Reasoning in the Light of an Unpublished Treatise on *Taqlīd* and *Ijtihād*," *Islamic Law and Society* 3, no. 2 (1996): 235 footnote 2; Baber Johansen, *Contingency*, 43-44.
[172] Johansen, "Casuistry."
[173] Hallaq, "From *Fatwās* to *Furūʿ* "; Johansen, "Legal Literature," 36; David S. Powers, "Four Cases Relating to Women and Divorce in al-Andalus and the Maghrib, 1100-1500" in *Dispensing Justice in Islam. Qadis and their Judgements*, eds. Muhammad Khalid Masud, Rudolph Peters and David S. Powers (Leiden: Brill, 2006), 407-408; Powers, "Fatwas As Sources For Social And Legal History," 300.
[174] For example, Johansen, "Legal Literature"; Serrano, "Rape"; Maribel Fierro, "Ill-Treated Women Seeking Divorce: The Qurʾanic Two Arbiters and Judicial Practice among the Mālikīs in al-Andalus and North Africa," in *Dispensing Justice in Islam. Qadis and their Judgements*, eds. Muhammad Khalid Masud, Rudolph Peters and David S.

hermeneutic level, scholars contested the "closure of the gate of *ijtihād*" (independent reasoning),[175] disputed the notion of *taqlīd* as blind imitation and highlighted its role as a complex reasoning mechanism(s) that often, but not always, resorted to analogy,[176] for instance. I have thus tried to underscore the evolution of certain concepts although by no means, all of the concepts and terms explored in this study.

Normative pluralism in *fiqh* works owes its existence, according to Johansen, to the belief by the *fuqahāʾ* (sing. *faqīh*/ jurist) "that all human reasoning is fallible and, therefore, contingent."[177] Juristic reasoning, however conscientious, did not amount to certain knowledge (*ʿilm yaqīn*) but to probability (*ẓann*) and "while knowledge is correlated with certainty, opinion is correlated with probability" according to Bernard Weiss.[178] This belief in the contingency of substantive rulings fulfilled three functions according to Johansen. They were, the legitimation of varied doctrines within and between legal schools, the "peaceful...co-existence" of divergent normative systems, as well as the "justification for the legal validity of judgements which are based on error concerning the facts of the case" at hand.[179]

As can be seen from the above, the discourse on contingency was closely tied to that on certainty and probability. Jurists were keenly aware of the limitations and fallibility of their

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Powers (Leiden: Brill, 2006) in which she documents the incorporation of local practice into the body of law, 323-347.

[175] Wael B. Hallaq, "Was the gate of ijtihād closed?" *International Journal of Middle East Studies* 16 (1984): 3-41; Rudolph Peters, "Ijtihad and taqlid in 18th and 19th century Islam," *Die Welt des Islams* 20, no. 3/4 (1980): 136-137; Bernard Weiss, "Interpretation in Islamic Law: The Theory of Ijtihād," *The American Journal of Comparative Law* 26, no. 2 (1978): 208; Norman Calder, "Al-Nawawī's Typology of *Muftīs* and Its Significance for a General Theory of Islamic Law," *Islamic Law and Society* 3, no. 2 (1996): 155- 162.

[176] Wael B. Hallaq, "Non-Analogical Arguments in Sunni Juridical Qiyās," *Arabica* 36, no. 3 (1989): 286-306; Wael B. Hallaq, *A History of Islamic Legal Theories. An Introduction to Sunnī Uṣūl Al-Fiqh* (Cambridge: Cambridge University Press, 1997), 83-107; Weiss, "Interpretation in Islamic Law," 207; Calder, "Al-Nawawī's Typology *of Muftīs*," 162; Zysow, *The Economy of Certainty*, 159-254.

[177] Johansen, *Contingency*, 38.

[178] Weiss, "Interpretation," 203.

[179] Ibid.

endeavours and the possibility of error implicit in the disagreement (*ikhtilāf*) between and amongst schools.[180] The importance of certainty and probability was equally underscored by Zysow who mentioned that these two elements "were the fundamental categories with which they [the jurists] approached every question of law."[181] The discourse on certainty and probability in the *uṣūl* is clearly reflected within the *furūʿ* discourse on rape in the difference between *zinā*, on the one hand, and *ikrāh* and *ghaṣb*, on the other hand. Whereas *zinā* called for absolute certainty and the highest burden of proof, *ikrāh* wished to establish strong probability (*ghālib al-ẓann*) or corroborating evidence (*bayyina*) in the case of *ghaṣb* as we shall see in the following chapters. I attempted to demonstrate doctrinal growth and plurality within these categories while highlighting the way the structure of *fiqh* works had evolved.

"Legal plurality" is not synonymous with legal indeterminacy. As scholars have shown, the *madhāhib* strove to limit indeterminacy "by restricting [the] powers of interpretation to upper level jurists,"[182] by developing a technical vocabulary indicating the status of various opinions within their legal corpus,[183] by arranging opinions in a hierarchical order according to their legal validity,[184] by replacing earlier opinions with later ones of equal validity,[185] by promoting *taqlīd*, in the sense of adherence to the school's hermeneutic methodology, substantive doctrines and legal authority.[186] Mohammad Fadel had argued, for example, that the rise of the *mukhtaṣar* had signified an attempt at codifying and streamlining the various

[180] Ibid., 204.
[181] Zysow, *The Economy of Certainty*, 1.
[182] Fadel, "Taqlīd," 219.
[183] Ibid., 215- 224.
[184] Hallaq, "From *Fatwās* to *Furūʿ*," 39.
[185] Ibid., 49.
[186] Fadel, "Taqlīd," 232; Sherman Jackson, *Islamic Law And The State. The Constitutional Jurisprudence of Shihāb al-Dīn al-Qarafī* (Brill: Leiden, 1996), xx, xxx, xxxii, 79-96.

opinions within schools,[187] while Sherman Jackson demonstrated how *taqlīd* was used to foster school allegiance to the authority and hermeneutics of extant schools.[188]

In addition, I am reading the *furūʿ* as emblematic of a "negotiative process" between functionalism and morality (as Abou El Fadl had argued in another context)[189] within a legal context that promoted reparation and restorative justice (as argued by Hallaq and Rosen);[190] the whole girded by a well-defined substantive legal corpus that subjected conflict resolution to its own standards and not vice versa, as Fadel had reminded us.[191] Indeed, the *raison d'être* behind chapter four is the exploration of different means of justice for coerced sex. It may be that jurists elaborated civil and restorative means of reparation in order to provide redress for complainants in the absence of absolute certainty such as four eyewitnesses to the penetrative act. Jurists had to contend with two contradictory elements, namely, the demand for certainty and proof beyond a reasonable doubt in the implementation of capital and/or physical punishment, and the often, private nature of coerced sexual acts, which did not allow for the presence of four adult male Muslim eyewitnesses to the penetrative act. As Asifa Quraishi had pointed out, for such a requirement to be fulfilled, *zinā* had to be "a public act of indecency."[192] In the absence of the certainty required for corporal and capital punishment, but with the presence of corroborating evidence, jurists, I would suggest, had to devise different/civil means of justice.

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[187] Fadel, "*Taqlīd*," 224.
[188] Jackson, *Islamic Law And The State*, 73.
[189] Khaled Abou El Fadl, "Between Functionalism and Morality. The Juristic Debates on the Conduct of War," in *Islamic Ethics of Life. Abortion, War and Euthanasia*, ed. Jonathan E. Brockopp (Columbia, S.C.: University of South Carolina Press, 2003), 121.
[190] Wael Hallaq, *Sharīʿah: Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009), 165, 366; Lawrence Rosen, *The Anthropology of Justice. Law as culture in Islamic society* (Cambridge: Cambridge University Press, 1989), 17-18.
[191] Mohammad Fadel, "A Tragedy of Politics or an Apolitical Tragedy?" *Journal of the American Oriental Society* 131, no.1 (2011): 121-122.
[192] Quraishi, "Her Honour," 409.

I am also reading the *furūʿ* as mediated sources; mediated by the male voices of their authors as well as contemporary scientific knowledge. Contemporary medical knowledge, in particular, can be seen to have played a prominent role with regards the role of the penetrated partner (*al-mafʿūl bihi*) in sexual acts.[193] One may argue that the belief by jurists in the limited sexual agency of the penetrated was translated into law in those sections of the *furūʿ* that state that the act of consent cannot be attributed to sexually penetrated females because of their limited role as sexual partners.[194] Kāsānī (d.1191 C.E.), for instance, had stated that *zinā* cannot be attributed to a sexually coerced female because what can be attributed to her is the [passive] act of *tamkīn* (compliance/acquiescence).[195] Contemporaneous medical knowledge was also taken into account in the section on pregnancy in the last chapter. Although I am aware of the important role that contiguity plays regarding my topic, I have unfortunately limited its scope.

As mentioned earlier, the legal occupies pride of place in this study particularly the analytical tools and criteria used in the field of criminal legal theory. Although such an approach may seem anachronistic, I nevertheless found it extremely useful in terms of identifying the elements of the crime as well as the tools and criteria utilized by criminal legal theory in defining crimes and which I tried to pay attention to in my analysis. These criteria include: the *actus reus*, *mens rea*, corroboration, resistance, power vs. force, proportionality, certainty vs. probability, agency, culpability, objective vs. subjective criteria, responsibility (criminal and civil) and justice in its different forms (punitive and restorative). I did not use

[193] The scholarship of Musallam and Ze'evi come to mind in this respect. Basim Musallam, *Sex and Society in Islam: Birth Control Before the Nineteenth Century* (Cambridge: Cambridge University Press, 1983); Ze'evi, *Producing Desire*, 16-47.
[194] This point will be further elaborated in chapter two.
[195] ʿAlāʾ al-Dīn Abī Bakr ibn Masʿūd al-Kāsānī, *Kitāb badāʾiʿ al-ṣanāʾiʿ fī tartīb al-sharāʾiʿ* (Beirut: Dār al-Kitāb al-ʿArabī, 1982), 10: 110.

the above-mentioned criteria in order to compare Islamic to Civil law, for example, but as yardsticks for concepts that preoccupied jurists, past and present, and which the latter have utilised in dealing with complaints of compelled, unwanted and forced sex. As such, I concentrated on the definition of the *actus reus* at the outset of all my chapters as well as some fault elements such as *mens rea*, malice, recklessness and negligence, in chapters one, two and three while dealing with the different forms of justice in chapter four. Not surprisingly, I found that some criteria like power versus force seem to have preoccupied pre-modern jurists just as they continue to occupy modern ones, while other criteria, such as consent, were treated in a manner that is quite different from its modern treatment. My understanding of criminal law and procedure was guided by the scholarship of Kent Roach, Roger Burke, Nelson Enonchong, Sanford Kadish and Stephen Schulhofer.[196]

Three years ago, towards finishing my then chapter two, I came across R. A. Duff and Stuart Green's *Defining Crimes*. The articles in that volume by Kyron Huigens[197] and Victor Tadros[198] as well as John Gardner and Stephen Shute's "The wrongness of rape"[199] had such a profound impact on my thought that I felt compelled to pursue their scholarship even further and as a result, I ended up re-writing my chapters and revisiting my sources. This dissertation is, in many ways, an attempt to investigate the "wrongness of rape" in the manner of Gardner, Huigens, Tadros and Temkin. By exploring the *mal* of rape (Gardner and Shute), calling for the treatment of rape as a differentiated offence (Tadros), highlighting the lacunae in the legal

[196] Kent Roach, *Criminal Law* (Concord, On.: Irwin Law, 1996); Roger Hopkins Burke, *Criminal Justice Theory. An Introduction* (London: Routledge, 2012); Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (London: Thomson Reuters, 2012); Sanford H. Kadish, Stephen J. Schulhofer, *Criminal Law And Its Processes. Cases And Materials* (Boston: Little, Brown and Company, 1989).
[197] Huigens, "Is Strict Liability Rape Defensible?" 196-217.
[198] Victor Tadros, "The Distinctiveness of Domestic Abuse: A Freedom-Based Account," in *Defining Crimes. Essays on the Special Part of the Criminal Law*, eds. R. A. Duff and Stuart P. Green (Oxford: Oxford University Press, 2005), 119-142.
[199] Gardner and Shute, "The Wrongness of Rape," 193-217.

definition of rape as a crime of violence (Temkin, Estrich, Schulhofer) and questioning the nature and scope of rape definition (Huigens, Tadros), I offer new insights into the multiple legal layers and actors that shaped the discourse on sexual violation in Islamicate societies.

A particular difficulty that I encountered was the presence in *furūʿ* works of multiple definitions, situations and solutions to forcible sexual acts. Moreover, the wrongness of rape did not seem to have been anchored in one particular *mal* from which all definitions ensued. The question became how to make sense of the numerous definitions and categories? And, how to frame such findings? I became increasingly aware that pre-modern jurists did not have a single definition for unwanted sex nor a single term to describe it. They did not categorically define rape as solely a crime of violence or a crime of sex, or even a property crime. Moreover, there was not a single definition that was abandoned and superseded by another with time. Rather, what I saw was the co-existence of a number of definitions pertaining to different contexts simultaneously in the different schools. As will become clear in chapters two, three and four, not all schools adopted all the categories examined.

Moreover, instead of having a single monolithic term to refer to unwanted sex and a single definition to describe it whether through violence, coercion, sex or property, pre-modern jurists used multiple terms and classified unwanted sex under different categories depending on the context and nature of the *actus reus*. Furthermore, pre-modern jurists seem to have recognised different kinds of *mal* for unwanted sex. They attributed the wrongness of unwanted sex to both *mala in se* and *mala prohibita* depending on the context of the act. If we take sexual penetration as an example, we find that it was treated as a prohibited wrong (*malum prohibitum*) in the context of sexual intercourse between spouses during the fasting month of Ramadan or the *ḥajj* (pilgrimage); and as a wrong in itself (*malum in se*) in the context

of an illicit adulterous relationship, for instance. Illicit or wrongful penetration was thus not accorded the same *mal* nor was it classified under the same category but under different ones.

Offences, in Islamic legal discourse, can be divided into three broad categories following Rudolph Peters. Those offences infringing on the rights of God (*ḥuqūq Allāh*) and punished through the *ḥudūd*; those infringing on the rights of individuals and punished through retaliation (*qiṣās*) or indemnity (*diyya*); and those meriting discretionary punishment through either *taʿzīr* (discretionary punishment) or *siyāsa* (punishment decreed and implemented by the ruling authority).[200] Whereas wrongs against God (the *ḥudūd*) demanded the most severe corporal punishments, absolute certainty and the highest burden of proof, wrongs against individuals were less demanding in terms of evidence, the need for certainty and were (often but not always) less severe in terms of punishment, requiring for the most part civil redress.[201] As far as the categories analysed in this study are concerned, we find that *zinā* fell under the *ḥudūd* while the other categories, *ghaṣb*, *ṣiyāl* and *ikrāh* straddled both the *ḥudūd* and non-*ḥudūd*. Whereas the *ḥudūd* necessitated fixed capital or physical punishment, the other categories often treated wrongs as torts and required civil redress and/or physical punishment based on *taʿzīr.*

It, thus, seemed to me that the legal pluralism that contemporary scholars of Islamic law have noted with regards to the existence of different schools of law, different layers of opinion within the schools and different mechanisms for discovering the law, such pluralism was equally adopted with regards to forcible sexual acts thereby making rape a differentiated offence. Consequently, I decided to frame my analysis of unwanted sex as a differentiated

[200] Peters, *Crime and Punishment*, 7; Rabb, "Islamic Legal Maxims"; Fierro, "Idrāʾu L-Ḥudūd Bi-L-Shubuhāt."
[201] For more please see, Peters, *Crime and Punishment*, 6- 68.

offence that partook of different definitions and categories, the most prominent of which being *ikrāh*, *ṣiyāl* and *ghaṣb*. Moreover, straddling what we would now call civil and criminal law, these categories offered redress through both punitive and restorative (in the sense of restitution and reparation) means.

This dissertation, thus, offers a vignette into a legal tradition in which rape was simultaneously defined as a sexual offence, as a crime of violence, a property crime *and* a crime of duress depending on the context of the crime as well as the different forms of the *actus reus* and fault elements. In other words, the Islamic legal tradition did not recognise "rape" as a single simple offence but as multiple offences. There was *ikrāh* for sexual coercion, *ghaṣb* where sex was obtained through the usurpation of sexual property by force and/or asportation and *ṣiyāl* where sex was placed alongside assaults and violent offences.

In this dissertation, a number of terms have been used guardedly. The term "crime", for example, is used even though it is not the best translation or description of the acts that I am referring to. As Hallaq has pointed out, "offence" is a better option than "crime." Hallaq drew attention to the conceptual differences between modern "crimes" and the "offences" described in pre-modern Islamic legal works. He pointed to the different contemporary connotations of the term "crime" and its conjunction with modern means of punishment enforced by modern states; elements which the offences in *fiqh* works, for example, do not partake of.[202] For those reasons, I am using the term "crime" guardedly.

Similarly, I am using the terms *mala in se* and *mala prohibita* equally guardedly while taking into consideration the differences between their different connotations and the classification of acts in Islamic law. Acts (*afʿāl*, sing. *fiʿl*) in Islamic legal works, were placed

[202] Hallaq, *Shariʿah*, 308-311.

along several trajectories. According to one such trajectory, acts were placed along a continuum ranging from the totally forbidden to the totally allowed. Hence, acts were classified according to five categories: the obligatory, the recommended, the permissible, the repugnant and the prohibited. The obligatory (*wājib*) involved acts that believers had to perform failing which punishment (in this world or the Hereafter) would ensue; the recommended (*mandūb*) involved acts that were commended and were rewarded in case of commission but were nevertheless optional and the omission of which did not involve any punishment; the permissible or neutral category (*mubāḥ*) involved acts that were allowed and that a believer could commit or not; the repugnant (*makrūh*) involved acts that were not recommended but were not punished when committed and finally the prohibited or forbidden category (*ḥarām*) involved acts that were not allowed and that involved severe punishment in case of commission (such as *zinā*).[203] From the above, it becomes clear that the classification of acts in Islamic legal thought differed from the binary classification of acts according to the *mala in se* and *mala prohibita* classification. These two categories would perhaps resemble the last two categories of the Islamic classification of acts, with an important caveat that the prohibition of acts in the *mala prohibita* category often stemmed from modern legislation which was not the case with the Islamic classification.

## Dissertation Layout & Research Questions

The dissertation is divided into four chapters. The first two chapters will deal with the category of duress. The first will offer a brief review of the legal category of duress highlighting some, but by no means all, of its salient features while chapter two will offer an

[203] Wael Hallaq, *A History of Islamic Legal Theories*, 40-42.

interpretation of sexual duress as portrayed in *furūʿ* and *fatāwá* works. Chapter three will delve into the related concepts of *ghaṣb* and *ṣiyāl* while chapter four will develop the notion of legal plurality further by exploring different means of justice (particularly restorative justice) suggested for sexual violation.

Chapters one and two were devoted to the category of duress, particularly sexual duress, for a number of reasons. As previously mentioned, the definition of rape as a crime of duress has not received the attention it deserves from scholars of Islamic law. Notable exceptions were the studies of Abou El Fadl, Syed and Azam. Secondly, the presence of a definition of rape as a crime of duress, is a legal phenomenon that deserves more attention in the field of Islamic legal history as well as the legal history of rape, in general.

Each chapter will tackle two subjects. The first being the substantive legal content of the category under purview while the second will be an analysis of the primary sources in terms of their structure and/ or methodology.

Finally, this dissertation is arranged topically, not chronologically. Although I sometimes trace the development of certain concepts or techniques, I do not make the chronological development of all topics my main concern.

## Chapter One

## Legal Definitions and Delineations of Duress (*Ikrāh*)

This chapter sheds light on the most salient features of the discourse on duress in *furūʿ* and *fatāwá* works. Attention will be paid to the definition of duress, its conditions and requirements, as well as the description of the coercer and the coerced. The *mal* (wrongness) of duress will be located within the harm principle as well as the nullification of consent. Furthermore, special focus will be given to the expansive nature of definitions, the subjective elements constituting victim experience in addition to the textual and methodological differences between the four *Sunnī* schools of law.

The legal category of duress (*ikrāh*) has attracted little attention from scholars of Islamic law. Only a handful of scholars have discussed this legal category, namely, Abou El Fadl, El-Hassan, Azam and Syed. Abou El Fadl compared the Islamic and Common law understandings of this concept,[204] Syed examined the theological implications of duress,[205] Azam compared the Ḥanafī concept of duress to the Mālikī concept of *ghaṣb*[206] while El-Hassan offered a very brief comparison of the concept of duress as portrayed in Islamic legal sources and Sudanese and English law.[207]

As far as sexual duress (*al-ikrāh ʿalá al-zinā*) is concerned, we find a limited number of scholars who had argued for the *de jure* existence of a discourse on sexual coercion in Islamic legal discourse. Abou El Fadl devoted three paragraphs to it within his general analysis of the

[204] Abou El Fadl, "Law of Duress," 305-350.
[205] Syed, "Coercion."
[206] Azam, "Competing Approaches," 327-341; Azam, "Sexual Violence."
[207] ʿAbd El-Wahab Ahmed El-Hassan, "The Doctrine of Duress (Ikrah) In Sharia, Sudan And English Law," *Arab Law Quarterly* 1 (1986): 231-236.

concept of *ikrāh*,[208] Syed devoted a number of pages to sexual duress within his overall analysis of coercion in general,[209] Azam compared the Ḥanafī concept of *ikrāh* to the Mālikī discourse on *ghaṣb,*[210] while Eich orally stated that rape is *ikrāh*, without further elaborating his position to the best of my knowledge.[211] As previously mentioned, Azam's contribution to the discourse on sexual coercion was the most elaborate and detailed of all previous attempts. Her seminal contribution will be referred to throughout this dissertation.

The discourse on sexual duress, in *furūʿ* and *fatāwá* works, was placed as a sub-category of duress partaking of the same definition, taxonomy and legal status. Hence, a brief review of the most salient features of the discourse on duress, particularly those points that bear direct relevance to sexual duress, seems quite relevant.

By examining the category of *ikrāh* in the *fiqh* works of all four *Sunnī* schools of law we can cover the main representative treatment of *ikrāh* in the *Sunnī* tradition and investigate some of the methodological and textual differences between one school and another, as well as one legal section and another within the same school, and their implications. Although Ḥanafī scholarship on *ikrāh* is more prolific than the others, it is important to note the existence of this legal category in the other schools, as well as their contribution to the discourse on duress, in general, and sexual duress in particular.

Given the concise and succinct nature of most *furūʿ* works, legal definitions and explanations were often not repeated in the sub-discourse on sexual duress once they had been examined at the outset of the discourse on *ikrāh*. Some points were treated in greater

[208] Abou El Fadl, "Duress," 325.
[209] Syed, "Coercion," 226-234; Syed, *Coercion and Responsibility in Islam*, 186-199.
[210] Azam, "Competing Approaches," 327-341; Hina Azam, "Sexual Violence," 143-283.
[211] Thomas Eich orally stated that rape falls under duress during the question period following his paper presentation (entitled "*Abortion after Rape in Islamic Law: An Historical Perspective*") at MESA, Montreal, Canada on Sunday, November 18th 2007.

depth in the sub-discourse on sexual duress, such as the nature of the duressor and the *ḥadd* punishment, but most other points were not repeated at all. For these reasons, I shall begin with a review of the legal definition of duress.

## The Linguistic and Legal Definitions of Duress

The definition of any legal category probably constitutes its "most important ...component" according to Roach.[212] One of the reasons for its importance lies in how expansive or restrictive a definition is and the interpretations and procedures that ensue from such definition, with prohibition following closely on the heels of definition. As a legal category, we find that the discourse on duress (*ikrāh*) often began with clear definitions of its limits outlining those acts that constitute duress as well as those that do not belong to the ambit of duress as well as the conditions for duress or its textual basis in Qurʾanic verses, Prophetic or non-Prophetic precedents.[213] In launching their discourse, jurists often used such formulae as: "*Al-ikrāh huwa.../* duress is...."[214] or "*fī bayān al-ikrāh.../* on the elucidation of

[212] Roach, *Criminal Law*, 6.

[213] Muwaffaq al-Dīn ʿAbd-Allāh ibn Aḥmad Ibn Qudāma, *al-Mughnī* (Beirut: Dār al-Kutub al-ʿIllmiyya, n.d.), 8: 259; Shams al-Dīn Muḥammad ibn ʿAbd-Allāh al-Zarkashī, *Sharḥ al-Zarkashī ʿalá Mukhtaṣar al-Khiraqī,* ed. ʿAbd al-Monʿim Khalīl Ibrāhīm (Beirut: Dār al-Kutub al-ʿIllmiyya, 2002), 2: 465-466; Abī Isḥāq Ibrāhīm ibn ʿAlī al-Firūzabādī al-Shīrāzī, *al-Muhadhdhab fī fiqh al-Imām al-Shāfiʿī* (Cairo: Maktabat Muṣṭafá al-Bābī al-Ḥalabī, 1976), 2: 99; Abī al-Ḥassan ʿAlī ibn Muḥammad al-Māwardī, *al-Ḥāwī al-kabīr* (Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī, 2009), 13: 76; Abī Zakariyyā Yaḥyá ibn Sharaf al-Nawawī, *Rawḍat al-ṭālibīn,* ed. Fuʾād ibn Sirāj ʿAbd al-Ghaffār (Cairo: al-Maktaba al-Tawfīqiyya, n.d.), 6: 52; Muḥammad ibn ʿAbd-Allāh al-Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl* (n.p.: Dār al-Fikr, n.d.), 4: 33; Shams al-Dīn al-Sarakhsī, *Kitāb al-Mabsūṭ* (Beirut: Dār al-Maʿrifa, n.d.), 24: 38; Kāsānī, *Badāʾiʿ*, 10: 97; Burhān al-Dīn ʿAlī ibn Abī Bakr ibn ʿAbd al-Jalīl al-Marghinānī, *al-Hidāya sharḥ Bidāyat al-mubtadī* (Cairo: al-Maktaba al-Tawfīqiyya, n.d.), 4: 69; Muḥammad ibn Ḥusayn ibn ʿAlī al-Ṭūrī, *Takmilat al-Baḥr al-rāʾiq sharḥ Kanz al-daqāʾiq,* printed with Zayn al-Dīn Ibn Nujaym, *al-Baḥr al-Rāʾiq sharḥ Kanz al-daqāʾiq* (n.p.: Dār al-Kitāb al-ʿArabī, n.d.), 8: 79; Shams al-Dīn Aḥmad ibn Qawḍar Qāḍī Zāda, *Natāʾij al-afkār fī kashf al-rumūz was al-asrār,* printed with Kamāl al-Dīn Muḥammad ibn ʿAbd al-Wāḥid ibn al-Humām, *Sharḥ Fatḥ al-qadīr* (Beirut: Dār al-Fikr, 1990), 9: 232-233; Muḥammad ibn ʿAlī al-Ḥaṣkafī, *al-Durr al-mukhtār sharḥ Tanwīr al-abṣār,* printed with Muḥammad Amīn Ibn ʿĀbidīn, *Ḥāshiyat Radd al-muḥtār ʿalá al-Durr al-mukhtār sharḥ Tanwīr al-abṣār* (Cairo: Maktabat wa Maṭbaʿat Muṣṭafá al-Bābī al-Ḥalabī, 1984), 6: 136.

[214] Abī al-Ḍiyāʾ Nūr al-Dīn ʿAlī ibn ʿAlī al-Shubrāmalsī, *Ḥāshiyat Abī al-Ḍiyāʾ Nūr al-Dīn ʿAlī ibn ʿAlī al-Shubrāmalsī,* printed with Shams al-Dīn Muḥammad ibn Aḥmad al-Ramlī, *Nihāyat al-muḥtāj ilá sharḥ al-Minhāj fī al-fiqh ʿalá madhhab al-imām al-Shāfiʿī* (Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī, 1992), 3: 387.

duress…"[215] or similar formulae that denote the doctrinal limits and/or bases for their views. Some *furūʿ* works began with a dual definition that delineated duress both linguistically and legally.[216] This technique can be traced in Ḥanafī works spanning different centuries. Cases in point include the work of Kāsānī (d. 1191 C.E.),[217] Qāḍī Zāda (d. 1580 or 81 C.E.),[218] Ḥaṣkafī (d. 1677 C.E.),[219] and Ṭūrī (active 1726 C.E.).[220]

Linguistically (*lughatan*), duress was defined as compelling someone to do something that s/he does not like, or that s/he hates (*yakrahuhu*)[221] and as the negation of consent (*riḍā*) and affection (*maḥabba*).[222] Interestingly, jurists stated that duress occurs when an individual is compelled to do something that he does not like, rather than something that he does not consent to. Legally (*sharʿan*), *ikrāh* was defined as the compulsion to act under threat or through promises;[223] as an act (*fiʿl*) undertaken by a coercer that moves the coerced in such a manner as to make the latter compelled to do what was asked of him;[224] as the intimidation undertaken by a capable [person] against another…that annuls the latter's consent (*yantafī bihi al-riḍā*).[225] Duress was said to affect two kinds of acts: physical (*ḥissiyya*) such as *zinā* and murder or legal (*sharʿiyya*) such as divorce and manumission.[226]

Within the Ḥanafī school, the definitions penned by Sarakhsī (d. 1090 C.E.) and Marghinānī (d.1196 or 7 C.E.) were often quoted by subsequent jurists and seem to have formed

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[215] Nawawī, *Rawḍat*, 6: 52.
[216] The linguistic analysis of texts plays a significant role in the area of *uṣūl*. For more, please see: Wael B. Hallaq, *A History Of Islamic Legal Theories,* 42-58.
[217] Kāsānī, *Badāʾiʿ*, 10: 97.
[218] Qāḍī Zāda, *Natāʾij*, 9: 232-233.
[219] Ḥaṣkafī, *Durr*, 6: 136.
[220] Ṭūrī, *Takmilat al-Baḥr al-rāʾiq*, 8: 79.
[221] Ṭūrī, *Takmilat al-Baḥr al-rāʾiq*, 8: 79; Qāḍī Zāda, *Natāʾij*, 9: 232; Ḥaṣkafī, *Durr*, 6: 136.
[222] Kāsānī, *Badāʾiʿ*, 10: 97.
[223] Ibid.
[224] Qāḍī Zāda, *Natāʾij*, 9: 233.
[225] Ibid.
[226] Kāsānī, *Badāʾiʿ*, 10: 112; Shams al-Dīn Muḥammad ibn Aḥmad al-Ramlī, *Nihāyat al-muḥtāj ilá sharḥ al-Minhāj fī al-fiqh ʿalá madhhab al-imām al-Shāfiʿī* (Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī, 1992), 6: 446.

the doctrinal kernels around which later definitions were added.[227] Sarakhsī defined duress as any act (*fiʿl*) inflicted upon a person by another that annuls the former's consent (*riḍā*) or vitiates his choice (*ikhtiyār*)[228] while Marghinānī (d.1196 or 7 C.E.) stated that "duress is the name of an act that someone does to someone else that vitiates his [the latter's] consent and spoils his choice"[229]; two definitions that began by underscoring the coercive acts that annul the consent and vitiate the choice of the duressed. Other Ḥanafī jurists also began their definitions of duress by listing examples of coercive acts or measures that constitute non-consent or lack of choice. This can be found in both *furūʿ* and *fatāwá* works. Cases in point include the *Fatāwá Bazzāziyya*,[230] the *Fatāwá Hindiyya*[231] as well as the work of Kāsānī (d.1191 C.E.),[232] Ḥalabī (d.1549 or 50 C.E.),[233] and Ḥaṣkafī (d.1677 C.E.).[234]

Jurists from the other three schools also began their elucidation of duress with the markers of coercion rather than the signs of resistance or non-consent.[235] For example, the Ḥanbalī Khiraqī (d. 945 or 6 C.E.) stated that duress involved some form of torture (*ʿadhāb*) such as strangulation (*khanq*), lapidation/battery (*ḍarb*) or similar acts,[236] while his commentator Ibn Qudāma (d. 1223 C.E.) added water-boarding (*al-ghaṭṭ fī al-māʾ*) and

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[227] See for example, Qāḍī Zāda's *Natāʾij* (9: 232-233) in which he traces the different constituents of the definition of *ikrāh* to their various author-jurists.
[228] Sarakhsī, *Mabsūṭ*, 24: 38.
[229] Marghinānī, *Hidāya*, 4: 69.
[230] Muḥammad ibn Muḥammad ibn Shihāb ibn al-Bazzāz al-Kardarī, *Al-Fatāwá al-Bazzāziyya,* printed with Al-Shaykh Nizām and other authors, *al-Fatāwá al-Hindiyya* (Diyār Bakr, Turkey: al-Maktaba al-Islāmiyya, 1973), 6: 127.
[231] Al-Shaykh Nizām and other authors, *al-Fatāwá al-Hindiyya* (Diyār Bakr, Turkey: al-Maktaba al-Islāmiyya, 1973), 5: 35.
[232] Kāsānī, *Badāʾiʿ*, 10: 97.
[233] Ibrāhīm ibn Muḥammad al-Ḥalabī, *Multaqá al-abḥur fī furūʿ al-ḥannafiyya,* printed with ʿAbd al-Raḥmān ibn Muḥammad Shaykh Zāda, *Majmaʿ al-anhur fī sharḥ Multaqá al-abḥur* (Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī, 2001), 4: 35.
[234] Ḥaṣkafī, *Durr*, 6: 136.
[235] Although I am focussing on the four major schools of Sunnī law, it is important to note that the Ẓāhirī Ibn Ḥazm equally defined the *actus reus* of duress according to the coercive measures undertaken by coercers. ʿAlī ibn Aḥmad ibn Ḥazm, *al-Muḥallá,* ed. Lajnat Iḥyāʾ al-Turāth al-ʿArabī (Beirut: Dār al-Jīl, n.d.), 8: 330.
[236] ʿOmar ibn al-Ḥusayn ibn ʿAbd-Allāh al-Khiraqī, *Mukhtaṣar al-Khiraqī,* printed with Shams al-Dīn Muḥammad ibn ʿAbd-Allāh al-Zarkashī, *Sharḥ al-Zarkashī ʿalá Mukhtaṣar al-Khiraqī,* ed. ʿAbd al-Monʿim Khalīl Ibrāhīm (Beirut: Dār al-Kutub al-ʿIllmiyya, 2002), 2: 466.

imprisonment,[237] and Mardāwī ( d. 1580 or 1 C.E.) enlarged the scope of coercive measures to include banishment and being chained/ bound (*al-qayd*) for a long time.[238]

Similarly, in the Shāfiʿī school, coercive acts were often classified according to seven broad categories that started with death (the death of the coerced, his kin or others), physical injury (*al-jarḥ*), battery (*al-ḍarb*), imprisonment, theft of property, banishment, insults and ridicule.[239] Shīrāzī (d. 1083 C.E.), for example, began his discourse with a broad statement describing the coercive element as any threat of personal harm (*ḍarar*) resulting in death, amputation, battery, long imprisonment, banishment or ridicule (*istikhfāf*).[240] The form of duress in this early statement was thus restricted to that of the person, although it acknowledged both physical and verbal harm. Ridicule, however, was extended to eminent individuals only (*min dhawī al-aqdār*).[241]

While Shīrāzī's definition underscored duress as strictly that of the person, later sources reported a vigorous debate concerning this form of duress. Nawawī (d. 1277 C.E.), for example, cited two contending opinions: one that limited duress to harm targeting the body of the coerced (*badan al-mukrah*) and one that enlarged the definition of harm to include harm to kin as well as economic duress.[242]

In the Mālikī school, descriptions of duress also began with its *actus reus* in the sense of the coercive measures undertaken by coercers to break the will or to enforce the compliance of the coerced.[243] A succinct enumeration of legally recognised coercive measures was penned

[237] Ibn Qudāma, *al-Mughnī*, 8: 260.
[238] ʿAlī ibn Sulaymān ibn Aḥmad al-Mardāwī, *al-Inṣāf fī maʿrifat al-rājiḥ min al-khilāf ʿalá madhhab al-imām Aḥmad ibn Ḥanbal*, ed. Muḥammad Ḥassan Ismāʿīl (Beirut: Dār al-Kutub al-ʿIllmiyya, 2002), 8: 440.
[239] Māwardī, *Ḥāwī*, 13: 77-78; Nawawī, *Rawḍat*, 6: 52-54; Ramlī, *Nihāyat*, 6: 447.
[240] Shīrāzī, *Muhadhdhab*, 2: 100.
[241] Ibid., 2: 100.
[242] Nawawī, *Rawḍat*, 6: 54.
[243] See for example, ʿAlī al-Ṣaʿīdī al-ʿAdawī, *Ḥāshiyat al-ʿAdawī ʿalá sharḥ Abī al-Ḥassan li-Risālat ibn Abī Zayd* (Cairo: Dār Iḥyāʾ al-Kutub al-ʿArabiyya, n.d.), 2: 72.

by Khalīl (d. 1365? C.E.) as follows: "If he is coerced (*ukriha*)...through an agonising fear of death, battery, imprisonment, being bound, being slapped in public for a dignified person or killing his son or [harm] to his property."[244] Khalīl's definition was later expanded along several trajectories by his commentators.[245]

From the above, three points loom large. First, that the definition of duress was based on the markers of coercion rather than the signs of resistance or non-consent, i.e. that the *actus reus* of duress was defined according to what the coercer did rather than how the coerced resisted or manifested his/her non-consent; thereby laying the focus on the coercer rather than the coerced. Second, that such a technique stands in sharp contrast to that employed in the discourse on *ghaṣb*. In the latter (as we shall see in the chapter three) the corroboration of force, resistance and non-consent by the victim was *de rigueur*.

The third point that merits attention is that the *mal* (wrongness) of duress was attributed to two different concepts, namely, coercion and the nullification of consent on the one hand and the infliction of harm on the other hand. Whereas the harm principle was evoked by the Shāfiʿīs and Ḥanbalīs; the nullification of consent and vitiation of choice were underscored by the Ḥanafīs. Even though all four schools touched upon both principles, different schools emphasised different principles.

## Consent

The term used by jurists to indicate consent was *riḍā*. They used this term predominantly in the discourse on *ikrāh* and not the terms *ījāb* (agreement) or *qubūl/ qabūl*

[244] Khalīl ibn Isḥāq al-Jundī, *Mukhtaṣar al-ʿalāma Khalīl,* printed with Ṣāliḥ ʿAbd al-Samīʿ al-Ābī al-Azharī, *Jawāhir al-iklīl sharḥ Mukhtaṣar al-ʿalāma Khalīl* (Cairo: Maṭbaʿat Muṣṭafá al-Bābī al-Ḥalabī, n.d.), 1: 340.
[245] Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 4: 33-34; Ṣāliḥ ʿAbd al-Samīʿ al-Ābī al-Azharī, *Jawāhir al-iklīl sharḥ Mukhtaṣar al-ʿalāma Khalīl* (Cairo: Maṭbaʿat Muṣṭafá al-Bābī al-Ḥalabī, n.d.), 1: 340.

(acceptance), for example, which they had used in the discourse on the marriage contract (*nikāḥ*) also to indicate consent.[246] Unlike *ījāb* or *qubūl*, *riḍā* connotes satisfaction, contentment and ease and not a formulaic form of acceptance. Although *riḍā* and *qubūl* are semantically synonymous, they do not seem to have been used interchangeably in the *furūʿ*.

The definition of *riḍā* was sometimes penned in the quarter (*rubʿ*) on the *buyūʿ*. *Riḍā* was defined as an internal, subjective condition (*khafī*) that could not be discerned by outsiders.[247] As an internal feeling, *riḍā* had to be demonstrated by overt acts in order to manifest itself such as through words or deeds (*qawl aw fiʿl*), according to Nafrāwī (d. 1714? C.E.)[248] or through words, writing or signs (*qawl aw kitāba aw ishāra*) according to ʿIllaysh (d.1882 C.E.)[249] In other words, consent, as *riḍā*, had to be both affirmative and/or performative. This understanding of consent as affirmative and/or performative and not implied can be seen in the thought of several jurists from different schools.[250]

In the Ḥanafī school, the definition of duress was structured around the axes of consent (*riḍā*) and choice (*khayār* or *ikhtiyār*) with the nullification of consent and vitiation of choice forming the basis for the wrongness of duress. Cases in point include the above definitions by Sarakhsī and Marghinānī as well as Ḥalabī's definition which succinctly defines *ikrāh* as: "An act that someone does to another that annuls his *riḍā* or vitiates his choice while maintaining

[246] Jalāl al-Dīn Aḥmad ibn Muḥammad al-Maḥallī, *Sharḥ al-Maḥallī ʿalá Minhāj al-ṭālibīn*, printed with Shihāb al-Dīn Aḥmad ibn Aḥmad al-Qalyūbī, *Ḥāshiyatān al-Qalyūbī wa ʿUmayrah ʿalá Sharḥ al-Maḥallī ʿalá Minhāj al-Ṭālibīn* (Cairo: Maṭbaʿat Muṣṭafá al-Bābī al-Ḥalabī, 1956), 3: 215.
[247] Ramlī, *Nihāyat*, 3: 375; Maḥallī, *Sharḥ,* 2: 153.
[248] Nafrāwī, for example, stated that contracts cannot be considered valid or binding without a clear demonstration of *riḍā* (*wa lā yalzam ilá bi-mā yadul ʿalá al-riḍā min qawl aw fiʿl*). Aḥmad ibn Ghunaym ibn Sālim al-Nafrāwī, *al-Fawākih al-dawānī ʿalá Risālat ibn Abī Zayd al-Qayrawānī* (Cairo: Maṭbaʿat Muṣṭafá al-Bābī al-Ḥalabī, 1955), 2: 158.
[249] Muḥammad ibn Aḥmad ʿIllaysh, *Taqrīrāt al-ʿalāma al-muḥaqiq al-shaykh Muḥammad ʿIllaysh,* printed with Muḥammad ibn ʿArafa al-Dasūqī, *Ḥāshiyat al-Dasūqī ʿalá al-Sharḥ al-kabīr* (Cairo: Dār Iḥyāʾ al-Kutub al-ʿArabiyya, n.d.), 3: 3. Muhammad ʿIllaysh was a major Azhar scholar who died in 1882.
[250] Maḥallī, *Sharḥ*, 2: 153; Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 5: 2; al-Ābī al-Azharī, *Jawāhir*, 2: 2; Dasūqī, *Ḥāshiya*, 3: 3.

his legal capacity."[251] This presumption of non-consent in coercive situations was repeatedly stressed by numerous jurists such as Ḥaṣkafī[252] and Ibn ʿĀbidīn (d.1836 C.E.) who had declared that all kinds of duress annul the consent of the coerced (*wa kul minhumā muʿdim li al-riḍā*).[253]

Jurists exerted considerable effort in outlining the relationship between coercion, consent and choice.[254] In theorizing this relationship, some jurists began by underscoring consent because consent was believed to be broader in scope (*aʿamm*) than choice, as a different marker of duress.[255] Moreover, the corruption of consent was said to be found in all categories of duress whereas choice was to be found in some instances only.[256] In addition, the lack of consent was said to constitute the *ratio legis* (*ʿilla*) for the presence of *ikrāh*.[257] By making consent the *ratio legis* for duress, jurists thereby expanded the area of doubt concerning coercion given how expansive their vision of consent was.

There seems to have been two positions regarding the inclusion of choice as a requirement for the recognition of duress. These two positions impacted the parameters of duress in the following manner: if choice were recognised as a condition for duress, then imprisonment and physical pain would not be deemed to be coercive measures because they did not pose an immediate threat to one's life the way that being attacked by a lion did, for example.[258] However, if choice were not a condition for duress, then the scope of coercive

[251] Ḥalabī, *Multaqá,* 4: 35-36.
[252] Ḥaṣkafī, *Durr*, 6: 138.
[253] Muḥammad Amīn Ibn ʿĀbidīn, *Ḥāshiyat Radd al-muḥtār ʿalá al-Durr al-mukhtār sharḥ Tanwīr al-abṣār* (Cairo: Maktabat wa Maṭbaʿat Muṣṭafá al-Bābī al-Ḥalabī, 1984), 6: 136.
[254] The role of choice, within the discourse on *ikrāh*, will be elucidated shortly alongside the agency of the coerced.
[255] Qāḍī Zāda, *Natāʾij*, 9: 233; Muḥammad ibn Maḥmūd al-Bābartī, *Sharḥ al-ʿInāya ʿalá al-Hidāya* printed with Muḥammad ibn ʿAbd-al-Wāḥid al-Sīwāsī ibn al-Humām, *Sharḥ Fatḥ al-Qadīr* (Beirut: Dār al-Fikr, 1990), 9: 232.
[256] ʿAbd al-Raḥmān ibn Muḥammad Shaykh Zāda, *Majmaʿ al-anhur fī sharḥ Multaqá al-abḥur* (Beirut: Dār Iḥyāʾ al-Turāth al-ʿArabī, 2001), 4: 35; Bābartī, *ʿInāya*, 9: 232; Qāḍī Zāda, *Natāʾij*, 9: 233.
[257] Bābartī, *ʿInāya*, 9: 233.
[258] Nawawī, *Rawḍat*, 6: 53.

measures would be significantly expanded to include acts and measures that did not pose a direct threat to the physical wellbeing of the coerced.

Accordingly, the argument against the inclusion of choice posited that coercion could obtain with acts that a rational person (*al-ʿāqil*) would balk at or be wary of (*ḥadhiran mimmā tahaddadahu bihi*) while taking into account the principle of proportionality regarding people and acts.[259] As such, with the exclusion of choice as a requirement, duress to kin and the duress of goods would be admissible as forms of duress alongside duress to the person.[260] In other words, with the exclusion of choice as a requirement for the recognition of duress, the scope of harm could be extended beyond the immediate and the physical. Within that debate, the second position was deemed to have been the most valid (*al-aṣaḥḥḥ*).[261]

While some jurists devoted separate sections to choice, such as Sarakhsī who composed a separate section within his book on duress entitled "the section (*bāb)* on choice within duress,"[262] others dealt with this issue as it cropped up in the different chapters of their works.[263]

Alongside consent and choice, jurists discussed the legal capacity of the duressed (*ahliyyat al-mukrah*), which was believed to exist in the presence of duress.[264] Ṭūrī, for example, maintained that "duress was not incompatible with the legal capacity of the duressed/*al-ikrāh lā yunāfī ahliyyat al-mukrah*"[265] while ʿAynī stated that the vitiation of choice did not negate

[259] Ibid., 6: 53-54.
[260] Ibid.
[261] Nawawī, *Rawḍat*, 6: 54.
[262] Sarakhsī, *Mabsūṭ*, 24: 135-144.
[263] Nawawī, *Rawḍat*, 6: 53; Māwardī, *Ḥāwī*, 13: 76.
[264] Ṭūrī, *Takmilat al-Baḥr al-rāʾiq*, 8: 80; Marghinānī, *Hidāya*, 4: 67; Sarakhsī, *Mabsūṭ*, 24 : 135-144; Bābartī, *ʿInāya*, 9: 233; Maḥmūd ibn Aḥmad al-ʿAynī, *al-Bināya fī sharḥ al-Hidāya* (Beirut: Dār al-Fikr, 1990), 10: 44.
[265] Ṭūrī, *Takmilat al-Baḥr al-rāʾiq,* 8: 80.

capacity.[266] By maintaining the legal capacity of the coerced, jurists rendered the latter culpable for acts committed under duress.[267] As such, committing murder or *zinā* would have been considered forbidden in the presence of duress, just as they would have been considered forbidden otherwise.[268] By giving more agency to the individual in resisting and rejecting compliance, jurists thereby made the duressed accountable to a certain degree for acts committed under duress. Committing a forbidden act under duress, however, mitigated the prescribed corporal punishment for that act, as we shall shortly see. What this issue indicates is that jurists distinguished between capacity, culpability and responsibility and were well aware of the interplay between these three elements in the sense that having the capacity to act engendered certain obligations and responsibilities while at the same time relieved the coerced of criminal punishment. In other words, certain jurists differentiated between private responsibility and criminal punishment whereby the first did not necessarily lead to the second.

## The Harm Principle

As already mentioned, the harm principle was evoked by a number of schools as the basis for the wrongness of duress. Within the Shāfiʿī school, an early jurist like Māwardī (d.1058 C.E.) stated that: "Duress obtains when harm and palpable injury is visited upon the coerced/ *al-ikrāh fa-yakūn bi-idkhāl al-ḍarar wa al-adhā al-bayyin ʿalá al-mukrah*."[269] This opinion was

[266] ʿAynī, *Bināya*, 10: 44.
[267] Ibid.
[268] Ṭūrī, *Takmilat al-Baḥr al-rāʾiq,* 8: 80.
[269] Māwardī, *Ḥāwī,* 13: 77.

shared by other Shāfiʿī jurists who equally anchored duress within the infliction of harm (*ḍarar*) both personal and collective.[270]

A clear expansion can be observed in the scope of harm whereby early sources limited harm to that of the individual, later sources reported the presence of contending opinions concerning collective harm and even later sources reported the acceptance of collective harm towards one's kin. A case in point is Shīrāzī's definition which limited harm to physical injury suffered by the coerced, while a later jurist like Nawawī cited two contending opinions: one that limited duress to harm targeting the body of the coerced (*badan al-mukrah*) and one that enlarged the definition of harm to include harm to kin and the duress of goods.[271] Later, Ramlī (d.1596 C.E.) considered threats against a person's wife as duress and even later Shubrāmalsī (d.1676 or 77 C.E.) added one's friend or servant to the scope of duress.[272] Through these expansions, jurists were thus able to broaden the scope of harm beyond the physical to include the psychological and also beyond the individual to include his/her kin, as will be shown shortly.

The seven facets of harm within the Shāfiʿī school included death (of the coerced, his ascendants, descendants, kin or others), physical injury (*jarḥ*), battery (*ḍarb*), imprisonment (*ḥabs*), the confiscation of one's money or property, banishment (*nafī*) as well as insults and ridicule (*al-sabb wa al-istikhfāf*).[273]

The harm principle was equally present in the Ḥanbalī school encompassing both personal and collective harm. Ibn Qudāma, for example, called for its acceptance as a form of duress even though previous opinion [presumably within his school] had not accepted harm to

[270] Shīrāzī, *Muhadhdhab*, 2: 100; Nawawī, *Rawḍat*, 6: 54.
[271] Nawawī, *Rawḍat*, 6: 54, as well as Māwardī, *Ḥāwī*, 13: 77.
[272] Ramlī, *Nihāyat*, 6: 447; Shubrāmalsī, *Ḥāshiya*, 6: 447.
[273] Māwardī, *Ḥāwī*, 13: 77-78; Shīrāzī, *Muhadhdhab*, 2: 100; Nawawī, *Rawḍat*, 6: 52-54; Ramlī, *Nihāyat*, 6: 447.

one's kin as a form of valid duress. He argued that harm towards one's child is greater than the loss of money or threats and hence had to be accepted as duress.[274] Later, Zarkashī (d.1370 C.E.) mentioned the presence of two contending opinions within his school concerning this issue[275] and by Mardāwī's time harm targeting one's child or parent had become the valid opinion within the school ("*al-ṣaḥīḥ min al-madhhab*").[276]

## Categories of Duress

Duress was divided by jurists into several categories depending on its validity and severity. Shāfiʿī, Mālikī and Ḥanbalī jurists distinguished between valid/legitimate duress (*bi-ḥaqq* or *sharʿī*) and invalid/illegitimate duress (*bi-ghayr ḥaqq* or *ghayr sharʿī*).[277] The valid duress was defined as duress that concerns the rights of another[278] and involved such acts as forcing a financially capable person to repay his debts, an impotent man to divorce his wife, or a person hoarding food at a time of need to sell to others.[279] Illegitimate duress, on the other hand, included such acts as forced apostasy or divorce for no valid reason.[280]

As I mentioned earlier, Ḥanafī jurists, had divided duress into compelling and non-compelling types.[281] This form of duress was also referred to as complete duress (*ikrāh tām* or

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[274] Ibn Qudāma, *al-Mughnī,* 8: 262.
[275] Zarkashī, *Sharḥ*, 2: 466.
[276] Mardāwī, *Inṣāf*, 8: 440.
[277] Shīrāzī, *Muhadhdhab*, 1: 342; 2: 99-100; Maḥallī, *Sharḥ*, 2: 156; Ramlī, *Nihāyat*, 6: 445; Shihāb al-Dīn Aḥmad ibn Aḥmad al-Qalyūbī, *Ḥāshiyatān al-Qalyūbī wa ʿUmayrah ʿalá Sharḥ al-Maḥallī ʿalá Minhāj al-Ṭālibīn* (Cairo: Maṭbaʿat Muṣṭafá al-Bābī al-Ḥalabī, 1956), 2: 156; al-Ābī al-Azharī, *Jawāhir*, 1: 340; Dasūqī, *Ḥāshiya*, 2: 367; Nafrāwī, *Fawākih*, 2: 75; ʿIllaysh, *Taqrīrāt*, 2: 367; Khurashī, *al-Khurashī ʿalá mukhtaṣar Sīdī Khalīl*, 4: 33-34; Ibn Qudāma, *al-Mughnī,* 8: 260.
[278] Dasūqī, *Ḥāshiya*, 2: 367; ʿIllaysh, *Taqrīrāt*, 2: 367.
[279] Shīrāzī, *Muhadhdhab*, 2: 99; Ibn Qudāma, *al-Mughnī,* 8: 260; Dasūqī, *Ḥāshiya*, 2: 367; Maḥallī, *Sharḥ*, 2: 156; Qalyūbī, *Ḥāshiya*, 2: 156.
[280] Shīrāzī, *Muhadhdhab*, 2: 99, as well as Māwardī, *Ḥāwī,* 13: 76 even though he referred to coerced acts as *yaṣuḥ/ lā-yaṣuḥ* instead of *bi-ḥaqq/ bi-ghayr ḥaqq*, which suggests that the latter terms may not yet have been accepted as the standard terms by the school when Māwardī wrote his *Ḥāwī.*
[281] Kāsānī, *Badāʾiʿ*, 10: 97-98; Shaykh Zāda, *Majmaʿ*, 4: 35; Ṭūrī, *Takmilat al-Baḥr al-rāʾiq,* 8: 79; Qāḍī Zāda, *Natāʾij*, 9: 233-234; Ḥaṣkafī, *Durr*, 6: 136; Ibn ʿĀbidīn, *Radd*, 6: 136-137; *al-Fatāwá al-Hindiyya*, 5: 35. This division was said to have been introduced by Ṣadr al-Sharīʿa, according to Shaykh Zāda. Shaykh Zāda, *Majmaʿ*, 4: 35. Indeed, this division can

*kāmil*)[282] because it involved a severe form of duress to the person and included death, dismemberment, severe battery/lapidation (*ḍarb*),[283] as well as being threatened with these acts.[284] Hence, it was believed to nullify the consent and vitiate the choice of the duressed.[285] Consequently, a person completely coerced into murder, *zinā* or apostasy, for example, was often absolved of the punitive consequences of these acts although some kind of civil redress was often required of them, as we shall shortly see.

One can argue that the division of duress along the valid/invalid binary aimed at establishing distinctions based on the legitimacy or appropriateness of the coerced act, whereas the compelling/non-compelling binary distinguished between acts on the basis of the method used and how effective it was in producing compliance. In other words, whereas one position distinguished between the nature of the coerced acts, the other examined the effectiveness of the method used. In retrospect, such distinctions mirror a similar division in jurisprudence (*uṣūl al-fiqh)* concerning analogical reasoning and arriving at the *ratio legis* (*ʿilla*). As Zysow had demonstrated, Ḥanafī jurists had promoted the principle of effectiveness whereas their counterparts had promoted analogy on the basis of appropriateness.[286] The principles of effectiveness and appropriateness promoted in the *uṣūl* could have been equally translated into the *furūʿ*. As far as the division of the different categories of duress are concerned, these principles were expressed in varied terms along school lines.

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be found in Ṣadr al-Sharīʿa's commentary on Tamartāshī's *Tanwīr al-Abṣār* without mention that this division was a new introduction to the field. Ḥaṣkafī did not state that he was introducing a novel point to the discourse on *ikrāh* but simply mentioned that duress could be divided into two categories. (Ḥaṣkafī, *Durr*, 6: 136).

[282] Kāsānī, *Badāʾiʿ*, 10: 97-98; Ṭūrī, *Takmilat al-Baḥr al-rāʾiq*, 8: 79; Ḥaṣkafī, *Durr*, 6: 136.

[283] Kāsānī, *Badāʾiʿ*, 10: 97-98; Shaykh Zāda, *Majmaʿ*, 4: 35; Qāḍī Zāda, *Natāʾij*, 9: 234; Bābartī, *ʿInāya*, 9: 238; Ḥaṣkafī, *Durr*, 6: 136.

[284] Al-*Fatāwá al-Hindiyya*, 5: 35.

[285] Kāsānī, *Badāʾiʿ*, 10: 97-98; Ṭūrī, *Takmilat al-Baḥr al-rāʾiq*, 8: 79; Qāḍī Zāda, *Natāʾij*, 9: 234.

[286] Zysow, *The Economy of Certainty*, 196-222.

Even in those schools that did not define duress according to the compelling and non-compelling, they still distinguished between the different forms of duress according to the severity of (threatened) acts. Thus, one of the conditions for the acceptance of a plea of duress was the presence of severe harm to the coerced resulting from death, harsh beatings, strangulation, long imprisonment, banishment from one's kin, the extortion of large sums of money or credible threats of severe harm (i.e. duress *per minas*).[287] Duress *per minas* posits that compliance could obtain in response to a threat, which the threatened person perceives as real, and believes that she has no other alternative but to comply.

The definition of duress underwent a noticeable shift with early jurists defining it (or were thought to have defined it) through the use of severe force[288] and later jurists defining it through the use of force and/or the threat of force (*al-tawaʿud* or *al-waʿīd*).[289] Some jurists even defined duress through the exclusive threat of extreme force. As early as the eleventh century C.E., Shīrāzī wrote that the threat of grave harm to the person was one of the conditions for the establishment of duress.[290] Similarly, the seventeenth century C.E. *Fatāwá Hindiyya* did not define compelling duress as one in which severe force was used but as one in which the threat of severe force was made (*al-ikrāh al-mulji' huwa al-ikrāh bi-waʿīd talaf al-nafs aw bi-waʿīd talaf ʿuḍū min al-aʿḍā'*/compelling duress is the duress [caused] by the threat of death or the threat of injury to a bodily part).[291]

The expansion of duress from the actual use of force to threats can be clearly witnessed in the Ḥanbalī school. Al-Khiraqī, for example, stated that duress obtains with the actual use of

[287] Ibn Qudāma, *al-Mughnī*, 8: 260-261; Zarkashī, *Sharḥ*, 2: 466; Mardāwī, *Inṣāf*, 8: 440; Shīrāzī, *Muhadhdhab*, 2: 99-100; Māwardī, *Ḥāwī,* 13: 77-78.
[288] Khiraqī, *Mukhtaṣar*, 2: 466; Nawawī stated that death was recognised by al-Shāfiʿī. Nawawī, *Rawḍat*, 6: 52.
[289] For example: Ḥaṣkafī, *Durr*, 6: 136; Ibn ʿĀbidīn, *Radd*, 6: 136; Nawawī, *Rawḍat*, 6: 52.
[290] Shīrāzī, *Muhadhdhab*, 2: 99-100.
[291] *Al-Fatāwá al-Hindiyya*, 5: 35.

force and that threats do not constitute duress,[292] while his commentator Ibn Qudāma made the case for the inclusion of threats as an equally valid form of duress.[293] Moreover, by the time of Ibn Qudāma's commentary, the majority opinion had come to accept threats against individuals as valid duress.[294] Later, by Zarkashī's time, the acceptance of duress *per minas* was made conditional upon the ability of the duressor to carry out his threats[295]and even later by Mardāwī's *Inṣāf*, the acceptance of duress *per minas* had become the official opinion of the school.[296]

The same chronological expansion can be witnessed in the Shāfiʿī school. Nawawī reported that Marwazī had stated that duress could only obtain with the actual use of force, whereas by Nawawī's own time the valid opinion (*al-ṣaḥīḥ*) held by the majority of jurists (*al-jumhūr*) was that threats suffice *in lieu* of force or other coercive measures.[297]

In the Ḥanafī school, Ḥaṣkafī defined the coercive act as a "*fiʿl*" whereas his commentator, Ibn Ābidīn expanded the definition as follows:

> The act (*al-fiʿl*) includes... ordering him to kill a man even if he [the coercer] does not threaten him with anything but the one receiving the order knows that... if he does not kill him, he [the coercer] will kill or cut him [the coerced]...and it includes verbal threats (*al-waʿīd bi al-qawl*).[298]

Ibn ʿĀbidīn thus enlarged the definition of the *actus reus* to include explicit and implicit threats and not overt acts only, as Ḥaṣkafī had done.

As mentioned, the expansion of duress to include threats passed through a process of debate amongst jurists before being accepted. During one period, two distinct opinions existed

[292] Al-Khiraqī, *Mukhtaṣar*, 2: 466.
[293] Ibn Qudāma, *al-Mughnī,* 8: 260-261.
[294] Ibn Qudāma, *al-Mughnī,* 8: 261.
[295] Zarkashī, *Sharḥ*, 2: 466.
[296] Mardāwī, *Inṣāf*, 8: 439.
[297] Nawawī, *Rawḍat*, 6: 52.
[298] Ḥaṣkafī, *Durr*, 6: 136; Ibn ʿĀbidīn, *Radd*, 6: 136.

within the Ḥanbalī school whereby some jurists accepted threats while others did not,[299] and in the Shāfiʿī school, Nawawī had stated that the majority of jurists (*al-jumhūr*) [in his time] had accepted duress *per minas* as the valid opinion (*al-ṣaḥīḥ*) while a minority opinion insisted on the actual use of force as proof of duress.[300]

The debate seems to have revolved around the issue of certainty versus probability. As mentioned in the introduction, several contemporary scholars had investigated the question of certainty versus probability in the *uṣūl*. The discourse on duress thus mirrors a similar discourse within the *furūʿ*. Zarkashī, for example, cited two opinions concerning this issue. According to the first opinion, duress provides a *rukhṣa* (permission) for the perpetrator and since threats are not based on reality but are grounded in supposition, one cannot judge on the basis of probability and abandon certainty.[301] However, the proponents of the second opinion argued that when threats are issued by a capable duressor and the duressed is almost sure that the threats will be carried out (*yaghlubʿalá ẓannihi*) and cannot escape; then such a condition amounts to duress and the duressed can act accordingly.[302] As such Kāsānī stated that "strong probability is a *ḥujja* (reason/justification) especially when it is difficult to reach certainty (*al-yaqīn*)."[303] A similar conclusion was reached by other jurists as well. [304]

In other words, duress *per minas* was a later expansion to the definition of duress. Whereas earlier jurists had defined the *actus reus* strictly as duress to the person, later ones added duress *per minas* to the definition of duress.

[299] Ibn Qudāma, *al-Mughnī,* 8: 260-261; Zarkashī, *Sharḥ*, 2: 466.
[300] Nawawī, *Rawḍat*, 6: 52.
[301] Zarkashī, *Sharḥ*, 2: 466.
[302] Ibid.
[303] Kāsānī, *Badāʾiʿ*, 10: 98-99.
[304] Shīrāzī, *Muhadhdhab*, 2: 99; Nawawī, *Rawḍat*, 6: 52.

Duress was said to obtain even if the threats were implicit, if duress had originated from a capable duressor.[305] Accordingly, both the *Fatāwá Hindiyya* and *Fatāwá Qāḍīkhān* stated that duress could obtain if the coercion were instigated by a sultan who did not explicitly threaten the coerced (*min al-sulṭān min ghayr tahdīd yakūn ikrāhan*), emphasis mine.[306] This acceptance of implicit threats as valid factors for duress, was said to have been introduced by Abū Yūsuf and Shaybānī who had maintained that if the coerced knew that if they did not comply with what was required of them, their coercer(s) would force them the way a sultan was capable of forcing others, then duress was equally said to obtain.[307] In other words, Abū Yūsuf and Shaybānī were credited with expanding the scope of implicit threats to duressors who did not occupy an official position as long as the latter were capable of harming the duressed and carrying out their implicit threats. This acceptance of implied threats as coercive factors was accepted by numerous authors of *furūʿ* and *fatāwá* works such as the *Fatāwá Bazzāziyya* which maintained that if someone (the coerced) were ordered by the coercer to kill another, and if the coerced knew that the coercer would actually harm him if he did not comply, then he is legally considered to have been acting under duress.[308] This is true even if the coercer did not threaten to kill the coerced for not complying with his order.

The second kind of duress was the non-compelling type involving a milder form of duress to the person. It involved imprisonment, being shackled and moderately beaten.[309] It did not involve personal physical injury (*talaf*).[310] This kind was often referred to as incomplete

[305] As seen in Ibn ʿĀbidīn's previous definition. Ibn ʿĀbidīn, *Radd*, 6: 136.
[306] *Al-Fatāwá al-Hindiyya*, 5: 35; *Fatāwá Qāḍīkhān*, 3: 483.
[307] *Al-Fatāwá al-Hindiyya*, 5: 35.
[308] *Al-Fatāwá al-Bazzāziyya*, 6: 127-128; *Fatāwá Qāḍīkhān*, 3: 483; Ibn ʿĀbidīn, *Radd*, 6: 136. This doctrinal shift from overt to implicit threats coincided with another expansion in the definition of the duressor, as we shall shortly see.
[309] Kāsānī, *Badāʾiʿ*, 10: 97-98; Shaykh Zāda, *Majmaʿ*, 4: 35; Ṭūrī, *Takmilat al-Baḥr al-rāʾiq*, 8: 79; Bābartī, *ʿInāya*, 9: 238; *al-Fatāwá al-Hindiyya*, 5: 35.
[310] Kāsānī, *Badāʾiʿ*, 10: 110.

duress (*ikrāh nāqiṣ* or *qāṣir*)[311] because it did not vitiate the choice of the coerced.[312] Even though mild duress annulled consent, it did not vitiate choice, according to Ṭūrī.[313] As such if someone were not severely coerced into committing murder, for example, and chose to do so he would have been criminally punished for it through *qiṣāṣ* (talion).[314] Both categories of duress (*mulji'* and *ghayr mulji'*) were said to annul consent.[315]

One can thus argue that expansion in the definition of duress in Ḥanafī *fiqh* followed three noticeable trajectories. It went from the definition of duress as a physical act imposed on another to one in which the capacity of the duressor to act was legally recognised. Similarly, the definition expanded from the requirement of coercive acts to the acceptance of explicit threats as coercive measures. In addition, the acceptance of threats as coercive measures was expanded to include implicit threats.

## Duress to Kin

The acceptance of harm towards kin as a form of duress seems to have passed through a period of debate within the Ḥanafī school. Whereas an earlier opinion seems to have rejected duress to kin because the projected harm did not target the coerced directly, later opinion accepted this form of duress.[316] As such, the threat of harm towards kinfolk was not deemed to be actual coercion but quasi coercion through *istiḥsān* (juristic preference).[317] As Ṭūrī

[311] Kāsānī, *Badā'i'*, 10: 97-98; Ṭūrī, *Takmilat al-Baḥr al-rā'iq*, 8: 79; Ḥaṣkafī, *Durr*, 6: 136.
[312] Shaykh Zāda, *Majma'*, 4: 35.
[313] Ṭūrī, *Takmilat al-Baḥr al-rā'iq*, 8: 79.
[314] Kāsānī, *Badā'i'*, 10: 108.
[315] Ḥaṣkafī, *Durr*, 6: 138; Ibn 'Ābidīn, *Radd*, 6: 136.
[316] Ṭūrī, *Takmilat al-Baḥr al-rā'iq*, 8: 80; Qāḍī Zāda, *Natā'ij*, 9: 234; Ibn 'Ābidīn, *Radd*, 6: 137.
[317] Ṭūrī, *Takmilat al-Baḥr al-rā'iq*, 8: 81.

mentioned: "It is *ikrāh* on the basis of *istiḥsān* ... and its rationale is that a person is harmed by the imprisonment of his son or slave."[318]

By contrast, Mālikī jurists recognised harm, as well as the fear of harm, done unto one's kin such as one's child or wife as a valid form of duress.[319] Moreover, with time, Khalīl 's acceptance of "one's child"[320] into the category of duress to the person was expanded to include "one's descendants" by later jurists even if those descendants were "dissolute/*ʿāq*", according to Dasūqī (d.1815 C.E.).[321]

Harm targeting one's kin was also present in the Ḥanbalī school encompassing both descendants and ascendants. Ibn Qudāma, for example, called for its acceptance as a form of duress even though previous opinion [presumably within his school] had not accepted harm to one's kin as a form of valid duress. He argued that harm towards one's child is greater than the loss of money or threats and hence had to be accepted as duress.[322] Later, Zarkashī mentioned the presence of two contending opinions within his school concerning this issue[323] and by Mardāwī's time harm targeting one's child or parent had become the valid opinion within the school ("*al-ṣaḥīḥ min al-madhhab*").[324]

Similarly, within the Shāfiʿī school, duress to kin was mentioned and expanded to include one's wife, ascendants, descendants alongside one's friend or servant.[325]

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[318] Ibid.
[319] Khalīl, *Mukhtaṣar*, 1: 340; ʿIllaysh, *Taqrīrāt*, 2: 368; Dasūqī, *Ḥāshiya*, 2: 368; Khurashī, *al-Khurashī ʿalá mukhtaṣar Sīdī Khalīl*, 4: 35.
[320] Khalīl, *Mukhtaṣar,* 1: 340.
[321] ʿIllaysh, *Taqrīrāt*, 2: 368; Dasūqī, *Ḥāshiya*, 2: 368.
[322] Ibn Qudāma, *al-Mughnī,* 8: 262.
[323] Zarkashī, *Sharḥ*, 2: 466.
[324] Mardāwī, *Inṣāf*, 8: 440.
[325] Māwardī, *Ḥāwī,* 13: 77; Nawawī, *Rawḍat*, 6: 54: Ramlī, *Nihāyat*, 6: 447; Shubrāmalsī, *Ḥāshiya*, 6: 447. Some of the terms used to indicate one's ascendants and descendants were: *aṣl/farʿ* (root/branch), *dhī raḥm* (uterine), *ʿalá/ safal* (ascendant/descendent).

## The Duress of Goods

In addition to duress to the person, to kin and the duress of imprisonment, jurists recognised the duress of goods. The duress of goods was understood in the sense of being coerced into damaging the property of third parties as well as being threatened with the damage, embezzlement or theft of one's own property (*akhdh al-māl wa itlāfih*)[326] by numerous jurists.[327] Jurists differed, however, as to the extent of damage that constituted valid duress, with the matter being settled in favour of the principle of proportionality. As such the amount of damage inflicted or the value of the stolen property, were to be judged according to the economic means of their owners.[328] Taking five *dirhams* from a wealthy individual (*al-mūsir*) did not constitute duress, Nawawī stated.[329]

The introduction of the duress of goods to the elements constituting valid duress was said to have been made after the expansion of duress to include physical acts other than death within the Shāfiʿī school. Nawawī attributed its introduction to Ibn Abī Hurayrah.[330] Similarly, in the Ḥanbalī school, Ibn Qudāma, Zarkashī and Mardāwī mentioned the duress of goods while their predecessor Khiraqī had not mentioned it, or at least had not mentioned it within his exposition of duress in his *Mukhtaṣar*.[331] The inclusion of the duress of goods into the ambit of the *actus reus* of duress was equally made in the Ḥanafī and Mālikī schools.[332]

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[326] Nawawī, *Rawḍat*, 6: 53.
[327] Khalīl, *Mukhtaṣar*, 1: 340; al-Ābī al-Azharī, *Jawāhir*, 1: 340; Khurashī, *al-Khurashī ʿalá Mukhtaṣar Sīdī Khalīl*, 4: 35; Dasūqī, *Ḥāshiya*, 2: 368; ʿIllaysh, *Taqrīrāt*, 2: 368; Ibn Qudāma, *al-Mughnī*, 8: 261; Zarkashī, *Sharḥ*, 2: 466; Mardāwī, *Inṣāf*, 8: 440; Māwardī, *Ḥāwī,* 13: 78; Ramlī, *Nihāyat*, 6: 447; Sarakhsī, *Mabsūṭ*, 24: 78-83; Marghinānī, *Hidāya*, 4: 67-68, 70; Kāsānī, *Badāʾiʿ*, 10: 106.
[328] Māwardī, *Ḥāwī*, 13: 78; Ramlī, *Nihāyat*, 6: 447.
[329] Nawawī, *Rawḍat*, 6: 53.
[330] Ibid.
[331] Khiraqī, *Mukhtaṣar*, 2: 465-466; Ibn Qudāma, *al-Mughnī,* 8: 261; Zarkashī, *Sharḥ*, 2: 466; Mardāwī, *Inṣāf*, 8: 440.
[332] Sarakhsī, *Mabsūṭ*, 24: 78-83; Marghinānī, *Hidāya*, 4: 67-68, 70; Khalīl, *Mukhtaṣar*, 1: 340; al-Ābī al-Azharī, *Jawāhir*, 1: 340; Khurashī, *al-Khurashī ʿalá Mukhtaṣar Sīdī Khalīl*, 4: 35.

## Conditions (*shurūṭ*) of Duress

For duress to obtain, several conditions had to be met. When Kāsānī wrote his *Badāʾiʿ* he listed only two[333] but by the time Ḥaṣkafī had written his *Durr*, the conditions had crystallised into four.[334] The first condition involved the duressor while the second involved the duressed, the third defined the *actus reus* while the fourth had to do with the consequences of duress and the changes that befell the duressed following his/her coercion.[335] The first three conditions were recognised by jurists from the other schools as well.[336] Thus, the coercer (*al-mukrih*) must have had the ability to carry out his threats or promises, the coerced (*al-mukrah*) must have believed that the coercer had the ability to carry out his threats and the duress had to be severe and life threatening.[337] Moreover, the coerced act had to be unjust (*ẓulm*) according to Māwardī. [338]

## The Coercer

The discourse on the coercer (*al-mukrih*) encompassed a number of important themes that seem to have been continually expanding. These themes included: the nature of the coercer's power and power versus force. According to an early opinion attributed to Abū Ḥanīfa, only a sultan had the ability to compel others against their wishes. This view, however, was contested by his two students who had argued that coercion could be exercised by

[333] Kāsānī, *Badāʾiʿ*, 10: 98.
[334] Ḥaṣkafī, *Durr*, 6: 137.
[335] Kāsānī, *Badāʾiʿ*, 10: 98; Ḥaṣkafī, *Durr*, 6: 136-137.
[336] See for example, Ibn Qudāma, *al-Mughnī*, 8: 261; Zarkashī, *Sharḥ*, 2: 466; Mardāwī, *Inṣāf*, 8: 440; Shīrāzī, *Muhadhdhab*, 2: 99; Nawawī, *Rawḍat*, 6: 52; Māwardī, *Ḥāwī*, 13:76; Ramlī, *Nihāyat*, 6: 446-447; Nafrāwī, *Fawākih*, 2: 75.
[337] Kāsānī, *Badāʾiʿ*, 10: 98; Shaykh Zāda, *Majmaʿ*, 4: 35; Qāḍī Zāda, *Natāʾij*, 9: 249; Bābartī, *ʿInāya*, 9: 233; Ḥaṣkafī, *Durr*, 6: 136; Nafrāwī, *Fawākih*, 2: 75; Ibn Qudāma, *al-Mughnī,* 8: 261; Zarkashī, *Sharḥ*, 2: 466; Mardāwī, *Inṣāf*, 8: 440; Nawawī, *Rawḍat*, 6: 52; Ramlī, *Nihāyat*, 6: 446-447.
[338] Māwardī, *Ḥāwī*, 13: 77.

numerous actors;[339] the determining factor being the ability (*al-qudra*) of the coercer to carry out his/her threats rather than the latter's official position or status. Over time, it was the opinion of Abū Yūsuf and Shaybānī which formed the authoritative *fatwá* within the Ḥanafī school.[340] Thus, coercion was said to obtain legally whenever it issued from someone capable of carrying out his threat ("*taḥaqquq al-qudra*") whether a sultan (*sulṭān*) or a thief (*liṣṣ*) because *ikrāh* is "the name of an act that someone imposes on another that annuls his consent or vitiates his choice while retaining his legal capacity (*ahliyyatuhu*)," according to Marghinānī.[341] Therefore, whenever capacity was present (whether from a sutan or another), duress was said to obtain since the determining factor was the presence of capacity rather than the official position of the coercer.

Similarly, we find scholars from different schools stating that coercion could occur whenever capacity was present and the coercer had the ability to dominate and coerce others.[342] Shafiʿī, for example, stated that duress obtains when a man is caught by someone whose power he cannot deny whether a sultan, a thief or a tyrant (*mutaghallib*)[343] while Nawawī succinctly defined the duressor as "an aggressor capable of enforcing his threats (*ghāliban qādiran*) [whether] through an official position (*wilāya*) or dominance (*taghallub*) and fierce assault (*farṭ hujūm*)."[344] Capacity, according to Nawawī's definition, could have stemmed from status, general dominance or physical strength.

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[339] Kāsānī, *Badāʾiʿ*, 10: 98, 109; Marghinānī, *Hidāya*, 4: 67; Sarakhsī, *Mabsūṭ*, 24: 88; Ṭūrī, *Takmilat al-Baḥr al-rāʾiq,* 8: 80; *al-Fatāwá al-Hindiyya*, 5: 35, 48.
[340] Shaykh Zāda, *Majmaʿ*, 4: 36; Qāḍī Zāda, *Natāʾij*, 9: 250; Qāḍīkhān, *Fatāwá Qāḍīkhān*, 3: 483; Ibn ʿĀbidīn, *Radd*, 6: 136; *al-Fatāwá Bazzāziya*, 6: 129; *al-Fatāwá al-Hindiyya*, 5: 35.
[341] Marghinānī, *Hidāya*, 4: 67.
[342] Of note is Qāḍī Zāda's extensive argument on the various interpretations of the sultan versus the non-sultan coercer. Qāḍī Zāda, *Natāʾij*, 9: 250-251. See also: Marghinānī, *Hidāya*, 4: 67; Shaykh Zāda, *Majmaʿ*, 4: 36; Ibn Qudāma, *al-Mughnī,* 8: 261; Mardāwī, *Inṣāf*, 8: 440; Ramlī, *Nihāyat*, 6: 446; Ibn Ḥazm, *Muḥallá,* 8: 335.
[343] Shafiʿī, *al-Umm*, 3: 210.
[344] Nawawī, *Rawḍat*, 6: 52.

In order to emphasize capacity as the demarcating factor in the legal recognition of a coercer, jurists described the latter as any capable aggressor using such terms as "*al-qādir* or *qādir,* "[345] "*qādiran,*"[346] "*qāhiran,*"[347] "*ghāliban qādiran*"[348] or "*al-ẓālim al-mutaghallib*."[349]

## Power versus Force

Defining the coercer through his capacity (*qudra*) rather than his office, his actual use of force or physical superiority marks an important legal development in the discourse on *ikrāh*; a development that distinguishes between the use of force and the capacity to unleash that force through overt physical harm as well as explicit and implicit threats. This stance is abundantly clear in numerous *furūʿ* and *fatāwá* sources that underscore capacity as a defining element in *ikrāh.*[350]

Moreover, capacity (*qudra*) was linked to dominance (*taghallub*) in general.[351] Mardāwī, for example, stated that one of the conditions for the presence of *ikrāh* is that the duressor is "capable" (*qādiran*) whether his capacity stemmed from power or dominance (*sulṭān aw taghallub*).[352] The recognition of dominance, as separate from official power or status and in addition to capacity was made by numerous jurists as well.[353] Capacity could have stemmed from general power or authority (*ʿām al-qudra*), such as that available to a sultan, or it could

[345] Marghinānī, *Hidāya*, 4: 69; Qāḍī Zāda, *Natāʾij*, 9: 233; Bābartī, *ʿInāya*, 9: 233.
[346] Shīrāzī, *Muhadhdhab*, 2: 99; Ibn Qudāma, *al-Mughnī,* 8: 261; Zarkashī, *Sharḥ*, 2: 466; Mardāwī, *Inṣāf*, 8: 440.
[347] Shīrāzī, *Muhadhdhab*, 2: 99; Māwardī, *Ḥāwī*, 13: 76.
[348] Nawawī, *Rawḍat*, 6: 52.
[349] Ibn ʿĀbidīn, *Radd*, 6: 136.
[350] *Fatāwá Qāḍīkhān*, 3: 483; Ḥalabī, *Multaqá,* 4: 36. Before being accepted as a form of duress, we observe that capacity passed through a stage of debate. See for example, Zarkashī, *Sharḥ*, 2: 466; Ibn Qudāma, *al-Mughnī,* 8: 261; Marghinānī, *Hidāya*, 4: 67; ʿAynī, *Bināya*, 10: 45; Shaykh Zāda, *Majmaʿ*, 4: 36.
[351] Sometimes jurists mentioned both *qudra* and *taghalub*, while at other times referred to this issue through the terms they applied to the coercers such as *qādir* and *mutaghalib*. Nawawī, *Rawḍat*, 6: 52; Ramlī, *Nihāyat*, 6: 446; Shaykh Zāda, *Majmaʿ*, 4: 36.
[352] Mardāwī, *Inṣāf*, 8: 440.
[353] Ibn Qudāma, *al-Mughnī,* 8: 261; Mardāwī, *Inṣāf*, 8: 440; Nawawī, *Rawḍat*, 6: 52; Shaykh Zāda, *Majmaʿ*, 4: 36; Ibn ʿĀbidīn, *Radd*, 6: 136.

have stemmed from specific power (*khāṣ al-qudra*) such as that existing between a master and his slave, according to Māwardī.[354] Both forms of capacity legally qualified as duress, according to the latter.[355]

Chronologically, a clear expansion in the definition of power can be observed. Whereas Abū Ḥanīfa had limited power to the holder of an official position such as the sultan, power was later extended to include other categories of persons and the nature of power evolved to include capacity (*qudra*) and dominance (*taghallub*) rather than brute force, as has been said.

This development has crucial implications for the way in which the coerced was perceived in the legal literature and in terms of her/is status, and the establishment of duress. By distinguishing power from force, a person claiming duress did not have to demonstrate that s/he had their arm amputated, for example, but that the coercer had the capacity to amputate her/is arm if they did not submit to his will. As such, jurists had lowered the corroboration bar for the coerced by making proof based on a balance of probability rather than absolute certainty. Alternatively, corroboration for duress did not rest on unequivocal proof of harm (i.e. on the highest form of proof) but on the probability that the coercer had the means to carry out his threats. The question became: could the coercer have made these threats rather than what sort of harm did the coercer cause? The emphasis on capacity nullified the corroboration of force and/or resistance and shifted the definition of duress towards the coercive measures undertaken by the coercers rather than the signs of resistance by the coerced. This development thus benefited the coerced because it meant that s/he did not have to actually suffer physical harm in order to plead duress as defence.

[354] Māwardī, *Ḥāwī,* 13: 76-77.
[355] Ibid.

By expanding the definition of the coercer and making it contingent on the latter's capacity or dominance rather than limiting it to an official status (*sulṭān* or *wilāya*), jurists were able to expand the definition of the coercer and reimagine the latter such as to include spouses, female coercers, minors and slave owners, among others (as we shall see in the following chapters).

Interestingly, a number of jurists expanded the interpretation of the term "*sulṭān*" to include one's husband.[356] On the basis of the *Fatāwá Bazzāziyya*, Ḥaṣkafī stated that: "The husband is the sultan of his wife and coercion can be attributed to him,"[357] if "she fears harm from him," Ibn ʿĀbidīn later added.[358] The extension of the scope of duress to include marital duress can be seen in several situations with both spouses exerting pressure on each other. Wives were portrayed as coercing their husbands into divorcing them,[359] whereas husbands were portrayed as coercing their partners in a number of situations, sexual and otherwise.[360]

Moreover, as a result of the distinction between power and force, duress was said to obtain regardless of the age of the duresssor. Jurists believed that duress could be exercised by anyone who had not reached the legal age of physical maturity (*al-bulūgh*) if the latter had obedient followers[361] just as it could have been exercised by non-rational actors such as the insane (*al-majnūn*), those with diminished intelligence (*al-maʿtūh*) and the young (*al-ghulām, al-*

[356] Ḥaṣkafī, *Durr*, 6: 140; Shaykh Zāda, *Majmaʿ*,4: 36; Ibn ʿĀbidīn, *Radd*, 6: 140; *al-Fatāwá al-Bazzāziyya*, 6: 128.
[357] Ḥaṣkafī, *Durr*, 6: 140. In quoting *al-Fatāwá al-Bazzāziyya*, Ḥaṣkafī quoted the same sentence that the latter had used *verbatim* (*al-Fatāwá al-Bazzāziyya*, 6: 128).
[358] Ibn ʿĀbidīn, *Radd*, 6: 140.
[359] Sarakhsī, *Mabsūṭ*, 24: 41; Shaykh Zāda, *Majmaʿ*, 4: 39; Ibn Qudāma, *al-Mughnī,* 2: 261; Zarkashī, *Sharḥ*, 2: 465; Māwardī, *Ḥāwī,* 13: 74; Qalyūbī, *Ḥāshiya*, 3: 332.
[360] In the context of *khulʿ* (divorce initiated by a wife) and *mahr*, please see *al-Fatāwá al-Bazzāziyya*, 6: 128-129; Ḥaṣkafī, *Durr*, 6: 149; Māwardī, *Ḥāwī*, 12: 182. In the context of sales, please see: Ḥaṣkafī, *Durr*, 6: 140. In the context of coercive sex, please see: Nafrāwī, *Fawākih*, 1: 365; Dasūqī, *Ḥāshiya*, 1: 530.
[361] Kāsānī, *Badāʾiʿ*, 10: 98.

*ṣabī*).[362] The defining factor for the legal recognition of duress was thus the ability of the duressors to carry out their threats irrespective of their age or status.

## The Coerced

The second condition concerned the coerced (*al-mukrah*). The discourse on the coerced was to a large extent predicated on victim experience and the latter's belief in the harm that would befall them, their fear, misery and personal perception of both physical and verbal harm.[363] The subjective perceptions of the coerced were said to have been influenced by their status, character and physique, according to numerous jurists. Together with subjectivity, other themes raised by jurists within that discourse included certainty versus probability, inescapability, proportionality and immediacy.

Thus, the duresssed must have firmly believed that their coercers would carry out their threats.[364] The duressed were not required to be absolutely certain that threats would be carried out but must have strongly believed that harm would befall them. According to numerous jurists from all four schools, a predominant belief (*ghālib al-raʾy* or *al-ẓann* or *akthar al-raʾy*) in the ability of the coercer provided sufficient motivation for the coerced to act accordingly.[365] In this instance, jurists opted for strong probability rather than absolute certainty.

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[362] In the case of the last three individuals, it would have been their *ʿāqila* that had to pay the *diya* for acts that they had coerced others into doing. Ṭūrī, *Takmilat al-Baḥr al-rāʾiq*, 8: 80; *Fatāwá Qāḍīkhān*, 3: 489.
[363] For more on the relationship between victim experience and the wrongness of rape, please see Wertheimer, *Consent to Sexual Relations*, 107-112; Gardner and Shute, "The Wrongness of Rape," 194.
[364] Kāsānī, *Badāʾiʿ*, 10: 98; Marghinānī, *Hidāya*, 4: 67; Ṭūrī, *Takmilat al-Baḥr al-rāʾiq*, 8: 80; Qāḍī Zāda, *Natāʾij*, 9: 249; Ḥaṣkafī, *Durr*, 6: 136; ʿAynī, *Bināya*, 10: 43; Ibn Qudāma, *al-Mughnī*, 8: 261; Zarkashī, *Sharḥ*, 2: 466; *Inṣāf*, 8: 440; Shīrāzī, *Muhadhdhab*, 2: 99; Nawawī, *Rawḍat*, 6: 52; Māwardī, *Ḥāwī*, 13: 77.
[365] Shīrāzī, *Muhadhdhab*, 2: 99; Nawawī, *Rawḍat*, 6: 52; Kāsānī, *Badāʾiʿ*, 10: 98; Marghinānī, *Hidāya*, 4: 67; Ṭūrī, *Takmilat al-Baḥr al-rāʾiq*, 8: 80; Bābartī, *ʿInāya*, 9: 233; *al-Fatāwá al-Bazzāziyya*, 6: 127; Nafrāwī, *Fawākih*, 2: 75; Ibn Qudāma, *al-Mughnī*, 8: 261; Zarkashī, *Sharḥ*, 2: 466; *Inṣāf*, 8: 440.

If, however, the coerced did not believe that his coercer would carry out his threats, then duress was not said to have obtained[366] and the coercer or his family would have been held financially responsible for his deeds. For example, if a minor committed murder without being forcibly coerced into doing so, his *ʿāqila* (support group)[367] would have been required to pay an indemnity to atone for his deed.[368] In other words, legal and civil responsibility were said to obtain in quasi-coercive situations.

Besides belief in the capacity of the duressor to carry out his threats, jurists from different schools mentioned fear (*al-khawf*) as a coercive element. Fear was mentioned in the sense of fright[369] as well as in the sense of fear of consequences[370] quite early on in the discourse on duress. The earliest mention of fear that I found was made in *al-Umm*.[371] Accordingly, if a coerced feared for himself from his coercer then duress was said to obtain (*al-mukrah...yaṣīr khāʾifan ʿalá nafisihi min jihat al-mukrih*/ the coerced becomes afraid for himself from the coercer) according to the *Fatāwá Hindiyya*.[372]

Numerous Mālikī and Shāfiʿī jurists also mentioned fear at the outset of their discourse on duress as one of the conditions for the legal recognition of *ikrāh*.[373] They mentioned the fear of death, imprisonment, amputation, battery/flogging (*ḍarb*), restraints, hunger, thirst,

[366] Kāsānī, *Badāʾiʿ*, 10: 98-99; Ṭūrī, *Takmilat al-Baḥr al-rāʾiq*, 8: 80.
[367] Although *ʿāqila* is often translated as agnates, I do not translate it as such because a person's *ʿāqila* involved more than her agnatic relatives. It could have involved one's tribesmen or guild members, among others. For more on the *ʿāqila*, please see Peters, *Crime and Punishment*, 49-50.
[368] Kāsānī, *Badāʾiʿ*, 10: 108.
[369] *Al-Fatāwá al-Hindiyya*, 5: 35.
[370] Shīrāzī, *Muhadhdhab*, 2: 99; Nawawī, *Rawḍat*, 6: 50-53; Ramlī, *Nihāyat*, 6: 446-447; Khalīl, *Mukhtaṣar*, 1: 340; ʿAdawī, *Ḥāshiya*, 2: 72; Dasūqī, *Ḥāshiya*, 2: 368; ʿIllaysh, *Taqrīrāt*, 2: 368; Sarakhsī, *Mabsūṭ*, 24: 39; Marghinānī, *Hidāya*, 4: 67; Ḥalabī, *Multaqá*, 4: 36; Shaykh Zāda, *Majmaʿ*, 4: 36.
[371] Shafiʿī, *al-Umm*, 2: 210.
[372] *Al-Fatāwá al-Hindiyya*, 5: 35.
[373] Khalīl, *Mukhtaṣar,* 1: 340; al-Ābī al-Azharī, *Jawāhir*, 1: 340; Dasūqī, *Ḥāshiya*, 2: 368; ʿIllaysh, *Taqrīrāt*, 2: 368; Khurashī, *al-Khurashī ʿalá Mukhtaṣar Sīdī Khalīl*, 4: 34; ʿAdawī, *Ḥāshiya ʿalá Sharḥ abī-l-Ḥassan*, 2: 72; Nawawī, *Rawḍat*, 6: 52.

banishment, separation from kin, harm to one's child or one's property (*māl*).[374] ʿAdawī (d.1775 C.E.), for instance, defined duress as follows: "*Ikrāh* obtains with the intense fear of death, battery even if negligible, imprisonment, restraints even if negligible, or being slapped"[375] while Maḥallī provided a list of elements constituting duress and listed them in what seems to have been the chronological order of their introduction.[376]

A later addition to these elements, was the fear of being raped or sodomised (*al-takhwīf bi al-zinā wa al-liwāṭ*); even if such fear were experienced by "the people of vice" (*wa law li-dhawī al-fujūr*).[377] The mention of prostitutes is interesting, particularly, since the Arabic term used was not gender specific thereby extending the law's theoretical protection to prostitutes of all genders. Such an addition, mirrors similar ones that students researching rape in pre-modern Europe have encountered. What they have also found was that theory was never really translated into reality, in the sense that the incidents of rape involving prostitutes or those accused of being so, were not accorded the attention given to other kinds of rape.[378]

In addition, the threat of being raped or sodomised was extended from duress to the person to duress to one's kin. As such, a number of jurists declared that the threat of rape, sexual harm (*fujūr*) or sodomy towards one's wife or child was a form of duress.[379] In terms very similar to the ones used by Ḥanafī jurists with regards to certainty in the coercer's ability to carry out his threats, Mālikī jurists too declared that a predominant fear of the coercer by the

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[374] Khalīl, *Mukhtaṣar,* 1: 340; al-Ābī al-Azharī, *Jawāhir*, 1: 340; Dasūqī, *Ḥāshiya*, 2: 368; ʿIllaysh, *Taqrīrāt*, 2: 368; Nawawī, *Rawḍat*, 6: 52-54.
[375] ʿAdawī, *Ḥāshiya ʿalá Sharḥ abī al-Ḥassan*, 2: 72.
[376] Nawawī, *Rawḍat*, 6: 52-54; Maḥallī, *Sharḥ*, 3: 332.
[377] Qalyūbī, *Ḥāshiya*, 3: 333.
[378] For more on prostitution, attitudes towards women and the gap between theory and practice, please see: Carter, *Rape in Medieval England*, 36, 97-105, 107-108,131-132; Ruggiero, *Eros*, 41-42; Clark, *Women's Silence*, 13; and possibly Vigarello, *A History of Rape*, 72 as well as the section in the Introduction on the justice gap between theory and practice in pre-modern Europe.
[379] Ramlī, *Nihāyat*, 6: 447; Sulaymān ibn Umar ibn Muḥammad al-Bujayrimī, *al-Tajrīd li-naf ʿal-ʿibād* (Cairo: Muṣṭafá al-Bābī al-Ḥalabī, n.d.), 4: 4.

coerced (*ghalabat al-ẓann*) constitutes *ikrāh*.[380] This fear did not have to be based on certainty (*lā yushṭarat tayaqunuhu*) nor on the implementation of the threat but on a predominant fear that the coercer would carry out his threats.[381] Khurashī (d.1689 or 90 C.E.), for example, mentioned that fear did not have to stem from a coercive act that had already taken place or was about to take place for duress to legally obtain (*taḥaquq aw wuqūʿ*).[382]

Together with belief in the capacity of the duressor and fear of the latter, a number of jurists mentioned distress, anguish or misery (*al-ghamm* or *al-ightimām*) as coercive factors. Quoting Tamartāshī (d.1595 or 96), Ḥaṣkafī (d.1677) very broadly defined the coercive element as "the thing coerced with being injurious to life or limb or causing distress (*ghamman*) that annuls the consent (*al-riḍā*)" of the coerced.[383] Similarly, the *Fatāwá Hindiyya* mentioned that *ghamm* annuls the consent of the coerced (*mūjiban ghamman bi-ʿadam al-riḍā*)[384] while the *Fatāwá Bazzāziyya* stated that while long imprisonment or handcuffs lead to misery (*ghamm*) they are not injurious to one's life.[385] However, the *Fatāwá* continued, some jurists believed that misery could be injurious to some people (*yakhāf ʿalayhi al-talaf ghamman*) especially to those used to ease of living (*dhā tanaʿum*).[386]

Together with fear and distress, jurists juxtaposed the helplessness (*ʿajz*) of the coerced vis à vis the dominance (*qudra*) of their coercers.[387] Nawawī, for example, described the coerced

[380] Dasūqī, *Ḥāshiya*, 2: 368; ʿIllaysh, *Taqrīrāt*, 2: 368.
[381] Ibid.
[382] Khurashī, *al-Khurashī ʿalá Mukhtaṣar Sīdī Khalīl*, 4: 34.
[383] Ḥaṣkafī, *Durr*, 6: 137.
[384] *Al-Fatāwá al-Hindiyya*, 5: 35. The *Fatāwá* seem to have quoted Ḥalabī's *Multaqá* verbatim. Ḥalabī, *Multaqá*, 4: 36 and Shaykh Zāda, *Majmaʿ*, 4: 36. It is important to note the presence of a spelling mistake in the edition of the *Multaqá* and *Majmaʿ* published by Dār Iḥyāʾ al-Turāth al-ʿArabī. Instead of the *ghayn* for *ghamman*, a dot is missing and an *ʿayn* was written instead.
[385] *Al-Fatāwá al-Bazzāziyya*, 6: 129.
[386] Ibid.
[387] Ramlī, *Nihāyat*, 6: 446.

as someone "dominated and helpless/*maghlūban ʿājizan*"[388] while Ramlī linked helplessness to inescapability and dominance.[389]

Another form of psychological duress that was discussed was verbal abuse in the sense of insults (*al-sabb* or *al-shatm*),[390] harsh words (*kalām khashin*),[391] ridicule (*istikhfāf*),[392] public humiliation (*bi-malaʾ*),[393] as well as blackening someone's face (*taswīd al-wajh*)[394] and being slapped.[395] Verbal harm was mentioned as a coercive measure by numerous authors of both *furūʿ* and *fatāwá* works from different schools.[396] These jurists pondered different facets of this issue such as the degree, nature and impact of verbal abuse, and whether public humiliation should be considered a form of duress and not private humiliation, as well as who can claim such a form of duress.[397]

The subjective feelings of the coerced played a major role in determining the presence of duress in terms of their belief that the coercer would actually carry out his threats as well as their fear, distress, helplessness and humiliation in addition to the level of harm that the coerced judged to be personally intolerable. Ṭūrī, for example, maintained that given how different people were, what one person may put up with, another may die from; therefore, the only solution was to go back to the coerced and gauge their reaction to the harm aimed at

[388] Nawawī, *Rawḍat*, 6: 52.
[389] Ramlī, *Nihāyat*, 6: 446.
[390] Māwardī, *Ḥāwī*, 13: 78; Bujayrimī, *Tajrīd,* 4: 4.
[391] Ḥaṣkafī, *Durr*, 6: 137.
[392] Shīrāzī, *Muhadhdhab*, 2: 100; Nawawī, *Rawḍat*, 6: 53; Māwardī, *Ḥāwī*, 13: 78.
[393] Khalīl, *Mukhtaṣar*, 1: 340; Nawawī, *Rawḍat*, 6: 53; Ramlī, *Nihāyat*, 6: 447.
[394] Nawawī, *Rawḍat*, 6: 53. For more on the blackening of someone's face as a form of humiliation, please see: Christian Lange, *Justice, Punishment and the Medieval Muslim Imagination* (Cambridge: Cambridge University Press, 2008), 228-232.
[395] Nafrāwī, *Jawāhir*, 1: 340; Dasūqī, *Ḥāshiya*, 2: 368; ʿIllaysh, *Taqrīrāt*, 2: 368; ʿAdawī, *Ḥāshiya ʿalá sharḥ abī al-Ḥassan*, 2; 72; Khurashī, *al-Khurashī ʿalá mukhtaṣar Sīdī Khalīl*, 4: 34; Nawawī, *Rawḍat*, 6: 53; Ramlī, *Nihāyat*, 6: 447.
[396] Ṭūrī, *Takmilat al-Baḥr al-rāʾiq,* 8: 80-82; Ḥaṣkafī, *Durr*, 6: 137; *al-Fatāwá al-Hindiyya*, 5: 36; Nafrāwī, *Jawāhir*, 1: 340; Dasūqī, *Ḥāshiya*, 2: 368; ʿIllaysh, *Taqrīrāt*, 2: 368; ʿAdawī, *Ḥāshiya ʿalá Sharḥ abī-l-Ḥassan*, 2: 72; Khurashī, *al-Khurashī ʿalá mukhtaṣar Sīdī Khalīl*, 4: 34; Māwardī, *Ḥāwī,* 13: 78; Shīrāzī, *Muhadhdhab*, 2: 100; Nawawī, *Rawḍat*, 6: 53.
[397] Ibíd.

them.[398] Other jurists equally endorsed this subjectivity towards the perception of duress by the coerced.[399]

Alongside this acceptance (and factoring in) of the subjectivity in the perception of duress, came a steadfast rejection (by numerous authors of *furūʿ* and *fatāwá* works) of a universal standard by which duress was to be gauged.[400] A case in point is the following statement by Ṭūrī:

> There is no standard (*ḥadd*) that must not be exceeded or lowered because it [*ikrāh*] differs according to people's circumstances; some of them are not harmed except with a severe beating and long imprisonment and some of them are harmed by the slightest thing.[401]

By "people's circumstances," Ṭūrī meant people's social standing whereby a nobleman was said to have been more affected by public humiliation than a person of a lower social class.[402] A number of jurists equally considered class as a factor influencing people's perception of humiliation, coercion or unhappiness. Cases in point include: Shīrāzī,[403] Nawawī,[404] Ḥaṣkafī[405] and the *Fatāwá Hindiyya*.[406] The link between class and language register was equally noted. Māwardī, for example, maintained that the impact and perception of insults and ridicule were to be judged according to the language register that people of different classes habitually used.[407]

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[398] Ṭūrī, *Takmilat al-Baḥr al-rāʾiq,* 8: 82.
[399] Bābartī, *ʿInāya*, 9: 239; Ḥaṣkafī, *Durr*, 6: 137; *al-Fatāwá al-Bazzāziyya*, 6: 127, 129; *al-Fatāwá al-Hindiyya*, 5: 36.
[400] Ṭūrī, *Takmilat al-Baḥr al-rāʾiq,* 8: 80-81; Bābartī, *ʿInāya*, 9: 239; *al-Fatāwá al-Bazzāziyya*, 6: 129; *al-Fatāwá al-Hindiyya*, 5: 36. For more on hierarchy and egalitarianism in Islamic societies, please see: Louise Marlow, *Hierarchy and egalitarianism in Islamic thought* (Cambridge: Cambridge University Press, 1997).
[401] Ṭūrī, *Takmilat al-Baḥr al-rāʾiq,* 8: 80.
[402] Ibid., 8: 80-81.
[403] Shīrāzī, *Muhadhdhab*, 2: 100.
[404] Nawawī, *Rawḍat*, 6: 53.
[405] Ḥaṣkafī, *Durr*, 6: 137.
[406] *Al-Fatāwá al-Hindiyya*, 5: 36.
[407] Māwardī, *Ḥāwī*, 13: 78.

In addition to class, personal character was recognised as a demarcating factor. A person with a sense of dignity (*dhī marūʾah*) would chafe at being publicly humiliated, beaten or slapped, a plethora of jurists stated,[408] even if that person were not a nobleman or a descendant of the prophet (*ashrāf*).[409] The degree of humiliation to qualify as duress was hotly debated amongst jurists,[410] with some jurists like Ramlī stating that the least humiliation (*al-yasīr*) towards a self-respecting person should be considered a form of duress,[411] others such as Shubrāmalsī not sharing such a view,[412] and still others such as Māwardī advocating discretion in judgement[413] while a jurist like Nawawī concisely summed it up as follows: "It [duress] differs according to people's nature and circumstances/ *yakhtalif bi-ikhtilāf al-nās wa aḥwālihim.*"[414]

Together with class and personal character, physique was suggested as another marker of difference. According to Bābartī, difference between people should be attributed to their physical (in)tolerance to pain. He stated that:

> The tolerance of a person's body to battery varies and there is no estimate/opinion (*naṣṣ muqadar*); hence what is admitted is the predominant belief of the sufferer and there is disregard for ...[the estimate of] forty [lashes]...because this [estimate] is based on *raʾy* (opinion) which is not admissible.[415]

[408] Ibn Qudāma, *al-Mughnī,* 8: 261-262; Zarkashī, *Sharḥ*, 2: 466; Khalīl, *Mukhtaṣar*, 1: 340; Khurashī, *al-Khurashī ʿalá Mukhtaṣar Sīdī Khalīl*, 4: 34; Nafrāwī, *Jawāhir*, 1: 340; ʿAdawī, *Ḥāshiya*, 2: 72; Dasūqī, *Ḥāshiya*, 2: 368; ʿIllaysh, *Taqrīrāt*, 2: 368; Māwardī, *Ḥāwī,* 13: 78; Ramlī, *Nihāyat*, 6: 447.
[409] ʿAdawī, *Ḥāshiya ʿalá sharḥ abī-l-Ḥassan*, 2: 72.
[410] Ibn Qudāma, *al-Mughnī,* 8: 261-262; Zarkashī, *Sharḥ*, 2: 466; Khalīl, *Mukhtaṣar*, 1: 340; Khurashī, *al-Khurashī ʿalá Mukhtaṣar Sīdī Khalīl*, 4: 34; Nafrāwī, *Jawāhir*, 1: 340; ʿAdawī, *Ḥāshiya*, 2: 72; Māwardī, *Ḥāwī*, 13: 78; Ramlī, *Nihāyat*, 6: 447.
[411] Ramlī, *Nihāyat*, 6: 447; see also Aḥmad al-Burullusī ʿUmayra, *Ḥāshiyat ʿUmayra ʿalá Minhāj-l-Ṭālibīn*, printed with Shihāb al-Dīn Aḥmad ibn Aḥmad al-Qalyūbī, *Ḥāshiyatān al-Qalyūbī wa ʿUmayrah ʿalá Sharḥ al-Maḥallī ʿalá Minhāj al-Ṭālibīn* (Cairo: Maṭbaʿat Muṣṭafá al-Bābī al-Ḥalabī, 1956), 3: 332.
[412] Nūr al-Dīn ʿAlī ibn ʿAlī al-Shubrāmalsī, *Ḥāshiyat al-Shubrāmalsī,* printed with Ramlī, *Nihāyat*, 6: 447.
[413] Māwardī, *Ḥāwī*, 13: 78.
[414] Nawawī, *Rawḍat*, 6: 53.
[415] Bābartī, *ʿInāya*, 9: 239.

In other words, Bābartī was arguing for proportionality in judgement and the tailoring of justice in the absence of certainty concerning harm.

As such, the equivalent of forty lashes (as a minimum standard for the establishment of duress) was rejected by a number of *furūʿ* works, as we have seen. Similarly, the *Fatāwá Bazzāziyya* declared that the "valid/*al-ṣaḥīḥ*" opinion is the one that disregarded a minimum standard for the establishment of duress given how different people were (*li-ikhtilāf al-nās*).[416] As such the *Fatāwá Bazzāziya* stated that: "If the feared damage could cause injury to life or limb, it is *ikrāh* and Muḥammad [al-Shaybānī] ...did not give it an estimate but left it to the discretion of the coerced."[417] The interplay between the objective and subjective elements within duress was thoroughly examined by Abou El Fadl in his "Duress."[418]

It seems that jurists preferred instead to leave the perception of duress to the discretion of the coerced and the judge [and/or the *majlis* (court/committee)] arbitrating the matter. The role of judicial discretion in determining the subjective perception of duress was expressed by the *Fatāwá Hindiyya* in the following manner:

> There is no standard (*ḥadd*) that must not exceeded or lowered but [the matter] is delegated to the opinion of the *imām* (leader/judge) because it[duress] differs according to people's circumstances; some of them are only harmed by a harsh beating and long imprisonment and some of them are harmed by the slightest thing.[419]

Indeed, leaving the matter to the discretion of the judge/*qādī* may have had several implications and may have been equally shaped by another set of diverse factors.

The importance of subjectivity lies in its role as a counter-balance to the property argument in the discourse on rape. By emphasizing the sexual subject rather than the sexual

[416] *Al-Fatāwá al-Bazzāziyya*, 6: 129.
[417] Ibid.
[418] Abou El Fadl, "Duress".
[419] *Al-Fatāwá al-Hindiyya*, 5: 36.

object, the subjectivity of victim experience marks an important constituent in the discourse on coercive sex. A constituent that took cognizance of the victim as a person rather than a sexual object that belonged to another. The idea of the body as property, both in the sense of self-ownership and in the sense of property belonging to another, is present in *furūʿ* works under the category of *ghaṣb* which will be dealt with in chapter three.

Together, subjectivity and property, offer us clear indications of two very different perceptions of the *mal* of rape. If we were to take property as the only reason for the wrongness of rape, we would assume that the *mal* of rape lay in the infringement of the property rights of another and that such a wrong would have been amended with compensation to the owner of that property and not necessarily to the victim. On the other hand, if we were to assume that subjectivity formed the sole reason for the wrongness of rape, we could argue (as Wertheimer, Gardner and Shute had recently done)[420] that with the negation of victim experience (as in the sleeping/drugged victim hypothesis) no wrong had been committed because the victim had not felt anything and there was no need for either compensation or punishment.[421] However, the presence of both subjectivity and property adds a layer of complexity to the discourse indicating that both conceptions of the wrongness of rape existed simultaneously. Moreover, these two conceptions were present in all schools. Accordingly, one cannot argue that the classification of the *mal* of rape along school lines was based on different kinds of wrong but that all schools recognised multiple reasons for the *mal* of rape. Even though not all schools or jurists emphasized these two notions equally, I suggest that differences between schools (regarding this topic) were a matter of degree not kind.

[420] Wertheimer, *Consent to Sexual Relations*, 107-112, especially 111; Gardner and Shute, "The Wrongness of Rape," 196.
[421] Jurists took cognizance of automatism (very broadly defined) in the discourse on *zinā* (as we will see in the last chapter).

Within the discourse on the coerced, the requirements of immediacy, inescapability and proportionality were equally raised. Thus, inescapability from harm, whether through pleas and entreaties, resistance (*muqāwamah*), running away (*firār*) or seeking help from another (*istighātha*, *istiʿāna bi-ghayrihi*), was deemed one of the conditions for the establishment of duress according to a number of jurists.[422]

In addition, the immediacy of duress (*ʿājilan* or *nājizan*) was discussed by numerous jurists who asked whether duress could be legally recognised if the coercive measures were not immediately implemented. And while some Ḥanafī and Shāfiʿī jurists required immediacy,[423] others did not. Cases in point include the Mālikī ʿAdawī who stated that duress could obtain in the absence of immediacy as long as one feared the implementation of the coercive measures and Khurashī who declared that the immediacy of coercion is not one of the conditions for the recognition of duress.[424]

The concept of proportionality in duress was equally found in the sense that acts performed under duress were not expected to exceed or differ from their initial requirement.[425] Thus, if someone were coerced into selling an item and sold everything or was required to divorce his wife a single divorce and pronounced a triple divorce, such coercion would have been deemed legally invalid and non-binding by some Mālikī jurists,[426] whereas others (such as the Shāfiʿī Nawawī and Bujayrimī) would have considered such acts to be legally valid since the coerced chose to act differently from what he was required to do.[427]

[422] Māwardī, *Ḥāwī,* 13: 78; Nawawī, *Rawḍat*, 6: 52; Ramlī, *Nihāyat*, 6: 446; ʿIllaysh, *Taqrīrāt*, 2: 367.
[423] Sarakhsī, *Mabsūṭ*, 24: 39; Ramlī, *Nihāyat*, 6: 446; Maḥallī, *Sharḥ*, 3: 332; Nawawī, *Rawḍat*, 6: 54.
[424] ʿAdawī, *Ḥāshiya*, 2: 72; Khurashī, *al-Khurashī ʿalá Mukhtaṣar Sīdī Khalīl*, 4: 34; as well as Dasūqī, *Ḥāshiya*, 2: 368.
[425] Ṭūrī, *Takmilat al-Baḥr al-rāʾiq,* 8: 81; ʿAdawī, *Ḥāshiya*, 2: 72; Maḥallī, *Sharḥ*, 3: 332.
[426] Nafrāwī, *Fawākih*, 2: 75; ʿAdawī, *Ḥāshiya*, 2: 72.
[427] Maḥallī, *Sharḥ*, 3: 332; Bujayrimī, *Al-Tajrīd,* 4: 4.

Proportionality also appears regarding the different kinds of duress and their impact on different people. This stance is most evident with regards to money, imprisonment and property. Thus, taking a small sum of money from a wealthy person (*al-mūsir*) was not considered duress,[428] just as short periods of imprisonment were not considered sufficiently coercive.[429] Whereas the fear of death or amputation was regarded as a coercive element for all people; the fear of battery, ridicule, public humiliation and the fear of being slapped were believed to differ according to "people's class and nature."[430]

Thus, in sum, if the two main conditions for duress were found, i.e., the ability of the coercer to carry out his threats and the belief by the coerced in the ability of the coercer to do so, then duress was said to obtain legally (*yathbut ḥukmuhu*).[431]

## The legality (*ḥukm*) of Duress

The legality of acts performed under duress and responsibility ensuing from their performance were divided by jurists into three categories. Some acts were allowed (*mubāḥ*) under duress, others were sanctioned (*murakhkhaṣ* or *jāʾiz*) and a third category of acts were considered forbidden (*ḥarām*) no matter the kind of duress imposed upon the coerced.[432] For example, it was allowed (*mubāḥ*) for a coerced person to eat carrion, drink blood or alcohol if he were severely coerced into doing so.[433] Kāsānī, for example, maintained that it was not only legitimate (*mubāḥ*) for such a person to do so but incumbent on him (*wājiban ʿalayhi*) to do so.[434]

[428] Nawawī, *Rawḍat*, 6: 53; Shīrāzī, *Muhadhdhab*, 2: 100.
[429] Māwardī, *Ḥāwī,* 13: 77.
[430] Nawawī, *Rawḍat*, 6: 53 as well as Shīrāzī, *Muhadhdhab*, 2: 100.
[431] Marghinānī, *Hidāya*, 4: 69; Bābartī, *ʿInāya*, 9: 233.
[432] For more on the categorisation of acts, please see: Hallaq, *A History of Islamic Legal Theories*, 40-42; Johansen, *Contingency*, 69-70.
[433] Kāsānī, *Badāʾiʿ*, 10: 99-100; Marghinānī, *Hidāya*, 4: 69; ʿAynī, *Bināya*, 10: 56-57; Ṭūrī, *Takmilat al-Baḥr al-rāʾiq,* 8: 82; *Fatāwá Qāḍīkhān*, 3: 489.
[434] Kāsānī, *Badāʾiʿ*, 10: 103.

Similarly, Ḥaṣkafī considered it a duty (*farḍ*) for such a person to eat or drink whatever he was forced to eat or drink and that it would be sinful for such a person to abstain from eating or drinking.[435] These opinions were shared by other jurists as well.[436]

The sanctioned (*murakhkhaṣ* or *jāʾiz*) category of acts involved apostatising or insulting another person. Duress did not make these acts legitimate, but a person was given permission (*rukhṣa*) to submit to his coercer's will without fear of consequences.[437] As such, duress was said to affect the consequences of the act without changing the nature of the act itself.[438] Jurists maintained that a person severely coerced into apostatizing may do so with impunity,[439] however, if one were not severely coerced into apostatizing and there was no compelling reason for him to do so, then *ikrāh* was not said to have obtained and he should not have submitted to his coercer's will.[440]

The third category of acts was deemed both illegal and forbidden. This category involved murder, dismemberment, beating one's parents and committing *zinā*.[441] No matter the kind of duress inflicted, it did not render the above acts licit or permissible (*lā yubāḥ wa lā yurakhkhaṣ*).[442] As such, committing any of the above acts would have been considered a sin, according to Kāsānī.[443] However, it was deemed more sinful for a man to commit *zinā* under duress, for example, than for a woman to do so.[444] As Marghinānī mentioned:

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[435] Ḥaṣkafī, *Durr*, 6: 141.
[436] Tamartāshī, *Tanwīr,* 6: 141; Ibn ʿĀbidīn, *Radd*, 6: 141; Marghinānī, *Hidāya*, 4: 67.
[437] Kāsānī, *Badāʾiʿ*, 10: 100-101; Marghinānī, *Hidāya*, 4: 69-70; ʿAynī, *Bināya*, 10: 59-65; Bābartī, *ʿInāya*, 9: 241; Ṭūrī, *Takmilat al-Baḥr al-rāʾiq,* 8: 83; Ḥalabī, *Multaqá*, 4: 39.
[438] Kāsānī, *Badāʾiʿ*, 10: 100-101.
[439] Kāsānī, *Badāʾiʿ*, 10: 103; Bābartī, *ʿInāya,* 9: 241; Ṭūrī, *Takmilat al-Baḥr al-rāʾiq,* 8: 83; Ḥalabī, *Multaqá*, 4: 39; Ḥaṣkafī, *Durr*, 6: 142; Ibn ʿĀbidīn, *Radd*, 6: 141; Marghinānī, *Hidāya*, 4: 69-70.
[440] Kāsānī, *Badāʾiʿ*, 10: 106; Bābartī, *ʿInāya*, 9: 241.
[441] Kāsānī, *Badāʾiʿ*, 10: 102; Ṭūrī, *Takmilat al-Baḥr al-rāʾiq,* 8: 84; Ibn ʿĀbidīn, *Radd*, 6: 141; Nawawī, *Rawḍat*, 7: 21.
[442] Kāsānī, *Badāʾiʿ*, 10: 102.
[443] Ibid.
[444] Kāsānī, *Badāʾiʿ*, 10: 102; Ṭūrī, *Takmilat al-Baḥr al-rāʾiq,* 8: 84.

> If he were coerced into committing *zinā*, he does not have permission (*rukhṣa*) to do so ...[whereas] the woman is allowed (*yurakhaṣ lahā*) to commit *zinā* under complete duress and there is no *ḥadd* ...under incomplete duress.[445]

This opinion was echoed by a plethora of jurists as well.[446] The rationale for this opinion, according to Kāsānī, lay in the fact that a man commits *zinā* through active penetration (*īlāj*) whereas a woman commits *zinā* through acquiescence (*tamkīn*) which is a passive or a silent act (*fiʿl sukūt*).[447] In other words, the degree of agency displayed by the coerced (whether active or passive) affected the jurists' perception of *zinā* and its consequences. Thus, under duress, a woman was allowed to submit to rape (*yurakhkhaṣ lahā*)[448] whereas a man was not. Submitting, however, did not render *zinā* any less sanctioned or licit for both men and women.[449] Complete duress did not change the legal status of these acts by rendering them legitimate but mitigated against their outcome, for women more so than for men (as we shall see in the next chapter).

The third category of acts, involving murder and *zinā*, caused considerable variation in juristic opinion. This variation manifested itself in terms of the perceived agency of the coerced and consequently, the outcome or the punishment to be meted out following the act and not the legitimacy of the act itself. For instance, it was not deemed licit to commit murder under duress whatever form this duress took (whether complete or partial) but jurists differed as to the form of punishment to be meted out and to whom. Should a person coerced into killing another (*al-mukrah*) be held responsible for murder or should the person coercing him (*al-mukrih*) carry the burden of responsibility, or both? In other words, where does agency and

[445] Kāsānī, *Badāʾiʿ*, 10: 102; Shaykh Zāda, *Majmaʿ*, 4: 40.
[446] Ṭūrī, *Takmilat al-Baḥr al-rāʾiq*, 8: 84; Khalīl, *Mukhtaṣar*, 1: 340; al-Ābī al-Azharī, *Jawāhir*, 1: 340;
[447] Kāsānī, *Badāʾiʿ*, 10: 102.
[448] Ibid.
[449] Ibid., 10: 103.

legal responsibility lie? Should they both be punished to the same degree, or differently? Should agency, *ipso facto*, imply culpability and lead to criminal or civil responsibility?

Citing Abū Ḥanīfa and Shaybānī, Kāsānī stated that a person overwhelmingly coerced into committing murder should be punished through *taʿzīr* (discretionary punishment) and not *qiṣāṣ* (talion).[450] According to Abū Ḥanīfa and Shaybānī, it is the coercer and not the coerced who should be punished through talion.[451] This opinion placed agency with the coercer and recognized the coerced as a mere instrument in the hands of another (*al-mukrah āla li al-mukrih*).[452] Kāsānī, for example, stated that the real "murderer is the coercer...the coerced ...is akin to an instrument (*āla*)."[453] In elucidating this point, Kāsānī distinguished between reality and its simulation (*al-ṣūra*) and stated that the real meaning of murder (*al-maʿnā*) can be found with the coercer, whereas its simulation is with the coerced who is an instrument in the hands of another (*ālat al-ghayr*).[454]

A second stance was said to have originated with Abū Yūsuf. According to this stance, legal responsibility fell solely on the shoulders of the coercer who was recognized as the real agent/murderer while the coerced was absolved of all responsibility. However, since the actual homicide was committed by the coerced, the coercer could not be punished for it in kind. As such, neither the coercer nor the coerced were to be punished by death due to the presence of doubt (*shubha*)[455] but the coercer should be made to pay a *diya*.[456]

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[450] Kāsānī, *Badāʾiʿ*, 107.
[451] Marghinānī, *Hidāya*, 4: 70; Shaykh Zāda, *Majmaʿ*, 4: 40. Kāsānī, *Badāʾiʿ*, 10: 108; Ṭūrī, *Takmilat al-Baḥr al-rāʾiq,* 8: 85.
[452] Sarakhsī, *Mabsūṭ*, 24: 39.
[453] Kāsānī, *Badāʾiʿ*, 10: 108.
[454] Ibid.
[455] Marghinānī, *Hidāya*, 4: 70-71; Kāsānī, *Badāʾiʿ*, 10: 107; Shaykh Zāda, *Majmaʿ*, 4: 40; Ṭūrī, *Takmilat al-Baḥr al-rāʾiq,* 8: 85; Ḥaṣkafī, *Durr*, 6: 145.
[456] Kāsānī, *Badāʾiʿ*, 10: 107; Shaykh Zāda, *Majmaʿ*, 4: 41.

A third stance, attributed to Zufar, stood in direct opposition to Abū Yūsuf's. According to this stance, legal responsibility lay solely with the coerced who was recognized as the real criminal actor[457] and hence was to be punished through *qiṣāṣ* for his deed.[458]

A fourth legal stance was attributed to Shafiʿī who was said to have recognized both the coercer and the coerced as guilty of homicide and hence advocated similar punishment for both. According to this opinion, legal responsibility was shared by both since the two of them collectively led to the loss of a human life.[459] Shafiʿī's view thus extended culpability to all those engaged in the criminal act, whether directly or indirectly, thereby expanding the definition of the criminal actor to include multiple ones and expanding the scope of the criminal act from an individual one to a joint criminal enterprise.

In the four stances concerning criminal liability and responsibility, we notice a distinction between the *de facto* and *de jure* criminal agent and considerable debate concerning the legal responsibility of each. As such, we find in the literature a spectrum of opinion with Abū Yūsuf at one end absolving the coerced of all criminal responsibility and recognizing the coercer as the sole *de jure* murderer[460] and Zufar at the other end calling for the punishment of the *de facto* murderer (the coerced) only, thereby absolving the coercer of criminal liability.[461] We also find Abū Ḥanīfa, Shaybānī and the majority of Ḥanafī jurists recognizing the coercer as the *de jure* murderer and attributing criminal responsibility to him through *qiṣāṣ* while punishing the *de facto* murderer through *taʿzīr* [462] as well as Shāfiʿī jurists who recognized both

[457] Marghinānī, *Hidāya*, 4: 70.
[458] Kāsānī, *Badāʾiʿ*, 10: 107; Ṭūrī, *Takmilat al-Baḥr al-rāʾiq,* 8: 85.
[459] Marghinānī, *Hidāya*, 4: 70-71; Kāsānī, *Badāʾiʿ*, 10: 107; Ḥaṣkafī, *Durr*, 6: 144.
[460] Kāsānī, *Badāʾiʿ*, 10: 107.
[461] Ibid.
[462] Ibid.

the *de jure* and *de facto* criminal actors as equally liable and equally punishable through *qiṣāṣ*.[463] This substantial legal variation concerning the extent of legal responsibility of the coerced versus the coercer was equally reflected in the discourse on sexual coercion (as we shall see).

Legal pluralism concerning the *de facto* and *de jure* criminal actors often employed the terms "*al-mukrah āla lil-mukrih*/ the coerced is an instrument of the coercer" in referring to the coerced or simply referred to the latter as the instrument (*al-āla*).[464] Thus, the *Fatāwá Hindiyya*, for example, stated that

> Whenever duress occurs through threat of injury…the [coercive] act is transferred from the coerced, in whatever [capacity] the coerced could be an instrument for the coercer, and the coercer is deemed to have carried out the act himself.[465]

Legal pluralism concerning the legal responsibility of the coerced seems to have been settled in later juristic thought with the majority of jurists absolving the coerced of criminal responsibility for grievous acts performed under duress, although some form of civil redress was required, such as the payment of an indemnity in the form of a *diya* or a dower (*mahr*).[466]

## Structure and Methodology

In elucidating their views on *ikrāh*, jurists resorted to two distinct techniques in terms of the placement and layout of their views within the overall structure of their works.[467]

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[463] Kāsānī, *Badāʾiʿ*, 10: 107. Shīrāzī and Nawawī reported that in cases of homicide, the coercer was to be punished through talion and that two opinions existed concerning the coerced. One opinion absolved the coerced of criminal responsibility and the other not. The latter opinion was believed to be the more valid one according to Nawawī. Shīrāzī, *Muhadhdhab*, 2: 227; Nawawī, *Rawḍat*, 7: 15.

[464] *Al-Fatāwá al-Hindiyya*, 5: 35; Ḥaṣkafī, *Durr*, 6: 143-144, Ibn ʿĀbidīn, *Radd*, 6: 143-144; ʿAynī, *Bināya*, 10: 43.

[465] *Al-Fatāwá al-Hindiyya*, 5: 35; Ḥaṣkafī, *Durr*, 6:143-144, Ibn ʿĀbidīn, *Radd*, 6: 143-145.

[466] *Al-Fatāwá al-Hindiyya*, 5: 35; *Fatāwá Qāḍīkhān*, 3: 492.

[467] *Furūʿ* works were usually divided into four unequal quarters. The first quarter (*rubʿ*) was always devoted to matters of worship (*ʿibādāt*) which was often, but not always, followed by two quarters devoted to interpersonal dealings (*muʿāmalāt*) whether marriage (*nikāḥ*) or sales (*buyūʿ*). The quarters on marriage and sales incorporated all manner of related subjects such as the different forms of marriage dissolution, alimony or parentage in the case of marriage and breaches of contract, powers of attorney and so on in the case of sales. These two quarters

Whereas the Ḥanafīs followed *en masse* a certain structure in their works, their counterparts from the other three schools adopted a different one altogether. I argue that this methodological fidelity to school structure, forms an important component in the discourse on forcible and unwanted sex. The importance of the study of structure lies in exposing school differences and in showing how difference went beyond the doctrinal or hermeneutic to include the textual as well. In other words, school differences were not only doctrinal but were textually inscribed in the very structure of their *oeuvres* thereby giving researchers important tools concerning the classification of offences. The place where jurists placed their discourse on rape for example, tells us what kind of offence these jurists thought it to be and by consequence the procedure and outcome that were likely to ensue.

Ḥanafī jurists devoted separate chapters to duress. These chapters bore the name of this category, *ikrāh*, and very often started with very clear definitions of its *actus reus*. This method can be found in both *furūʿ* and *fatāwá* works. Cases in point include Sarakhsī,[468] Marghinānī,[469] Kāsānī,[470] Bābartī,[471] Ḥalabī,[472] Ibn Nujaym,[473] and Ibn ʿĀbidīn[474] as well as the Ḥanafī authors of the *Fatāwá Hindiyya*,[475] *Qāḍīkhān* and *Bazzāziyya*.[476]

The Ḥanafī chapters on duress were placed within the *buyūʿ* (sales and commercial transactions) quarter (*rubʿ*) of *furūʿ* works. They were not placed in the last quarter alongside

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were often known as "the two contracts/ *al-ʿaqdayn.*" Sometimes marriage was placed before sales or vice versa. The last quarter often, but not always, dealt with punishments, the *ḥudūd*, judgeship, inheritance, witnesses and procedural matters, to name a few. This exposition is of course a crude simplification that does not take cognizance of the change from the old (*qadīm*) to the new (*jadīd*) structure and the fact that considerable variations do exist between and amongst schools. For more, please see: Wael Hallaq, *Sharīʿah*, 551-552.

[468] Sarakhsī, *Mabsūṭ*, 24: 38-155.

[469] Marghinānī, *Hidāya*, 9: 232-253.

[470] Kāsānī, *Badāʾiʿ*, 10: 97-135.

[471] Bābartī, *Sharḥ*, 9: 232-252.

[472] Ḥalabī, *Multaqá*, 4: 35-43.

[473] Ṭūrī, *Takmilat al-Baḥr al-rāʾiq*, 8: 79-88.

[474] Ibn ʿĀbidīn, *Ḥāshiya,* 6: 136-150.

[475] *Al-Fatāwá al-Hindiyya*, 5: 35-49.

[476] *Fatāwá Qāḍīkhān*, 6: 127-133; *al-Fatāwá al-Bazzāziyya*, 6: 127-133.

the *ḥudūd*, for example. Rather, they were placed alongside elements restricting a person's freedom of action such as *ḥajr* (interdiction/isolation/exclusion), *ḥabs* (imprisonment), *walāʾ* (clientship/allegiance),[477] or elements calling for judicial/ discretionary punishment (*taʿzīr*).[478]

The sub-category of sexual duress (*al-ikrāh ʿalá al-zinā*) was quite unique in that it straddled both the *ḥudūd* and the *muʿāmalāt*. Hence it was often mentioned in both places. For example, Sarakhsī's *Mabsūṭ* has an entire chapter entitled *kitāb al-ikrāh* (the book on duress), within which there is a four-page section devoted to "sexual coercion and injury/*bāb al-ikrāh ʿalá al-zinā wa al-qaṭʿ*."[479] Within that sub-section, Sarakhsī examined various aspects of the discourse on sexual coercion. Similarly, Sarakhsī frequently mentioned sexual duress within the *ḥudūd* without repeating many of his thoughts on the nature or requirements of duress, for example.[480] More will be said about the placement of the discourse on sexual coercion in the following chapter, which is devoted entirely to it.

Devoting a special chapter to duress seems to have been a uniquely Ḥanafī (and perhaps Ẓāhirī)[481] technique that was not utilised by jurists from the other three schools. The majority of Shāfiʿī, Mālikī and Ḥanbalī sources consulted for this study did not compile separate chapters on *ikrāh*.[482] This is not to say that they did not recognize *ikrāh* as a legal category, rather that they did not treat it as a separate textual category bearing its own title.

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[477] Kāsānī, *Badāʾiʿ*, 10: 77-96, 97-135; Ḥalabī, *Multaqá*, 4: 28-45; Ṭūrī, *Takmilat al-Baḥr al-rāʾiq*, 8: 73-88; Ibn ʿĀbidīn, *Radd*, 6: 126-162.
[478] Sarakhsī, *Mabsūṭ*, 24: 35-156.
[479] Sarakhsī, *Mabsūṭ*, 24: 38-155; the sub-section on sexual coercion and injury is from page eighty eight to ninety three.
[480] Sarakhsī, *Mabsūṭ*, 9: 52-54, 57-59, 67, 75.
[481] Although Ibn Ḥazm devoted a separate chapter to *ikrāh* in his *Muḥallá* (8: 329-336), I do not think we can draw from this fact any concrete conclusions as to the classification of *ikrāh* as a separate textual category (or not) within the Ẓāhirī school due to the paucity of published works by jurists from that school.
[482] There are two notable exceptions to this statement. The first is Shafiʿī's *al-Umm* and the second is Sharqāwī's *Ḥāshiya*. There are two separate sections on duress in *al-Umm*. The first is within the discourse on *iqrār* (acknowledgements) and the second alongside the discourse on *ghaṣb*. Shafiʿī, *al-Umm*, 3: 209-210, 230. What is interesting is the time difference between these two works. While *al-Umm* is the first work of Shafiʿī *furūʿ*, Sharqāwī's *Ḥāshiya* was penned in the nineteenth century and did not follow the structure adopted by his

In the Mālikī, Shāfiʿī and Ḥanbalī sources used for this study, the discourse on duress was subsumed within other categories. It was mentioned in the sections on sales,[483] marriage,[484] divorce,[485] forced sexual intercourse during the pilgrimage[486] and while fasting[487] as well as the *ḥudūd*,[488] to name but a few.[489]

Even though duress was incorporated within several categories, important features of that category were proffered, often but not always, in the section on divorce.[490] Indeed, numerous Ḥanbalī, Mālikī and Shāfiʿī *furūʿ* works did so within the discourse on the conditions for the (non)validity of divorce, duress being one of those conditions.[491] A case in point is

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predecessors. ʿAbd-Allāh ibn Ḥijāzī al-Sharqāwī, *Ḥāshiyat al-Sharqāwī ʿalá Tuḥfat al-ṭulāb bi-sharḥ Taḥrīr Tanqīḥ al-lubāb* (Cairo: Maktabat wa Maṭbaʿat Muṣṭafá al-Bābī al-Ḥalabī, n.d.), 2: 390-91. It is also interesting to note that Shāfiʿī had adopted the structure used by Hanafī jurists as well as the Ẓāhirī Ibn Ḥazm. Could we then posit that this structure was an earlier one that continued to be used by the Ḥanafīs but was superseded by another in the other three schools? Could we also suggest that structure was fluid at a certain period of time? Further research, however, may confirm or refute this statement. Sharqāwī, *Ḥāshiya*, 2: 390-91.

[483] Zarkashī, *Sharḥ*, 2: 7; Qalyūbī, *Ḥāshiya*, 2: 156, 3: 332; Maḥallī, *Sharḥ,* 2: 156, 3: 332; ʿUmayra, *Ḥāshiya*, 3: 332; Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 5: 2; Mardāwī, *Inṣāf*, 4: 357.

[484] Zarkashī, *Sharḥ*, 2: 351; Qalyūbī, *Ḥāshiya*, 3: 224.

[485] Muwaffaq al-Dīn ʿAbd-Allāh ibn Aḥmad Ibn Qudāma, *al-Mughnī (*Beirut: Dār al-Kutub al-ʿIllmiyya, n.d.), 8: 259; *Zarkashī*, *Sharḥ, 2*: 466; Muḥammad ibn Aḥmad ibn Rushd, *Bidāyat al-mujtahid wa nihāyat al-muqtaṣid* (Cairo: al-Maktaba al-Tawfīqiyya, n.d.), 2: 150; Khalīl, *Mukhtaṣar*, 1: 340; al-Ābī al-Azharī, *Jawāhir*, 1: 340; Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 4: 33-35; Dasūqī, *Ḥāshiya*, 2: 367-369; ʿIllaysh, *Taqrīrāt*, 2: 367-369; Nafrāwī, *Fawākih*, 2: 75; Shīrāzī, *Muhadhdhab*, 2: 98-99; Nawawī, *Rawḍat*, 6: 52; Māwardī, *Ḥāwī,* 13: 76; Ramlī, *Nihāyat*, 6: 446; Maḥallī, *Sharḥ*, 3: 332-333; Qalyūbī, *Ḥāshiya*, 3: 332-333.

[486] Ibn Qudamā, *al-Mughnī,* 3: 314-316; Mardāwī, *Inṣāf*, 3: 477; Dasūqī, *Ḥāshiya*, 2: 70; Nawawī, *Rawḍat*, 2: 394.

[487] Ibn Qudamā, *al-Mughnī,* 3: 58, 60-61; Shams al-Dīn Ibn Qudamā, *al-Sharḥ al-kabīr*, printed with Muwaffaq al-Dīn ʿAbd-Allāh ibn Aḥmad Ibn Qudāma, *al-Mughnī (*Beirut: Dār al-Kutub al-ʿIllmiyya, n.d.), 3: 59; Mardāwī, *Inṣāf*, 3: 274; Dasūqī, *Ḥāshiya*, 1: 530.

[488] Ramlī, *Nihāyat*, 7: 425; Shubrāmalsī, *Ḥāshiya*, 7: 425; Maḥallī, *Sharḥ*, 4: 179; ʿUmayra, *Ḥāshiya*, 4: 179; Ibn Rushd, *Bidāyat*, 2: 652; Dasūqī, *Ḥāshiya*, 4: 318; ʿIllaysh, *Taqrīrāt*, 4: 318-319.

[489] Ḥanafī jurists equally mentioned duress in a plethora of categories in addition to devoting a special chapter to duress. See for example: Kāsānī who mentions duress within the *jināyāt* (Kāsānī, *Badāʾiʿ*, 10: 465) and the *ḥudūd,* Kāsānī, *Badāʾiʿ*, 9: 238.

[490] A case in point is Shubrāmalsī's *Ḥāshiya* where important points in the theory on duress were penned in the *buyūʿ* rather than marriage or divorce. However, Shubrāmalsī was commenting on Ramlī's *Nihāyat al-Muḥtāj* which is a commentary on the earlier *Minhāj* where duress was mentioned in the *buyūʿ*. Shubrāmalsī, *Ḥāshiya*, 3: 387.

[491] Ibn Qudamā, *al-Mughnī,* 8: 259; *Zarkashī*, *Sharḥ,* 2: 466; Khalīl, *Mukhtaṣar*, 1: 340; al-Ābī al-Azharī, *Jawāhir*, 1: 340; Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 4: 33-35; Dasūqī, *Ḥāshiya*, 2: 367-369; ʿIllaysh, *Taqrīrāt*, 2: 367-369; Nafrāwī, *Fawākih*, 2: 75; Shīrāzī, *Muhadhdhab*, 2: 99; Nawawī, *Rawḍat*, 6: 52; Māwardī, *Ḥāwī,* 13: 76; Ramlī, *Nihāyat*, 6: 446.

Mardāwī who mentioned *ikrāh* in his chapters on the *buyūʿ*,[492] the *jināyāt*,[493] *zinā*,[494] fasting[495] and pilgrimage[496] but only offered his full exposition of duress in the chapter on divorce.[497]

Within the discourse on divorce, jurists penned important components of their theories on duress such as the requirements for the recognition of duress, its textual basis in the *Qurʾān* or *ḥadīth* and/or the basis for its wrongness (such as its *ratio legis* in the harm principle).[498]

As such, the discourse on duress within these three schools differed from its Ḥanafī counterpart in two ways. Whereas the Ḥanafīs had devoted separate chapters to their discourse on *ikrāh*, jurists from the other schools did not. The latter had subsumed duress under different categories. As such, their discourse on coercion was not textually differentiated by being enclosed within its own chapter and secondly, it was, mainly but not exclusively, discussed within the quarter on marriage and divorce (*nikāḥ*) rather than the quarter on commercial transactions (*buyūʿ*).

What all schools held in common though was their placement of the bulk of their discourse on duress (and sexual duress) in the two sections of the *furūʿ* known as "the two contracts/*al-ʿaqdayn*" within the *muʿāmalāt* as opposed to the *ʿibādāt* or the *ḥudūd*, for example. This is not to say that *ikrāh* was not mentioned in the *ʿibādāt* or the *ḥudūd*, because it was.[499] However, key elements of this discourse were placed in the *muʿāmalāt*.

[492] Mardāwī, *Inṣāf*, 4: 357.
[493] Ibid., 9: 475.
[494] Ibid., 10: 171.
[495] Ibid., 3: 274.
[496] Ibid., 3: 477.
[497] Ibid., 8: 439-442.
[498] Ibn Rushd, *Bidāyat*, 2: 150;
[499] For example, Kāsānī, *Badāʾiʿ*, 9: 238; Ibn Qudamā, *Mughnī,* 3: 58, 60-61, 314-316; Mardāwī, *Inṣāf*, 3: 274, 477.

Given that sexual coercion (*al-ikrāh ʿalá al-zinā*) straddled both the *muʿāmalāt* and the *ḥudūd* and that it was discussed by jurists under both categories, it is important to note the ramifications that its classification as a crime of duress and, by extension, as a tort entailed. These ramifications impacted the definition of the offence, its procedure and outcome as well as the kind and degree of required evidence. Classifying forcible and unwanted sexual acts as torts (*daʿwā al-istikrāh*)[500] allowed for civil litigation alongside or instead of criminal litigation. This is particularly helpful when the stringent evidentiary rules for the *ḥudūd* could not be fulfilled.[501]

## Concluding Remarks

The legal category of duress (*ikrāh*) was present in the substantive works of all four schools of law, enjoying varying degrees of attention from the scholars of these schools both synchronically and diachronically. These scholars elaborated a complete theory on duress taking cognizance of its various elements such as duress of the person, of kin, of goods, psychological and spousal duress as well as duress *per minas*. The scope of choice, agency and consent under duress, the nullification of consent under complete duress, the recognition of fear and personal subjectivity in the perception of duress as well as clear definitions of what duress entailed (the *actus reus*) were all subjects that jurists had broached in their discourse on *ikrāh*. The *actus reus* of *ikrāh* was described as the duress (physical, emotional, overt and implicit) brought to bear by a capable duressor upon a duressed.

Legal change in connection to duress was realized through continuous expansion and interpretation, which led to significant legal plurality within and between the various schools.

[500] Ibn Rushd, *Bidāyat*, 2: 652.
[501] More will be said concerning this point in the coming chapters.

Cases in point include the expansion in the definition of the duressor, the shift between the actual use of force and the capacity to unleash that force (*al-qudra*), the later acceptance of duress *per minas* (including implicit threats) and psychological duress in place of brute force. As for legal pluralism, it can be observed with regards to the punishment of the *de facto* versus the *de jure* criminal actor as well as the attribution of the wrongness of duress to both the harm principle and the nullification of consent.

In all schools, duress was defined through the coercive measures undertaken by the duressors and was not defined through the markers of non-consent or the resistance of the duressed. Indeed, the various definitions of duress that were cited always began with very clear examples of the coercive measures. These measures were continuously reinterpreted and expanded along several trajectories such as the move from force to capacity, from acts to threats, from explicit to implicit threats.

A major difference between schools concerned the textual position of duress within the overall structure of *fiqh* works. Whereas the Ḥanafīs had devoted distinct chapters to duress within the *buyūʿ* (in addition to the mention of duress within numerous other areas of the *furūʿ*), their counterparts from the other three schools did not do so. Rather, the latter merged the discourse on *ikrāh* within most areas of the *furūʿ* with important components of the discourse on *ikrāh* being mentioned in the section on divorce.

What all schools held in common though was the mention of duress, and the sub-category of sexual duress, within the *muʿāmalāt*. The *muʿāmalāt* devote a great deal of attention to torts and the resolution of personal and property infringements through various means of justice such as reparation and restitution.

Finally, an important component of the discourse on duress was the acknowledgement of victim experience as portrayed in the recognition of fear, helplessness, class, physique, language register, personal character and subjectivity regarding the perception of physical or verbal abuse.

The importance of subjectivity lies in its role as a counter argument to the "body as property" argument. This is not to say that the property argument did not exist, because it did (as we shall see in chapter three). However, the presence of both the subjectivity and property concepts within the *furūʿ* signifies the presence of a nuanced perception of the body and the person in the juristic literature.

## Chapter Two

## Sexual Duress

This chapter investigates the topic of sexual duress within a group of representative *furūʿ* works from all four *Sunnī* schools of law. Forced and unwanted sexual acts were discussed within numerous legal categories, but I focus in this chapter on two categories, namely, *ikrāh* and *zinā*. I show that the definition of the *actus reus* of sexual coercion expanded beyond the act of forced penile penetration to include a sexual continuum committed under different contexts and through different means.[502] This feature, as I will show, transformed significantly questions of responsibility, certainty, accountability and punishment of forced and unwanted sexual acts, and their implications.

One of the earliest expositions of sexual coercion is Shafiʿī's (d.820 C.E.) section on *al-mustakraha* (the coerced woman) in his *al-Umm.*[503] Shafiʿī had devoted two separate sections in his work to this topic; the first section lies at the end of the chapters on *ikrāh* and *ghaṣb* while

[502] *Black's* defines an *actus reus* as: "The guilty act. A wrongful deed which renders the actor criminally liable." *Black's,* 36.

[503] The dating and authorship of *al-Umm* (as well as other early works on Islamic law) were questioned by Norman Calder in his *Studies in Early Muslim Jurisprudence* (Oxford: Clarendon Press, 1993). Calder argued that several early works of Islamic law were products of disparate redactions that took place over time. His theories, however, have been severely contested by several scholars such as Harald Motzki, "The Prophet and the Cat: On Dating Malik's Muwatta and Legal Traditions," *Jerusalem Studies in Arabic and Islam*, 22 (1998): 18-83; Wael Hallaq, "On Dating Malik's Muwatta," *UCLA Journal of Islamic & Near Eastern Law* 1 (2001): 47-65; Joesph E. Lowry, "the Legal hermeneutics of al-Shāfiʿī and Ibn Qutayba: a reconsideration," *Islamic Law and Society* 11 (2004): 1–41; Jonathan E. Brockopp, "Competing Theories of Authority In Early Mālikī Texts," in *Studies In Islamic Legal Theory*, ed. Bernard G. Weiss (Leiden: Brill, 2002),5 where Brockopp mentions that Miklos Muranyi had shown him fragments of *al-Muwaṭṭaʾ* found in Qayrawān dating back to 235/849 or 50; Yasin Dutton, "Review of Studies in Early Muslim Jurisprudence by Norman Calder," *Journal of Islamic Studies* 5, 1 (1994): 102-108; Yasin Dutton, " Amal v. Hadith in Islamic Law: The Case of Sadl al-Yadayn (Holding One's Hands by One's Sides) When Doing the Prayer," *Islamic Law and Society* 3, 1 (1996): 13-40; Ahmed El Shamsy, "From tradition to law: The origins and early development of the Shafiʿī school in ninth century Egypt" (Ph.D. dissertation: Harvard University, 2009), 265-277; Hans-Thomas Tillschneider, *Die Entestehung der Juristischen Hermeneutik (uṣūl al-fiqh) im fruhen Islam* (Wurzburg: Ergon Verlag, 2006), quoted from Ahmed el-Shamsy's review of the former's book in *The Journal of the American Oriental Society* 129, 3 (2009): 522-525; Behnam Sadeghi, "The Authenticity of Two 2nd/8th Century Ḥanafī Legal Texts: the Kitāb al-āthār and al-Muwaṭṭaʾ of Muḥammad ibn al-Ḥasan al-Shaybānī," *Islamic Law and Society*, 17 (2010): 291-319. In light of the above and in the absence of further arguments or physical proofs supporting Calder's claims, I shall continue to attribute *al-Umm* to al-Shafiʿī.

the second can be found at the end of the section on *zinā*.[504] The following is an excerpt from the first exposition:

> Concerning a man who coerces (*yastakrihu*) a woman or a slave woman [until] he gets her (*yuṣībahā*), that each of the two [women] should receive a dower equivalent to that [of women] of her status and no punishment and the coercer (*al-mustakrih*) [should receive] the *ḥadd* of stoning if he were sexually experienced (*thayyib*) [or] lapidation and banishment if he were a virgin (*bikr*) and Muḥammad b. al-Ḥassan [al-Shaybānī] said...the coercer should receive the *ḥadd* and the dower is not [incumbent] on him [because] the *ḥadd* and the dower cannot be combined and he relied on the *āthār* (sing. *athar* precedent/saying) and some of our *aṣḥāb* (associates) objected to this [on the basis] of Mālik who related on the authority of Ibn Shihāb that Marwān b. ʿAbd-al-Malik issued a judgement (*qaḍāʾ*) to a woman who had been coerced by a man [and awarded her] her dower to be paid by the person who had coerced her (*istakrahaha*). He who based himself on this [opinion] said that Marwān knew most of the Companions of the Prophet and had possessed *ʿilm* and *mushāwara* (knowledge and consultation) and had passed this judgement in Medina and was not opposed in it....and Abū Ḥanīfa said that a man got (*aṣāba*) a woman through *zinā* and wanted to avoid the *ḥadd* so he forced himself on her (*taḥāmala ʿalayhā*) until he tore her perineum (*yufḍīhā*) [consequently] the *ḥadd* was dropped and it became a *jināya* (offence) requiring payment from his money...al-Shafiʿī said [that] if he were a *zānī* he should receive the *ḥadd*... he did not escape from *zinā* due to *ifḍāʾ* (causing a perineal tear to a female); *ifḍāʾ* added to his misdeed.[505]

In terms of structure,[506] this section appears as a separate *masʾala* (question) at the end of the section on *ghaṣb* and after that on *ikrāh*. Although part of the discourse on *ikrāh*, it is treated as a separate issue in its own right and is not incorporated within the general discourse on *ikrāh*.[507] It is entitled "*masʾalat al-mustakraha"* and is followed by a section on the *ghaṣb* (usurpation/abduction) of a slave woman by a *ghāṣib* (usurper) who unlawfully has sexual

[504] Muḥammad ibn Idrīs al-Shafiʿī, *Kitāb al-Umm* (n.p.: Kitāb al-Shaʿb, 1968), 3:230.
[505] Shafiʿī, *al-Umm*, 3: 230.
[506] By structure, I mean, the organization of *furūʿ* works into chapters, sections and sub-sections and the different methods that schools adopted in organizing their works. This dissertation will seek to highlight the link between the structure of *furūʿ* works and their classification of crimes.
[507] Shafiʿī, *al-Umm*, 3: 209-210.

intercourse with her. Similar to "*masʾalat al-mustakraha.*" the section on the *ghaṣb* of a female slave equally appears as a separate section after the general discourse on *ghaṣb* and the whole section is described as a "*bāb*" (chapter or section).[508] Although both sections deal with prohibited and coercive intercourse with a woman, *ghaṣb* deals with slave women whereas *ikrāh* encompasses both free and slave women. This placement of the discourse on sexual coercion under the rubrics of *ikrāh* and/ or *ghaṣb* (alongside *zinā* and other categories) was repeated throughout the centuries by numerous jurists.[509] The implications of these different placements of rape within the *furūʿ* as well as their implications on the classification of these crimes will be discussed throughout the following chapters.

In terms of content, this very short *masʾala* by Shāfiʿī incorporates a number of key elements that were further expanded by later jurists. These elements include a recognition of sexual duress as an offence, its classification under a certain legal category (*ikrāh*), the recognition of a coercer and a coerced who were not necessarily free individuals but could have been slaves as well, an *actus reus* (prohibited act) legally recognised to be reprehensible, the imposition of punishment (whether in the form of financial compensation, banishment, lapidation or death), physical injuries to the coerced woman and their connection to *ikrāh*, as well as the presence of divergent and sometimes conflicting opinions within the discourse on *ikrāh*. It is important to note that many of these future differences of opinion were differences in both degree (for example, the degree of punishment meted out to the coercer but not the

[508] Ibid., 3: 230, as well as 3: 220-221.

[509] Sarakhsī, *Mabsūṭ*, 24: 88-90; Kāsānī, *Badāʾiʿ*, 10: 109-110; Ṭūrī, *Takmilat al-Baḥr*, 8: 84-85; Shaykh Zāda, *Majmaʿ*, 4: 40,76-77; Ibn ʿĀbidīn, *Radd*, 6: 145; Māwardī, *Ḥāwī,* 8: 337-338; Nawawī, *Rawḍat*, 4: 149-150; Ibn Qudāma, *al-Mughnī,* 5: 407; Mardāwī, *Inṣāf*, 10: 171; Khalīl, *Mukhtaṣar*, 1: 340-341, 2: 153; Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 6: 148; ʿIllaysh, *Taqrīrāt,* 1: 367-369; Dasūqī, *Ḥāshiya*, 2: 367-369; al-Ābī al-Azharī, *Jawāhir*, 2: 153. It is important to note that major differences existed between the different schools concerning the placement of the discourse on sexual coercion. More will be said on this point in the last section of this chapter.

imposition of some sort of punishment) and kind (for example, the imposition of punishment (or not) on a male coerced into having sexual intercourse with another male or female).

Let us now turn our attention to a number of key elements in the discourse on *ikrāh*, starting with the different terms used to denote sexual intercourse.

## Terminology

Shafiʿī used the phrase "*yastakrihu al-marʾata yuṣībahā*" (as cited above) to indicate a forcible sexual act committed against a woman opting for the verb "*yuṣībahā*" rather than the verbs *zinā*, *jimāʿ*, *waṭʾ* or *ityān* to describe the sexual act; verbs which he had used elsewhere in his *oeuvre* in association with sexual intercourse.[510] The question then is, why did he use a word with very broad connotations like "*yuṣībahā*" which could mean any kind of sexual intercourse (anal, vaginal or digital), carnal knowledge or a sexual assault that does not culminate in penetration (*īlāj*), whether full or partial, and/ or ejaculation (*inzāl*)? I would argue that he used the verb "*iṣāba*" for two main purposes; the first being that the other verbs, although similar in many ways, were not synonymous and did not convey the semantic meaning that he had intended and secondly that the broadness, generality and somewhat inexactness of the verb "*iṣāba*" was intentional in the sense that it denoted a broad sexual spectrum. Indeed, an investigation into these terms will reveal that significant semantic differences existed amongst them; that the meanings of these terms sometimes stayed constant while at other times metamorphosed; and lastly that the usage of a very broad term in connection with *ikrāh* may have been intentional in terms of both semantics and legal doctrine. For example, jurists sometimes used the terms "*al-ikrāh ʿalá al-waṭʾ*", whereas at other times they stated "*al-ikrāh ʿalá*

[510] The usage of the term "*aṣāba*" in connection with sexual coercion was equally noted by Serrano in "Rape," 167.

*al-zinā*" or used the term *ikrāh* in connection with *jimāʿ*; three usages which may seem synonymous at first blush but on deeper examination do not appear to be so.

It is imperative, therefore, to undertake an inquiry into the various terms used to describe sexual acts in *furūʿ* works. It is important to do so for a number of reasons: firstly, it has not been undertaken before, as far as I know. Numerous scholars have written about *zinā* [511] without delineating the semantic difference(s) between the various terms used to indicate sexual intercourse; tracking the evolution of some of these terms; mapping the continuities and discontinuities in their meaning(s); or demonstrating the doctrinal differences with regards these terms, if any. Secondly, I would like to suggest that pre-modern jurists did recognise significant semantic differences between the different terms used to describe sexual acts, as the following quotation from Ḥalabī (d.1549 or 50 C.E.) demonstrates. *Zinā,* he said, is "proven through the collective testimony (*shahāda*) of four men concerning [the occurrence of] *zinā* and **not** *waṭʾ* **or** *jimāʿ*/ *al-zinā* ***lā*** *al-waṭʾ aw al-jimāʿ*"[512] (emphasis mine); a sentiment equally echoed by Ibn ʿĀbidīn who stated that the witnesses had to testify that what they saw was *zinā* and not *waṭʾ*. [513] Similarly, Abī al-Ḥassan affirmed that the only sexual intercourse (*waṭʾ*) that warrants the *ḥadd* was either *zinā* or *liwāṭ*.[514] By juxtaposing these different terms, these jurists made it clear that semantic differences existed between *zinā*, *waṭʾ* and *jimāʿ*.

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[511] For example: G. H. Bousquet, *L'Ethique Sexuelle De L'Islam* (Paris: G.-P.Maisonneuve Et Larose, 1966), 55-75; Schacht, *An Introduction to Islamic Law*, 178; Noel J. Coulson, "Regulation of Sexual Behaviour Under Traditional Islamic Law," in *Society And The Sexes In Medieval Islam*, ed. Afaf Lutfi Al-Sayyid-Marsot (Malibu, CA: Undena Publications, 1979): 65-68; Colin Imber, *Studies In Ottoman History And Law* (Istanbul: The Isis Press, 1996), 175-206; Rudolph Peters, "Zinā or Zināʾ," *The Encyclopaedia of Islam*, New Edition (Leiden: Brill, 2002): XI: 509-510; Nadia Abu-Zahra, "Adultery and Fornication," *Encyclopaedia of the Qur'ān* ed. Jane Dammen McAuliffe (Brill online) accessed 22 October 2010; Pavlovitch, "The ʿUbāda B. Al-Ṣāmit Tradition," 137-235 especially page 141 footnote 6 where he stated that Muslim jurists used the term *zinā* to refer to "sexual transgression in general."

[512] Ḥalabī, *Multaqá*, 2: 221-222.

[513] Ibn ʿĀbidīn, *Radd*, 4: 7.

[514] Abī al-Ḥassan, *Sharḥ Abī al-Ḥassan li-risālat ibn Abī Zayd al-musamá Kifāyat al-ṭālib al-rabbānī li-Risālat ibn Abī Zayd,* printed with ʿAlī al-Ṣaʿīdī al-ʿAdawī, *Ḥāshiyat al-ʿAdawī ʿalá sharḥ Abī al-Ḥassan li-Risālat ibn Abī Zayd* (Cairo: Dār Iḥyāʾ al-Kutub al-ʿArabiyya, n.d.), 2: 300.

Consequently, I find it imperative as an interpreter of these sources, to equally recognise these differences and to take them into consideration in my interpretation of the topic.

### *Waṭʾ*

The first term to be analysed is *waṭʾ*, which was very aptly translated by Bouhdiba as "coit/coitus."[515] "Coitus", I think, perfectly encapsulates the broadness of "*waṭʾ*", which was used in *furūʿ* works to refer to sexual intercourse in general whether in terms of the gender and relationship between the two partners or the kind of intercourse engaged in. As such, *waṭʾ* was used to indicate a broad sexual continuum comprising vaginal, anal, heterosexual and homosexual intercourse, just as it was used to indicate non-penetrative intercourse as well as zoosexuality.[516]

Numerous jurists used this term in reference to heterosexual intercourse in general regardless of the kind of relationship between the two partners whether licit through marriage (*nikāḥ*) or slavery (*mulk yamīn*), quasi-allowed through *shubha* (such as sexual intercourse with a shared slave woman) or illicit (such as sexual intercourse with one's step-daughter).[517]

In addition to heterosexual intercourse, *waṭʾ* was used to indicate homosexual intercourse[518] as well as sexual intercourse with the intersex/ non-binary.[519]

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[515] Abdelwahab Bouhdiba, *La Sexualité en Islam* (Paris: Presse Universitaire de France, 1975), 24; Abdelwahab Bouhdiba, *Sexuality in Islam* (London: Saqi Books, 2012), 15.
[516] Māwardī, *Ḥāwī,* 13: 160-162; Shafiʿī, *al-Umm*, 5: 3, 39; Khalīl, *Mukhtaṣar*, 1: 146,151; Kāsānī*, Badāʾiʿ*, 9: 187; Dasūqī, *Ḥāshiya*, 1: 523; ʿIllaysh, *Taqrīrāt*, 1: 523; Nafrāwī, *Fawākih*, 2: 83; ʿAdawī, *Ḥāshiya*, 1: 478; Ibn Qudāma, *al-Mughnī,* 1: 204.
[517] Shafiʿī, *al-Umm*, 5: 3, 39; Dasūqī, *Ḥāshiya*, 1: 523; Khalīl, *Mukhtaṣar*, 1: 146, 151; Kāsānī*, Badāʾiʿ*, 9: 187; Ibn Ḥazm, *Muḥallá*, 8: 335; ʿIllaysh, *Taqrīrāt*, 1: 523; ʿAdawī, *Ḥāshiya*, 1: 478; Ibn Qudāma, *al-Mughnī,* 1: 204.
[518] Ibn Qudāma, *al-Mughnī,* 1: 204- 205.
[519] Ibid.

*Waṭʾ* was equally used to indicate a broad sexual continuum. Shīrāzī, for example, used this term in reference to sexual intercourse in general whether vaginal, anal, heterosexual or homosexual. He stated: "Anal intercourse with a woman and sodomy are akin to vaginal intercourse...because they are all *waṭʾ/ wa waṭʾ al-marʾa fī al-dubr wa al-liwāṭ kal-waṭʾ fī al-farj...liʾanna al-jamīʿ waṭʾ*."[520] This broadness in the meaning of the term *waṭʾ* was echoed by other jurists from different schools as well.[521]

Just as *waṭʾ* was used to indicate vaginal intercourse (*waṭʾ ...fī al-farj*),[522] it was used to denote heterosexual anal intercourse[523] as well as non-penetrative intercourse (*waṭʾ dūn al-farj*) or intercourse that did not culminate in ejaculation.[524]

*Waṭʾ* was further used to denote zoosexuality (*waṭʾ al-bahīma*) by some jurists such as Ḥalabī,[525] Marghinānī,[526] Ibn Qudāma,[527] ʿAdawī[528] and ʿIllaysh.[529]

### *Jimāʿ*

Like *waṭʾ*, the term *jimāʿ* was also used to indicate a broad continuum of sexual acts whether penetrative or not,[530] vaginal or anal,[531] with or without ejaculation,[532] intentional or

[520] Shīrāzī, *Muhadhdhab*, 1: 249.
[521] Māwardī, *Ḥāwī,* 13: 160-161; Zarkashī, *Mukhtaṣar*, 1: 72-75; ʿAdawī, *Ḥāshiya*, 1: 478.
[522] Ibn Qudāma, *al-Mughnī,* 1: 314.
[523] Al-Ābī al-Azharī, *Jawāhir*, 1: 275.
[524] Ibn Qudāma, *al-Mughnī,* 1: 199, 204, 3: 322; Zarkashī, *Mukhtaṣar*, 1: 72; Marghinānī, *Hidāya*, 2: 369; Nafrāwī, *Fawākih*, 2: 83; ʿAdawī, *Ḥāshiya*, 1: 478; Māwardī, *Ḥāwī,* 17: 55; Ibrāhīm al-Bayjūrī, *Ḥāshiyat Ibrāhīm al-Bayjūrī ʿalá Sharḥ Ibn al-Qāsim al-Ghuzī ʿalá Matn al-shaykh Abī al-Shujāʿ* (Cairo: al-Maktaba al-Tawfīqiyya, n.d.), 2: 448. Bayjūrī stated that non-penetrative sexual intercourse was to be punished through *taʿzīr*.
[525] Ḥalabī, *Multaqá*, 2: 231.
[526] Marghinānī, *Hidāya*, 2: 370.
[527] Ibn Qudāma, *al-Mughnī,* 3: 57, 316.
[528] ʿAdawī, *Ḥāshiya*, 2: 300.
[529] ʿIllaysh, *Taqrīrāt*, 4: 316.
[530] Marghinānī, *Hidāya*, 2: 58.
[531] Ibid., 2: 57.
[532] Ibid., 2: 55, 58.

coercive [533] as well as *coitus interruptus*.[534] In addition, we find Ibn ʿĀbidīn using it to denote male homosexual intercourse,[535] Ibn Nujaym using it in reference to sexual intercourse between women,[536] al-Ābī al-Azharī limiting its previous broadness to penetrative intercourse only,[537] Marghinānī using it to indicate zoosexuality,[538] Zarkashī using it to denote non-penetrative intercourse (*jāmaʿa dūn al-farj*)[539] and ʿIllaysh using it to denote penetrative homosexual and heterosexual intercourse.[540]

Interestingly, Marghinānī distinguished between real *jimāʿ* and its simulation (*ṣūrat al-jimāʿ*) by declaring that real intercourse is marked by ejaculation resulting from desire (*al-inzāl ʿan shahwa*).[541]

However, unlike *waṭʾ*, many jurists seem to have used it in reference to legitimate heterosexual couples. Shafiʿī, for instance, used this word to indicate sexual intercourse between married partners. He affirmed: "It is not permitted for a man whose wife is menstruating to have intercourse with her/ *wa lā yaḥillu l-imriʾin imraʾatuhu ḥāʾiḍan an yujāmiʿahā.*"[542] Similarly, in the chapter on fasting Shafiʿī stated: "If somebody has anal intercourse with his wife (*imraʾatuhu*) ...it [his fast] is corrupted and it is intercourse (*jimāʿ*) even though it is not the kind of permitted intercourse (*al-jimāʿ al-mubāḥ*)."[543] In addition, he maintained that if somebody had been travelling and was not fasting and came home to find

[533] Ibn Qudāma, *al-Mughnī*, 3: 54, 57, 60; Zayn al-Dīn Ibn Nujaym, *al-Baḥr al-Rāʾiq sharḥ Kanz al-daqāʾiq* (n.p.: Dār al-Kitāb al-ʿArabī, n.d.), 3: 16, 2: 292-293; Mardāwī, *Inṣāf*, 3:311, 315; Marghinānī, *Hidāya*, 2: 55; Shafiʿī, *al-Umm*, 1: 31-32; 5: 230.
[534] Ibn Qudāma, *al-Mughnī,* 3: 63.
[535] Ibn ʿĀbidīn, *Ḥāshiya*, 1: 169.
[536] Ibn Nujaym, *Baḥr*, 2: 293.
[537] Al-Ābī al-Azharī, *Jawāhir*, 1: 149.
[538] Ḥalabī, *Multaqá*, 2: 231; Marghinānī, *Hidāya*, 2: 57.
[539] Zarkashī, *Sharḥ*, 1: 424.
[540] ʿIllaysh, *Taqrīrāt*, 1: 128.
[541] Marghinānī, *Hidāya*, 2: 55.
[542] Shafiʿī, *al-Umm*, 1: 50.
[543] Shafiʿī, *al-Umm*, 2: 86.

out that his wife had not been fasting as well because her menstruation had just ended; there is no problem if he has sexual intercourse (*fa-jāmaʿahā*) with her.[544] Other jurists also used the term *jimāʿ* to denote sexual intercourse between legitimate heterosexual partners whether spouses or a slave owner and his slave woman. Cases in point include, Sarakhsī who stated "a man had sexual intercourse (*jāmaʿa*) with his wife"[545] as well as Ibn ʿĀbidīn,[546] Ibn Qudāma,[547] Qāḍīkhān,[548] Shīrāzī,[549] Zarkashī,[550] al-Ābī al-Azharī[551] and the *Fatāwá Hindiyya.*[552] The meaning of *jimāʿ*, as sexual intercourse between legitimate partners, seems to have stayed constant in the sources. It was found in the ninth century work of Shafiʿī as well as the nineteenth century work of ʿAdawī and the numerous jurists cited above.[553]

### *Ityān*

The term *ityān* was mostly used by jurists to indicate anal or prohibited intercourse with males or females. It was used to describe intercourse with a menstruating female (*ityān al-nisāʾ ḥayḍan*),[554] heterosexual anal intercourse (*ityān al-nisāʾ fī adbārihin*)[555] as well as female homosexual intercourse (*ityān al-marʾatu al-marʾata*).[556] Although *liwāṭ* was the term most used

[544] Ibid., 2: 86.
[545] Shīrāzī, *Muhadhdhab*, 1: 247; Sarakhsī has a whole chapter devoted to lawful sexual intercourse (*al-jimāʿ*) in his *Kitāb al-Mabsūṭ* (Beirut: Dār al-Maʿrifa, 1986), 4: 118-122.
[546] Ibn ʿĀbidīn, *Radd*, 1: 171.
[547] Ibn Qudāma, *al-Mughnī*, 3: 335.
[548] Qāḍīkhān, *Fatāwá*, 3: 487.
[549] Shīrāzī, *Muhadhdhab*, 1: 247.
[550] Zarkashī, *Mukhtaṣar*, 1: 75, 424. As was common in many *furūʿ* works, Zarkashī used the term "*ahl*" (family) to indicate a man's wife or legitimate partner.
[551] al-Ābī al-Azharī, *Jawāhir*, 1: 275.
[552] *Al-Fatāwá al-Hindiyya*, 5: 49.
[553] ʿAdawī, *Ḥāshiya*, 1: 121.
[554] Shafiʿī, *al-Umm*, 5: 83-84.
[555] Abī al-Ḥassan, *Sharḥ Abī al-Ḥassan li-risālat ibn Abī Zayd,* 2: 299; Kāsānī, *Badāʾiʿ*, 6: 422; ʿAdawī, *Ḥāshiya,* printed with Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 8: 76; Shafiʿī, *al-Umm*, 5: 85.
[556] Shīrāzī, *Muhadhdhab*, 2: 344; Māwardī, *Ḥāwī,* 17: 4.

to refer to male homosexuality,[557] *ityān* or derivatives thereof were also used. For example: "If a man had sexual intercourse with another man/ *idhā atā al-rajulu al-rajula*"[558] or "having anal intercourse with males/ *ityān al-dhukūr fī adbārihim*."[559] Another usage of this term was in reference to zoosexuality (*ityān al-bahāʾim*). Cases in point include, Shafiʿī,[560] Shīrāzī[561] and Māwardī.[562] In sum, *ityān* seems to have been a term mostly used to indicate homosexual, anal or prohibited intercourse as well as zoosexuality.

### *Zinā*

Scholarship on the legal category of *zinā* is both varied and impressive. Scholars have delved into the depiction of *zinā* in the Qurʾān; Prophetic and non-prophetic precedents, their veracity, provenance or dating and in Islamic legal discourse[563] as well as the related issues of the *ḥudūd*, the role of judges and witnesses,[564] adultery/fornication,[565] homosexuality,[566] marriage, parentage and illegitimacy,[567] honour crimes and crimes of passion,[568] rape in court

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[557] Abī al-Ḥassan, *Sharḥ Abī al-Ḥassan li-risālat ibn Abī Zayd,* 2: 299; Māwardī, *Ḥāwī,* 17: 4, 40; Shīrāzī, *Muhadhdhab*, 2: 344.
[558] Shīrāzī, *Muhadhdhab*, 2: 344.
[559] Abī al-Ḥassan, *Sharḥ Abī al-Ḥassan li-risālat ibn Abī Zayd,* 2: 299.
[560] Shafiʿī, *al-Umm*, 5: 85.
[561] Shīrāzī, *Muhadhdhab*, 1: 249, 2: 345.
[562] Māwardī, *Ḥāwī,* 17: 44.
[563] Peters, "Zinā", 508-509; Semerdijian, "*Off the Straight Path,*" 4-28; Azam, "Sexual Violence"; Norman, "Rape Law"; Lucas, "Perhaps You Only Kissed Her?"; Pavlovitch, "The ʿUbāda B. Al-Ṣāmit Tradition," 137-235.
[564] Rabb, "Islamic Legal Maxims," 63-125; Fierro, "Idraʾū L-Ḥudūd Bi-L-Shubuhāt," 208-238; Robert Gleave, "Public Violence, state legitimacy: the *Iqāmat al-ḥudūd* and the sacred state" in *Public Violence in Islamic Societies. Power, Discipline, and the Construction of the Public Sphere, 7th-9th Centuries C.E.,* Christian Lange and Maribel Fierro eds. (Edinburgh: Edinburgh University Press, 2009), 266-267; Cheema and Mustafa, "The Hudood Ordinances," 1-48; Intisar A. Rabb, "The Islamic Rule of Lenity: Judicial Discretion and Legal Canons," *Vanderbilt Journal Of Transnational Law* 44 (2011): 1299-1351; Mohammad Hashim Kamali, "Punishment in Islamic Law: A Critique of the Hudud Bill of Kelantan, Malaysia," *Arab Law Quarterly* 13, 3 (1998): 203-234; Young, "Stoning and Hand-Amputation."
[565] Sidahmed, "Problems in Contemporary Applications of Islamic Criminal Sanctions," 187-204; Pavlovitch, "Early Development of the Tradition of the Self-Confessed Adulterer in Islam," 371-410; Burton, "Law and exegesis: the penalty for adultery in Islam," 269-284.
[566] Sara Omar, "From Semantics to Normative Law: Perceptions of *Liwāṭ* (Sodomy) and *Siḥāq* (Tribadism) in Islamic Jurisprudence (8th-15th Century CE), *Islamic Law and Society*, 19 (2012): 222-256.
[567] Uri Rubin, " 'Al-walad lil-firāsh' On the Islamic Campaign Against 'Zinā', " *Studia Islamica* 78 (1994): 5-24.

records, *fatāwá* works and *kanunnames*,[569] sexuality,[570] and modern state attempts at defining, controlling and punishing sexual behaviour.[571]

What I would like to contribute to this scholarship is the distinction in the meaning of the term *zinā* between *zinā* as a legal term referring to a *ḥadd* category to be compared to the other *ḥudūd* categories in terms of their evidentiary standards, *actus reus* and fault elements, and *zinā* as a term that refers to a particular sexual act and is thus to be compared to other terms for other sexual acts. Such a distinction would enable us to broaden the scope of interpretation of this term and its related categories and outcomes and also to acknowledge a distinction between *de facto* and *de jure zinā* that jurists like Khurashī and Dasūqī, for example recognised.[572] I shall begin with the meaning of *zinā* as a sexual act before exploring the legal ramifications of such a distinction.

Both *furūʿ* and *fatāwá* works usually devoted a separate section to the legal category of *zinā* within their chapters on the *ḥudūd*. These sections usually outlined the precedents, rationale, modes of punishment, proofs, testimony and witnesses for it. The two most crucial elements in the establishment of *zinā* being the (fourfold) confession of one or both of the

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[568] Lama Abu Odeh, "Honor Killings and the Construction of Gender in Arab Societies," *The American Journal of Comparative Law* 58, 4 (2010): 911-952; Lynn Welchmann and Sara Hossain, *'HONOUR' Crimes, paradigms and violence against women* (London: Zed Books, 2005).

[569] Jennings, "Kadi, Court, and Legal Procedure in 17th Century Ottoman Kayseri," 171; el-Nahal, *The Judicial Administration of Ottoman Egypt In The Seventeenth Century*, 30; Imber, "*Zinā*," 195-197; Sonbol, "Law and Gender Violence," 285-289; Sonbol, "Rape and Law," 214- 231; Peirce, *Morality Tales*, 351-374; Peirce, "Le dilemme de Fatma," 291-319; Semerdijian, "*Off The Straight Path*"; Semerdijian, "Gender Violence," 180-197; Ergene, "Why did Ümmü Gülsüm Go to Court?" 215-244; Zarinebaf, *Crime & Punishment in Istanbul 1700-1800*, 116-118; Kozma, "Negotiating Virginity," 55-65; Ruiz, "Virginity," 214- 226; Ze'evi, *Producing Desire*, 48-76.

[570] Coulson, "Regulation of Sexual Behaviour Under Traditional Islamic Law," 63-68; Kecia Ali, *Sexual Ethics and Islam. Feminist Reflections on Qurʾan, Hadith, and Jurisprudence* (Oxford: Oneworld, 2006), 57-66; Pinar Ilkaracan ed. *Deconstructing Sexuality In The Middle East* (London: Ashgate Publishing Limited, 2008).

[571] Quraishi, "Her Honour"; Shahnaz Khan, *Zina, Transnational Feminism, and the Moral Regulation of Pakistani Women* (Vancouver: UBC Press, 2006); Mir-Hosseini, "Criminalising Sexuality," 7-33; Gunnar J. Weimann, "Divine Law and Local Custom in Northern Nigerian *zinā* Trials," *Die Welt des Islams* 49 (2009): 429-465; Eltantawi, " Stoning in the Islamic Tradition"; Jones-Pauly, *Women Under Islam,* 228-237.

[572] Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 8: 75; Dasūqī, *Ḥāshiya*, 4: 313. More will be said about this point later.

sexual partners and/or the testimony of four free adult male Muslim witnesses of good repute and sound mind to having seen the sexual couple *in flagrante delicto*.[573] Without their collective testimony to having witnessed the act of penetration (*īlāj*) without the shadow of a doubt, *zinā* could not be ascertained and the *ḥadd* could not be imposed. The importance of establishing penetration was expressed by Shafiʿī in the following manner: "The judge has to stand them [the witnesses] up and they have to testify that they saw that of him enter that of her just as a *koḥl* stick enters a pot of *koḥl*."[574] This narrow understanding of *zinā* as penetrative intercourse coupled with the insistence on the unequivocal affirmation of penetration by four adult male eyewitnesses was reiterated throughout the centuries by jurists from all four *Sunnī* schools. Cases in point include, ʿAdawī,[575] Ḥalabī,[576] Kāsānī,[577] Marghinānī[578], Mardāwī[579] and Shīrāzī[580] among others, who all demanded the highest burden of proof concerning the establishment of *zinā*.[581]

Penetration was thus a cardinal element in the definition and legal consequences of *zinā* and was a demarcating factor between the term *zinā* and the other terms used to indicate sexual intercourse. As we have seen, *jimāʿ*, *waṭʾ* and *ityān* were used to indicate a broad spectrum of sexual acts that may or may not have included penetration. Foreplay, sexual pleasure, passionately hugging and kissing were not considered *zinā*, nor even akin to *zinā*, except in the case of first degree relatives of one's spouse such as a man's step-daughter or

[573] Shafiʿī, *al-Umm*, 6: 143; Kāsānī, *Badāʾiʿ*, 9: 202-207; Ibn ʿĀbidīn, *Radd*, 4: 7; Ibn Abī Zayd al-Qayrawānī, *Risālat* printed with Aḥmad ibn Ghunaym ibn Sālim al-Nafrāwī, *al-Fawākih al-dawānī ʿalá Risālat ibn Abī Zayd al-Qayrawānī* (Cairo: Maṭbaʿat Muṣṭafá al-Bābī al-Ḥalabī, 1955), 2: 282; Nafrāwī, *Fawākih*, 2: 282; Ibn Rushd, *Bidāyat*, 2: 651-652.
[574] Shafiʿī, *al-Umm*, 6: 143.
[575] ʿAdawī, *Ḥāshiyat al-ʿAdawī ʿalá sharḥ abī al-Ḥassan,* 2: 296.
[576] Ḥalabī, *Multaqá*, 2: 221-222.
[577] Kāsānī, *Badāʾiʿ*, 9: 202-203, 206-207.
[578] Marghinānī, *Hidāya*, 2: 355-356.
[579] Mardāwī, *Inṣāf*, 10: 175-177.
[580] Shīrāzī, *al-Muhadhdhab*, 2: 430.
[581] Nafrāwī, *Fawākih*, 2: 282; Zarkashī, *Sharḥ*, 3: 108-110.

mother in law, according to an authority which Shafiʿī cites but does not name.[582] Similarly, Ibn Qudāma distinguished between sexual pleasure (*istimtāʿ*) and the kind of penetrative intercourse that warrants the *ḥadd* in the following terms: "Pleasure ... does not warrant *an sich* (*bi-nawʿihi*) the *ḥadd*...[whereas] penetrative intercourse (*al-waṭʾ fī al-farj*) warrants *an sich* (*bi-nawʿihi*) the *ḥadd.*" [583]

Penetration was understood to mean vaginal penetration by numerous Ḥanafī jurists such as Ḥalabī[584] and Marghinānī who stated that: "The kind of sexual intercourse (*waṭʾ*) that warrants the *ḥadd* is *zinā* which is known legally ...[as] the vaginal penetration of a woman by a man."[585] The term *zinā* was not used to indicate heterosexual intercourse in general, but penetrative intercourse in particular. As Kāsānī stated: "The *zinā* of a man is through penile penetration (*īlāj*) and her *zinā* is through enablement/ *zinā al-rajul bi al-īlāj wa zināha bi al-tamkīn.*"[586] *Zinā* was thus understood in a very narrow sense and proofs for it were even more restricted and closely constructed.

However, we find jurists from the other schools enlarging the scope of penetration to include both vaginal and anal penetration. Cases in point include Shīrāzī,[587] Nafrāwī[588] Khurashī[589] and Khalīl who penned a very expansive, yet very succinct, definition of *zinā* as follows:

[582] Shafiʿī, *al-Umm*, 5: 136.
[583] Ibn Qudāma, *al-Mughnī,* 3: 323.
[584] Ḥalabī, *Multaqá*, 2: 221.
[585] Marghinānī, *Hidāya*, 2: 366.
[586] Kāsānī, *Badāʾiʿ*, 10: 103.
[587] Shīrāzī, *al-Muhadhdhab*, 2: 344.
[588] Nafrāwī, *Fawākih*, 2: 284.
[589] Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 8: 76.

> *Zinā* [is] sexual intercourse (*waṭʾ*)... [of] a human orifice (*farj ādamī*)...consensually (*bi-ittifāq*) intentionally (*taʿammudan*) even if it is sodomy (*liwāṭ*) or the anal penetration of a woman who is a stranger or a dead woman or a female child (*ṣaghīra*).[590]

The mention of the female child in this instance is quite noteworthy in the sense that young age was not regarded as an exemption to be tolerated. Rather, *zinā* was regarded as a prohibited act irrespective of the age of the female in question. Khalīl went on to include other kinds of women such as quasi-slaves and prostitutes but what interests us here is his expansion of penetration to include both anal and vaginal as well as his usage of the term *waṭʾ* and not *īlāj*. Had he used the word *īlāj*, like Kāsānī, he would have limited the element of penetration to penile penetration. Instead he used *waṭʾ,* which could also indicate digital penetration, as well as penetration with an object. In other words, Khalīl defined *zinā* very broadly as the intentional and consensual anal or vaginal penetration of a person by another through a variety of means (penile, digital or with an object).

Another interesting word that Khalīl used is "*ādamī* /human", which was used in order to exclude zoosexuality from the legal definition of *zinā*, according to Khurashī.[591] *Ādamī* is also a word that refers to people of all genders (males, females and the non-binary/intersex). Thus, Khalīl did not limit the legal definition of penetration to females thereby excluding male penetration, nor did he state that *zinā* was the illicit penetration of males and females thereby excluding the intersex/ non-binary.[592] Rather, he used the very broad term "*farj ādamī*/ human

[590] Khalīl, *Mukhtaṣar*, 2: 283, printed with al-Ābī al-Azharī, *Jawāhir al-iklīl*, 2: 283.
[591] Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 8: 75.
[592] However, such an interpretation did not apply to an intersex person who possessed full male and female organs and who penetrated others or was penetrated by others, according to Khurashī, because of the presence of *shubha*/doubt in the application of the *ḥadd*. Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 8: 75. See also: Dasūqī, *Ḥāshiya*, 4: 313.

orifice." The terms "*farj ādamī*" or simply "*ādamī*" or "*ādamiyya*" were adopted by a number of jurists as well in their definition of *zinā*, *waṭʾ* and/or *jimāʿ*.[593]

Limiting the feature of penetration to vaginal intercourse only or widening it to include both vaginal and anal intercourse seems to have followed school lines. Thus, the Shāfiʿīs, Ḥanbalīs and Mālikīs enlarged the scope of penetration and the Ḥanafīs limited it. In other words, those schools that subsumed *liwāṭ* under the category of *zinā* had a broader definition of penetration *vis à vis* the other schools.

Homosexual intercourse (*liwāṭ*) was considered different from *zinā* by many jurists who drew sharp distinctions between *liwāṭ* and *zinā* as two related but separate categories.[594] The classification of *liwāṭ* as either a sub-category of *zinā* or as a separate category followed school lines according to Peters and Omar who maintained that Mālikīs, Shāfiʿīs and Ḥanbalīs, in general, regarded *liwāṭ* as *zinā* whereas Ḥanafīs and Ẓāhirīs regarded *liwāṭ* as a separate category from *zinā* to be punished through *taʿzīr* and not the *ḥadd*.[595]

The legal implication of this interpretation would be that, theoretically, the Shāfiʿīs and Mālikīs would have considered a male sexually coercing another male as *ikrāh ʿalá al-zinā* with the coercer possibly facing the *ḥadd* penalty for his forcible penetration of another,[596] whereas the Ḥanafīs would have recognized such an act as forced *liwāṭ* and not forced *zinā* and the perpetrator would not have faced the theoretical possibility of a *ḥadd* for his coercive deed.

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[593] Nafrāwī, *Fawākih*, 2: 284; ʿIllaysh, *Taqrīrāt*, 2: 68; Ibn Qudāma, *al-Mughnī,* 1: 204; Ramlī, *Nihāyat*, 7: 423.
[594] ʿAdawī, *Ḥāshiya*, 2: 99; Nafrāwī, *al-Fawākih*, 1: 138.
[595] R. Peters, *Zinā*, 509; Sara Omar, "From Semantics to Normative Law: Perceptions of *Liwāṭ* (Sodomy) and *Siḥāq* (Tribadism) in Islamic Jurisprudence (8th-15th Century CE), *Islamic Law and Society*, 19 (2012) 230-236.
[596] Abī al-Hassan, for example, stated that the *ḥadd* applied to sodomy just as it applied to *zinā* with the establishment of penetration. However, his commentator, ʿAdawī stated that differences of opinion existed concerning males being forced into penetrating others. Abī al-Hassan, *Sharḥ*, 2: 299, printed with ʿAdawī, *Ḥāshiya*, 2: 299.

Interestingly, Fīrūzābādī al-Shīrāzī (d.1083 C.E.) used the term *zinā* to indicate penetrative intercourse between a man and his wife during Ramaḍān (*in zanā bihā fī Ramaḍān*).[597] Similarly, Dasūqī stated that one form of "*zinā* that did not warrant the *ḥadd* was marriage without a guardian (*walī).*"[598] These examples are quite interesting given the later understanding of *zinā* as prohibited intercourse between couples not related through (quasi)marriage or (quasi)slavery. What they highlight, however, is the understanding of *zinā* as a penetrative sexual act irrespective of the relationship between the two partners. Similarly, this usage indicates that a jurist as early as Shīrāzī had a broader understanding of the term than our contemporary jurists, for example, who use the term in relation to non-married couples.

Shīrāzī's expansion of the definition of *zinā* to include sexual intercourse within a legally licit relationship is noteworthy because it indicates an expansive conception of *zinā* as a *malum prohibitum* in addition to the more traditional definition as a *malum in se.* He used the term *zinā* to indicate prohibited intercourse where prohibition was anchored in the context of the act (the fasting month) and not the illicitness of the relationship between the sexual partners or the penetrative act. By contrast, the prohibition of *zinā* as a *malum in se* was based on the illicitness of the act and the relationship between the sexual partners.

Shīrāzī's usage of this term cannot be said to apply to all Shāfiʿī jurists though. Bayjūrī (d. 1860 C.E.), for example, had stated that spousal sexual intercourse (*waṭʾ)* during Ramaḍān or the pilgrimage was not "*zinā*". Whereas Bayjūrī was a late jurist, Shīrāzī had been an early one,

[597] Fīrūzabādī al-Shīrāzī stated that if during the fasting month of Ramaḍān "the husband (*al-zawj* ) had been sleeping and the wife/woman (*al-marʾa*) inserted his penis [into her]...she has to perform a penance (*kaffāra*)...and if he commits *zinā* with her in Ramaḍān (*wa in zanā bihā fī Ramaḍān*)...he has to perform a *kaffāra.*" Abū Isḥāq Ibrāhīm ibn ʿAlī al-Fīrūzabādī al-Shīrāzī, *al-Muhadhdhab fī Fiqh al-Imām al-Shafiʿī* (Cairo: Maktabat wa Maṭbaʿat Muṣṭafá al-Bābī al-Ḥalabī, 1976), 1: 248.
[598] Dasūqī, *Ḥāshiya*, 4: 313.

consequently their difference could reflect different strands within the Shāfiʿī school or evolution and difference across time.[599]

Although Cheema and Mustafa have pointed out that some "Traditionalist" understandings of the term *zinā* encompass both illicit sexual behaviour and/or lewd or immoral behaviour in general,[600] I have not found this understanding of *zinā* as immoral behaviour devoid of sexual intercourse in the sections on *zinā* that I have examined. Rather what was repeatedly stressed was the confirmation of penetration by four witnesses beyond any doubt.

As mentioned earlier, one of the reasons for the previous investigation into the different terms used to describe sexual acts was the fact that jurists employed different terms in connection with sexual coercion. Jurists sometimes described sexual coercion as *al-ikrāh ʿalá al-zinā*,[601] while at other times stated al-*ikrāh ʿalá al-waṭʾ*,[602] or used the term *ikrāh* in connection with *jimāʿ*.[603]

Therefore, in light of the previous investigation into these terms, I would like to argue that when jurists used the term *al-ikrāh ʿalá al-zinā* they meant by it a coercive *penetrative* sexual act, whereas when they used *al-ikrāh ʿalá al-waṭʾ* or used *ikrāh* in connection with *jimāʿ*, they meant a greater continuum of coercive sexual acts that may or may not have been penetrative. In other words, *al-ikrāh ʿalá al-waṭʾ* or *al-jimāʿ* were used to indicate a broader range

[599] Bayjūrī, *Ḥāshiya*, 2: 448.
[600] Cheema and Mustafa, "The Hudood Ordinances," 24-25.
[601] Sarakhsī, *Mabsūṭ*, 24: 88; Kāsānī, *Badāʾiʿ*, 6: 180; Marghinānī, *Hidāya*, 4: 72; Māwardī, *Ḥāwī,* 17: 56.
[602] Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 1: 255; Mardāwī, *Inṣāf*, 3: 315; Ibn Ḥazm, *Muḥallá,* 8: 335.
[603] Sarakhsī, *Mabsūṭ*, 4: 121; Dasūqī, *Ḥāshiya*, 1: 128.

of coercive sexual acts that may or may not have been anal, vaginal, digital, with an object, or any sexual assault that may or may not have culminated in penetration.[604]

Hence, one can argue that the *actus reus* of *zinā* was penetration whereas the *actus reus* of *al-ikrāh ʿalá al-zinā* was coerced penetration. Similarly, the *actus reus* of *al-ikrāh ʿalá al-waṭʾ* or *al-jimāʿ* was the duress imposed in the performance of a broad sexual continuum, that may or may not have been penetrative, with a partner who may or may not have been legitimate.

If *zinā* were perceived as a crime of sex, and *ikrāh* as a crime of coercion, then *al-ikrāh ʿalá al-zinā* was a crime of coerced penetration while both *al-ikrāh ʿalá al-waṭʾ* or *al-jimāʿ* were crimes of coerced sex; sex here being interpreted as a broad continuum of sexual acts. Although all three phrases indicated coercive sex, important nuances existed amongst them semantically and by consequence legally in terms of punishment and/or redress.

As mentioned in the introduction, Johansen had drawn attention to the fact that legal categories often engendered different results in different areas of the law.[605] As such, by distinguishing between *zinā* as a *ḥadd* category and *zinā* as a sexual act, one would be drawing attention to the different results that such an act could have engendered. *Zinā,* as heterosexual penetration in the context of adultery/fornication, for example, was to be punished through the *ḥadd* according to the four schools. However *zinā*, as penetrative sodomy, could not have been punished through the *ḥadd* in those schools that did not subsume same sex acts under *zinā.*[606] Penetration, in these cases would have punished through other means such as *taʿzīr* according to the Ḥanafīs[607] or through *adab* (reprimands), in the case of a man having sexual

[604] In order to distinguish between penile penetration and penetration by other means, the phrase "*ālat al-jimāʿ* or *ālat al-waṭʾ* " was sometimes used. See for example, Nawawī, *Rawḍat*, 7: 167 and Qayrawānī, *Sharḥ*, 2: 300.
[605] Johansen, "Casuistry," 152.
[606] Kāsānī, *Badāʾiʿ*, 9: 167-168.
[607] Ibid.

intercourse with a shared slave woman.[608] Lastly, *zinā* as penetrative intercourse between a married couple in Ramaḍān would have required penance/expiation (*kaffāra*).[609] Although the *actus reus* was the same, i.e. sexual penetration, different results were envisaged.

The distinction between *zinā* as a *ḥadd* category and *zinā* as a term indicating penetrative intercourse that may or may not have resulted in a *ḥadd* punishment was underscored by Khurashī who distinguished between *de jure* and *de facto zinā* in his discourse on the requirement of *taklīf*/ legal capacity. He stated that the *ḥadd* cannot be applied to a person who was not legally recognised to be responsible (*mukallaf*) "like a child or an insane person because such an act is not called *zinā* legally (*sharʿan*) even though it is *zinā* linguistically (*lughatan*)."[610] Similarly, in listing the different kinds of sexual intercourse that do not legally qualify as *zinā*, Dasūqī stated that "even though all [these] are *zinā* linguistically … [they are] not called *zinā* legally (*sharʿan*)."[611] The distinction between *de jure* and *de facto zinā* is an important element within the discourse on *zinā,* I would argue, given its legal implications in terms of punishment for the accused.

An important legal implication of the above distinction concerns the Mālikī recognition of pregnancy as proof of *zinā*.[612] Given that the above quotations were made by Mālikī jurists, one might argue that when Mālikīs declared that pregnancy was proof of *zinā,* they could have had two distinct meanings in mind, either that pregnancy was the result of illicit sexual intercourse (as in an adulterous relationship), or that pregnancy was the result of sexual

[608] Abī al-Ḥassan, *Sharḥ Abī al-Ḥassan li-risālat ibn Abī Zayd,* 2: 297.
[609] Shīrāzī, *al-Muhadhdhab,* 1: 248. For more on the *kaffāra* and its connection to sexual intercourse whether consensual, coerced, licit or illicit, please see: Sarakhsī, *Mabsūṭ*, 24: 154; Nawawī, *Rawḍat*, 2: 229-233.
[610] Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 8: 75. A similar view was also held by Bayjūrī, *Ḥāshiya*, 2: 448.
[611] Dasūqī, *Ḥāshiya*, 4: 313.
[612] For examples of Mālikī statements on the relationship between pregnancy, *zinā* and the *ḥadd*, please see: Mālik, *Muwaṭṭaʾ*, 2: 647; ʿIllaysh, *Taqrīrāt*, 4: 319; Qayrawānī, *Risālat*, 2: 282, 284; Ibn Rushd, *Bidāyat*, 2: 651-652; Muḥammad ibn Yūsuf al-ʿAbdarī al-Mawwāq, *al-Tāj wa al-iklīl li-Mukhtaṣar Khalīl* printed with Muḥammad ibn Muḥammad ibn ʿAbd al-Raḥmān al-Ḥaṭṭāb, *Kitāb Mawāhib al-Jalīl li-sharḥ Mukhtaṣar Khalīl* (Beirut: Dār al-Fikr, 1992), 6: 294; Nafrāwī, *Fawākih*, 2: 284.

penetration in a context that did not warrant the *ḥadd*. Further research may prove or disprove this point, but for the moment it is important to note that nuances in interpretation existed within the Mālikī school concerning the term *zinā* semantically and by extension legally as well.

It is equally important to note that not all schools recognised pregnancy as proof of adultery/ fornication. In outlining the difference between the Shāfiʿī and the Mālikī positions concerning this issue, the Shāfiʿī jurist Māwardī described the Mālikī rationale as "wrong/ *khaṭaʾ*" and stated that: "Pregnancy could occur from legally uncertain intercourse (*waṭʾ shubha*) or from duress (*ikrāh*) or from *zinā.* Therefore, pregnancy should not receive the harshest judgement (*al-aghlaẓ*)," on the basis of the precedent on lenity in cases of ambiguity and/or uncertainty (*shubha*).[613]

## Sexual coercion

This section will take cognizance of both homosexual and heterosexual forcible sexual acts. In it, the three facets of sexual coercion, namely *al-ikrāh ʿalá al-zinā, al-waṭʾ* and *al-jimāʿ*, will be analysed with the first facet on *zinā* receiving the most attention.

## *Ikrāh* and *Zinā*

"*Al-ikrāh ʿalá al-zinā*" was the category that occupied jurists the most and as such we find ample evidence of it in both *furūʿ* and *fatāwá* works. Jurists from all four schools used the term *ikrāh* or derivatives thereof, such as "*istikrāh*", "*istukrihat*", "*mukrah*" or "*mukraha*", to

[613] Māwardī, *Ḥāwī,* 17: 45. See also Nawawī, *Rawḍat*, 7: 316.

refer to a coercive sexual act.[614] Al-Ābī al-Azharī, for example, defined *istikrāh* as the "coercion to commit *zinā/ ikrāhan ʿalá al-zinā*."[615]

Discourse on "*al-ikrāh ʿalá al-zinā*" was made under the two categories of *ikrāh* and *zinā*, among others. An important feature of that discourse was the emphatic refutation of the *ḥadd* for women claiming sexual duress. Such refutation was made by jurists from all four schools.[616] Cases in point include the Mālikī Khurashī who had stated that "the coerced woman does not [receive] the *ḥadd* nor is she reprimanded because of the lack of intent on her part (*li-nafī al-taʿammud ʿanhā*)[617] and the Shāfiʿī Shīrāzī who stated that the *ḥadd* "should not be [dealt] to a woman if she were coerced into submitting to *zinā/ ukrihat ʿalá al-tamkīn min al-zinā*" on the basis of a rational reason (the lack of choice on her part) and a textual one (a Prophetic *ḥadīth*).[618] Similarly, the Ḥanbalī jurist Mardāwī emphasised that "the valid opinion within his school, the one that is recognised and [followed] by his colleagues" is that a coerced woman should not receive the *ḥadd* "absolutely/*muṭlaqan*"[619] while the Ḥanafī Kāsānī declared that:

> There is no difference between compelling and non-compelling [duress.] The *ḥadd* is lifted from her with both kinds of duress because the act of *zinā* cannot be attributed to her ...what can be attributed is submission (*tamkīn*) which cannot be proof of consent (*dalīl al- riḍ-ā*) under coercion. [For this reason,] the *ḥadd* is lifted from her.[620]

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[614] Kāsānī, *Badāʾiʿ*, 10: 109-110; Ṭūrī, *Takmilat al-Baḥr al-rāʾiq*, 8: 84; Ḥalabī, *Multaqá*, 4: 43; Shaykh Zāda, *Majmaʿ*, 4: 40, 43; Ibn ʿĀbidīn, *Ḥāshiya*, 6: 145; Shafiʿī, *al-Umm*, 3: 230; Shīrāzī, *Muhadhdhab*, 2: 342; Māwardī, *Ḥāwī*, 17: 45; Nawawī, *Rawḍat*, 7: 320- 321; Ramlī, *Nihāyat*, 7: 424-425; Bujayrimī, *Ḥāshiya*, 4: 210; Qayrawānī, *Risālat*, 2: 284; Nafrāwī, *Fawākih*, 2: 284; Ibn Rushd, *Bidāyat*, 2: 652-653; Khalīl, *Mukhtaṣar*, 2: 153; Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 8: 79-80; Dasūqī, *Ḥāshiya*, 4: 318; ʿIllaysh, *Taqrīrāt*, 4: 319; al-Ābī al-Azharī, *Jawāhir*, 2: 284; Mardāwī, *Inṣāf*, 10: 171; Mālik, *Muwaṭṭaʾ*, 2: 647.

[615] al-Ābī al-Azharī, *Jawāhir*, 2: 153.

[616] Sarakhsī, *Mabsūṭ*, 24: 90, 138; Kāsānī, *Badāʾiʿ*, 10: 110; Ṭūrī, *Takmilat al-Baḥr al-rāʾiq*, 8: 84; Shaykh Zāda, *Majmaʿ*, 4: 40; Ibn ʿĀbidīn, *Ḥāshiya*, 6: 145; Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 8: 79; ʿIllaysh, *Taqrīrāt*, 4: 318; al-Ābī al-Azharī, *Jawāhir*, 2: 284; Shīrāzī, *Muhadhdhab*, 2: 242; Māwardī, *Ḥāwī*, 17: 58; Shubrāmalsī, *Ḥāshiya*, 7: 425; Mardāwī, *Inṣāf*, 10: 171.

[617] Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 8: 79.

[618] Shīrāzī based his opinion on two arguments a rational one (the lack of choice) and a textual one (a Prophetic *ḥadīth*). Shīrāzī, *Muhadhdhab*, 2: 342.

[619] Mardāwī, *Inṣāf*, 10: 171.

[620] Kāsānī, *Badāʾiʿ*, 10: 110.

A similar opinion was expressed in the *Fatāwá Hindiyya* which affirmed that:

> If a woman in a state of *iḥrām* (purity) was coerced into *zinā* (*ukrihat ʿalá al-zinā*) under pain of death, she is allowed to comply (*tumakkin min nafsihā*) and her *iḥrām* will be corrupted and she has to perform penance (*kaffāra*)...and if she does not [comply] until she dies, she is allowed to do that.[621]

The above quotations were purposely chosen to reflect different schools as well as varying geographical locations and time periods. This great variety, however, is in sharp contrast to the unanimity of opinion expressed therein concerning the coerced female. Of equal note is the juristic differentiation between the act of submission (*tamkīn*) and *zinā* on the basis of rational and textual arguments. Such differentiation within the primary sources is not reflected in some scholarly work on rape and *zinā.* A case in point is Imber's statement that: "If a woman yields to a rapist, she is guilty of *zinā*. In this the *ḳānūn* follows the *sharīʿa*."[622]

Unlike the discourse on coerced females, which displays juristic unanimity on the non-culpability of the coerced, the discourse on coerced males displays considerable juristic difference. Legal plurality concerning the legal culpability and responsibility (both civil and criminal) of coerced males revolved around several axes such as the extent of sexual agency displayed by the coerced, his choice, nature, fear and desire. In discussing these elements, as we shall shortly see, jurists drew sharp distinctions between males and females, on the one hand, as well as between penetrating males (*al-fāʿil*) and penetrated males (*al-mafʿūl bihi*) on the other hand. In other words, difference was structured around both gender and non-gender lines (including class and power relations) according to what jurists saw as active versus passive agency with the active agent being held to a higher legal bar in terms of culpability and responsibility.

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[621] *Al-Fatāwá al-Hindiyya*, 5: 49.
[622] Imber, *Studies*, 187.

The sexual agency of the coerced male was discussed under the rubric of the latter's willingness (*al-ṭawāʿiya*) as well as that on choice (*al-khayār*) and was generally tied to the discourse on male erectile response.[623] Jurists asked whether a positive erectile response was a sign of desire (*shahwa*), volition and culpability or not. Was desire and volition, on the one hand, as well as culpability on the other hand two mutually exclusive acts with no causal link between them or was desire a sign of consent? Similarly, jurists explored the link between fear and arousal and asked whether male desire could occur in spite of fear. Could arousal occur in the presence of fear thereby turning the coerced into an instrument in the hands of another (*āla li al-mukrih*) and exempting him from responsibility for his act, or was his arousal and penetration of another person, a sign of his willingness, agency and, by extension, culpability and legal responsibility?

According to an early opinion attributed to Abū Ḥanīfa, if a man were forced into penetrating another, he was criminally responsible for his *zinā* and its subsequent *ḥadd* punishment.[624] The rationale for this early opinion, according to a number of jurists, was that the act of *zinā* required the arousal (*ladhdha* or *ladhādha*) and active penetration by the coerced of another and that such arousal coupled with a positive erectile response (*intishār*) could be interpreted as a sign of volition (*dalīl al-ṭawāʿiya*) warranting the *ḥadd*.[625]

This opinion, however, was rejected by subsequent jurists such as Marghinānī who argued that a positive erectile response on the part of a male coerced into penetrating another could not be construed as wilful intent but as a physical trait (*ṭabʿan lā ṭawʿan*).[626]

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[623] Sarakhsī, *Mabsūṭ*, 24: 88; Marghinānī, *Hidāya*, 2: 372.
[624] A later, and diametrically opposed, opinion was also attributed to Abū Ḥanīfa which held that a coerced male was not legally responsible for the act of *zinā* and its subsequent *ḥadd* punishment. Kāsānī, *Badāʾiʿ*, 10: 109; Marghinānī, *Hidāya*, 4: 72; Bābartī, *Sharḥ*, 9: 249.
[625] Kāsānī, *Badāʾiʿ*, 10: 109; Marghinānī, *Hidāya*, 2: 372; Bābartī, *Sharḥ*, 9: 249.
[626] Marghinānī, *Hidāya*, 2: 372.

Similarly, a number of jurists argued that a positive erectile response was a sign of virility (*fuḥūla*), i.e. an act of nature (*amr ṭabīʿī*), that could be summoned to save one's life and not a sign of desire (*dafʿ al-halāk ʿan nafsihi lā iqtiḍāʾal-shahwa*) thereby exempting the coerced from criminal punishment.[627] The argument from nature was most clearly expressed by Ibn Ḥazm who stated that: "Erection and ejaculation are acts of nature (*fiʿl al-ṭabīʿa*) that God created in man whether he liked it or not, he has no choice in it."[628]

Consequently, a late jurist such as Shaykh Zāda held that there is no *ḥadd* for the *zinā* of the coerced male just as there is no *ḥadd* for a coerced female (*lā ḥadd bi-zinā al-mukrah sawāʾan kāna al-mukrah zāniyan aw mazniyyan*).[629] This opinion was based on the rationale of Abū Yūsuf and Shaybānī and formed the basis of *fatāwá* within the Ḥanafī school (*wa al-fatwá ʿalá qawlihimā*), as opposed to Abū Ḥanīfa's earlier opinion which had placed agency with the coerced.[630] The exemption of the sexually coerced male from the *ḥadd* punishment was equally echoed in *fatāwá* works.[631] Exemption from the *ḥadd*, however, did not mean exemption from civil responsibility towards the female sexual partner since an indemnity often had to be paid to her.[632]

Although Ḥanafī jurists seem to have diverged from the earlier opinion of their eponym in favour of the sexually coerced male,[633] other schools followed different paths. Khurashī reported that the majority opinion within the Mālikī school and the one which formed its official position (*al-madhhab*), held the coerced male to be culpable of *zinā* notwithstanding

[627] Sarakhsī, *Mabsūṭ*, 24: 88-89; Bābartī, *Sharḥ*, 9: 249.
[628] Ibn Ḥazm, *Muḥallá*, 8: 331.
[629] Shaykh Zāda, *Majmaʿ*, 2: 233.
[630] Ibid.
[631] *Al-Fatāwá al-Hindiyya*, 5: 48; Māwardī, *Ḥāwī*, 17: 58.
[632] The issue of Ḥanafī indemnities will be dealt with in detail in the last chapter.
[633] *Al-Fatāwá al-Hindiyya*, 5: 48; Shaykh Zāda, *Majmaʿ*, 2: 233; Māwardī, *Ḥāwī*, 17: 58.

famous opposition to such a view by Ibn Rushd, Ibn ʿArabī and Lakhmī.[634] Similarly, within the Shāfiʿī and Ḥanbalī schools, jurists reported the presence of disagreement concerning males claiming sexual duress.[635] Ghazalī (d.1111C.E.) attributed such difference to the "hesitancy" of some jurists in accepting that a positive male erectile response was not a sign of volition and choice (*al-ikhtiyār*).[636]

As mentioned, desire (*al-shahwa*) was part of the discourse on sexual agency. Whereas some jurists held that desire was indicative of volition, culpability and by extension legal responsibility, others did not share such a view.[637] Māwardī, for example, did not criminalise desire by making it a conduit to the *ḥadd*. Rather, he argued that the *ḥadd* was to be imposed for acts and desire was not an act. Moreover, when a person was coerced, he was required to act not to desire.[638] Interestingly, both desire and arousal were considered to affect males differently from females in the sense that desire was thought to be a sign of male volition and culpability but not of female culpability. A coerced female was deemed to be innocent of *zinā* even if she had been aroused by the sexual act forced upon her, according to Ibn Ḥazm,[639] whereas male arousal was indicative of volition, according to Abū Ḥanīfa's early opinion.

The agency (or lack of) of the coerced was sometimes discussed by jurists in the discourse on choice. Some jurists devoted separate sections to this issue, such as Sarakhsī who composed a separate section within the book on duress entitled "the section on choice within duress" while other jurists dealt with this issue as it cropped up in the different chapters of

[634] Khurashī, *Ḥāshiya*, 8: 80.
[635] Abī Ḥāmid Muḥammad ibn Muḥammad al-Ghazālī, *al-Wasīṭ* (Beirut: Dār al-Kutub al-ʿIllmiyya, 2001), 3: 273; Māwardī, *Ḥāwī*, 17: 58; ʿUmayra, *Ḥāshiya*, 4: 179; Mardāwī, *Inṣāf*, 10: 171.
[636] Ghazālī, *Wasīṭ*, 3: 273.
[637] Māwardī, *Ḥāwī*, 17: 58; ʿAbd al-Raḥmān ibn Nāsir al-Saʿdī, *al-Fatāwá al-Saʿdiyya* (Beirut: Dār al-Kutub, 1995), 419.
[638] Māwardī, *Ḥāwī*, 17: 58.
[639] Ibn Ḥazm, *Muḥallá*, 8: 331.

their works.[640] A case in point is *Fatāwá Qāḍīkhān* where the discourse on choice was subsumed under the heading of what a coerced can and cannot do. Within *Fatāwá Qāḍīkhān*, it was stated that if a man had been coerced into murder or *zinā,* he did not have the license to do so (*lā yubāḥ*), but did not receive the *ḥadd* punishment for it on the basis of *istiḥsān,* even though he should receive such punishment on the basis of *qiyās.*[641] Such a man, nevertheless, had to pay an indemnity equal to the dower (*mahr*) of the woman who had been violated. Similarly, a coerced female was not to be punished through the *ḥadd* "even if she were not coerced because the claim of coercion raises the question of doubt," according to *Fatāwá Qāḍīkhān.*[642]

Interestingly, in the case of a coerced male, *Fatāwá Qāḍīkhān* specified that the kind of coercion that was legally valid had to be severe ("not the threat of imprisonment, shackles or the shaving of a beard which is not coercion")[643] but when it came to a coerced female, imprisonment and being tied up were considered valid coercive measures as well as the mere claim to coercion, which sufficed as grounds for doubt and mitigation against corporal punishment. A similar opinion was equally held by other jurists.[644]

Indeed, within the discourse on the different kinds of duress (*tām* or *nāqiṣ/ muljiʾ* or *ghayr muljiʾ*) and their criminal or civil consequences, Kāsānī distinguished between the sexually coerced male and female and accorded them different opinions. A coerced male was held more responsible for the act of *zinā* [if he were the penetrating partner] than a coerced female, particularly in situations of insufficient duress.[645] The situation of the coerced female

[640] Sarakhsī, *Mabsūṭ*, 24: 135-144.
[641] *Fatāwá Qāḍīkhān*, 3: 492.
[642] Ibid.
[643] Ibid.
[644] Kāsānī, *Badāʾiʿ,* 10:109-110; Marghinānī, *Hidāya*, 2: 371; Ḥaṣkafī, *Durr,* 6: 145; Ibn ʿĀbidīn*, Radd*, 6: 145.
[645] Ibid., 10: 109.

was not contingent on the level of duress suffered and she was not to suffer the *ḥadd* punishment irrespective of the severity of duress suffered (*tām* or *nāqiṣ*). Kāsānī stated that:

> As for…the female, there is no difference between an *ikrāh tām* or *nāqiṣ* and the *ḥadd* shall be withheld from her in both kinds of duress because the act of *zinā* cannot be ascribed to her but what can be ascribed is compliance (*tamkīn*), which cannot be construed as proof of consent.[646]

A similar opinion was espoused by Marghinānī, [647] Ibn ʿĀbidīn[648] and Ḥaṣkafī who stated:

> If he were coerced into committing *zinā*, he does not have permission to do so (*lā yurakhkhaṣ lahu*)…but he does not suffer the *ḥadd* on the basis of *istiḥsān*, rather he has to pay the *mahr* even if she were willing (*ṭāʾiʿa*)…as for the female; she has permission to commit *zinā* under complete duress.[649]

The *Fatāwá Hindiyya* equally espoused the withholding of the *ḥadd* for both males and females coerced into *zinā* "if the coercion involved threats of physical harm but if the coercion involved threats of imprisonment or being tied up, the man receives the *ḥadd*…but the woman does not receive the *ḥadd*."[650]

From the above, one can argue that the implications of this stand with regards to the imposition of the *ḥadd* differed along gender lines; whereas males had to endure and prove complete duress in order to avoid the *ḥadd*, females had to endure and prove merely the existence of duress in order to avoid the *ḥadd*. The level of duress, complete or incomplete, did not affect the outcome of *zinā* for females but carried significant weight for males. This difference reflected the view that men were capable of exerting more physical and social

[646] Ibid., 10: 110.
[647] Marghinānī, *Hidāya*, 2: 371.
[648] Ibn ʿĀbidīn, *Radd*, 6: 145.
[649] Ḥaṣkafī, *Durr,* 6: 145.
[650] *Al-Fatāwá al-Hindiyya*, 5: 48.

control of these situations than women, and that they had the means to resist what they deemed to be abhorrent and hateful.

Unlike male fear, female fear was deemed a mitigating factor in *zinā* because fear does not preclude intercourse from taking place inside the female body.[651] Moreover, a woman could acquiesce to *zinā* in spite of her fear whereas a male had to be aroused in order to engage in such an act, according to Sarakhsī.[652] Furthermore, Bābartī very succinctly stated that:

> *Zinā* cannot be imagined from a man except with his erection which cannot happen without arousal; which is a sign of his willingness in contrast to a woman because she is the abode of the act and with fear, compliance can be achieved...compliance cannot constitute proof of willingness (*falá yakūn al-tamkīn dalīl al-ṭawāʿiya*).[653]

Interestingly, the female body was described, in the above statement, as the repository of the act (*maḥal al-fiʿl*)[654] and not the repository of individual, family or national honour for instance.

A similar stand can be equally seen with regards to the principle of necessity, particularly economic necessity.[655] Whether necessity was recognised as a form of economic duress or an independent defence tool within the *ḥudūd*, or both is not clear. What is clear, is the presence of economic necessity within the discourse on duress in a number of Mālikī sources chief among which is Khalīl's *Mukhtaṣar*. After enumerating different forms of duress such as duress *per minas*, of the person, of goods and towards kin, Khalīl stated that "*qadhf* (defamation)... is permissible under pain of death just like a woman who does not find

[651] Sarakhsī, *Mabsūṭ*, 24: 88.
[652] Ibid.
[653] Bābartī, *Sharḥ*, 9: 249.
[654] Bābartī, *Sharḥ*, 9: 249; Marghinānī, *Hidāya*, 2: 371.
[655] Serrano also noted the presence of hunger as grounds for "*shubha*" in Mālikī works. Serrano, "Rape," 175.

anything to eat except with he who commits *zinā* with her and patience/endurance is better."[656] A statement interpreted by al-Ābī al-Azharī as follows:

> A woman who does not find any food to safeguard her life (*yaḥfadh…ḥayātahā*)…except if she submits (*tumakkin min nafsihā*) to he who commits *zinā* with her, she is permitted to do so (*yajūz lahā*) in proportion to staving off the danger of hunger (*al-jūʿ*).[657]

Several Mālikīs concurred with the principle of economic necessity as an exculpating factor. A case in point was Zurqānī (on the basis of Ibn Rushd) who stated that there was no greater *shubha* (doubt) in avoiding the *ḥadd* than hunger.[658]

In the same vein, personal hunger was extended to hunger suffered by one's offspring. ʿIllaysh, for example, extended the permission to commit *zinā* to women who do so in order to feed their children.[659] On the basis of *qiyās* (analogy), ʿIllaysh compared the extension of duress to the person to that of one's kin and concluded that just as duress to one's child was considered duress to oneself, so was hunger suffered by a woman's children. In such a case, a woman was allowed to commit *zinā* in order to feed her children.[660] Dasūqī went even further than Khalīl by stating that instead of using the term "staving off hunger/ *yasud ramaqahā*", Khalīl should have used the term "*yushbiʿuhā*", i.e., to give her her full. As such, he stated that if a woman finds two men, one of whom will barely feed her and another who will give her more food, she is to commit *zinā* with the one who will give her more food.[661] While concurring with Khalīl on the permissibility of submitting to *zinā* for a hungry female, Khurashī nonetheless stated that abstaining was more meritorious.[662]

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[656] Khalīl, *Mukhtaṣar,* 1: 340-341.
[657] Al-Ābī al-Azharī, *Jawāhir*, 1: 341.
[658] ʿAbd al-Bāqī al-Zurqānī, *Sharḥ al-Zurqānī ʿalá Mukhtaṣar sīdī Khalīl* (Beirut: Dār al-Fikr, n.d.), 8: 81.
[659] ʿIllaysh, *Taqrīrāt,* 2: 369.
[660] "*Fa-yajūz lahā al-zinā li-dhālik wa…sad ramaq ṣibyānihā qiyāsan ʿalá qawlihi aw qaṭl waladih,*" ʿIllaysh, *Taqrīrāt,* 2: 369.
[661] Dasūqī, *Ḥāshiya*, 2: 369.
[662] Khurashī, *al-Khurashī ʿalá mukhtaṣar Sīdī Khalīl*, 4: 36.

The recognition of economic necessity and its concurrent permission to submit ("*mubāḥa li-al-muḍṭar*")[663] was extended to females only. Indeed, economic necessity was not recognised as an exculpating factor for males, even if they were young and were the passive/penetrated partners. As Dasūqī mentioned that "a young man cannot let sodomy be done unto him even if he dies from hunger" just as an adult male cannot be given permission to commit *zinā* with a woman in return of food.[664] Although Dasūqī attributed the reason for Zurqānī's latter opinion to the adult male's sexual agency (*intishārihi*) and by extension his perceived culpability, I do not think that the question of sexual agency was the determining factor since economic necessity was not extended to the young penetrated male in the previous example. Rather, the determining factor seems to have been the gender of the coerced. A female coerced by hunger was given more leeway than a male, young or old in a homosexual or heterosexual relationship.

The principle of necessity was equally recognised by a number of Shāfiʿī jurists as grounds for *shubha* within the *ḥudūd*. Cases in point include Shubrāmalsī and Bujayrimī.[665]

As mentioned at the top of this section, gender as well as the sexual role of a person, whether penetrating or penetrated (active or passive), influenced juristic perceptions of

[663] Dasūqī, *Ḥāshiya*, 2: 369.
[664] Ibid. Dasūqī, however, added that if a female were willing (*ṭāʾiʿah*) and she had no husband and was not a slave and he was coerced under pain of death to commit *zinā* with her, he may do so. Permission, in this instance, was granted due to the threat made to the man's life (i.e. duress to his person) rather than economic necessity.
[665] Shubrāmalsī, *Ḥāshiya*, 7: 425 and Bujayrimi who quoted Shubrāmalsī *verbatim* and acknowledged his source. Bujayrimī, *Ḥāshiya*, 4: 210. The acceptance of necessity within duress or *shubha* may be explained in terms of law and contemporaneous events. In terms of law, Zysow had drawn attention to the late addition of *ʿirḍ*, which he translated as good repute, to the *kulliyāt*. (Zysow, *The Economy of Certainty*, 201, footnote 259). The *kulliyāt* were the essential needs that a person had to safeguard such as one's life, religion and property. The protection of one's life was recognised as the first and most important of the *kulliyāt* and the protection of which was given precedence above the others. The protection of one's honour, interpreted perhaps as the protection and control of (female) sexuality, was a late addition to the *kulliyāt* and was ranked last in order of importance. Therefore, in contexts of hunger and famine, the protection of one's life was perhaps seen as more important than the protection of female honour and judicial sanction extended the *kulliyāt* to meet contemporaneous social needs. It is also worth noting that many of the jurists quoted above, both Mālikīs and Shāfiʿīs, were late Egyptian jurists. Their extension of economic necessity cut across school lines and may be quite telling in terms of the social contexts that these jurists lived in. The above is, of course, a suggestion, which may be proven or disproven by further research.

culpability and by extension criminal or civil responsibility. Whereas juristic doubt shrouded a penetrating male (*al-mukrah ʿalá al-fiʿl bi-ghayrihi*),[666] a penetrated male (especially a young man) was often not held legally responsible. The Ḥanafī jurist Ḥaṣkafī, for example, stated that under complete duress a coerced male was given permission to submit sexually to his coercer (*turakhkhaṣ bi al-muljiʾ*)[667] to which Ibn ʿĀbidīn added that this *rukhṣa* extended to the coerced in either role (penetrating or penetrated/ *al-fāʿil wa al-mafʿūl bihi*).[668] Similarly, the Shāfiʿī scholar Ramlī maintained that a coerced or a non-*mukallaf* male who was sodomised was not to be held responsible since he did not owe anything (*lā shayʾa alayhī*).[669] In addition, the juxtaposition of sexual roles between the penetrating and the penetrated (*al-fāʿil* and *al-mafʿūl bihi*) and their ensuing legal responsibility can be clearly seen in the thought of the Mālikī jurist Abī al-Ḥassan.[670]

Two further elements seem to have influenced juristic thought on male culpability, namely, female consent or coercion as well as the status of the female partner whether in a relationship or not. As such, ʿIllaysh maintained that if a man were coerced into committing *zinā* with a coerced woman or a woman in a relationship with a husband or an owner, the coerced was not allowed to do so under pain of death but if she were willing (*ṭāʾiʿa*) and she was not in a licit relationship through marriage or concubinage, then sexual intercourse was allowed (*yajūz*) under pain of death (*al-ikrāh bi al-qatl*).[671] ʿIllaysh, thus, categorically forbade *zinā* with a coerced woman but thought that it might be allowed, under pain of death, if the

[666] ʿAdawī, *Ḥāshiyat al-ʿAdawī ʿalá Abī al-Ḥassan*, 2: 299.
[667] Ḥaṣkafī, *Durr*, 6: 145.
[668] Ibn ʿĀbidīn, *Radd*, 6: 145. It is important to note that these jurists granted the coerced permission to submit to his coercer and avoid the *ḥadd* while simultaneously stating that male homosexual activity was considered religiously forbidden (Ḥaṣkafī, *Durr*, 6: 145; Ibn ʿĀbidīn, *Radd*, 6: 145). Similar to the discourse on coerced heterosexual discourse, jurists granted the coerced permission to submit and avoid the punitive consequences of submission while simultaneously acknowledging that submission does not render the act legally sanctioned.
[669] Ramlī, *Nihāyat*, 7: 424.
[670] Abī al-Ḥassan, *Sharḥ Abī al-Ḥassan li-risālat ibn Abī Zayd,* 2: 299. See also: Nafrāwī, *Fawākih*, 2: 282.
[671] ʿIllaysh, *Taqrīrāt,* 2: 369.

female were consenting and had no legitimate partners. This distinction between a coerced versus a consenting female was echoed by Dasūqī and Ṣāwī as well.[672]

From the above, it can be surmised that sexual agency influenced juristic thought to a great extent especially when it came to the sexual roles of active males penetrating others (male or female) who claimed duress as defence. Whereas females and, to a lesser extent, penetrated males (*al-maf ʿūl bihi*) were portrayed as lacking in agency; the agency of penetrating males (*al-fāʿil*) engendered considerable juristic difference. In other words, jurists were divided concerning the *mens rea* of males but not of females.

### *Ikrāh* and *Waṭʾ*

As mentioned earlier, *waṭʾ* was a broad term used to indicate an expansive sexual spectrum that included both heterosexual and homosexual intercourse that went beyond penetration (anal or vaginal) to include non-penetrative intercourse as well (*waṭʾ dūn al-farj*). I argued that the usage of the term *waṭʾ* in conjunction with *ikrāh*, probably signified the duress imposed in the performance of a broad sexual spectrum that may or may not have been penetrative or that may or may not have been vaginal or anal. In other words, I suggested that the *actus reus* of *al-ikrāh ʿalá al-waṭʾ* was more comprehensive than the narrow *actus reus* of *al-ikrāh ʿalá al-zinā*.

*Al-ikrāh ʿalá al-waṭʾ* was mentioned by several jurists who chose to use the term *waṭʾ* rather than *zinā* (or in combination with *zinā*) in referring to sexual molestation. Cases in point include al-Ābī al-Azharī and Khurashī who stated that there is no *ḥadd* for a woman who had

[672] Dasūqī, *Ḥāshiya*, 2: 369; Aḥmad al-Ṣāwī, *Bulghat al-sālik li-aqrab al-masālik* (n.p.: Dār al-Fikr, n.d.), 2: 392.

suffered from coerced coitus ("*inna al-mukrahata ʿalá al-waṭʾ lā ḥadd ʿalayhā*").[673] Similarly, Ibn Ḥazm used *waṭʾ* in describing the sexual intercourse that a father in-law was forced to engage in with his daughter in-law, the consequence of which was the annulment of her marriage to his son.[674]

*Ikrāh* was equally used in connection with *waṭʾ* by Shīrazī and Khurashī in the context of coerced sexual intercourse during the fast.[675]

### *Ikrāh* and *Jimāʿ*

As previously mentioned, the term *jimāʿ* was used to denote a broad range of sexual acts. However, it seems to have been a term predominantly used to indicate sexual intercourse between legitimate heterosexual couples (*jāmaʿa zawjatuhu* or *jāmaʿa …zawjatahu aw jāriyatahu*).[676]

Jurists used the term *ikrāh* in connection to *jimāʿ* to indicate coerced spousal sexual intercourse in terms of a man sexually coercing his wife (or slave woman) as well as a man being coerced by a third party into having sexual intercourse with his partner. This usage can be found in both *furūʿ* and *fatāwá* works. For example, the *Fatāwá Hindiyya* stated that if a man were forced (*ukriha*) to have sexual intercourse with his wife (*imraʾatuhu*) during the day in Ramaḍān, he had to make up for that day later on but did not have to perform a *kaffāra* (penance) to atone for it.[677]

The discourse on spousal sexual coercion during Ramaḍān or while on pilgrimage is to be found in *furūʿ* works from all four schools. Within that discourse, sexual coercion was

[673] Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 8: 80; al-Ābī al-Azharī, *Jawāhir*, 2: 284.
[674] Ibn Ḥazm, *Muḥallá,* 8: 335.
[675] Shīrāzī, *Muhadhdhab*, 1: 247; Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 1: 254.
[676] ʿAdawī, *Ḥāshiyat al-ʿAdawī ʿalá sharḥ abī al-Ḥassan*, 1: 121; al-Ābī al-Azharī, *Jawāhir*, 1: 275.
[677] *Al-Fatāwá al-Hindiyya*, 5: 49.

condemned because of its timing but not *an sich*. As such, jurists debated the questions of redress (what kind) and indemnity (who pays it) as well as the (non)validity of the pilgrimage or the fast of both parties.[678]

An interesting feature of that discourse is that while jurists used the terms *ikrāh* and *jimāʿ* in connection to each other extensively, their usage of the phrase *al-ikrāh ʿalá al-jimāʿ* was less widespread.[679]

## Structure

Numerous jurists placed the definition of terms related to sexual intercourse in the *ʿibādāt* (acts of worship) sections of *furūʿ* works and not in the *muʿāmalāt* (interpersonal dealings) sections.[680] Surprisingly, the most detailed definitions of terms or the most illustrative demonstrations of their meaning(s) can be found in the *ʿibādāt* chapters on ablution, fasting and pilgrimage, for example,[681] and not in the *muʿāmalāt* chapters on marriage (*nikāḥ*) or adultery/fornication as might be expected.

It is also noteworthy that jurists often did not repeat these definitions later on in the various sections of the *muʿāmalāt*. It seems that once a term had been defined or explained in the *ʿibādāt*, that definition was not repeated fully or at all in the *muʿāmalāt*. This happens most particularly in the *mukhtaṣars* (such Khalīl's) whereas in the *mutūn* (such as Sarakhsī's) one might find a very brief allusion to the definition that the jurist had proffered earlier on.

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[678] Nafrāwī, *Fawākih*, 1: 365; Mardāwī, *Inṣāf,* 3: 446-447; Ibn Qudāma, *al-Mughnī,* 3: 58, 315-316; Ibn Qudāma, al-*Sharḥ al-Kabīr*, 3: 58-59, 317; Zarkasī, *Sharḥ*, 1: 424; al-Ābī al-Azharī, *Jawāhir*, 1: 192; Dasūqī, *Ḥāshiya*, 1: 531; ʿIllaysh, Taqrīrāt, 1: 531; Sarakhsī, *Mabsūṭ*, 4: 121; Marghinānī, *Hidāya*, 2: 55; Dāmād Affandī, *Majmaʿ*, 1: 359; Nawawī, *Rawḍat*, 2: 394.

[679] Dasūqī, for example, used the phrase *al-ikrāh ʿalá al-jimāʾ*. Dasūqī, *Ḥāshiya*, 1: 531.

[680] I borrowed the translation of these two terms from Y. Dutton, "Sadl", 14.

[681] For example: Ibn Qudāma, *al-Mughnī,* 3: 58, al-Ābī al-Azharī, *Jawāhir*, 1: 22.

This method of defining terms at the beginning of *fiqh* works could be explained by the desire by jurists to define their terms or explain what they mean by them at the first instance where the term was mentioned in the *fiqh* work as a whole, or the first instance where the term carried special significance which often happened to be in the *ʿibādāt* and not in the *muʿāmalāt*.

Similarly, the first mention of sexual duress was often made in the *ʿibādāt*. Jurists mentioned sexual coercion within the chapters on fasting and pilgrimage.[682] Although the definition of duress as a legal category was usually made in the *muʿāmalāt*, it is important to note the presence of *ikrāh* within the *ʿibādāt* as well.

The implications of this discursive method are, firstly, that *fiqh* works emerge as very concise organic units where negligence of certain sections might affect one's understanding of the topic under purview. For example, if I as a contemporary scholar had ignored the *ʿibādāt*, I would not have noticed that the terms referring to sexual intercourse were explained at the beginning of the *furūʿ* and as a result, would have been oblivious to the differences between them and would have assumed that they were all synonymous. Similarly, if I had ignored the *ʿibādāt*, I would not have known that the first mention of sexual duress was made within them.

By knowing that semantic definitions and explanations were stated once and only once (in most cases) at the beginning of *fiqh* works or at the first instance where they were deemed most appropriate, a scholar is obliged to read different sections of *fiqh* works, including the *ʿibādāt*, in order to gather the different threads offered throughout them and then try to weave these threads into a meaningful interpretation.

[682] Al-Ābī al-Azharī, *Jawāhir*, 1:151; Ibn Qudāma, *al-Mughnī,* 3: 58, 60-61, 314-315; Mardāwī, *Inṣāf*, 3: 274, 477; Dasūqī, *Ḥāshiya*, 1: 530, 2: 70; Nawawī, *Rawḍat*, 2: 394; *al-Fatāwá al-Hindiyya*, 5: 49.

Recognition of the organic unity of texts equally implies recognition that, as far as this topic is concerned, information was not compartmentalized under a single heading(s) but was disseminated throughout the *furūʿ*.

The second implication of this diffuse methodology is the recognition of the semantic and doctrinal importance of the *ʿibādāt*. Neglect of sexual duress mentioned within the *ʿibādāt* would have led to disregard of an important facet of sexual duress, namely spousal sexual duress. Had I ignored the *ʿibādāt*, I would have ignored different facets of the *actus reus* of sexual duress and the different legal outcomes that plurality would have engendered. Similarly, the *ʿibādāt* mention that an outcome of sexual duress was personal penance in the form of a *kaffāra*. Personal penance, in this instance, indicates that the outcomes for coerced sex went beyond the punitive *ḥadd* to include a personal rehabilitative element as well. This addition to the discourse on coerced sex also speaks to the interplay between the subjective and objective elements previously mentioned, as well as the interplay between the *ẓāhir* and the *bāṭin* mentioned in the introduction. In that respect, the information gleaned from the *ʿibādāt* concerning the meaning of the various terms as well as the recognition of spousal sexual duress, played an integral role as far as this topic is concerned.

I would thus like to argue that the information gleaned from the *ʿibādāt*, as far as this topic is concerned, leads to two important points. The first is the organic unity of the *furūʿ* and the second is the importance of the *ʿibādāt* in terms of semantics and legal doctrine.

## Concluding Remarks

The purpose of this chapter was to demonstrate the existence of forcible sexual acts *de jure* within *furūʿ* works. I argued that unwanted sex was recognised in all schools within the

category of *ikrāh* and that such recognition encompassed both homosexual and heterosexual coercion and was not tied to a specific gender.

This chapter began with an exploration of the semantic differences between the various terms used to refer to sexual intercourse. I suggested that noticeable differences existed between these terms and that these semantic differences often implied legal differences as well.

Semantic plurality reflected doctrinal plurality in terms of the *actus reus* of duress as well as the different forms of redress or punishment that could have ensued. While the lifting of the *ḥadd* from coerced females enjoyed legal unanimity, the case of a coerced male displayed considerable juristic difference.

Finally, by taking cognizance of the structure of *furūʿ* works, I underscored the role of the *ʿibādāt*. I suggested that the information gleaned from the *ʿibādāt* played an integral role in the semantic and doctrinal analysis of this topic. A fact which pointed to the important links between the *ʿibādāt* and the rest of the *furūʿ* as well as the organic unity of the latter.

## Chapter Three

## Sexual Assault (*ṣiyāl*) and Forced Sex as a Property Crime (*ghaṣb)*

This chapter tackles the discourse on forced sex as portrayed in the categories of *ghaṣb and ṣiyāl.* Whereas the previous chapters investigated the definition of unwanted sex as a coercive offence straddling both duress and *zinā*, this chapter will focus on two different notions. They are: sexual assaults (as portrayed within the category of *ṣiyāl*) and forced sex as a property offence (as outlined in the discourse on *ghaṣb*). In ploughing the primary sources for notions of rape, contemporary scholars have delved into the categories of *zinā*, *ikrāh* and *ghaṣb* in varying degrees.[683] Yet, the category of *ṣiyāl* was predominantly neglected in connection to unwanted sexual acts. The approach to *ṣiyāl* and the historical development in the discourse on its meaning and implications deserve a close look. This look will not only be a welcome addition to the discourse on forced sex but will reformulate our understanding of notions of rape in Islamic law.

### *Ṣiyāl* (Assaults)

Unawareness of the discourse on forced sex within *ṣiyyal* among modern scholars may be attributed to the structure of this category within the *furūʿ*. Consequently, I would like to begin with this point. Similar to *ikrāh*, *ṣiyāl* does not seem to have existed as a separate textual category in *furūʿ* works across the *Sunnī* schools. Rather, *ṣiyāl* seems to have been accorded its own textual space within the Shāfiʿī school only.[684] Although assaults were woven through the

[683] Please refer to the section entitled "Review of the Literature" in the introduction for more on this topic.
[684] For example: Shafiʿī, *al-Umm*, 6: 172; Muzanī, *Mukhtaṣar*, 5: 178; Shīrāzī, *Muhadhdhab*, 2: 288; Nawawī, *Rawḍat*, 7: 395-402; Ramlī, *Nihāyat*, 8: 23-44; Sharqāwī, *Ḥāshiya*, 2: 440-443; Muḥammad ibn Muḥammad al-Khaṭīb al-Shirbīnī, *Mughnī al-muḥtāj ilá maʿrifat alfāẓ al-Minhāj* (Cairo: Dār al-Ḥadīth, 2006), 5: 520- 542; Shubrāmalsī, *Ḥāshiya*, 8: 23-44; Rashīdī, *Ḥāshiya*, 8: 23-44.

tapestry of other *fiqh* works,[685] it seems that only the Shāfiʿīs had devoted separate textual units to this topic.[686]

The great majority of Shāfiʿī jurists, starting with Shāfiʿī and Muzanī placed this section after the *ḥudūd*.[687] Of all the Shāfiʿī works consulted for this section, the only exception to this placement was Shīrāzī's *Muhadhdhab* where *ṣiyāl* was placed after the *jināyāt* and before the *ḥudūd*.[688]

The second reason for the scholarly neglect of *ṣiyyal* may be attributed to its title in some early works. For instance, Shafiʿī's *al-Umm* used the title "*al-jamal al-ṣaʾūl*/ the assaulting camel) while Muzanī 's *Mukhtaṣar*, Māwardī's *Ḥāwī* and Shīrāzī's *Muhadhdhab* gave this section the title of "*ṣawl al-faḥl*/assaults by beasts" rather than the later (and broader) title of *ṣiyāl* which was used by Nawawī, Ramlī, Maḥallī, Qalyūbī and Anṣārī, to name but a few.[689] Consequently a reader not familiar with this section might think that it was primarily concerned with assaults by animals on humans and that assaults by humans on humans were not part of this discourse.

The third reason may be attributed to the fact that assaults (as torts) were discussed in tandem with their *ḍamān* (indemnity/civil redress/liability). Discourse within the *ṣiyāl* was inextricably linked to their civil outcome with jurists exerting considerable effort and devoting significant space to the different kinds of assaults that warrant *ḍamān*. The purpose of

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[685] For example, the Ḥanafī jurist Ibn ʿĀbidīn mentioned assaults within the *jināyāt* (Ibn ʿĀbidīn, *Radd*, 6: 581, 585) while the two Ḥanbalī jurists Ibn Mufliḥ and Mardāwī mentioned *ṣiyāl* within the category of *ghaṣb* (Burhān al-Dīn Ibrāhīm ibn Muḥammad ibnMufliḥ, *al-Mubdiʿ sharḥ al-Muqniʿ* (Riyad: Dār ʿĀlam al-Kutub, 2003), 5: 131; Mardāwī, *al-Inṣāf*, 6: 228) and the Mālikī Ibn Rushd mentioned *ṣiyāl* within *ghaṣb* (Ibn Rushd, *Bidāyat*, 2: 490-491).
[686] Assaults were equally mentioned by Shāfiʿī within the *jirāḥ* (injuries) section of *al-Umm*. Shafiʿī, *al-Umm*, 6: 27-29.
[687] Shafiʿī, *al-Umm*, 6: 172; Muzanī, *Mukhtaṣar*, 5: 178; Nawawī, *Rawḍat*, 7: 395-402; Ramlī, *Nihāyat*, 8: 23-44; Sharqāwī, *Ḥāshiya*, 2: 440-443; Shirbīnī, *Mughnī*, 5: 520- 542; Shubrāmalsī, *Ḥāshiya*, 8: 23-44; Rashīdī, *Ḥāshiya*, 8: 23-44;
[688] Shīrāzī, *Muhadhdhab*, 2: 288.
[689] Muzanī, *Mukhtaṣar*, 5: 178; Māwardī, *Ḥāwī,* 17: 252; Shīrāzī, *Muhadhdhab*, 2: 288; Nawawī, *Rawḍat*, 7: 395; Ramlī, *Nihāyat*, 8: 23; Maḥallī, *Sharḥ*, 4: 206; Qalyūbī, *Ḥāshiya*, 4: 206; Zakariyā al-Anṣārī, *Tuḥfat al-ṭulāb bi-sharḥ Taḥrīr Tanqīḥ al-lubāb*, printed with ʿAbd-Allāh ibn Ḥijāzī al-Sharqāwī, *Ḥāshiyat al-Sharqāwī ʿalá Tuḥfat al-ṭulāb bi-sharḥ Taḥrīr Tanqīḥ al-lubāb* (Cairo: Maktabat wa Maṭbaʿat Muṣṭafá al-Bābī al-Ḥalabī, n.d.), 2: 440.

these sections does not seem to have been assaults, *per se*, but the latter's legal and monetary ramifications as well. The conjunction between *ṣiyāl* and *ḍamān* is most clear in Nawawī's *Minhāj*, for example, where he gives this category the following title: "*Kitāb al-ṣiyāl wa ḍamān al-wullāh*" (the book of assaults and the redress due by those responsible for them).[690]

Interestingly, the formal legal definition of *ṣiyāl* started with the adoption of the broader title. The shift from the specific (as in *ṣawl al-faḥl*) to the general (*kitāb al-ṣiyāl*) can be broken down into a number of stages. At an early stage, Muzanī, Māwardī and Shīrāzī did not define *ṣiyāl* either linguistically or legally at the outset of their discourse. Rather, all three jurists began with examples of assaults.[691] At a second stage, Nawawī began his discourse with a broad statement concerning the main elements of the discourse, namely, the aggressor, the assaulted, the means of resistance and their legality before embarking on a general explication of these elements.[692] Then, nearly three centuries later, Ramlī began his discourse with a terse definition of *ṣiyāl*. [693]

*Ṣiyāl* was defined by Ramlī as the assault (*wuthūb*) and arrogance (*istiṭāla*) shown by a person towards another (*ʿalá al-ghayr*).[694] This definition was expanded by Qalyūbī who stated that linguistically (*lughatan*) *ṣiyāl* meant the assault and arrogance shown towards another, but that legally it was a special kind of *istiṭāla*.[695] This special kind of assault (*istiṭāla makhṣūṣa*) was later interpreted as unwarranted or illegal assault (*bi-ghayr ḥaqq*).[696] Sharqāwī also added that *ṣiyāl* meant to attack, to subjugate and to subdue (*al-hujūm wa al-ʿaduw wa al-qahr*).[697]

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[690] Yaḥyá ibn Sharaf al-Nawawī, *Minhāj al-ṭālibīn,* printed with Muḥammad ibn Muḥammad al-Khaṭīb al-Shirbīnī, *Mughnī al-muḥtāj ilá maʿrifat alfāẓ al-Minhāj* (Cairo: Dār al-Ḥadīth, 2006), 5: 520.
[691] Muzanī, *Mukhtaṣar*, 5: 178; Māwardī, *Ḥāwī,* 17: 252; Shīrāzī, *Muhadhdhab*, 2: 288.
[692] Nawawī, *Rawḍat*, 7: 395; Nawawī, *Minhāj,* 5: 520.
[693] Ramlī, *Nihāyat*, 8: 23.
[694] Ibid.
[695] Qalyūbī, *Ḥāshiya*, 4: 206.
[696] Sharqāwī, *Ḥāshiya*, 2: 440; Bayjūrī, *Ḥāshiya*, 2: 486.
[697] Sharqāwī, *Ḥāshiya*, 2: 440.

The importance of the above meanings to the discourse on forced sex is that they describe the quintessential markers of stranger rape.[698] The markers of this kind of rape include an attack committed by a stranger, the use of force to overcome the will of the victim, resistance and/or submission on the latter's part as well as corroborative signs of resistance and/or struggle. A clear example of a "stranger-in-the-bush" description of an attempted sexual assault was offered by Māwardī as follows:

> A maiden (*jāriya*) went out of Medina to gather firewood when she was followed by a man who tried to tempt her (*fa-rāwadahā ʿan nafsihā*). She threw a *fihr* at him killing him and the matter was brought before Umar [the second Caliph].[699]

In the event, Māwardī stated, the young woman was absolved of the man's murder and was not required to pay his relatives an indemnity.[700] In other words, the young woman was absolved of both criminal and civil liability.

The reasons for absolving the young woman and the assaulted, in general, according to jurists were both textual and rational. The textual reasons included Qurʾanic passages as well as Prophetic and non-prophetic precedents;[701] particularly a Prophetic saying declaring that whoever dies protecting his life, family or property is a martyr.[702] This saying was interpreted and re-interpreted in a plethora of ways to allow for the protection of one's life, family, property and sexuality by numerous means without being held criminally liable for injuring

[698] For more on the different kinds of rape, please refer to the section entitled "Rape" in the introduction.
[699] Māwardī, *Ḥāwī*, 17: 252. The same incident was also reported by Muzanī, *Mukhtaṣar*, 5: 178.
[700] Māwardī, *Ḥāwī*, 17: 252. Even though Schacht had translated *jāriya* as a slave girl, I think there is compelling evidence that this term meant a maiden rather than a slave particularly in an early work like Māwardī's. For early works, *jāriya* was more indicative of age than status, I suggest. Schacht, *An Introduction to Islamic Law*, 299.
[701] Shafiʿī, *al-Umm*, 6: 172-173; Muzanī, *Mukhtaṣar*, 5: 178; Māwardī, *Ḥāwī*, 17: 252-253; Shīrāzī, *Muhadhdhab*, 2: 288; Nawawī, *Rawḍat*, 7: 395; Ramlī, *Nihāyat*, 8: 23-24; Anṣārī, *Tuḥfa*, 2: 440; Bayjūrī, *Ḥāshiya*, 2: 486, 488; Muḥammad al-Shirbīnī al-Khaṭīb, *al-Iqnāʿ fī ḥall alfāẓ Abī al-Shujāʿ* (Cairo: Dār Iḥyāʾ al-Kutub al-ʿArabiyya, n.d.), 2: 240-241.
[702] Anṣārī, *Tuḥfa*, 2: 440; Bayjūrī, *Ḥāshiya*, 2: 488; Shirbīnī, *Mughnī,* 5: 520.

one's attacker.[703] Accordingly, jurists held that an assaulted person who injured or killed his attacker was not liable for the death or the injuries that the latter had sustained, if certain criteria were met.[704] Interestingly, jurists used the very broad term *ḍamān* (as in *fa-lā ḍamān ʿalayhi* or *lam yaḍmanhu*)[705] which encompassed various forms of monetary compensation such as the *diya*, *ḥukūma*, or *qīmah* as well as *kaffāra* and/or talion (*qawd* or *qiṣāṣ*) to indicate the complete exoneration of the assaulted.[706]

An interesting phrase that Māwardī used in the above quotation to describe the means of assault was "*fa-rāwadahā ʿan nafsihā,*" meaning he tempted her or he tried to seduce her. I find it interesting because one would have expected Māwardī to have used a verb with stronger connotations of force and violence particularly within a chapter on assaults. Rather, Māwardī opted for a verb denoting seduction and a certain degree of malice. The phrase, as a whole, is reminiscent of Q.12: 23, 26, 30, 32 and 51 which describe the attempted seduction of Joseph by Potiphar's wife and which use the same verb stem "r-w-d", "*rāwada*". Moreover, Māwardī was not the only jurist to have mentioned the above precedent and to have used the same phrase.[707] Could one then extrapolate from the above that *ṣiyāl*, as a legal category, encompassed sexual assaults obtained through either violence and/or seduction? Could one also argue that the *mal* of attempted rape, in the above case, was anchored in deceit and ill faith? As modern research has shown, rapes as crimes of seduction are notoriously difficult to define and prosecute because they are mostly committed by acquaintances such as an

[703] Muzanī, *Mukhtaṣar*, 5: 178; Māwardī, *Ḥāwī,* 17: 252-253; Shīrāzī, *Muhadhdhab*, 2: 288; Nawawī, *Rawḍat*, 7: 395; Ramlī, *Nihāyat*, 8: 23-24; Anṣārī, *Tuḥfa*, 2: 440; Bayjūrī, *Ḥāshiya*, 2: 486; Shirbīnī, *Iqnāʿ*, 2: 240.
[704] Muzanī, *Mukhtaṣar*, 5: 178; Māwardī, *Ḥāwī,* 17: 252-253; Shīrāzī, *Muhadhdhab*, 2: 288; Nawawī, *Rawḍat*, 7: 395-396; Ramlī, *Nihāyat*, 8: 23-24; Anṣārī, *Tuḥfa*, 2: 442; Sharqāwī, *Ḥāshiya*, 2: 442; Qalyūbī, *Ḥāshiya*, 4: 206; Bayjūrī, *Ḥāshiya*, 2: 488; Shirbīnī, *Mughnī,* 5: 520-521; Nawawī, *Minhāj,* 5: 520-521.
[705] Bayjūrī, *Ḥāshiya*, 2: 488; Anṣārī, *Tuḥfa*, 2: 442; Nawawī, *Minhāj*, 5: 520.
[706] Ramlī, *Nihāyat*, 8: 24; Bayjūrī, *Ḥāshiya*, 2: 488; Anṣārī, *Tuḥfa*, 2: 442; Maḥallī, *Sharḥ Minhāj al-ṭālibīn*, 4: 206; Nawawī, *Rawḍat*, 7: 395; Shirbīnī, *Mughnī,* 5: 521.
[707] Muzanī, *Mukhtaṣar*, 5: 178.

employer, a fiancé or a boyfriend and usually rely on non-violent means such as false promises, lies and deceit. In his study of early twentieth century American criminal seduction cases, Brian Donovan maintained that "seduction commonly denotes a man's use of flattery and persuasion to entice a woman to have sex with him."[708] He similarly pointed out that such cases were often brought to court by women "against men who promised to marry them, and yet reneged on this promise after the two had sex."[709] In the same vein, Liat Kozma has estimated that in about a third of Egyptian rape cases that she had examined, the victims had "said that they had been seduced by the promise of marriage or other forms of deception."[710]

Although future research may prove or disprove this point, it is still interesting to note the possible presence of seduction within the discourse on unwanted sex. Similarly, the legal recognition of non-violent means, by Māwardī and Muzanī, is worth noting because non-violent means often cannot be corroborated through signs of struggle. The will of the victim in these cases is overcome by deceit rather than violence and corroboration of the latter does not exist. The last point to be mentioned with regards to the above quotation is its possible expansion of the fault elements. The above, I suggest, offers the possibility of adding malice to the accepted roster of fault elements alongside recklessness and negligence.

The assailant (*al-ṣāʾil*) was defined as any "human being (*ādamī*), a Muslim or an unbeliever, sane or insane, adult or minor, acquaintance or stranger (*qarīban aw ajnabiyyan*)."[711] The criminal actor, according to this definition, was so broadly defined as to allow for the legal recognition of both acquaintance and stranger assaults as well as offences committed by minors. Such broad legal recognition thus extended legal, often civil, liability to a broad range

[708] Donovan, "Gender Inequality and Criminal Seduction," 63.
[709] Ibid., 64.
[710] Kozma, "Negotiating Virginity," 61.
[711] Shirbīnī, *Iqnāʿ*, 2: 240.

of criminal actors. Of equal importance, in this definition, is the mention of the mental state of the assailant. According to the above, Shirbīnī renders such a state irrelevant and, by extent, casts assaults as strict liability offences.

The discourse on *ṣiyāl* took cognizance of the whole range of resistance strategies ranging from utmost resistance and reasonable resistance to total submission as well as the various means and degrees of resistance starting from the mildest to the deadliest. For example, in terms of the means of resistance and defence (*al-dafʿ*), jurists advocated a gradual process starting with mild means and progressing to more forceful ones (*al-tadrīj wa al-dafʿ bi al-ahwan fa al-ahwan*)[712] such as entreating the aggressor, raising the hue and cry, calling for help, beating the aggressor with one's hands, striking the latter with a whip, a stick, a sword and ultimately killing the aggressor in order to save one's life.[713]

Resistance was allowed on the basis of strong suspicion (*ghalabat al-ẓann*) of an eminent assault.[714] Although one did not have to wait until an assault became a reality (*ḥaqīqatan*), doubts or weak supposition did not allow for resistance.[715]

Although resistance was allowed, in the forms of ultimate resistance (killing the attacker) or reasonable resistance (hitting the attacker), some jurists allowed submission[716] while others advocated submission to one's attacker stating that submission was better "*afḍal* or *afḍaliyya.*"[717] The importance of allowing submission in the discourse on assaults lies in its relation to corroborative evidence of struggle (and the lack thereof in such cases) as well as the

[712] Nawawī, *Rawḍat*, 7: 395.
[713] Shīrāzī, *Muhadhdhab*, 2: 288; Nawawī, *Rawḍat*, 7: 395-396; Ramlī, *Nihāyat*, 8: 27; Maḥallī, *Sharḥ*, 4: 207; Anṣārī, *Tuḥfa*, 2: 442; Qalyūbī, *Ḥāshiya*, 4: 207; Shirbīnī, *Mughnī,* 5: 524-525; Shirbīnī, *Iqnāʿ*, 2: 242.
[714] Shubrāmalsī, *Ḥāshiya*, 8: 23; Bujayrimī, *Ḥāshiya*, 4: 237; Bayjūrī, *Ḥāshiya*, 2: 486.
[715] Shubrāmalsī, *Ḥāshiya*, 8: 23; Bujayrimī, *Ḥāshiya*, 4: 237.
[716] Maḥallī, *Sharḥ*, 4: 206; ʿUmayra, *Ḥāshiya*, 4: 206; Bujayrimī, *Ḥāshiya*, 4: 237; Māwardī, *Ḥāwī*, 17: 256; Sharqāwī, *Ḥāshiya*, 2: 443; Bayjūrī, *Ḥāshiya*, 2: 487.
[717] Ramlī, *Nihāyat*, 8: 23, Shubrāmalsī, *Ḥāshiya*, 8: 23; Rashīdī, *Ḥāshiya*, 8: 23.

subsequent demand for *ḍamān* in addition to the pragmatic cognizance of the role of fear during an attack.

The concept of proportionality can be equally seen with regards to the object(s) of the assault. An assault made on one's life or sexuality was not put on a par with an assault on property.[718] Ramlī, for example, stated that it is not obligatory (*lā yajib*) to resist an assault on property, except if that property involved a life [such as a slave], whereas it is obligatory (*yajib*) when the assault involved one's safety, one's limbs or one's sexual organ (*buḍʿ*) or the sexual organ of another, even if that other is a female who is a stranger (*ajnabiyya*).[719] Consequently the degree of resistance that was legally allowed depended on the aim of the assault, according to Māwardī.[720]

If the aim of an assault were sex, resistance was not only allowed but advocated by several jurists.[721] A case in point is Ramlī who stated that "it is forbidden for a woman to submit to someone who assaulted her in order to commit *zinā* with her even if she feared for her life."[722] Ramlī's opinion thus advocated utmost personal resistance, i.e. a woman had to resist till the death. In a similar vein, jurists stated that if someone saw his wife or any woman (*ajnabiyya*) being assaulted by another man, he had to defend her to the utmost and ignore the gradual use of different means, particularly if she were being penetrated.[723]

By contrast, a number of later jurists took cognizance of the role of personal fear for one's life during an assault and allowed the assaulted to submit to the attacker if the former

[718] Nawawī, *Rawḍat*, 7: 397; Shirbīnī, *Mughnī,* 5: 521; Shirbīnī, *Iqnāʿ*, 2: 241.
[719] Ramlī, *Nihāyat*, 8: 24.
[720] Māwardī, *Ḥāwī*, 17: 255.
[721] Ramlī, *Nihāyat*, 8: 25; Sharqāwī, *Ḥāshiya*, 2: 443; Bujayrimī, *Ḥāshiya*, 4: 237; Nawawī, *Minhāj*, 5: 521; Shirbīnī, *Mughnī,* 5: 520-521; Shirbīnī, *Iqnāʿ*, 2: 241.
[722] Ramlī, *Nihāyat*, 8: 25.
[723] Māwardī, *Ḥāwī*, 17: 258; Qalyūbī, *Ḥāshiya*, 4: 207; Anṣārī, *Tuḥfa*, 2: 443.

feared for their lives.[724] Shirbīnī and Anṣārī, for example, stated that it is obligatory to defend one's sexual organ, if the person did not fear for his life.[725] Making resistance conditional on the protection of one's life was a later opinion attributed by several jurists to the Shafiʿī jurist (of the Khurāsān school), al-Baghawī (d. 1117, 1121 or 1122 C.E.).[726]

As already mentioned, the defence of sexuality was considered a duty by jurists who stated that if someone were witness to an act of sexual assault, one must (*yajib*) defend the victim whether the latter were kin or not, male or female.[727] This duty was considered a personal one when the assaulted were kin, but a collective duty (*ʿalá al-kifāya*) when the assaulted were not kin.[728] The rationale for this obligation was mentioned by Māwardī as follows:

> Stopping debauchery (*fāḥisha*) is ... amongst the duties towards God (*ḥuqūq Allāh*) and a duty incumbent on him towards his kin and a duty towards his wife if she were coerced (*mukraha*) therefore he cannot forfeit these *ḥuqūq*... but if he finds him [the aggressor] committing *zinā* with a foreign woman who is not from his kin, he has to forbid him and stop him, and if she were coerced (*mukraha*) he has to target him [the aggressor] and not her, and if she were willing he has to stop the two of them.[729]

In the case of sexual assaults, jurists recognised a wide spectrum of sexual acts as cause for defence. These sexual acts ranged from an assault on a sexual organ (*buḍʿ*)[730] to coerced

[724] Anṣārī, *Tuḥfa*, 2: 443; Bayjūrī, *Ḥāshiya*, 2: 487; Shirbīnī, *Mughnī,* 5: 521.
[725] Shirbīnī, *Mughnī,* 5: 521; Anṣārī, *Tuḥfa*, 2: 443; Shirbīnī, *Iqnāʿ*, 2: 241.
[726] Nawawī, *Rawḍat*, 7: 397; Maḥallī, *Sharḥ*, 4: 207; Shirbīnī, *Mughnī,* 5: 521.
[727] Ramlī, *Nihāyat*, 8: 24; Māwardī, *Ḥāwī,* 17: 257-258; Sharqāwī, *Ḥāshiya*, 2: 441; Bayjūrī, *Ḥāshiya*, 2: 487; Nawawī, *Rawḍat*, 7: 395; Shirbīnī, *Mughnī,* 5: 521; Nawawī, *Minhāj*, 5: 521.
[728] Māwardī, *Ḥāwī*, 17: 258.
[729] Māwardī, *Ḥāwī*, 17: 258.
[730] Nawawī, *Rawḍat*, 7: 395; Ramlī, *Nihāyat*, 8: 24; Maḥallī, *Sharḥ*, 4: 206; Qalyūbī, *Ḥāshiya*, 4: 206; Anṣārī, *Tuḥfa*, 2: 441; Shubrāmalsī, *Ḥāshiya*, 8: 24; Rashīdī, *Ḥāshiya*, 8: 24; Bayjūrī, *Ḥāshiya*, 2: 487; Bujayrimī, *Ḥāshiya*, 4: 237; Shirbīnī, *Mughnī*, 5: 520-521.

foreplay (*muqaddimātuhu* or *muqaddimāt al-waṭʾ*)[731] to coerced non-penetrative intercourse of one's spouse (*al-istimtāʿ bi-ahlihi fī-mā dūn al-farj*)[732] such as kissing and/or hugging.[733]

In referring to the sexual organ, jurists used the gender-neutral term *buḍʿ*, which encompassed both anal and vaginal orifices (*qibalan ...aw duburan*),[734] thereby including heterosexual and same-sex forcible sexual acts. As such, if someone were to witness two simultaneous assaults one "on a boy being sodomised and the other on a woman being penetrated (*yuznā bihā*)," the witness had to save the woman first according to one opinion,[735] save the boy first according to another opinion, or make a choice between the two according to a third opinion.[736]

By using the gender-neutral term *buḍʿ* and referring to the sexual organ to be defended rather than the gender of the plaintiff, jurists extended legal protection against rape to males, females and the non-binary/intersex. Sharqāwī, for example, stated that the sexual organ to be protected is "the *buḍʿ* vaginal or anal of a human (*ādamī*)"[737] thereby referring to humans, in general, and not males or females, in particular. This, I suggest, is in line with the *weltanschauung* of the *furūʿ* where the intersex/non-binary were legally recognised and legally protected as having a distinct sexual nature alongside "males" and "females" per se. The legal protection of sexual integrity was not limited to females or female virginity, according to the above but extended to all those who could be penetrated.

By recognising a wide sexual spectrum as cause for defence, jurists thereby criminalised a wide range of forced sexual acts that were not limited to penetration. In other

[731] Ramlī, *Nihāyat*, 8: 25; Qalyūbī, *Ḥāshiya*, 4: 206; Anṣārī, *Tuḥfa*, 2: 441; Nawawī, *Rawḍat*, 7: 395; Bayjūrī, *Ḥāshiya*, 2: 487; Bujayrimī, *Ḥāshiya*, 4: 237; Shirbīnī, *Mughnī*, 5: 521; Shirbīnī, *Iqnāʿ*, 2: 241.
[732] Shirbīnī, *Mughnī,* 5: 520.
[733] Anṣārī, *Tuḥfa*, 2: 441; Sharqāwī, *Ḥāshiya*, 2: 443; Ramlī, *Nihāyat*, 8: 25; Bujayrimī, *Ḥāshiya*, 4: 237.
[734] Sharqāwī, *Ḥāshiya*, 2: 441.
[735] Ramlī, *Nihāyat*, 8: 24; Sharqāwī, *Ḥāshiya*, 2: 441.
[736] Bayjūrī, *Ḥāshiya*, 2: 487; Shirbīnī, *Mughnī,* 5: 521.
[737] Sharqāwī, *Ḥāshiya*, 2: 441.

words, the legal definition of sexual assault was not limited to penetration but included non-penetrative acts of a sexual nature under the rubric of assault. Unlike *zinā* where proof of penetration was *de rigueur*, *ṣiyāl* recognised a wider range of sexual acts as legally and personally repugnant and allowed a victim to defend herself with impunity for non-penetrative acts. Accordingly, legal protection was not limited to penetration (for non-virgins) or defloration (for female virgins) but was extended to a wide sexual spectrum. In other words, the protection of virginity or spousal sexual privilege were not the sole aims for the discourse on *ṣiyāl*. Rather, jurists seem to have opted for an expansive definition of sexual integrity that extended beyond the female hymen and beyond females by including males and the non-binary/intersex.

Finding one's wife with another man, was a topic that engaged numerous jurists.[738] These jurists deliberated the extent of legally sanctioned resistance in such cases, the textual proofs and precedents for it as well as the related issue of corroboration.[739] Muzanī, for example, mentioned the main elements of this issue as follows:

> If a man killed another and said I found him on top of my wife, he would have [thus] admitted [to the need for] retaliation and made a claim. Therefore, if he did not provide corroboration, he is to be killed. Saʿd said: 'O Prophet...if I found a man with my wife, do I give him time until I fetch four witnesses and he said...yes and ʿAlī b. Abī Ṭālib said if he did not fetch four witnesses, he is to be killed.[740]

Regardless of the veracity of the above precedent, it is still significant to see that it was quoted.[741] Moreover, unlike numerous issues where plurality was the norm, this issue seems to have enjoyed a significant degree of juristic unanimity regarding the prohibition of murder

[738] Muzanī, *Mukhtaṣar*, 5: 179; Shīrāzī, *Muhadhdhab*, 2: 289; Nawawī, *Rawḍat*, 7: 398; Māwardī, *Ḥāwī,* 17: 259.
[739] Shīrāzī, *Muhadhdhab*, 2: 289; Nawawī, *Rawḍat*, 7: 398; Muzanī, *Mukhtaṣar*, 5: 178-179; Māwardī, *Ḥāwī,* 17: 259.
[740] Muzanī, *Mukhtaṣar*, 5: 178-179.
[741] Shīrāzī, *Muhadhdhab*, 2: 289; Māwardī, *Ḥāwī,* 17: 259.

without absolute evidential certainty in the form of four adult male Muslim witnesses of good repute and sound mind.

In spite of the above, Māwardī did mention a precedent set by Caliph Umar in which retaliation for murder was not sought in spite of the lack of corroborative certainty in the form of four eyewitnesses to the sexual act.[742] A problem associated with *ṣiyāl* is the terseness and ambiguity surrounding the description of sexual acts within those sections. A case in point is the above quotation. Taken within the context of the whole section and following the definition of what *ṣiyāl* was and the kind of resistance one was allowed to put up, the reader may assume that the jurist was describing a case of sexual assault and the right of the assaulted to defend herself or to be defended by her husband. However, taken on its own such a passage may be interpreted as a "crime of passion" in which a husband finds his wife *in flagrante delicto* with another man and kills the latter. Whether jurists understood the above as a crime of passion or a sexual assault, they repeatedly stated that the husband in such a case did not have the right to kill the other man without raising the hue and cry and calling four witnesses to the scene.[743] What jurists were describing may have been a sexual assault or a crime of passion, but certainly not a pre-meditated crime of honour in which the husband kills another man whom he had suspected of having an affair with his wife.[744]

### *Ghaṣb* (usurpation/ civil misappropriation/abduction)

As mentioned in the introduction, the discovery and analysis of sexual violation under the banner of *ghaṣb* was the contribution of two scholars, namely, Serrano and Azam. In her

[742] Māwardī, *Ḥāwī,* 17: 259.
[743] Muzanī, *Mukhtaṣar*, 5: 178-179; Māwardī, *Ḥāwī,* 17: 259; Shīrāzī, *Muhadhdhab*, 2: 289.
[744] For more on the distinction between crimes of honour and crimes of passion, please refer to Lama Abu Odeh, "Honor Killings and the Construction of Gender in Arab Societies," *The American Journal of Comparative Law* 58, no. 4 (2010): 911-952.

seminal paper on *ghaṣb*, Serrano was the first scholar, to my knowledge, to have investigated the presence of rape within that category.[745] In doing so, she not only proved that rape existed *de jure* within the *furūʿ* but offered a corrective to the assumption that rape did not exist in legal theory, or at best, that it had been classified as a sub-category of the *ḥadd* of *zinā.* Later, Azam expanded the search for rape within *ghaṣb* and drew attention to the link between sexual violation as *ghaṣb* and the "body as property" argument.[746] Both scholars based their analyses of *ghaṣb* on mainly Mālikī *furūʿ* works.

In this section, I shall follow in the footsteps of both Serrano and Azam but I shall broaden my analysis to include the contribution of the other three schools of law to the discourse on *ghaṣb*. Moreover, I shall be reading the category of *ghaṣb* in tandem with the others on *ṣiyāl* and *ikrāh*, as well as the *diyyāt* in the following chapter. But first, a few words concerning the textual architecture of this category.

The category of *ghaṣb* existed as a separate textual category in nearly all *furūʿ* works of all four *Sunnī* schools of law. Unlike *ṣiyāl,* which only the Shāfiʿis had devoted a separate chapter to, and *ikrāh* which only the Ḥanafīs (and the Ẓāhirī Ibn Ḥazm) had accorded a separate textual unit to, *ghaṣb* existed as a distinct textual unit in nearly all *Sunnī furūʿ* works. It was placed within the *muʿāmalāt*, particularly the *rubʿ* (quarter) on the *buyūʿ*, alongside other forms of financial transactions. Sexual violation was usually placed towards the end of the sections on *ghaṣb*.

As a legal term, *ghaṣb* was translated into English as the "usurpation"[747] or "unlawful appropriation"[748] of private property. As a legal category, *ghaṣb* encompassed numerous acts of

[745] Serrano, "Rape".
[746] Azam, *Sexual Violation*.
[747] Schacht, *An Introduction to Islamic Law*, 160.
[748] Hallaq, *Sharīʿah*, 301.

larceny and misappropriation which did not fall within the narrow definitions of theft (*sariqa*) or banditry/highway robbery (*ḥirāba*).[749] In contrast to theft and *ḥirāba* which were classified as *ḥudūd* crimes and resulted in severe corporal punishment, *ghaṣb* "pertain[ed] to the 'civil' sphere of misappropriation"[750] and often required civil redress only. Also, in contrast to the *ḥudūd*, particularly *zinā*, the *actus reus* of *ghaṣb* does not seem to have been as closely or strictly construed.[751] Whereas the definition of the *actus reus* of *zinā* was very narrowly and precisely construed so as to exclude all acts that did not plainly fall within that one narrow definition of sexual penetration, *ghaṣb* included a multitude of illegal offences that could have been interpreted in a plethora of ways.

Before exploring the definition of *ghaṣb*, it is worth mentioning that the discourse on *ghaṣb* in the *furūʿ* (like *ikrāh*) seems to have passed through a number of stages. At an early stage, as in Shafiʿī's *al-Umm*, discourse did not start with a clear definition of *ghaṣb*. Rather, it started with examples of acts that qualified as *ghaṣb*. Such acts included the usurpation or damage of another's private property (*māl*), such as damage inflicted on the outfit (*thawb*), object (*matāʿ*), slave (*mamlūk*) or animal (*ḥayawān*) of another individual.[752] Later, Māwardī started his commentary on Shafiʿī's *al-Umm* with the textual bases for the prohibition of *ghaṣb* in the *Qurʾān*, *ḥadīth* and the consensus of the community (*ijmāʿ al-umma*)[753] while Shīrāzī began

[749] Schacht, *An Introduction to Islamic Law*, 160.
[750] Hallaq, *Sharīʿah*, 302.
[751] Strict construction was defined by *Black's* as: "A close and rigid reading and interpretation of a law. It is said that criminal statutes must be strictly construed.... Rule of "strict construction" means that criminal statute will not be enlarged by implication or intendment beyond fair meaning of language used...and will not be held to include offences and persons other than those which are clearly described and provided for" *Black's*, 1422. For more on the strict construction of the *ḥudūd*, please see Rabb's "Islamic Legal Maxims." Also, on the *ḥudūd*, please see Anver Emon, "*Ḥuqūq Allāh* and *Ḥuqūq Al-ʿIbād*: A Legal Heuristic For A Natural Rights Regime," *Islamic Law and Society* (2006) 13, 3, 325-391. www.academia.edu (accessed April 24, 2007).
[752] Shafiʿī, *al-Umm*, 3: 218.
[753] Māwardī, *Ḥāwī*, 8: 308-312.

with a clear and terse statement on the prohibition of *ghaṣb*.[754] Also during the fifth/eleventh century (but presumably later), Sarakhsī began his discourse with a short definition explaining what *ghaṣb* meant both linguistically and legally followed by a clear statement on its prohibition as well as the textual bases for such prohibition.[755]

The citation of the *Qurʾān* and *ḥadīth* at the outset of the discourse on *ghaṣb* was a technique resorted to by numerous jurists,[756] particularly Shāfiʿī and Ḥanbalī ones.[757] These citations seem to have been used for two purposes. First, as textual proofs of the prohibition of *ghaṣb* and second, to bolster the rational arguments preceding them on the inclusion or exclusion of certain acts from the ambit of prohibition.

The presence of a dual definition of the term *ghaṣb* distinguishing between its broad linguistic connotations as well as its closed legal meaning can be observed in the work of other/later jurists as well. This technique was employed by jurists from all four schools of law.[758] In exploring the various definitions of *ghaṣb*, I shall concentrate on the following key elements, namely, the definition of the *actus reus*, the use of force and the removal/asportation (*naql*) of usurped property. I shall not delve into the usurpation of immovable property (such as agricultural land or dwellings) or movable inanimate property (such as grains). Rather, I

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[754] Shirāzī, *Muhadhdhab*, 1: 482.
[755] Sarakhsī, *Mabsūṭ*, 11: 49.
[756] Ibn Qudāma, *al-Mughnī*, 5: 374-376; Zarkashī, *Sharḥ*, 2: 158-160; Ibn Mufliḥ, *Mubdiʿ*, 5: 85,89; Sharaf al-Dīn Mūsā bin Aḥmad al-Ḥajāwī, *al-Rawḍ al-murrabbaʿ bi-sharḥ zād al-mustaqnaʿ* (Cairo: al-Maṭbaʿa-l-salafiyya, 1380/1960) 1: 221-222; Māwardī, *Ḥāwī,* 8: 308-312; Shirbīnī, *Mughnī,* 3: 286-287; Bayjūrī, *Ḥāshiya*, 2: 21; Shirbīnī, *Iqnāʿ*, 2: 55; Sharqāwī, *Ḥāshiya*, 2: 148; ʿAbd al-Karīm ibn Muḥammad al-Rāfiʿī, *Fatḥ al-ʿazīz sharḥ al-Wajīz*, printed with Taqī al-Dīn ʿAlī ibn ʿAbd al-Kāfī al-Subkī, *Takmilat al-majmūʿsharḥ al-muhadhdhab* (Cairo: Maṭbaʿat al-Taḍāmun al-Akhawī, n.d.), 11: 239-240; Nafrāwī, *Fawākih*, 2; 244; Ibn Rushd, *Bidāyat*, 2: 481; Ḥattāb, *Mawāhib*, 5: 273; Sarakhsī, *Mabsūṭ*, 11: 49
[757] This fact may speak to the important role that both schools of law accorded to the use of *ḥadīth* in the derivation of the law. In other words, jurists from both schools translated their schools' doctrine on the importance of *ḥadīth* (as expressed in works of *uṣūl*) into action in their *furūʿ* works. For more on this topic, please see: Wael Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2005), 102- 121.
[758] Marghinānī, *Hidāya*, 4: 93; Ḥaṣkafī, *Durr*, 6:188; Zarkashī, *Sharḥ*, 2: 158; Ibn Mufliḥ, *Mubdiʿ*, 5: 85; Shirbīnī, *Mughnī*, 3: 286; Bayjūrī, *Ḥāshiya*, 2: 21; Sharqāwī, *Tuḥfur*, 2: 147; Qalyūbī, *Ḥāshiya*, 3: 26; ʿUmayra, *Ḥāshiya*, 3: 26; Shirbīnī, *Iqnāʿ*, 2: 55; Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 6: 129; Abī Bakr ibn Ḥassan al-Kashnāwī, *Ashal al-madārik sharḥ Irshād al-sālik fī fiqh imām al-aʾimma Mālik* (n.p.: Maṭbaʿat ʿĪsá al-Bābī al-Ḥalabī, n.d.) 3: 62.

shall concentrate on the above elements in order to trace the development, amendments, expansions and school differences within the theory on *ghaṣb*. Additionally, I shall do so in order to locate the *mal* of this category, in general, and that of sexual *ghaṣb* in particular. The *mal* of *ikrāh*, as previously argued, had been the coercion exerted upon a person by another through a variety of means that could have been violent or non-violent. Accordingly, by classifying rape within the legal category of *ikrāh*, jurists had *ipso facto* recognised some forms of sexual violation as crimes of coercion rather than crimes of violence or seduction, for example. Hence, by analysing the *mal* of *ghaṣb*, the reason for the legal classification of sexual violation under its banner would become clear.

Within the Ḥanafī school, Sarakhsī defined *ghaṣb* as the aggressive (*ʿudwān*) appropriation (*akhdh*) of another's property. Even though he acknowledged that linguistically *ghaṣb* was used by his contemporaries to indicate the seizure of people, legally, *ghaṣb* pertained to property crimes only,[759] according to his school.

The requisites of misappropriation, removal (asportation), seizure and force were insisted upon by other Ḥanafī jurists as well. Quoting Abū Ḥanīfa and Abū Yūsuf, Kāsānī defined *ghaṣb* as the removal of the owner's possession from his property through force.[760] Removal was literally described as "the transportation (*naql*) of the usurped from one place to another."[761] Similarly Marghinānī, Ḥalabī, Ibn ʿĀbidīn and the authors of the *Fatāwá Hindiyya* and *Bazzāziyya* also insisted on the hostile seizure and removal of usurped property from the possession of its owner for an act to be legally recognised as *ghaṣb*.[762]

[759] Sarakhsī, *Mabsūṭ*, 11: 49.
[760] Kāsānī, *Badāʾiʿ*, 10: 7.
[761] ʿAbd al-Ḥakīm al-Afghānī, *Kashf al-ḥaqāʾiq sharḥ Kanz al-daqāʾiq*, ed. Maḥmūd al-ʿAṭṭār (Cairo: Maṭbaʿat al-Mawsūʿāt, 1900), 2: 192.
[762] Marghinānī, *Hidāya*, 4: 93; Ḥalabī, *Majmaʿ*, 4: 65; Ibn ʿĀbidīn, *Radd*, 6: 188; *al-Fatāwá al-Hindiyya*, 5: 119; *al-Fatāwá al-Bazzāziyya*, 6: 167.

The concept of legal possession versus mere custody of property can be found in Ḥalabī who defined *ghaṣb* as the removal of legal possession through the enforcement of unlawful possession.[763] This addition refined the concept of *ghaṣb* so as to preclude all those who lawfully held physical possession of other's property (such as servants and custodians) from being convicted of larceny. This addition can be found in the thought of numerous jurists as well.[764]

Similarly, the seizure (*istīlāʾ*) of property, the unlawfulness of such seizure (*ẓulman* or *bi-ghayr ḥaqq*) as well as the use of force (*qahran*) marked the definition of *ghaṣb* within the Ḥanbalī school.[765] Aggression and hostility in the act of seizure readily defined an act as an instance of *ghaṣb* according to the valid opinion within the Ḥanbalī *madhhab*, as Mardāwī stated.[766] Ḥanbalī jurists differed from their Ḥanafī counterparts in terms of asportation though, by including immovable property under the ambit of *ghaṣb*. Indeed, they recognised that property could have been usurped without being taken away from its place,[767] presumably as long as the original owner had been denied access or use of that property.

Like Ḥanbalī jurists, their Shāfiʿī counterparts did not make asportation a necessary condition for the recognition of *ghaṣb*.[768] Māwardī, for example stated that *ghaṣb* occurs when two conditions obtain, namely, when a usurper unlawfully denies another access to his property and manipulates that property (*al-manʿ wa al-taṣṣaruf*), whether the usurper removes the usurped property or not.[769]

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[763] Ḥalabī, *Multaqá*, 4: 65.
[764] Bābartī, *Sharḥ*, 9: 316; Dāmād Affandī, *Majmaʿ*, 4: 65.
[765] Ibn Qudāma, *al-Mughnī*, 5: 374; Mardāwī, *Inṣāf*, 6: 113; Zarkashī, *Sharḥ*, 2: 158.
[766] Mardāwī, *Inṣāf*, 6: 115.
[767] Ibn Qudāma, *Sharḥ*, 5: 375; Mardāwī, *Inṣāf*, 6: 115; Zarkashī, *Sharḥ*, 2: 158, 160.
[768] Shirbīnī, *Mughnī*, 3: 287.
[769] Māwardī, *Ḥāwī,* 8: 310.

Moreover, unlike both Ḥanafīs and Ḥanbalīs, Shāfiʿīs did not insist on the use of force in the act of seizure. While enumerating the different definitions (*ʿibārāt*) of *ghaṣb*, Nawawī and Rāfiʿī attributed such a stance to the eponym of their school stating that *ghaṣb* "is the unlawful usurpation of another's property and [that] the *imām* [al-Shafiʿī] had chosen this sentence and said that there is no need to tie it to force/aggression but that *ghaṣb* and its outcome obtain without force (*ʿudwān*)."[770]

Furthermore, Shāfiʿīs defined the *actus reus* in terms of unlawful seizure (*istīlāʾ...bi ghayr ḥaqq*), hostile appropriation (*akhdh... ʿalá jihat al-taʿaddī*) as well as an extremely broad definition that "any [property] that warrants *ḍamān* from the person possessing it, is considered *ghaṣb*."[771] Indeed, it appears that for many Shāfiʿīs, *ghaṣb* obtained whenever a usurper established physical control over a usurped object unlawfully regardless of asportation or force (according to one opinion within the school).[772] For example, while commenting on Nawawī's earlier definition of *ghaṣb* as "seizure", Shirbīnī mentioned that since seizure was based on aggression, *ghaṣb* could include any misappropriation of property that its owner dislikes (*kārih*) such as a person asking another for money in public, in the presence of others, thereby obliging the owner to acquiesce out of shyness and submission (*al-ḥayāʾ wa al-qahr*).[773]

As for Mālikī jurists, it seems that they had maintained a position fairly similar to their Shāfiʿī counterparts in terms of asportation and perhaps force. Numerous Mālikī jurists defined *ghaṣb* as the "unlawful (*ẓulman* and/or *qahran*) and aggressive (*taʿadiyan*) appropriation (*akhdh*)

[770] Nawawī, *Rawḍat*, 4: 96; Rāfiʿī, *Fatḥ*, 11: 239.
[771] Ibid.
[772] Shirbīnī, *Mughnī*, 3: 287; Nawawī, *Rawḍat*, 4: 96; Rāfiʿī, *Fatḥ*, 11: 239.
[773] Shirbīnī, *Mughnī*, 3: 286.

of property without recourse to *ḥirāba*."[774] This definition was traced to Ibn al-Ḥājib[775] and interpreted and expanded by numerous jurists such that "appropriation" was frequently explained as "seizure."[776] Although seizure had to be aggressive, the amount of force deemed legally acceptable for inclusion within *ghaṣb*, did not have to amount to that of *ḥirāba*. Interestingly, some jurists expanded the definition of *ghaṣb* in such a way that physical seizure of the usurped object was not deemed necessary as long as the wrongdoer had maintained control over the usurped property and denied the owner access to that property, without removing said property from its place.[777] This amendment not only declared that force and asportation were not necessary but that actual physical control of the usurped property was not required for an act to be recognised as *ghaṣb*.

It thus seems that for Mālikī and Shāfiʿī jurists the crucial element in *ghaṣb* was the establishment of unlawful control over the usurped property. For them, asportation and force were important elements but not necessary to the legal establishment of *ghaṣb*. This position stands in sharp contrast to the Ḥanafī one where asportation and force were *de rigueur* in the determination of *ghaṣb*.

Although all schools had a separate textual category entitled *ghaṣb*, a marked difference existed amongst them concerning the scope of usurpation. Whereas the Mālikīs had placed the seizure and sexual violation of free and slave individuals under this category, jurists from the other three schools did not. Ḥanafī, Shāfiʿī and Ḥanbalī jurists included the usurpation of slaves

[774] Khalīl, *Mukhtaṣar*, 2: 148; ʿIllaysh, *Taqrīrāt*, 3: 442; ʿAlī ibn ʿAbd al-Salām al-Tusūlī, *al-Bahja fī sharḥ al-Ṭuḥfa ʿalá al-urjuza al-musammāh bi Tuḥfat al-ḥukām li Ibn ʿĀṣim al-Andalusī* (Casa Blanca: Dār al-Rashād al-Ḥadītha, 1991), 2: 653; Muḥammad ibn Muḥammad ibn ʿAbd al-Raḥmān al-Ḥaṭṭāb, *Kitāb Mawāhib al-Jalīl li-sharḥ Mukhtaṣar Khalīl* (Beirut: Dār al-Fikr, 1992), 5: 274; Kashnāwī, *Ashal*, 3: 62; Zurqānī, *Sharḥ*, 6: 136; Nafrāwī, *Fawākih*, 2: 244; Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 6: 129-130; Mawwāq, *Tāj*, 5: 274.

[775] Ḥaṭṭāb, *Mawāhib*, 5: 274; Kashnāwī, *Ashal*, 3: 62.

[776] Tusūlī, *Bahja*, 2: 653; Kashnāwī, *Ashal*, 3: 62; Zurqānī, *Sharḥ*, 6: 136; Dasūqī, *Ḥāshiya*, 3: 442

[777] Dasūqī, *Ḥāshiya*, 3: 442; Muḥammad al-Bannānī, *Ḥāshiyat sīdī Muḥammad al-Bannānī*, printed with ʿAbd al-Bāqī al-Zurqānī, *Sharḥ al-Zurqānī ʿalá Mukhtaṣar sīdī Khalīl* (Beirut: Dār al-Fikr, n.d.), 6: 136.

(who were considered property "*māl*") under the scope of *ghaṣb*, but did not classify the abduction and sexual usurpation of free individuals as *ghaṣb*. Rather, they treated crimes against free individuals under the rubric of other legal categories such as *ikrāh*, *ṣiyāl* and *diyyāt*. These two stances held important ramifications concerning the *ghaṣb* of a free woman and the outcome of such an act, as will be demonstrated.

For example, the Ḥanbalī jurist Ibn Qudāma stated that if somebody were to seize a free individual, the former did not pay the latter an indemnity on the basis of *ghaṣb* because a free individual was not considered property, but on the basis of damage (*itlāf*) or on the basis of usage and benefit (*manāfiʿ*) if he had benefitted from the labour of the usurped individual.[778] Thus, benefitting from the usurped necessitated the payment of an indemnity *in lieu* of such benefit. As Zarkashī stated: "The benefits [accrued] from the usurped are to be compensated for because such benefits are akin to money."[779] Similarly, Mardāwī declared that a free person was not to be compensated through *ghaṣb*, unless the usurper had benefitted from him. In that case, the usurper had to pay the usurped for his labour.[780] Although the majority opinion and the official one within the Ḥanbalī school had declared that a free person could not be possessed and become the property of another, Mardāwī mentioned a minority opinion that a free person could be [legally recognised as being] physically controlled by another as his property (*thubūt al-yad ʿalayhi*).[781]

Similarly, according to a number of Shāfiʿī jurists, individuals could not be considered as property (*māl*) and their indemnity was to be calculated on the basis of offences (*jināyāt*) against their lives and limbs or on the basis of using them (*istihlāk*) and benefitting from using

[778] Ibn Qudāma, *Sharḥ*, 5: 378-379.
[779] Zarkashī, *Sharḥ*, 2: 159.
[780] Mardāwī, *Inṣāf*, 6: 119-120.
[781] Ibid., 6: 119.

their bodies (*manfaʿat badan al-ḥurr*).[782] Therefore, if somebody had seized [read abducted] a free person by force and made the latter work (*sakhkharahu fī ʿamal*), the usurper had to pay the latter the price of his labour.[783] If, however, the usurper had not made the usurped person work for him, he would not have been obliged to pay the latter anything, according to the soundest opinion within the school.[784] Consequently, the usage of a free person's sexual organs (*manfaʿat al-buḍʿ*) was not indemnified on the basis of *ghaṣb*.[785] The reason being that a free person could not be considered the property of another, hence compensation was not to be calculated on the basis of possession.[786] Rather, the indemnity was to be paid as a dower equivalent in value to that of the usurped woman's peers (*mahr al-mithl*).[787] More will be said on this topic shortly.

Ḥanafī jurists equally excluded free individuals from the scope of *ghaṣb* because they were not legally regarded as the property of another.[788] The compensation for the *ghaṣb* of a free individual (*ḍamān*) was not to be based on possession, but on damage (*itlāf*)[789] and the *jināyat.*[790] As such, if somebody had abducted a free born child and that child later died, the usurper would not have paid the child's kin a *ḍamān* if the child had died of natural causes. If, however, the child had not died of natural causes and his death had been caused by the

[782] Nawawī, *Rawḍat*, 4: 105, 107; Māwardī, *Ḥāwī,* 8: 336; Shirbīnī, *Mughnī*, 3: 304.
[783] Nawawī, *Rawḍat*, 4: 105, 107.
[784] Nawawī, *Rawḍat*, 4: 105, 106; Shirbīnī, *Mughnī*, 3: 304.
[785] Nawawī, *Rawḍat*, 4: 105, 106.
[786] Ibid.
[787] Shirbīnī, *Mughnī,* 3: 304.
[788] Sarakhsī, *Mabsūṭ*, 11: 57; Kāsānī, *Badāʾiʿ*, 10: 16; *al-Fatāwá al-Hindiyya*, 5: 149; ʿUbayd Allāh ibn Masʿūd, *Sharḥ ibn Masʿūd ʿalá matn al-Wiqāya*, printed with ʿAbd al-Ḥakīm al-Afghānī, *Kashf al-ḥaqāʾiq sharḥ Kanz al-daqāʾiq*, ed. Maḥmūd al-ʿAṭṭār (Cairo: Maṭbaʿat al-Mawsūʿāt, 1900), 2: 192.
[789] Sarakhsī, *Mabsūṭ*, 11: 57; Kāsānī, *Badāʾiʿ*, 10: 16.
[790] *Al-Fatāwá al-Hindiyya*, 5: 149.

usurper (whether directly or not), the latter (and/or his *ʿāqila*/ solidarity group) would have had to pay for the child's death.[791]

Similarly, Mālikī jurists extended the *ḍamān* for *ghaṣb* to free individuals on the basis of usage or benefit (sing. *manfaʿa*/pl. *manāfiʿ*) and not on the basis of ownership. As such, if an alleged *ghāṣib* had abducted a free person and locked him up, the *ghāṣib* would not have had to pay a *ḍamān* to the latter. However, if he had used the latter for work, the former would have had to pay the latter for such work.[792] This is in contrast to objects where the usurper had to compensate the owner for the usurped object whether the object had been used or not.[793] As Zurqānī stated:

> Usurping a benefit ... is to be indemnified even if he did not use it except for a sexual organ and a free [person] ... the benefit from a sexual organ and a free [person] is [indemnified on the basis of] usage (*tafwīt*) and everything else [is compensated for on the basis of] alienation (*fawāt*).[794]

## Sexual *Ghaṣb*

Sex appears in the legal category of *ghaṣb* under different forms. Jurists discussed both wanted and coerced sex with free or slave individuals, as well as the *ḍamān* (or lack thereof) to be paid following the usurpation and abduction of the *maghṣūba* (the usurped woman).

As mentioned above, Mālikī jurists had stated that compensation for a free person or a sexual organ was tied to usage. In other words, they equated sexual benefit to a usurped property, usage of which warranted the payment of an indemnity to the owner of that

[791] Kāsānī, *Badāʾiʿ*, 10: 16; *al-Fatāwá al-Hindiyya*, 5: 148-149.
[792] Aḥmad al-Dardīr, *Al-Sharḥ al-ṣaghīr*, printed with Aḥmad al-Ṣāwī, *Bulghat al-sālik li-aqrab al-masālik* (n.p.: Dār al-Fikr, n.d.), 2: 203.
[793] Zurqānī, *Sharḥ*, 6: 138.
[794] Ibid., 6: 138 and 151 where Zurqānī explains the meaning of "*tafwīt*" as usage.

property. Sexual violation, in such a case, became a tort.[795] The indemnity, however, was not to be paid on the basis of the usurpation or abduction but on the basis of violation (*taʿaddī*) through usage (*istiʿmāl*).[796] If the usurper had violated a free woman, he would have had to pay a dower equal in value to that received by her peers[797] and if he had violated a slave woman, he would have had to pay a sum equivalent to the depreciation in her value as caused by sexual intercourse.[798] If, however, the usurper had not violated the woman in question, he would not have had to pay her anything.[799] In addition to an indemnity, a person who had sexually coerced a woman by penetrating her, would have been punished through the *ḥadd*,[800] according to an opinion attributed to the eponym of the Mālikī school.[801]

Within Mālikī discourse on *ghaṣb*, the issue of sexual coercion was repeatedly raised, often in conjunction with the fear of false accusations and the corroborating evidence needed to settle the case. Therefore, if a woman had declared that she had been sexually coerced (*istikrāhan*),[802] she had to provide corroboration in the form of holding onto the accused,[803] raising the hue and cry and be seen bleeding.[804] Immediacy of reporting was also recommended,[805] as well as witnesses in the form of a *bayyina*.[806] Corroboration was particularly

[795] Rape as a tort was thoroughly investigated by Azam throughout her book. Azam, *Sexual Violation*. The tort of rape was also noted by other scholars, who did not delve into it. Cases in point include: Peters, *Crime and Punishment*, 59; Kozma, "Negotiating Virginity," 57; Sonbol, "Law and Gender Violence," 287.
[796] Dardīr, *Sharḥ*, 2: 203.
[797] Tusūlī, *Bahja,* 2: 672; Dardīr, *Sharḥ*, 2: 203; Zurqānī, *Sharḥ*, 6: 151; Kashnāwī, *Ashal*, 3: 64.
[798] Dardīr, *Sharḥ*, 2: 203; Zurqānī, *Sharḥ*, 6: 151; Kashnāwī, *Ashal*, 3: 64.
[799] Dardīr, *Sharḥ*, 2: 203; Zurqānī, *Sharḥ*, 6: 151.
[800] Nafrāwī, *Fawākih*, 2: 245.
[801] Ibn Rushd, *Bidāyat*, 2: 491.
[802] Khalīl, *Mukhtaṣar*, 2: 153; ʿIllaysh, *Taqrīrāt*, 3: 459; al-Ābī al-Azharī, *Jawāhir*, 2 : 153; Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 6: 148; ʿAdawī, *Ḥāshiya*, 6: 148; Ḥaṭṭāb, *Mawāhib*, 5: 292; Mawwāq, *Tāj,* 5: 292.
[803] Tusūlī, *Bahja*, 2: 676; Khalīl, *Mukhtaṣar*, 2: 153 ; ʿIllaysh, *Taqrīrāt*, 3: 459; Al-Ābī al-Azharī, *Jawāhir*, 2 : 153; Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 6: 148; Ḥaṭṭāb, *Mawāhib*, 5: 292; Mawwāq, *Tāj,* 5: 292.
[804] Ḥaṭṭāb, *Mawāhib*, 5: 292.
[805] Tusūlī, *Bahja*, 2: 676.
[806] Tusūlī, *Bahja*, 2: 673; Nafrāwī, *Fawākih*, 2: 284.

important if the accused had been known for his uprightness.[807] If, however, the plaintiff had accused someone without corroborating her accusation, she could have faced the *ḥadd* for defamation (*qadhf*),[808] unless the accused had been of a shady character.[809] Corroboration, as such, was quite difficult to provide because of the often private nature and private setting of rape. As both Wanshārīsī and Tusūlī stated: "Not every *maghṣūba* is capable of holding onto"[810] her rapist until witnesses arrive. Indeed, corroboration is easier to provide in cases of violent rape or stranger rape rather than acquaintance rape.

Similar to Mālikī jurists, Ḥanbalīs and Shāfiʿīs also called for the dual punishment of a usurper who abducts and violates a woman.[811] Consequently, if somebody were to sexually coerce a free woman by penetrating her, he would have had to pay her a dower and receive the *ḥadd* punishment.[812] A free woman took the money for herself, while a slave woman's owner received her indemnity.[813] The coerced woman was exculpated from *zinā* (*maʿdhura*)[814] and would not have been punished by the *ḥadd*.[815] In the same vein, whoever usurped a slave woman and had sexual intercourse with her, he had to pay her owner an indemnity equal in value to the dower received by her peers in addition to receiving the *ḥadd* punishment for *zinā*.[816] In the absence of doubt (*shubha*) concerning marriage or ownership, the usurper (*al-*

[807] ʿIllaysh, *Taqrīrāt*, 3: 459; Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 6: 148.
[808] Khalīl, *Mukhtaṣar*, 2: 153; ʿIllaysh, *Taqrīrāt*, 3: 459; al-Ābī al-Azharī, *Jawāhir*, 2: 153; Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 6: 148; ʿAdawī, *Ḥāshiya*, 6: 148; Ḥaṭṭāb, *Mawāhib*, 5: 292; Mawwāq, *Tāj,* 5: 292.
[809] ʿIllaysh, *Taqrīrāt*, 3: 459; Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 6: 148.
[810] Aḥmad ibn Yaḥyá al-Wanshārīsī, *al-Miʿyār al-Muʿrib*, ed. Muḥammad Hajjī (Beirut: Dār al-Gharb al-Islāmī, 1981), 10: 235; Tusūlī, *Baḥja*, 2: 676.
[811] Ibn Qudāma, *al-Mughnī*, 5: 412; Māwardī, *Ḥāwī,* 8: 337; Nawawī, *Rawḍat*, 4: 149; Shirbīnī, *Mughnī*, 3: 316; Rāfiʿī, *Fatḥ*, 11: 322.
[812] Ibn Qudāma, *al-Mughnī*, 5: 407; Shirbīnī, *Mughnī*, 3: 316.
[813] Ibn Qudāma, *al-Mughnī*, 5: 407.
[814] Ibid.
[815] Māwardī, *Ḥāwī,* 8: 337; Ibn Qudāma, *al-Mughnī*, 5: 407.
[816] Ibn Qudāma, *al-Mughnī*, 5: 407; Ibn Mufliḥ, *Mubdiʿ*, 5: 106; Zarkashī, *Sharḥ*, 2: 160; Mardāwī, *Inṣāf*, 6: 159; Nawawī, *Rawḍat*, 4: 149.

*ghāṣib*) was considered to have committed *zinā* because the usurped slave was neither his wife nor his legal property.[817]

Doubt (*shubha*), as an exculpating factor, included both mistakes of law and mistakes of fact. Jurists, for example, cited lack of legal knowledge as an exculpating factor if somebody did not know that having sexual intercourse was forbidden, was a new convert, was coerced, lived at a distance from other Muslims, thought that *ghaṣb* established permission, or thought that the slave woman in question was his own.[818] In these cases, the person claiming doubt, would not have suffered the *ḥadd.*

The payment of the indemnity was required whether the slave had consented to sex (*muṭāwiʿa*) or was coerced (*mukraha*), according to Ḥanbalī jurists,[819] because payment was seen as a right due to her owner.[820] In other words, the tort of sex was required regardless of the slave's own volition. As such, an argument from consent could not have been raised by the usurper because payment was not conditional on volition; he had to pay in any case. Criminal fault, in this case stemmed from the misappropriation of sexual property and not sexual coercion, which consequently made sex with an abducted slave a strict liability offence.

Shāfiʿīs, however, differed with regards the nullification of consent as two distinct opinions co-exited concerning this issue within their school.[821] The first, accepted the plaintiff's oath that she had been coerced and demanded the payment of an indemnity on the basis of harm while the second accepted the defendant's oath that the alleged victim had

[817] Ibn Qudāma, *al-Mughnī*, 5: 407; Ibn Mufliḥ, *Mubdiʿ*, 5: 106; as well as Zarkashī, *Sharḥ*, 2: 160.
[818] Nawawī, *Rawḍat*, 4: 149; Zarkashī, *Sharḥ*, 2: 160; Nawawī, *Rawḍat*, 4: 149; Shirbīnī, *Mughnī*, 3: 316; Rāfiʿī, *Fatḥ*, 11: 322.
[819] Ibn Qudāma, *al-Mughnī*, 5: 407; as well as Ibn Mufliḥ, *Mubdiʿ*, 5: 106; Mardāwī, *Inṣāf*, 6: 159.
[820] Ibn Qudāma, *al-Mughnī*, 5: 407; Ibn Mufliḥ, *Mubdiʿ*, 5: 106; Zarkashī, *Sharḥ*, 2: 160.
[821] Māwardī, *Ḥāwī,* 8: 338; Nawawī, *Rawḍat*, 4: 149; Shirbīnī, *Mughnī*, 3: 316; Rāfiʿī, *Fatḥ* , 11: 322.

consented to sex and as such did not demand reparation.[822] According to the second stance, the payment of the indemnity was conditional on the slave woman's coercion and was not required if the slave had consented to sex with the person who had kidnapped her.[823]

In addition to *mahr al-mithl*, some jurists had called for the payment of an additional indemnity *in lieu* of defloration (*arsh al-bikāra*).[824] This additional indemnity, however, was not required by all jurists since the dower of a virgin was considerably higher than that of a non-virgin.[825] On the other hand, the *ratio legis* for the payment of the indemnity was the principle of benefit particularly sexual benefit,[826] which was considered akin to property and indemnified as a tort.

Within the category of *ghaṣb*, Ḥanbalīs, Shāfiʿīs and Mālikīs used such terms as *ikrāh*, *istikrāh*, *istikrāhan* and *mustakraha* when discussing the abducted woman's consent or coercion. They were used with regards both free and slave women.[827] These terms evoke the category of *ikrāh* and all its ramifications. Moreover, a paragraph or short section was sometimes devoted to sexual coercion within *ghaṣb*.[828]

As previously mentioned, Ḥanafī jurists had not extended the compensation for *ghaṣb* to free individuals because the latter were not considered property. Rather than *ghaṣb*, free individuals were to be compensated on the basis of other categories and offences.[829] In this respect, the discourse on *ghaṣb* in Ḥanafī works was primarily concerned with the abduction of slaves and the indemnity due to their owners. Jurists described different scenarios involving

[822] Māwardī, *Ḥāwī,* 8: 338.
[823] Nawawī, *Rawḍat*, 4: 149; Shirbīnī, *Mughnī*, 3: 316; Rāfiʿī, *Fatḥ*, 11: 322.
[824] Ibn Qudāma, *al-Mughnī*, 5: 407; Zarkashī, *Sharḥ*, 2: 160; Mardāwī, *Inṣāf*, 6: 159; Nawawī, *Rawḍat*, 4: 149.
[825] Ibn Qudāma, *al-Mughnī*, 5: 407.
[826] Zarkashī, *Sharḥ*, 2: 161; Māwardī, *Ḥāwī,* 8: 338; Shirbīnī, *Mughnī*, 3: 316.
[827] Ibn Qudāma, *al-Mughnī*, 5: 407,412; Māwardī, *Ḥāwī,* 8: 337-338; Nawawī, *Rawḍat*, 4: 149; Shirbīnī, *Mughnī*, 3: 316; Khalīl, *Mukhtaṣar*, 2: 153; ʿIllaysh, *Taqrīrāt*, 3: 459; al-Ābī al-Azharī, *Jawāhir*, 2 : 153; Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 6: 148; ʿAdawī*, Ḥāshiya*, 6: 148; Ḥaṭṭāb, *Mawāhib*, 5: 292; Mawwāq, *Tāj,* 5: 292.
[828] Tusūlī, *Bahja*, 2: 672- 679; Ibn Qudāma, *al-Mughnī*, 5: 407.
[829] For example, Sarakhsī, *Mabsūṭ*, 11: 57; *al-Fatāwá al-Hindiyya*, 5: 149.

the abduction (*ghaṣb*) and *zinā* of slave women. A striking feature of this discourse was the usage of the term *zinā* rather than *al-ikrāh ʿalá al-zinā* which they had previously used quite extensively in their chapters or sections on duress. This usage may have been due to the presumption of consent inherent in the act of (quasi)ownership, or to the nullification of consent as a defence tool available to the usurper, or to the disregard of the slave's volition. In any case, I shall be translating their discourse as closely as possible to the original using the term *zinā.*

According to Ḥanafī opinion, if somebody were to abduct a slave woman, have sexual intercourse with her and she is later returned to her owner pregnant and dies subsequently, the usurper would have had to pay her owner an indemnity equal to her value as a slave, according to Abū Ḥanīfa. However, no indemnity would have been paid according to Abū Yūsuf and Shaybānī because the slave had died while in her owner's possession.[830] Payment of the indemnity would have precluded the *ḥadd* punishment because payment established ownership for the duration of the *ghaṣb*.[831]

If, however, the abducted woman had been free and had been sexually coerced (*mukraha*),[832] her kidnapper would not have been asked for an indemnity on the basis of *ghaṣb* (*lā tuḍman bil-ghaṣb*)[833] and no *ḍamān* would have been due.[834] Interestingly, while jurists refrained from references to coercion with regards slave women, duress was mentioned in the context of an abducted free woman. Moreover, they mentioned that no *ḍamān* was to be paid, they did not say that no *mahr al-mithl* was to be paid which means that the rulings for *ikrāh* and

[830] Ibn Masʿūd, *Sharḥ*, 2: 196. See also: Bābartī, *Sharḥ*, 9: 353; Marghinānī, *Hidāya*, 4: 102-103; Ḥalabī, *Multaqá*, 2: 76-77; Dāmād Affandī, *Majmaʿ*, 2: 76-77.
[831] *Al-Fatāwá al-Hindiyya*, 5: 145; Marghinānī, *Hidāya*, 4: 102-103.
[832] Afghānī, *Kashf*, 2: 197.
[833] Ibid.
[834] Bābartī, *Sharḥ*, 9: 353; Marghinānī, *Hidāya*, 4: 102-103.

not *ghaṣb* were to be applied to free women. In other words, jurists distinguished between abducted free and slave women in a number of ways. For slave women, volition was disregarded and an indemnity on the basis of *ghaṣb* rather than *ikrāh* was to be sought. By contrast, for free women, volition and the lack thereof constituted the basis for the indemnity which was a *mahr* rather than a *ḍamān*.

Azam has observed that Ḥanafī discourse on sexual *ghaṣb* was rather "minimal."[835] This observation is certainly true, particularly in comparison to Mālikī discourse on the same category. However, if one bears in mind that Ḥanafīs had entire sections devoted to *ikrāh* and that Mālikīs did not, a different picture emerges. Moreover, Ḥanafī jurists, like their Shāfiʿī and Ḥanbalī counterparts had not included the *ghaṣb* of a free female under the category of *ghaṣb,* because these three schools only included property, not free individuals under that category. Similarly, because the other schools of law did not have separate chapters for duress, they included duress throughout their works whenever the need arose. As such, it is not surprising that the other schools of law would mention sexual duress within *ghaṣb* and would devote more space and thought to it than the Ḥanafīs. It is also significant that when referring to sexual duress, even within *ghaṣb*, all jurists had used terms derivative of *ikrāh*.

## Concluding Remarks

All four schools of law appear to have treated the *mal* of *ghaṣb* as the unlawful usurpation of private property from its lawful owner. They differed, however, in their approaches to the means of possession, the use of force and the necessity of asportation. By including different forms of rape (broadly defined) under *ghaṣb*, which is a legal category

[835] Azam, *Sexual Violation*, 147.

primarily concerned with property crimes, jurists had thus associated rape with crimes against property making sexuality a commodity to be indemnified through violation (*taʿaddī*) and usage (*istiʿmāl*).

As mentioned in the introduction, the classification of rape as a property crime was equally observed by scholars of pre-modern Europe, particularly Gravdal, who maintained that during the medieval period crimes against property were sometimes regarded as more important than crimes against individuals.[836] This development pointed to an awareness of rape as an indemnifiable tort to be compensated for.

In the first two chapters on coercion and *zinā* as well as the current one on *ṣiyāl* and *ghaṣb*) we saw that rape was legally classified under different categories; each of which had a different definition, a different *mal*, different terminology and described different contexts and situations within which sexual violation could occur. These facts raise a number of important questions, such as: why did jurists do so? What does this taxonomy indicate in terms of the classification of offences? And, what were the ramifications of such classification in terms of the judicial process?

I would like to suggest that the classification of sexual violation under different legal categories indicates that jurists had conceived of rape as a complex offence rather than a simple one. Had they regarded rape as a simple offence, a single category would have been allocated to it. Rather, jurists imagined different contexts for rape such as coercion, assault, seduction and property. There was not a single definition for rape but different ones depending on the context of the crime, the circumstances surrounding it and the status of the parties concerned. Importantly, jurists recognised that sexual violation could straddle

[836] Gravdal, *Ravishing Maidens*, 126.

different categories such as coercion and *zinā* as well as *ghaṣb* and *zinā*. In other words, the definition of rape seems to have been context-based and context-informed. Had jurists conceived of rape as a single simple offence, they would have created a single legal category for it and endowed it with a single monolithic term that denoted this phenomenon as unique. This fact has diverse implications. On the one hand, it meant that rape did not gain an independent status in the *furūʿ* like the dissolution of marriage, for example, which included several types (*ṭalāq*, *khulʿ* etc.) with distinct conditions. Jurists did not consider these context-based factors subordinate to the act of rape categorically, and thus these factors took precedence and prevented the emergence of a unified rubric for "rape". On the other hand, it was neither invisible nor marginal. Jurists struggled to present all the various forms, which it could take, and tried, painstakingly, to place and link them to the paramount legal categories that existed traditionally, in the manuals. They tried thus to push the limits of the structure of legal categorizations in creative ways. Rather than uniqueness, jurists opted for parity with other categories. Some dealt with violent offences and some did not. Pragmatic concerns may have also compelled jurists to take cognizance of acquaintance rape and stranger rape in addition to attempted rape. Furthermore, a broad sexual continuum comprising penetrative and non-penetrative sexual intercourse was recognised. In other words, sexual violation short of penetration was equally accepted as legally repugnant. Moreover, discourse on rape did not revolve around the protection of virginity only but extended to non-virgins as well.

In addition, both subjective (for example, fear) and objective (such as force) elements were acknowledged. The objective elements carried more weight in terms of burden of proof, but the subjective ones were not ignored. Importantly, rape was not portrayed as a gendered crime. Rather, jurists employed a gender-neutral language opting for the name of the sexual

organ rather than the gender of the violated individual. This does not mean that descriptions of gender followed the male-female binary either, since the intersex (non-binary) were recognised as legal subjects. Gender diversity had been recognised in other legal categories in the *furūʿ*, such as inheritance.

So how did this legal plurality in terms of definition, context, and conditions impact the legal process? Did this theoretical plurality translate itself into more flexibility in courtrooms? Did the creation of numerous legal categories, provide more tools for judges and litigants? Did it allow judges to tailor their judgements to the case at hand? Was this plurality the result of pragmatic considerations in the face of an offence that often occurred behind closed doors and did not particularly lend itself to objective proofs?

In her research on sexual violation, Azam cogently argued that the Ḥanafī understanding of *ikrāh* stood at a sharp contrast to the Mālikī one on *ghaṣb* in spite of the fact that both schools had recognised both categories.[837] Her final conclusion though was that, despite common interests, the Mālikī approach to sexual violation provided greater justice to rape victims than the Ḥanafī one. She affirmed that:

> [T]he composite or dual rights theory of rape upheld by the Mālikī school, with its insistence on a proprietary approach to sexuality alongside a theocentric sexual ethics, was far more workable and equitable than the single rights theory of rape upheld by the Ḥanafī.[838]

Even though it is tempting and logical to view Ḥanafī *ikrāh* and Mālikī *ghaṣb* as two "competing" categories as Azam had argued,[839] I chose to view them as two complementary categories devised by jurists to supplement each other and other categories dealing with

[837] Azam, *Sexual Violation*, 150.
[838] Ibid., 240.
[839] Azam, "Competing Approaches."

sexual violation. My reasons are that each category imagines a different scenario for rape and is based on a different *mal* for its prohibition, the categories therefore catered to different needs and contexts that did not negate each other. Whereas *ikrāh* may have favoured crimes of coercion by acquaintances, *ghaṣb* lent itself more readily to violent crimes where seizure, abduction and tangible proofs of rape could be provided. Moreover, Ḥanafī *ikrāh* and Mālikī *ghaṣb* were not the only choices available. Rather, there was the category of *ṣiyāl* as well as the understandings of the other schools of law.

## Chapter Four

## Multiple Outcomes and the Legal Status of Female Victims

In this chapter, I look closely at three major socio-legal outcomes, which impacted a female victim of rape, namely, the change to her legal status, financial restitution and pregnancy. The impetus for exploring these features stems from, first, the definition of rape as a complex differentiated offence, and second, my hypothesis that rape cases may have been brought to court or to public awareness, for the most part, through victim appeal, and third, the association, which has been made between justice for rape, particularly penetrative rape, and the imposition of the *ḥudūd.*

With respect to the first point, I have argued so far that rape, broadly defined, was not confined to a single legal category but existed under several banners depending on the context of the offence. As such several terms were devised, definitions differed and, consequently, evidentiary standards and outcomes varied. It is these different evidentiary standards, burdens of proof and outcomes that I would like to explore in this chapter.

Legal and linguistic complexity engendered several forms of redress obtained through different means of justice. These means went beyond corporal/capital punishment and the imposition of the *ḥadd*. Rape as *ikrāh* was very different from rape as *ṣiyāl* or *ghaṣb* and consequently, the outcome was different for each offence. Similarly, corroboration for coercive *zinā* necessitated the highest burden of proof in the form of four eyewitnesses whereas proof of *ghaṣb* necessitated a lower burden of proof in the form of corroboration (*bayyina*) while *ikrāh* was deemed possible if the circumstances for coercion had existed. In

other words, sexual coercion was regarded as a civil offence not a criminal one and hence adjudicated on a balance of probability rather than corroborative evidence. Civil cases are nowadays judged based on a balance of probability and it seems that in the past they may have been equally so.

By exploring some of these varying standards of proof and outcomes, I shall argue that "rape" was not a single offence called *ikrāh* by some jurists, or *ṣiyāl* or *ghaṣb* by others, but that each of these categories was a very different type of offence that cannot be compared to the other two. Just as theft is a very broad term encompassing several legal categories such as larceny, fraud, embezzlement, robbery, shoplifting and extortion which are very different from one another, so was rape/sexual violation in *fiqh* works. Each of the categories, previously explored, was legally and linguistically different from the others to the extent that an argument can be made for their uniqueness. The glaring difference is that *fiqh* works do not seem to have had an umbrella term that encompassed all of these legal categories. Rather, each category had its own term, its own definition, standard of proof and outcome.

Like their European counterparts (as mentioned in the Introduction), either the victim or her kin may have appealed to the judge/community for redress.[840] Victim appeal took the form of making a claim (*daʿwa*) and bolstering that claim with corroborative evidence based on the principle that "proof/corroboration is incumbent on the claimant and the oath is incumbent on the defendant/*al-bayyina ʿalá al-mudaʿī wa al-yamīn ʿalá man ankar*."[841]

[840] Carter, *Rape in Medieval England*, 3-4.
[841] For more on this principle, please see: Maḥallī, *Sharḥ*, 4: 341; Ibn Qudāma, *al-Mughnī,* 12: 94. For claims and evidence in general, please see: Maḥallī, *Sharḥ*, 4: 334-349 especially p. 344.

Moreover, before the invention of the adversarial trial, the coming of the office of the prosecution and the conceptualisation of criminal offences as crimes against the state,[842] the focus of rape cases may have been the infringement of the victim's rights or the rights of God but not the rights of the state.[843] Hence, because the process had been different, the outcome may have been more focused on righting some of the wrong done to the victim, through concrete means of redress. Criminal punishment definitely existed (as evidenced by the chapters on the *ḥudūd*), however, other outcomes and other means of redress were also envisaged. It is the aim of this chapter to explore some of these outcomes.

Finally, I question the association of justice for rape, particularly penetrative rape, with the imposition of the *ḥudūd*. In making this argument, I shall be taking my cue from Ibn ʿĀbidīn's statement that *zinā* is broader than the *ḥudūd* and that only certain kinds of *zinā* warrant the *ḥadd*.[844] Indeed, not every sexual act was considered a *ḥadd* offence warranting corporal or capital punishment. Moreover, several scholars have challenged the association of justice for rape with the *ḥudūd*. They pointed out that rape was recognised as an indemnifiable tort and that justice often took the form of financial restitution.[845] Azam, in particular, devoted considerable attention to this topic and delved, in great detail, into the difference between the Mālikī and Ḥanafī schools concerning such an indemnity.[846] I shall follow in the footsteps of these scholars.

In broadening the scope of the outcomes envisaged for sexual violation, my emphasis will be on restorative rather than punitive justice. My understanding of restorative justice was

[842] John H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press, 2002); John Hostetler, *Fighting For Justice. The history And Origins of Adversary Trial* (Winchester, United Kingdom: Waterside Press, 2006).
[843] For more on the rights of the individual and the rights of God, please see Emon, "Ḥuqūq."
[844] Ibn ʿĀbidīn, *Radd*, 4: 4.
[845] Peters, *Crime and Punishment*, 59; Azam, *Sexual Violation*, 114-167; Kozma, "Negotiating Virginity," 57.
[846] Azam, *Sexual Violation*, 114-247.

influenced by the scholarship of Sen, Johnstone and Van Ness, as well as Zehr.[847] Equally influential on my thought was Saleilles' "The individualization of punishment."[848] Johansen, as I noted earlier, had stated that acts engendered different outcomes in different areas of the *furūʿ*. Therefore, by considering the different outcomes of rape, I would be drawing upon Johansen's arguments by enlarging the scope of justice beyond the punitive and demonstrating the plurality of options available to judges and litigants.

Jurists devised different outcomes to acts of sexual violation. Some of these outcomes will be delved into in this chapter and some will not. There was, for example, the *ḥadd* punishment for a penetrative act (*zinā*); there was the legal recognition of a rape victim as a virgin even when she was not factually so; there was financial indemnity paid either to the victim or to her owner if she had been a slave and lastly there was penance and expiation (*kaffāra*) for spousal coercion if *ikrāh* had occurred while fasting or on pilgrimage.[849] However, since the act of spousal coercion was condemned because of its circumstance and not *an sich*, rehabilitation was offered as religious atonement. Spousal sexual coercion was condemned and punished by means of an indemnity only when it entailed physical harm to the wife.

As such, different means of justice were being served: restitution[850] (the legal recognition of the raped victim as a virgin), reparation[851] (the indemnity), rehabilitation

[847] Amartya Sen, "What Do We Want From a Theory of Justice?", in *Theories of Justice*, ed. Tom Campbell and Alejandra Mancilla (Great Britain: Ashgate, 2012), 27-50; Gerry Johnstone and Daniel W. Van Ness, "The meaning of restorative justice," in *A Restorative Justice Reader*, ed. Gerry Johnstone, 2nd ed. (London and New York: Routledge, 2013), 12-22; Howard Zehr, "Retributive justice, restorative justice," in *A Restorative Justice Reader*, ed. Gerry Johnstone, 2nd ed. (London and New York: Routledge, 2013), 23-35.
[848] Robert Saleilles, "The individualization of punishment," in *Offenders or Citizens. Readings in Rehabilitation*, ed. Philip Priestly and Maurice Vanstone (Devon: Willan Publishing, 2010), 42-46.
[849] *Al-Fatāwá al-Hindiyya*, 5: 49; Shīrāzī, *Muhadhdhab*, 1: 247, 282.
[850] I am using the term 'restitution' in the sense defined by *Black's* as: "An equitable remedy under which a person is restored to his or her original position prior to loss or injury, or placed in the position he or she would have been, had the breach not occurred."1313.

(*kaffāra*) and corporal/capital punishment (the *ḥadd*) depending on the nature or the circumstances surrounding the act. In other words, legal theory devised a number of possible outcomes that could have allowed jurists to tailor justice to fit the crime through a variety of personal, monetary and punitive means.

Before embarking on the outcomes, a few words are in order concerning the identity of the coerced and their coercers. It is important to do so for a number of reasons. Firstly, it will show who these people were thought to be. Instead of the impersonal "*al-mukrih*" and "*al-mustakraha*," we will glimpse a more personal and concrete picture of the coerced and their coercers. Secondly, in doing so, we shall see different kinds of rape being legally recognised as offences. The recognition of different types of rape as legally repugnant is an important legal development because some forms of rape such as acquaintance, marital and male rape were not always legally recognised as offences. Hale's definition of the inadmissibility of marital rape, as quoted in the introduction, is a case in point. Indeed, while violent rapes and stranger rapes were (and still are) the two most legally recognisable forms of rape, other forms of rape were not always legally recognised as offences. Estrich's seminal argument concerning the need to broaden the legal recognition of multiple forms of rape, demonstrates this ongoing process. Thirdly, acknowledging and handling acquaintance and seduction rapes pose, and probably posed, unique problems in terms of corroborative evidence (or the lack thereof) since these forms of rape usually take place in private settings and do not resort to force in overcoming the will of the victim, for the most part. Victim compliance is usually obtained through fear, lies, threats, false promises etc... hence the absence of signs of struggle or resistance on the body of the coerced. To counterbalance this lack of physical evidence, jurists

[851] I am using the term 'reparation' in the sense defined by *Black's* as: "Payment for an injury or damage; redress for a wrong done," 1298.

needed to broaden the scope of acceptable proofs as we shall see and to re-calibrate the role of consent, as we already saw by nullifying victim consent in many instances thereby recognising many acts of rape as strict liability offences where punishment obtains by virtue of the sexual act rather than the establishment of *mens rea* or the lack of consent. *Mens rea* and criminal fault, in these instances may have helped determine the degree of punishment but not the fact of punishment.

## The Coercer

Shāfiʿī's *masʾalat al-mustakraha* incorporated a number of elements that were later discussed and expanded by other jurists. The first was the recognition of a coercer who was usually referred to as *al-mukrih* or *al-mustakrih.*[852] The coercer was usually referred to in very general terms and no or very little detail was offered concerning his identity, in the sections on *ikrāh* within *furūʿ* and *fatāwá* works. Cases in point include Shāfiʿī,[853] Kāsānī,[854] Bābartī,[855] Qāḍī Zāda[856], Shaykh Zāda[857] and the *Fatāwá Hindiyya,*[858] to name but a few.

Although male sexual coercion was frequently mentioned, jurists did not often mention if these males were coerced into penetrating others or being penetrated by others. For example:

> If he were coerced under pain of death to commit *zinā* (*ukriha bil-qatl ʿalá an yaznī*) he cannot comply and if he does and he was in a state of *iḥrām*, his *iḥrām* would have been corrupted and he had to perform penance (*kaffāra*).[859]

[852] *Al-Fatāwá al-Hindiyya*, 5: 35, 48; Nafrāwī, *Fawākih*, 2: 75.
[853] Shāfiʿī, *al-Umm*, 3: 230.
[854] Kāsānī, *Badāʾiʿ*, 7: 180-181.
[855] Bābartī, *al-ʿInāya,* 9: 249.
[856] Qāḍī Zāda, *Natāʾij*, 9: 249.
[857] Shaykh Zāda, *Majmaʿ al-Anhur*, 4: 43.
[858] *Al-Fatāwá al-Hindiyya*, 5: 48.
[859] Ibid., 5: 49.

Although most mention of sexual coercion did not state the gender of the other sexual partner, jurists sometimes clearly mentioned the gender of the other sexual partner and sometimes the two statements were juxtaposed one against the other. For example, the *Fatāwá Hindiyya* mentioned two cases consecutively one involving a man coerced into committing *zinā* with a female[860] as well as another case involving a man coerced into *zinā*.[861] Unlike the first case, the *Fatāwá Hindiyya* did not mention the gender of the sexual partner in the second case; a juxtaposition which may have carried no special significance or a change in technique that may have signified that when a female was involved she was specifically mentioned but when a male was involved the gender of the sexual partner was not specifically mentioned.

When one examines sections other than *ikrāh* in *furūʿ* works, however, or delves into *fatāwá* works, one finds that the coercer could have been both a stranger and/or an acquaintance or family member. The coercer was portrayed as a single actor such as a husband, a son-in-law, a father in-law or the owner of a slave-woman as well as multiple criminal actors. For example, in the chapter on *ṣawm* (fasting), Khurashī mentioned a husband who forced his wife into having sexual intercourse with him in Ramaḍān;[862] also in the chapter on fasting, ʿIllaysh stated that the coercing husband could have been both free or slave coercing a wife who was either free or slave.[863] Similarly, in the chapter on the *diyyāt*, Qāḍīkhān considered the case of a husband being forced into sexual intercourse with his wife in Ramaḍān.[864] Moreover, in the chapter on *nikāḥ* (marriage), Shāfiʿī examined the case of a man

[860] Ibid., 5: 48.
[861] Ibid., 5: 49.
[862] Khurashī, *al-Khurashī ʿalá Mukhtaṣar Sīdī Khalīl* (n.p.: Dār al-Fikr, n.d.), 1: 255. Ramaḍān is the ninth month of the Islamic calendar. It is the month of fasting.
[863] ʿIllaysh, *Taqrīrāt*, 1: 530. I am writing his name as ʿIllaysh and not ʻUllaysh because his biography states that his name is to be pronounced with an "ī" not a "u" sound. Dasūqī, *Ḥāshiya*, 1, appendix D.
[864] Qāḍīkhān, *Fatāwá*, 3: 487.

who forced his slave women into prostitution,[865] and in the chapter on *mīrāth* (inheritance), Ibn Ḥazm wrote of a father in-law being forced to carnally abuse his daughter in-law in order to annul her marriage to his son.[866] Furthermore, Ibn Qudāma maintained that if a man forced himself onto his step-mother during his father's illness (thereby *ipso facto* annulling her marriage to his father) and the father later dies; she should still inherit her share from her late husband's estate. He stated that "if the son coerced his step-mother (*istakraha*) into annulling her marriage through sexual intercourse or anything else (*min waṭʾin aw ghayrahu*) during his father's last illness, and the father dies from that illness she inherits from him."[867]

In addition to male coercers, a number of jurists mentioned female coercers as well. These female coercers were portrayed as coercing men and women alike. ʿAdawī and Dasūqī both considered the case of a man who had been coerced by a woman into having intercourse with her (*law kānat hiya al-mukrihatu lahu ʿalá al-zinā*) and whether he should still pay her an indemnity and receive the *ḥadd* punishment for it or not.[868] Similarly, Zurqānī stated that if a male were coerced by a female into committing *zinā* with her, the coerced was not obliged to pay her an indemnity in such a case.[869] The case of a female coercer and the negation of the indemnity in such a case were equally mentioned by Ṣāwī.[870]

The female coercer could also have been a woman or a group of women physically overpowering another girl or woman and deflowering her. Qalyūbī (d.1658 or 9 C.E.) stated that if a virgin deflowers another virgin, the same act should befall her ("retaliation must be

[865] Shāfiʿī, *al-Umm*, 5: 156.
[866] Ibn Ḥazm, *al-Muḥallá*, 7: 211.
[867] Ibn Qudāma, *al-Mughnī*, 7: 225. My emphasis.
[868] ʿAlī al-ʿAdawī, *Ḥāshiyat al-Shaykh ʿAlī al-ʿAdawī,* printed with Khurashī, *al-Khurashī ʿalá Mukhtaṣar Sīdī Khalīl* (n.p.: Dār al-Fikr, n.d.), 8: 80; Dasūqī, *Ḥāshiya*, 4: 318.
[869] Zurqānī, *Sharḥ*, 8: 80.
[870] Ṣāwī, *Bulghat*, 2: 392.

done unto her/*wajab al-qawdu ʿalayhā"*).[871] Ibn Qudāma, on the other hand, stated that if a woman or group of women intentionally and digitally deflower a virgin ("*fa-ʿamadat ilayhā fa-afsadathā bi-iṣbaʿihā"*), they should pay their victim an indemnity.[872] Ibn Qudāma's statement points to the acceptance of multiple perpetrators as sexual coercers, all of whom could have been held equally responsible for civil redress towards their victim. Of particular interest in Ibn Qudāma's statement is his use of diction particularly "*fa-ʿamadat*/ she intentionally" and "*afsadathā*/ she spoiled/removed chastity her" [spoiling here is in the form of removing chastity] which denote both willful intent to inflict harm as well as a certain degree of malice. In other words, Ibn Qudāma seems to have extended the fault element of duress beyond *mens rea* to include malice as well.

The examples I included here are not many but they are rare. Finding them was like looking for a needle in a hay stack because they involved the search into legal categories that are not ususally connected to rape. My only explanation for the scarcity of concrete examples is that in writing the *furūʿ*, jurists may have stripped them of as much personal information as possible in order to translate the particular into the general. Jurists seem to have incorporated casuistry but tried to move beyond it in a process that resembled that used in the *fatāwá* literature or the process of incorporating the *fatāwá* within the *furūʿ*, as Hallaq had demonstrated.[873]

[871] Shihāb al-Dīn Aḥmad ibn Aḥmad al-Qalyūbī, *Ḥāshiyatān al-Qalyūbī wa ʿUmayrah ʿalá Sharḥ al-Maḥallī ʿalá Minhāj al-Ṭālibīn* (Cairo: Maṭbaʿat Muṣṭafá al-Bābī al-Ḥalabī, 1956), 4: 142.
[872] Ibn Qudāma, *al-Mughnī*, 8: 68.
[873] Hallaq, "From Fatwās to Furūʿ."

## The Coerced

Like the coercers, the coerced were referred to in very generic terms such as "*al-mukrah*"[874] for a male and "*al-mukraha*"[875] or "*al-mustakraha*"[876] for a female with very little or no indication about them in the chapters on *ikrāh*, *zinā* or *ghaṣb*. However, their mention, in the previous contexts, does indicate that the coercion of both males and females was equally recognised.[877]

The coerced female was referred to in terms of the act done unto her (*al-mukraha*) but was not described as the victim (*al-majnīʿalayhā*), for example. By contrast, a coerced male was sometimes described in terms of the act done unto him as the penetrated (*al-mafʿūl bihi*).[878]

From the previous investigation into the different types of coercers, one is able to discern the kind of women who were legally recognized to have been victims of sexual coercion. One encounters females from all age groups whether wives, step-daughters, step-mothers, slaves or free women as well as virgins and non-virgins alike. By criminalising the sexual coercion of non-virgins, the protection of the law was theoretically extended beyond the hymen. In other words, the rulings on sexual coercion were not devised for the sole purpose of the protection of virginity but recognised the sexual integrity of all females. This is of course as far as legal doctrine decreed, whether legal practice implemented the spirit of the law, as Serrano affirmed in her study of rape cases,[879] or not is beyond the purview of this

[874] Khalīl, *Mukhtaṣar*, 2: 284, printed with al-Ābī al-Azharī, *Jawāhir*, 2: 284; *al-Fatāwá al-Hindiyya*, 5: 35; Nafrāwī, *Fawākih*, 2: 75.
[875] Khalīl, *Mukhtaṣar*, 2: 284, printed with al-Ābī al-Azharī, *Jawāhir*, 2: 284.
[876] Shāfiʿī, *al-Umm*, 3: 230; Mālik, *Muwaṭṭaʾ*, 2: 576.
[877] For examples of jurists who mentioned both male and female coerced in the same discourse, please see: Khalīl, *Mukhtaṣar*, 2: 284, printed with al-Ābī, *Jawāhir*, 2: 284;
[878] Abī al-Ḥassan, *Sharḥ Abī al-Ḥassan li-risālat ibn Abī Zayd,* 2: 299. See also: Nafrāwī, *Fawākih*, 2: 282.
[879] Serrano, "Rape", 185.

dissertation. It is, however, significant that legal doctrine recognised the protection of sexuality in general and not virginity in particular.

### Legal Status of the Female Victim

In this section, I shall delve into the legal status of the female victim of rape. The discourse on virginity and the legal definition of a virgin, I argue, offers one of the clearest indications of restorative justice at work. The three terms used by jurists in this context were *thayyib*,[880] *bikr* and to a lesser extent *ʿadhrāʾ*. As to be expected, not all four schools held the same opinion concerning the legal status of the victim following her rape. Although they shared certain opinions, a marked difference existed concerning their final decisions. I shall argue that a number of distinct positions can be discerned concerning the legal status of the rape victim. The Ḥanafīs maintained a certain position and the Shāfiʿīs and Ḥanbalīs maintained an opposite position, while the Mālikīs maintained an intermediate position between these different stances;[881] each of which carried significant legal advantages and disadvantages for the victim.

The discourse on virginity and non-virginity as well as the factors that change the legal status of the female from one to the other can be found in the "quarter" of *fiqh* works dealing with marriage. Specifically, this discourse was usually placed in the sections dealing with marriage guardians and whom they could and could not marry without the latter's consent. While a virgin, particularly an under-age one, whether male or female could have been married off by his/her guardian, a non-virgin had the right to choose her spouse.

[880] Hans Wehr, *A Dictionary of Modern Written Arabic* (Weisbaden: Otto Harrasowitz, 1979), 131 defines a *thayyib* as "a deflowered but unmarried woman, widow, and divorcee."

[881] A similar finding in the context of the *ḥudūd* was noted by Anver Emon who observed that the Ḥanafīs had maintained a certain position, the Shāfiʿīs and Ḥanbalīs maintained a diametrically opposed one and the Mālikīs had maintained an intermediate position between these two stances. Emon, "Ḥuqūq," 391.

While sexual intercourse within the framework of valid matrimony, quasi-matrimony (*shubha*) and ownership changed a female's legal status from virgin to non-virgin, jurists questioned the effect of sexual intercourse within other frameworks. Would a victim of *zinā* or *ghaṣb* (whose sexual experience amounted to this one coercive act) be recognised as a *thayyib* based on this act and given all the rights that go with such status or not, particularly if she had been underage? In such cases, was age the determining factor or the sexual experience, however transient? Moreover, if age were the determining factor, would an older virgin be granted the right to choose *ipso facto*? What would the cut-off age be for freedom of choice, would it be puberty or maturity? And, if sexual experience were the determining factor, what kind of sexual experience did it have to be? Penetrative or not? Once or multiple times? All these were questions that jurists raised and grappled with.[882] However, for the purpose of this section, I shall concentrate on the relation between *zinā* and *ghaṣb* and their after-effects on the legal status of the female.

Due to the fact that the discourse on legal status was tied to that of (non)virginity and its concomitant right to choose a spouse, all three topics were broached simultaneously in *fiqh* works. As we shall shortly see, the legal change of a female's status from *bikr* to *thayyib* often meant that the female was granted the right to choose her future spouse; a right which some jurists were reluctant to grant to a pre-pubescent victim of *ikrāh* or *ghaṣb*, for example. As such, some jurists did not change a rape victim's status to that of a *thayyib* by not recognising *zinā* or *ghaṣb* as valid sexual experiences. Consequently, they did not grant her the right to choose a spouse. Other jurists, however, recognised *zinā* and *ghaṣb* as valid sexual experiences

[882] See for example, Ibn Rushd, *Bidāyat*, 2: 30-33; ʿIllaysh, *Taqrīrāt*, 2: 222-223; Dasūqī, *Ḥāshiya*, 2: 222-223; Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 2:3: 176; ʿAdawī, *Ḥāshiya*, 2:3: 176; Maḥallī, *Sharḥ*, 3: 222-223; Qalyūbī, *Ḥāshiya*, 3: 223; ʿUmayra, *Ḥāshiya*, 3: 223; Shirbīnī, *Mughnī*, 4: 251-252; Nawawī, *Rawḍat*, 5: 376-377; Ramlī, *Nihāyat*, 6: 230; Bayjūrī, *Ḥāshiya*, 2: 212; Khalīl, *Mukhtaṣar,* 1: 278; al-Ābī al-Azharī, *Jawāhir*, 1: 278.

that changed a female's status to that of a non-virgin and granted the female the right to choose her spouse based on that experience. A third group of jurists maintained an intermediate position between the previous two by recognising *zinā* and *ghaṣb* as causes for change to a female's status but not enough to grant her the right to choose a spouse, particularly if she were underage and if her sexual experience had been the result of *zinā* or *ghaṣb*.

Jurists who maintained that *zinā* and *ghaṣb* were not on a par with sexual intercourse within valid matrimony, quasi matrimony or ownership were mostly Ḥanafī and Mālikī jurists. For example, the Ḥanafī jurist Nasafī stated that if someone had "lost her virginity through jumping or menstruation or a wound ...or *zinā,*"[883] she could still be *legally* considered a virgin. An opinion shared by his commentator Ibn Nujaym who stated that: "Whoever lost her virginity (ʿ*udhratahā*)...through the means that he [Nasafī] stated is a virgin *de jure* (*ḥukman*) and through [means] other than *zinā* she is a *de facto* (*ḥaqīqatan*) virgin as well."[884] Similarly, Ḥaṣkafī maintained that a *de facto bikr* could be someone whose defloration was due to heavy menstruation, jumping (*wathba*), a wound (*jirāḥa*) or spinsterhood (*taʿnīs*),[885] thereby drawing a sharp distinction between a *de facto* and a *de jure* virgin. Ibn ʿĀbidīn also included under that *bikr* category, females who had been widowed or divorced before their marriages had been consummated with their former spouses. In such cases, a female was considered a *de facto* (*ḥaqīqatan*) virgin as well.[886] While the widow or divorcee described above was both a *de facto* and a *de jure* virgin, it is surprising that Ibn ʿĀbidīn also included under that category females

[883] ʿAbd-Allāh ibn Aḥmad al-Nasafī, *Kanz al-daqāʾiq*, printed with ʿAbd al-Ḥakīm al-Afghānī, *Kashf al-ḥaqāʾiq sharḥ Kanz al-daqāʾiq*, ed. Maḥmūd al-ʿAṭṭār (Cairo: Maṭbaʿat al-Mawsūʿāt, 1900), 3: 124.
[884] Ibn Nujaym, *al-Baḥr*, 3: 124.
[885] Ḥaṣkafī, *Durr*, 3: 67-68.
[886] Ibn ʿĀbidīn, *Radd*, 3: 67-68.

who had been deflowered through various means. In other words, the *de facto* loss of a woman's virginity through these means did not automatically signify that she had been considered a non-virgin *de jure*, according to these eminent Ḥanafī jurists.

A *de jure* virgin (*bikr ḥukman*) according to Ibn ʿĀbidīn and Ḥaṣkafī was someone who could have been deflowered as a result of *zinā*, as long as she had not received the *ḥadd* for it (i.e. she had not been found guilty of it) and this *zinā* had not been repeated. In such cases, such a female was legally considered to have been a *de jure* virgin. To emphasize this point, Ibn ʿĀbidīn added that Ḥaṣkafī had meant by *de jure* (*ḥukman*) what was not real or *de facto* (*ḥaqīqī*).[887]

The distinction between a *de facto* and a *de jure* virgin can be seen in the thought of other jurists as well such as Shaykh Zāda and Kāsānī. For example, Shaykh Zāda stated that whoever "loses her virginity due to jumping, menstruation, a wound or age/spinsterhood (*taʿnīs*) ...is considered a *de facto* virgin (*bikr ḥaqīqatan*), in other words, they are legally considered virgins (*abkār*) ...but she is not an *ʿadhrāʾ* (virgin)."[888] In this statement, Shaykh Zāda not only outlined the difference between a *de facto* and a *de jure* virgin but also the difference between a *bikr* and an *ʿadhrāʾ*. Whereas the former denoted someone who was legally considered to have been a virgin (even if she was not so *de facto*), the latter was someone who was *de facto* and *de jure* virgin.

Consequently, it is important to note the existence and usage of two separate terms for "virgin." *Bikr* was a legal term used to denote someone who was legally considered to have been a virgin either *de facto* (*ḥaqīqatan*) or *de jure* (*ḥukman*), while *ʿadhrāʾ* was a similar term

[887] Ibid.
[888] Shaykh Zāda, *Majmaʿ al-anhur*, 1: 401.

used exclusively to denote someone who was a *de facto* virgin. While at first blush both terms may seem synonymous, deeper examination reveals a marked difference between them. It is equally important to note that *bikr* was the term most used by jurists in the sections on marriage, *mahr* and the *ḥudūd*. It is also the term used in marriage contracts and not the term *ʿadhrāʾ*.

The distinction between *de facto* and *de jure* was equally expressed by Kāsānī who maintained that:

> It is important to know virginity or non-virginity *de jure* (*fī al-ḥukm*) and not *de facto* (*lā fī al-ḥaqīqa*) because the reality of virginity is the presence of the hymen and the reality of non-virginity (*thayūba*) is the absence of the hymen, however, the law (*al-ḥukm*) is not based on that, on the basis of *ijmāʿ*.[889]

In addition, Kāsānī maintained that there was no disagreement, presumably amongst his contemporaries, that whoever loses her virginity due to jumping, menstruation or age that she was to be legally considered as a virgin.[890] However, if such a female were to lose her virginity "as a result of *zinā*, she is to be married as a virgin according to Abū Ḥanīfa but according to Abū Yūsuf, Muhammad [Shaybānī] and Shafiʿī she is to be married as a non-virgin," he added.[891] Providing that she had not [been convicted of and] received the *ḥadd* for *zinā* and that her *zinā* was not a repeated habit (*ʿāda*), Sarakhsī mentioned.[892]

The above statements demonstrate the existence of disagreement amongst early jurists concerning the scope of legal virginity. Whereas Abū Ḥanīfa had included *zinā* among the causes of *de jure* virginity, Abū Yūsuf, Shaybānī and Shafiʿī did not. The presence of these two

[889] Kāsānī, *Badāʾiʿ*, 3: 374-375.
[890] Ibid.
[891] Ibid.
[892] Sarakhsī, *Mabsūṭ*, 5: 7.

early stances can be equally seen in the thought of Sarakhsī and Marghinānī.[893] Whereas the two stances concerning the inclusion/exclusion of *zinā* from the ambit of legal virginity were found in the thought of early Ḥanafī jurists like Kāsānī and Sarakhsī, disagreement concerning the legal status of the unconvicted *zāniya* seems to have been resolved by the time of Ibn ʿĀbidīn.

In sum, within the Ḥanafī school, jurists seem to have agreed that whoever had lost her virginity due to heavy menstruation, jumping, a wound or old age was deemed to have been a *de jure* and a *de facto bikr* but not an *ʿadhrāʾ*.[894] In addition, there seems to have been an early disagreement concerning the woman who had lost her virginity as a result of *zinā*, particularly if had not received the *ḥadd* for it, it was not a recurrent act,[895] and her *zinā* had not been publicised (*zinā khafī*).[896] In other words, she had not been convicted of it. This disagreement was attributed to difference between Abū Ḥanīfa, on the one hand, and Abū Yūsuf and Shaybānī on the other hand.[897] This disagreement seems to have been resolved in later sources in favour of recognising the blameless *zāniya* as a *de jure bikr* as well.[898]

Within the Mālikī school, a discourse similar to the above can be found concerning the definition of virginity versus non-virginity and the elements that cause this change in legal status. The Mālikī position, as I shall demonstrate, seems to have occupied an intermediate position between that of the Ḥanafīs, on the one hand, and the Shāfiʿīs and Ḥanbalīs, on the

[893] Sarakhsī, *Mabsūṭ*, 5: 7-8; Marghinānī, *Hidāya*, 2: 170.
[894] Marghinānī, *Hidāya*, 2: 170; Ḥalabī, *Multaqá,* 1: 401; Shaykh Zāda, *Majmaʿal-anhur*, 1: 401; Nasafī, *Kanz*, 3: 124; Ibn Nujaym, *al-Baḥr*, 3: 124 and 3: 67-68; Ḥaṣkafī, *Durr*, 3: 67-68; Kāsānī, *Badāʾiʿ*, 3: 374-375; Sarakhsī, *Mabsūṭ*, 5: 8.
[895] Ḥalabī, *Multaqá,* 1: 401; Shaykh Zāda, *Majmaʿal-anhur*, 1: 401; Ibn ʿĀbidīn, *Radd*, 3: 67-68; Ḥaṣkafī, *Durr*, 3: 68; Kāsānī, *Badāʾiʿ*, 3: 375;
[896] Ḥalabī, *Multaqá,* 1: 401.
[897] Marghinānī, *Hidāya*, 2: 170; Ḥalabī, *Multaqá,* 1: 401; Shaykh Zāda, *Majmaʿal-anhur*, 1: 401; Ibn Nujaym, *al-Baḥr*, 3: 124; Kāsānī, *Badāʾiʿ*, 3: 375; Sarakhsī, *Mabsūṭ*, 5: 7.
[898] Nasafī, *Kanz*, 3: 124; Ibn Nujaym, *Baḥr*, 3: 124; Ibn ʿĀbidīn, *Radd*, 3: 67-68; Nasafī, *Kanz*, 3: 124; Ḥaṣkafī, *Durr*, 3: 67-68.

other. While Mālikī jurists did not recognise a blameless *zāniya* as a legal *bikr*, they still treated her as such by granting her father the right to marry her off without her consent. The Mālikīs called such a female a *thayyib* but treated her as a *bikr* by not granting her the right to choose her spouse.

Ibn Rushd stated that contemporaneous disagreement concerning the definition of non-virginity could be attributed to two stands. The first stand was attributed to Abū Ḥanīfa and Mālik who had maintained that non-virginity had to be the result of valid matrimony, quasi-matrimony or ownership but not the result of *zinā* or *ghaṣb*. The other stand was attributed to al-Shafiʿī.[899] According to the first stand, the female's father had the right to marry her off but according to the second stance, he did not have the right to do so and she had the right to reply [to the marriage proposal] either in agreement or disagreement.[900]

Importantly, for the purpose of this section, Abū Ḥanīfa and Mālik's positions did not recognise either *zinā* or *ghaṣb* as a factor on a par with matrimony or ownership. Whereas matrimony and ownership changed the legal status of the female into a *thayyib* and gave her the right to choose her future spouse, *zinā* and *ghaṣb* did not do so according to Abū Ḥanīfa and Mālik.[901] This difference stemmed from the distinction between *de jure* virginity (*thayyuba sharʿiyya*) and linguistic virginity (*thayyuba lughawiyya*), according to Ibn Rushd.[902]

In spite of their agreement that *zinā* and *ghaṣb* were not on a par with matrimony, an important difference existed between Abū Ḥanīfa and Mālik and their respective schools. That difference concerned the term given to the female victims of *zinā* or *ghaṣb*. Whereas Ḥanafīs

[899] Ibn Rushd, *Bidāyat*, 2: 31-32.
[900] Ibid.
[901] Ibid.
[902] Ibid.

called such a woman a *de jure bikr* and treated her as *bikr* by granting her father the right to marry her, Mālikīs called such a female a *thayyib* but treated her as a *bikr*. ʿIllaysh, for example, stated that a father could marry a *thayyib* off if [her non-virginity had been a result of] a transient accident (*ʿāriḍ*) such as a jump or a blow or an illicit act such as *zinā* or *ghaṣb*, even if she had given birth as a result of that act.[903] However, if her *zinā* were repeated until "her modesty had taken flight,"[904] would her father still have the power to marry her off? There were two answers to such a question, according to ʿIllaysh, one in the affirmative and one in the negative.[905] ʿIllaysh also stated that the soundest response (*al-arjaḥ*) was that the father had the right to marry such a female off.[906]

Other Mālikī jurists also shared the same opinions and the same terminology as the above. As such, the term *thayyib* was used to designate all females who had lost their virginity. However, some jurists withheld the right to choose their future spouses from non-virgins if the latter had been minors, if their defloration had occurred through non-sexual means such as an accident, a blow or an object or through *zinā* and /or *ghaṣb* whether consensual or coerced, and whether it had occurred under a sound state of mind or in a state of sleep and even if the female had borne children as a result of such intercourse.[907] Khurashī stated that a father can marry a daughter off even if "she had committed *zinā* or *zinā* was done unto her or she had been forced (*ghuṣibat*)."[908] Similarly, ʿAdawī maintained that if a *thayyib* "had intended *zinā* to be done unto her, or had had *zinā* done unto her while she was asleep, even if she had

[903] ʿIllaysh, *Taqrīrāt*, 2: 223.
[904] Ibid.
[905] Ibid.
[906] Ibid.
[907] Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 2:3: 176; ʿAdawī, *Ḥāshiya*, 2:3: 176; ʿAdawī, *Ḥāshiya ʿalá sharḥ abī al-Ḥassan*, 2: 39; Khalīl, *Mukhtaṣar,* 1: 278; al-Ābī al-Azharī, *Jawāhir*, 1: 278.
[908] Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 2:3: 176.

had children as a result,"[909] then the most widespread opinion (*al-mashhūr*) within the Mālikī school was that her father could still marry her off,[910] i.e. that notwithstanding her sexual experience, she was still treated as a virgin.

As mentioned earlier, al-Shafiʿī did not consider the blameless *zāniya* as a *de jure* virgin. He stated that "whoever has had sexual intercourse through valid or invalid marriage or *zinā*, before or after puberty is a *thayyib*. Her father cannot marry her off without her consent. He cannot marry her off if she were a *thayyib* even if she were pre-pubescent."[911] This stance seems to have been uniformly adopted by his followers, although some jurists differed from their eponym concerning the age of consent to marriage.[912] Shīrāzī, for example, stated that whoever had lost her virginity through sexual intercourse was to be considered a *thayyib* and could not be married without her consent if she had reached puberty and was of sound mind (*bāligha ʿāqila*).[913] If, however, she had lost her virginity through means other than sexual intercourse then she was to be married as a virgin. The latter was the valid opinion of the Shāfiʿī school.[914]

Indeed, other Shāfiʿī jurists also maintained an expansive definition of virginity by recognising that a *de jure* virgin could have been someone who had lost her virginity through non-sexual means (*bilā waṭʾ*) or through digital penetration.[915] Some jurists also took cognizance of the fact that some females were born without a hymen and hence should still be

[909] ʿAdawī, *Ḥāshiya*, 2:3: 176.
[910] Ibid.
[911] Shafiʿī, *al-Umm*, 5: 16.
[912] Nawawī, *Rawḍat*, 5: 376-377; Shīrāzī, *Muhadhdhab*, 2: 48; Shirbīnī, *Iqnāʿ*, 2: 128; Maḥallī, *Sharḥ*, 3: 223; Qalyūbī, *Ḥāshiya*, 3: 223; ʿUmayra, *Ḥāshiya*, 3: 223.
[913] Shīrāzī, *Muhadhdhab*, 2: 48.
[914] Ibid.
[915] Ramlī, *Nihāyat*, 6: 230; Nawawī, *Rawḍat*, 5: 376-377; Shirbīnī, *Mughnī*, 4: 251-252; Muḥammad al-Marṣafī, *Nafāʾis wa laṭāʾif muntakhaba min Taqrīr al-shaykh Muḥammad al-Marṣafī ʿalá Ḥāshiyat al-Bujayrimī* printed with Sulaymān ibn ʿUmar ibn Muḥammad al- Bujayrimī, *Al-Tajrīd li-nafʿ al-ʿibād* (Cairo: Muṣṭafá al-Bābī al-Ḥalabī, n.d.), 3: 340; Bayjūrī, *Ḥāshiya*, 2: 212; Shirbīnī, *Iqnāʿ*, 2: 128; Maḥallī, *Sharḥ*, 3: 223.

legally considered as virgins.[916] Similarly, anal penetration was not considered a cause for becoming a *thayyib*.[917] The defining factor for changing a female's status from virgin to non-virgin was vaginal penetration (*al-waṭʾ fī maḥal al-bikara*).[918]

Like their Ḥanafī counterparts, some Shāfiʿī jurists also distinguished between a *de facto* and a *de jure* virgin and also between a *bikr* and an *ʿadhrāʾ*. Ramlī, for example, stated that:

> A *bikr* is synonymous with *ʿadhrāʾ* legally and linguistically but some distinguish between them by calling a *bikr*, she whose consent [to marriage] is her silence even if she had lost her hymen and they designate as *ʿadhrāʾ*, she who is a *bikr de facto* (*ḥaqīqatan*).[919]

In sum, Shāfiʿī jurists, seem to have held an expansive definition of legal virginity. They recognised as *de jure* virgin women who had lost their virginity through non-sexual means. Unlike their Ḥanafī counterparts, they did not recognise a blameless *zāniya* as a *de jure bikr* but as a *thayyib*.

Ḥanbalī jurists maintained a position very similar to their Shāfiʿī counterparts.[920] The valid opinion within their school (*al-ṣaḥīḥ*) recognised both licit and illicit vaginal sexual intercourse as cause for change to a female's legal status,[921] although a minority opinion did not recognise *zinā* as cause for change especially if the female had been coerced (*mukraha*).[922] If, however, defloration was the result of non-sexual means (such as a jump or heavy menstruation) or if a female had been digitally deflowered or deflowered with an object; such

[916] Ramlī, *Nihāyat*, 6: 230; Nawawī, *Rawḍat*, 5: 376-377; Shirbīnī, *Mughnī*, 4: 251-252; Marṣafī, *Taqrīr*, 3: 340; Bayjūrī, *Ḥāshiya*, 2: 212; Shirbīnī, *Iqnāʿ*, 2: 128-129.
[917] Shubrāmalsī, *Ḥāshiya*, 6: 229; Ramlī, *Nihāyat*, 6: 230; Nawawī, *Rawḍat*, 5: 376; Shirbīnī, *Mughnī*, 4: 251-252; Marṣafī, *Taqrīr*, 3: 340; Bayjūrī, *Ḥāshiya*, 2: 212; Maḥallī, *Sharḥ*, 3: 223; Qalyūbī, *Ḥāshiya*, 3: 223.
[918] Marṣafī, *Taqrīr*, 3: 340; Shirbīnī, *Mughnī*, 4: 251-252
[919] Ramlī, *Nihāyat*, 6: 228.
[920] An excellent summary of Ḥanbalī opinion was provided by Ibn Qudāma, *al-Mughnī*, 7: 388.
[921] Ibid.
[922] Mardāwī, *Inṣāf*, 8: 62-63.

defloration did not change a female's status from *bikr* to *thayyib*.[923] Similarly, anal intercourse did not change a female's legal status.[924]

A noteworthy point raised in some *fiqh* works pertained to the verification of virginity. Was a female's word taken for granted concerning her virginity/defloration? Or was an exam necessary? In other words, did the law bring its gaze inside the female body or not? Interestingly, those Shāfiʿī jurists who had raised this issue within the sections on marriage unanimously agreed that no tests should be performed to verify whether a female had been a virgin or not. This does not mean that other jurists did not ask for virginity tests in other sections of the *furūʿ*.[925] Rather, within the sections on marriage dealing with the definition of virginity, a number of jurists had advocated discretion by calling for the female's word to be taken for granted at face value.[926]

The origin of this stance on virginity tests was attributed to Shāfiʿī who was said to have deemed such a search to be "repugnant" and that asking the female could lead to the "disclosure" of her wrongdoing while "the law advocated discretion."[927] As previously mentioned, this view was adopted by numerous Shāfiʿī jurists, from different eras, as well.[928] A case in point is Bayjūrī who had stated that:

> She is to be believed in her claim to virginity, without an oath, even if she were profligate.... And she is not to be asked for the cause so she should not be asked: what is

[923] Mardāwī, *Inṣāf*, 8: 62-63; Zarkashī, *Sharḥ*, 2: 346, Ibn Qudāma, *al-Mughnī*, 7: 388.
[924] Mardāwī, *Inṣāf*, 8: 63.
[925] See for example, Zarkashī, *Sharḥ*, 2: 416 where a test was called for in order to verify a claim of male impotence raised by a wife against her husband.
[926] Qalyūbī, *Ḥāshiya*, 3: 223; Ramlī, *Nihāyat*, 6: 230; Nawawī, *Rawḍat*, 5: 376-377; Shirbīnī, *Mughnī*, 4: 251-252; Bayjūrī, *Ḥāshiya*, 2: 212; Shirbīnī, *Iqnāʿ*, 2: 128.
[927] Ḥalabī, *Multaqá,* 1: 401.
[928] Qalyūbī, *Ḥāshiya*, 3: 223; Ramlī, *Nihāyat*, 6: 230; Nawawī, *Rawḍat*, 5: 376-377; Shirbīnī, *Mughnī*, 4: 251-252; Bayjūrī, *Ḥāshiya,* 2: 212; Shirbīnī, *Iqnāʿ*, 2: 128.

> the cause of your non-virginity? Even if she had not been married before and she is not to be examined as happens frequently because she knows herself best.[929]

Automatism was sometimes mentioned in the discourse on virginity, just as it is often mentioned in the discourse on *zinā*, in both *furūʿ* and *fatāwá* works.[930] Within the discourse on *zinā*, automatism was always cited as an exculpating factor for the female.[931] Accordingly, a female accused of *zinā* could have pleaded automatism to ward off the *ḥadd* punishment, i.e. she could have said that someone had had sexual intercourse with her while she was asleep or unconscious and she did not know who or how it had happened.[932] Hence, a number of jurists maintained that if a female had lost her virginity through valid or invalid (licit/ illicit) sexual intercourse, *zinā*, coercion or *shubha*, even if repeated, and even if the sexual intercourse had been in a state of sleep or a similar state [she was unconscious, for example], she was to be recognised as a *thayyib*.[933]

The legal implications of the above stands on the *bikr* versus a *thayyib* carried both advantages and disadvantages for females. The legal recognition of the blameless *zāniya* as a *de jure* virgin restored to the latter the legal status that she had lost through *zinā* or *ghaṣb* and

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[929] Bayjūrī, *Ḥāshiya*, 2: 212. Although numerous Shāfiʿī jurists had held the same opinion as Bayjūrī, I chose to quote him in particular because he was a renowned nineteenth century Egyptian jurist writing against virginity tests at a time when such tests were being performed by government appointed midwives. I find his disapproval interesting because he was arguing against the expansion of the legal gaze into the female body at a time when the modern Egyptian state was introducing and broadening such a gaze. Did this contrast in outlook between Bayjūrī's and the modern Egyptian state's signify two different visions of the law and its penetrative scope into people's lives? For more on virginity tests as well as the role of midwives in nineteenth century Egypt, please see: Fahmy, "Women, medicine and power in nineteenth-century Egypt"; Ruiz, "Virginity"; Kozma, "Negotiating Virginity."

[930] Qāḍīkhān, *Fatāwá,* 3: 468; Sarakhsī, *Mabsūṭ*, 24: 88; Ibn Rushd, *Bidāyat*, 2: 652-653; Ḥaṭṭāb, *Mawāhib*, 6: 294.

[931] Automatism, as a mitigating factor for the coerced female, was recognised by jurists as early as Sarakhsī who had stated that *zinā* could occur even if the female were unconscious or sleeping. Sarakhsī, *Mabsūṭ*, 24: 88. See also: Qāḍīkhān, *Fatāwá,* 3: 468; Ibn Rushd, *Bidāyat*, 2: 652-653; Ḥaṭṭāb, *Mawāhib*, 6: 294; Nawawī, *Rawḍat*, 7: 318.

[932] Automatism also figures in archival court records where females sometimes accused their attackers of raping them after drugging them. Kozma has estimated that in nearly a quarter of the rape cases that she had examined, the victims claimed that they had been "drugged or intoxicated." Kozma, "Negotiating Virginity," 61. The plea of automatism on the part of the victim could have been advanced for a number of reasons such as explaining the lack of corroborative evidence, absolving themselves of possible wrongdoing, thwarting an argument from consent by the alleged rapist and generally bolstering their argument and innocence.

[933] Nawawī, *Rawḍat*, 5: 376; Ramlī, *Nihāyat*, 6: 228; ʿAdawī, *Ḥāshiya*, 2:39; Qalyūbī, *Ḥāshiya*, 3: 223.

perhaps restored to her a measure of dignity by not holding her legally guilty of the act done unto her. It may have also been financially advantageous to her because she could have theoretically demanded the *mahr* of a virgin in such as a case. At the same time, a change of legal status into a *thayyib* granted the latter the right to choose her spouse, irrespective of her guardian's wishes. The right to choose a spouse was stated by Ibn Ḥazm as follows: "The *thayyib* marries whoever she wants, even if her father hates it."[934]

In formulating their positions concerning the definition of the *bikr* and *thayyib*, jurists grappled with a number of related concerns such as the right to choose a spouse as well as the kind of sexual intercourse that causes a change of status. Ḥanafī and Mālikī jurists, for example, did not put *zinā* or *ghaṣb* on a par with sexual intercourse within valid/quasi valid matrimonial or ownership relationships, particularly if the female had been a minor, or the *zinā* had not been repeated and/or the female had not been found to have been legally guilty of it. And, since the female was not found guilty, she could not become a *thayyib* on a par with a wife according to Ḥanafī jurists. As such, they used a number of legal terms and categories to define these females. There was the *ʿadhrāʾ* who was both *de facto* and *de jure* virgin. There was the *de facto bikr* who was a virgin who had been deflowered through non-sexual means and there was the *de jure bikr* who had been deflowered through sexual means but who was not legally guilty/ responsible for them. Consequently, Ḥanafī jurists translated their beliefs into action by restoring the blameless *zāniya* to her former legal status. And, while Mālikī jurists also shared the same views as their Ḥanafī counterparts on sexual intercourse within and without legally sanctioned relationships, they opted for defining a non-virgin as a non-virgin while at the same time withholding from her the right to choose a spouse given that her sexual

[934] Ibn Ḥazm, *Muḥallá,* 9: 459.

experience was not on a par with matrimony or ownership. By contrast Shāfiʿī and Ḥanbalī jurists had called a non-virgin as a non-virgin and treated her as a non-virgin by giving her the right to choose her future spouse.

What the above demonstrates is that the discourse on virginity in *furūʿ* works was far from monolithic or homogenous. Jurists grappled with complex questions and devised novel solutions to address them. This investigation, I hope, will form a welcome contribution to scholarship on the history of virginity. In the same vein, the analysis of the different terms used to define the different kinds of virgins offers an additional contribution to scholarship by outlining the complexity of the discourse both linguistically and legally. Although *bikr* and *ʿadhrāʾ* may seem synonymous at first blush, I hope to have demonstrated that they carried different legal connotations. Research on the different terms used to denote females was undertaken by Peirce who had tackled the different terms used for females in archival records.[935] In her research, however, the different kinds of *bikr* as well as the difference between a *bikr* and an *ʿadhrāʾ* were not explored. This may have been due to the nature of archival records where terms were used without necessarily an explication of their meanings, since the records utilised the terms already explored in other legal genres.

What the above section also demonstrates is that legal development and change were achieved in terms of the expansion of the parameters of the discourse on virginity, the expansion of the different categories as well as the invention of new terms. Legal change was not undertaken in terms of exclusion, the contraction of the scope of categories or the

[935] Peirce, "Seniority, Sexuality, And Social Order: The Vocabulary Of Gender In Early Modern Ottoman Society," in Madeline C. Zilfi ed. *Women In The Ottoman Empire. Middle Eastern Women in the Early Modern Era* (Leiden: Brill, 1997), 169-196.

elimination of terms and by consequence the concepts that these terms embodied; a feature very similar to legal developments pertaining to the category of duress.

Rather than a narrow definition of virginity that only recognized *de facto* virgins as such, the sources reflect an expansive *de jure* definition that did not seek to tighten the parameters of virginity. Jurists of all schools recognised as *de jure* virgins, females who had been deflowered through non-sexual means. How can we interpret such a phenomenon? Is this legal expansion indicative of the importance of virginity for the societies that these jurists addressed? In other words, did jurists expand the definition in order to include as many women as possible under its rubric, given the close links between virginity, marriageability and perhaps honour that (may have) existed at the time? Did such legal recognition lessen the degree of victim blaming? Or, to the contrary, was virginity not regarded as axiomatic to marriageability and jurists felt free to expand the parameters of such a definition?[936] Were they simply being pragmatic? Moreover, what does this expansion denote in terms of the legal control of sexuality and the female body? Was this legal expansion an attempt at restoring the victim to her original position or did it reflect a greater anxiety about the need to control new aspects of gender relations and female sexuality?

In terms of structure, as previously mentioned, the discourse on virginity can be usually located towards the beginning of the chapters/ quarters on marriage. It was regularly placed under the sections on whom a guardian could or could not marry. This placement of the discourse on virginity at the beginning of the chapters on marriage can be found in all four

[936] For more on the close links between marriageability and virginity in modern society, please see: Samantha Wehbi, "Women With Nothing To Lose" Marriageability And Women's Perceptions Of Rape And Consent In Contemporary Beirut," *Women's Studies International Forum* 25, no. 3 (2002): 287-300.

schools of law.[937] Given that sexual duress, *zinā* and *ghaṣb* were mentioned within this discourse, it is important to note that information on rape was disseminated throughout *furūʿ* works. Information on rape was not bundled in a separate section. Rather, the *furūʿ* seem to have been conceived as organic units with layers of meaning dispersed under different headings.

## Indemnity

This section deals with the different kinds of financial indemnities that were paid in settlement of civil cases of rape and sexual violence. Although financial indemnities were mentioned, *inter alia*, in the previous chapters, here I explore this issue in greater depth. I delve specifically into the dower (*mahr/ sadāq*) suggested for penetrative intercourse, the indemnity called *arsh* proposed for defloration and thediyafor sexual injuries.[938] I try to show that more than one kind of indemnity was available to victims depending on the context and nature of the offence as well as the extent of damage accrued. Each indemnity had a specific legal term to denote it. I view the indemnities as a form of reparation made by the criminal actor and/or his support group (*ʿāqila*) towards the victim. Highlighting the different indemnities will underscore the effort made by jurists to expand the parameters of justice from the punitive to the restorative. Justice, as I will try to show, was not limited to inflicting the *ḥadd* on the offender but extended to concrete reparation towards the victim. Jurists

[937] Marghinānī, *Hidāya*, 2: 170; Ḥalabī, *Multaqá,* 1: 401; Shaykh Zāda, *Majmaʿ al-anhur*, 1: 401; Nasafī, *Kanz*, 3: 124; Ibn Nujaym, *al-Baḥr*, 3: 124; 3: 67-68; Ḥaṣkafī, *Durr*, 3: 67-68; Kāsānī, *Badāʾiʿ*, 3: 374-375; Sarakhsī, *Mabsūṭ*, 5: 8; Ibn ʿĀbidīn, *Radd*, 3: 67-68.

[938] The indemnity for sexual injuries inflicted on a slave woman was called a *ḥukūma*. There was no fixed amount for it but was decided on a case by case basis depending on a number of variables. To pay full justice to the *ḥukūma*, a separate study needs to be undertaken which, unfortunately, lies beyond the scope of this dissertation.

explored in great detail, as will be shown, the different kinds of harm, the different kinds of victims (old or young/ wife or stranger), as well as the different means of inflicting harm (penile, digital or with an object). Similarly, they linked their conclusions to criminal fault, i.e. did the offender inflict harm with full intent, partial intent or was his act an unintentional mistake? Similarly, the link between the *actus reus* and consent will be explored.

Jurists sometimes required that the offender pay the indemnity out of his own funds and at other times required his support group to do so. Such a requirement, I would like to suggest, underscores community involvement in reparation for criminal offences as well as, perhaps, the prevention of recidivism. Accordingly, whenever the support group was mentioned, I shall make note of it.

Another reason for exploring the indemnities is the desire to situate my research *vis à vis* that of Azam's. Although I agree with many of her findings and acknowledge her substantial contribution to the discourse on rape, I disagree with her on the matter of Ḥanafī dower payments. Azam had argued that Ḥanafī jurists did not grant rape victims a dower preferring instead to punish the offender through the *ḥadd*.[939] While that conclusion may have been true in some rape cases, it is not evident in all rape cases, as I shall seek to show. The most common forms of indemnity for rape seem to have been a payment equivalent to the dower received by the peers of the victim and/or a *diya in lieu* of physical injuries. The *diya* could have been full or partial depending on the extent of injuries that the victim had sustained. Although a victim could have suffered multiple injuries, genital or otherwise, I shall concentrate on the compensation for genital injuries.

[939] Azam, *Sexual Violation*, 154-156.

## The Dower

A dower equivalent in value to that received by the female victim's peers was usually required for sexual violation recognised as either *ikrāh* or *ghaṣb*. Similarly, in the case of an abducted slave, the indemnity paid to her owner was usually called a *ḍamān*. By devising a number of indemnities for rape and sexual violence, jurists thereby recognised rape as an indemnifiable tort in addition to a *ḥadd* offence. The question that presented itself was: Could a single deed exist as a criminal offence (warranting the *ḥadd*) as well as a civil one (warranting an indemnity) or did one form of punishment negate the other? In other words, were the civil and criminal elements combined or were they separated?

Not surprisingly, a marked difference existed between schools regarding the combination of different types of punishments. Whereas some schools had allowed for the combination of criminal and civil liability in the form of the *ḥadd* in addition to a financial indemnity (in the form of a dower paid to a free woman), other schools did not. According to the second stance, the offender could either receive the *ḥadd* or pay his free victim a dower. The victim could not ask for both forms of punishment. This difference between schools was well noted by Ibn Rushd who had declared that his contemporaries and predecessors differed considerably concerning the combination of the *ḥadd* and the dower for a woman who had been coercively penetrated ("*al-mukraha ʿalá al-zinā*").[940] Whereas the Mālikīs and Shāfiʿīs had allowed for the combination of both forms of punishment, Abū Ḥanīfa and al-Thawrī had advocated only one form of redress.[941] Ḥanbalī jurists, like their Shāfiʿī and Mālikī counterparts, had also advocated both forms of punishment. Thus, if somebody had abducted a slave, had

[940] Ibn Rushd, *Bidāyat*, 2: 491.
[941] Ibid.

sexual relations with her and she became pregnant, that person would have suffered the *ḥadd* in addition to the payment of a *mahr* to her owner.[942]

In the Ḥanafī school, as will be shown, the *ḥadd* and the *mahr* could not have been combined. Thus, if a man had raped a free woman and enough evidence had been garnered in the form of four eye witnesses to the act without any ambiguity or doubt (*shubha*) as to any mistake of law or fact, then a case could have been brought against the perpetrator as a *ḥadd* crime and he would have received the *ḥadd* for *zinā*. If, however, a case could not have been brought against such man as a *ḥadd* crime, the case against him would have become a civil case and he would have been liable for an indemnity paid to his victim or her owner, if she had been a slave. In other words, rape would have been treated as an indemnifiable tort instead of a criminal one warranting capital/corporal punishment.[943] According to the Ḥanafī jurist Bābartī:

> The *ḥadd* and the *mahr* cannot be combined in our [school] for the same act. In any place where the *ḥadd* is dropped, the *mahr* becomes obligatory because sexual intercourse without ownership/entitlement warrants either. Therefore, if the *ḥadd* is dropped then the *mahr* becomes obligatory to demonstrate the importance of the place, whether she was coerced (*mustakraha*) or had consented (*adhinat*). The first because she did not consent to the loss of her right and the second because consenting to him does not legalise the intercourse, hence her consent is nonsense since she is forbidden to do so by law.[944]

Evidently, Bābartī maintained that if the female had been coerced, then payment should have been made because she had not agreed to forego her right to a *mahr* and if she had consented to sexual intercourse, her consent would have been considered legally immaterial because she could not consent to an illicit act. This statement thus raises a number of issues,

[942] Zarkashī, *Sharḥ*, 2: 160.
[943] In outlining the Ḥanafī position, I shall be making extensive direct quotations in order to underscore the Ḥanafī position through the words of its exponents as well as to underscore my difference with Azam concerning Ḥanafī indemnities.
[944] Bābartī, *Sharḥ*, 9: 249.

namely, the separation of punishment, the nullification of female consent and the rationale for the payment of an indemnity; issues which have been raised by other jurists and shall be explored.

Concerning the nullification of female consent, I would like to suggest that the majority of jurists treated this issue in a manner very similar to that of modern legislation concerning statutory rape. *Black's* defines statutory rape as "the unlawful sexual intercourse with a female under the age of consent" and notes that it is not required that the prosecution proves "that intercourse was without the consent of the female because she is conclusively presumed to be incapable of consent by reason of her tender age."[945] The offence as such, may be recognized "with or without the victim's consent; and mistake as to the victim's age is usually no defense."[946] As we saw in the above quotation from Bābartī, a defense based on consent could not have been raised by the offender. The later was attributed to the necessity of an indemnity in all cases where ownership or entitlement did not exist, the dropping of criminal punishment in the form of the *ḥadd* necessitated civil restitution in the form of an indemnity as well as the nullification of consent on the basis of legal/religious grounds. Other jurists, of both *furūʿ* and *fatāwá* works, equally emphasised the points raised above.[947] A case in point is the *Fatāwá Hindiyya,* which maintained that:

> If a man had been coerced into committing *zinā* with a woman...he does not suffer the *ḥadd*...and the *mahr* has to be paid by the person committing the *zinā* whether the woman had been coerced into *zinā* (*mukraha ʿalá al-zinā*) or was willing (*ṭāʾiʿa*).[948]

[945] *Black's*, 1412.
[946] Ibid., 1260.
[947] Sarakhsī, *Mabsūṭ*, 24: 90; Ḥaṣkafī, *Durr*, 6: 145; Ibn ʿĀbidīn, *Radd*, 6: 145.
[948] *Al-Fatāwá al-Hindiyya*, 5: 48.

In the same vein, Sarakhsī stated that the *ḥadd* and the indemnity (in the form of a *mahr*) could not be combined in the Ḥanafī school as a result of the same act. Therefore, whenever "the *ḥadd* is dropped, the *mahr* becomes obligatory because sexual intercourse without ownership warrants either the *ḥadd* or the *mahr*."[949] The reason for this "obligation" was anchored in the importance and respect that needed to be shown to body parts which must be "protected from abuse, respected [just] as life is respected."[950] Moreover, reparation was deemed obligatory by virtue of the sexual act regardless of female consent or coercion. Sarakhsī stated that:

> If he had coerced her there is no problem because the *mahr* is obligatory *in lieu* of what he had damaged and there was no consent on her part for forfeiting her right. But if she had consented to him in that, she is not allowed to do so by law and her consent is immaterial because she is not allowed by law to do so. [951]

In addition, Ḥaṣkafī maintained that if a man had been coerced into *zinā*, he did not receive the *ḥadd* on the basis of *istiḥsān* but had to pay a dower, even if the female had been willing.[952] Payment had to be made by the coerced, Ibn ʿĀbidīn added, because sexual benefit was enjoyed by the coerced not his coercer.[953] In the case of a slave woman, a *ḍamān* was required in cases of *ghaṣb*.[954] The *ḍamān* was to be paid to her owner, according to several Ḥanafī jurists.[955]

[949] Sarakhsī, *Mabsūṭ*, 24: 90.
[950] Ibid.
[951] Ibid.
[952] Ḥaṣkafī, *Durr*, 6: 145.
[953] Ibn ʿĀbidīn, *Radd*, 6: 145.
[954] As previously mentioned, Ḥanafī jurists had limited the category of *ghaṣb* to property crimes and not to crimes against free individuals. Crimes against free individuals were dealt with under the rubric of other categories. Slaves were recognised as property, hence, the usurpation and/or abduction of a slave woman were treated under this category. Kāsānī, *Badāʾiʿ*, 10: 16; Marghinānī, *Hidāya*, 4: 103.
[955] Marghinānī, *Hidāya*, 4: 102; Ḥaṣkafī, *Durr*, 6: 217-218; Ibn ʿĀbidīn, *Radd*, 6: 217-218.

The rationale for the payment of the indemnity rested on numerous arguments such as the belief that the mere usage of a female body had to be compensated for regardless of the circumstances surrounding that usage (whether licit or not) as well as the sanctity that had to be shown to the body. Sarakhsī, for example, attributed the demand for an indemnity to the sanctity and respect that had to be shown towards body parts; a respect and sanctity that were akin to that shown towards the protection of life.[956] The protection of life, in Islamic law, counted among the five elements (*kulliyāt/ḍarūriyyāt*) that one had to respect and to protect. Therefore, by likening the protection of sexuality to that of life, Sarakhsī elevated the former to the status of the latter and granted it the same rights under the law. Accordingly, whoever had sexual intercourse with a woman he was not entitled to have sexual intercourse with, had to either pay her an indemnity or receive the *ḥadd* punishment.[957] The indemnity had to be paid for abusing something that one was not entitled to. In other words, the *ratio legis* for the payment of the indemnity was anchored in the misuse and damage to a bodily part and this use engendered liability. In this light, female consent or coercion carried equal weight because compensation had to be paid in either case. Usage and misusage both necessitated the payment of an indemnity irrespective of the circumstances surrounding this usage whether consensual or coerced.[958]

The above argument thus reasoned that female consent was not only deemed to be immaterial in coercive situations, but that the alleged coercer had to pay the coerced female an indemnity as well. In other words, pleading female consent was not regarded as a valid

[956] Sarakhsī, *Mabsūṭ*, 24: 90. Sarakhsī stated that the *mahr* had to be paid "in order to show the importance of the place [bodily part] because it [should be] protected from degradation (*ibtidhāl*) and respected (*muḥtaram*) the way lives (*al-nufūs*) are respected." The words *muḥtaram* and *iḥtirām* that he used could be understood and translated as respect and/or sanctity (*ḥurma*) from the root *ḥrm* and *ḥarām* (forbidden).
[957] Sarakhsī, *Mabsūṭ*, 24: 90.
[958] For Ḥanafī opinion on this issue, please see: Sarakhsī, *Mabsūṭ*, 24: 90; Bābartī, *Sharḥ*, 9: 249; Ḥaṣkafī, *Durr*, 6: 145; Ibn ʿĀbidīn, *Radd*, 6: 145; Kāsānī, *Badāʾiʿ*, 10: 114; al-Ābī al-Azharī, *Jawāhir*, 2: 151. For Shāfiʿī opinion on this issue, please see: Nawawī, *Rawḍat*, 7: 166-167.

defence for the defendant and did not negate his civil responsibility to pay his victim an indemnity. Consequently, the nullification of consent meant *ipso facto* that the crime was conceived as a strict liability offence whereby guilt was not contingent on consent, or fault in some cases (such as the case of a male being forced by a third party to have sexual intercourse with a female). Punishment or restitution had to be made regardless of fault or consent because the *actus reus an sich* engendered redress.

Significant differences seem to have existed with regards to the payer of the indemnity. These differences reflect, to a great extent, the differences we saw earlier with regards to the extent and nature of legal responsibility of the coerced *vis à vis* the coercer. For example, the *Fatāwá Hindiyya* argued that the indemnity had to be paid by the male who had had unlawful penetrative intercourse with a female (*al-zānī*) even if that man had been coerced into *zinā* and regardless of the status of his female partner whether consenting or coerced (*mukraha ʿalá al-zinā aw kānat ṭāʾiʿa*).[959] The rationale for this *fatwá* was that the benefit (*manfaʿa*) accruing from the sexual intercourse was gained by the person who had engaged in the sexual intercourse and not his coercer, hence the payment had to paid by him.[960] This *fatwá* thus clearly distinguished between the coerced male's civil versus criminal responsibility for the act of coerced sexual intercourse. While the coerced was exempt from the *ḥadd*, he was not exempt from civil redress towards the female even if she had been a willing partner. This *fatwá* also reflects the Ḥanafī stance on the separation of the criminal and the civil, in the case of the *mahr*.

The wording in the legal statements provided by numerous Ḥanafī jurists in both *furūʿ* and *fatāwá* texts, which I attempted to quote directly in the above examples, underscores the

[959] *Al-Fatāwá al-Hindiyya*, 5: 48.
[960] *Al-Fatāwá al-Hindiyya*, 5: 48; Ibn ʿĀbidīn, *Radd*, 145.

fact that the Ḥanafī school did advocate the payment of an indemnity, in the form of a dower, as reparation for rape. Payment was required when the *ḥadd* was not or could not be imposed. Indeed, numerous jurists had described such a requirement as "obligatory." They did not say that if the *ḥadd* were dropped, the victim does not get anything. Rather, they said that when the *ḥadd* is dropped, the *mahr* becomes obligatory. In other words, they were against the combination of punishment but not against the indemnity *an sich*. Either the offender was physically punished, or he had to make reparation but not both. In emphasizing this point through the above quotations, I am underscoring my difference with Azam's conclusions on this matter.

In her seminal work on sexual violation in Islamic law, Azam had suggested the presence of a stark difference between the Ḥanafī and Mālikī rationale on rape. Mālikīs, she argued had conceived of rape as a property crime and sexuality as a commodity that had to be compensated for through the payment of a dower. Ḥanafīs, on the other hand, viewed rape as a moral transgression requiring the *ḥadd* as punishment and eschewed the payment of an indemnity to the victim.[961] She stated that:

> By the end of the of the formative period of Islamic law, key Kūfan figures had asserted that the violator of the free woman was to undergo the *ḥadd* punishment only and was not liable for any monetary compensation whatsoever. This *ḥadd*-only position became the enduring doctrine of the Ḥanafī school, and school authorities continued to affirm and elaborate upon this substantive doctrine over time.[962]

We saw earlier that numerous Ḥanafī jurists had been against the combination of punishment but not against the payment of an indemnity. Even though they had maintained that the *ḥadd* and the *mahr* could not combined, they nevertheless repeatedly stated that an

[961] Azam, *Sexual Violation*, 155.
[962] Ibid., 154.

indemnity is obligatory when corporal punishment could not be applied. Moreover, the preference of the rights of God versus those of men may not have been a stance uniformly accepted by all Ḥanafī jurists. A case in point is Ṭūrī who had declared that when the rights of men and God collide, the rights of men take precedence over the rights of God because the former need those rights,[963] i.e. Ṭūrī was arguing for the *maṣlaḥa* or welfare of subjects *vis à vis* other subjects and God.

In Mālikī *furūʿ* works, discourse on the indemnity to be paid as reparation for sexual violation can be found in the sections on *ghaṣb*. As previously mentioned, Mālikīs did not have a separate textual chapter on *ikrāh* (including sexual coercion) and thus often mentioned sexual coercion within the chapters on *ghaṣb* and/ or *zinā*. They used the terms *ikrāh* and *ghaṣb* (or their derivatives) to denote sexual violation in both chapters.[964]

Due to this inclusion of sexual coercion within *ghaṣb*, and the fact that two different offences with two underlying *mal* were discussed simultaneaously (*ikrāh* being anchored in coercion while *ghaṣb* was a category dealing with the usurpation of property with or without asportation), some jurists employed different techniques to distinguish between the two different offences.

A case in point is Dasūqī who distinguished between *ghaṣb* for sexual purposes and *ghaṣb* for other purposes. He did not use the term *ghaṣb* to denote sexual violation only. For instance, at the beginning of his chapter on *ghaṣb*, he specified that in cases of *ghaṣb* or abduction for sexual purposes (*ghāṣib al-buḍʿ li-ajl waṭʾihi*), the indemnity obtained only with sexual intercourse, whereas if a free male were abducted/usurped for the purpose of

[963] Ṭūrī, *Takmilat al-Baḥr al-rāʾiq,* 8: 80.
[964] For example, Ibn Rushd, *Bidāyat*, 2: 491, 652-653; Khalīl, *Mukhtaṣar*, 2: 153, 284; al-Ābī al-Azharī, *Jawāhir*, 2: 153, 284.

employing him; then the indemnity for the latter's labour was to be paid if the usurper had made the former work for him.[965] In both instances, Dasūqī had used the term *ghaṣb* but distinguished between the two acts in order to denote that *ghaṣb* did not *ipso facto* denote sexual violation. When he later wanted to indicate sexual violation and coercion, he used the terms *ikrāh* or *istikrāh*.[966]

Similarly, Khalīl and his commentator al-Ābī al-Azharī used the term 'coerced' (*mukrah* and *mukraha*) to denote sexually coerced individuals and used '*ghaṣb*' in the discourse on corroboration for a claim of *ghaṣb*. They did not use the two terms interchangeably.[967] While some jurists were very clear in their usage and distinction between the two terms, others were not and seem to have used both terms interchangeably. Tusūlī, for example, used "*ightiṣāb*" in the sense of compulsion (*jabran*),[968] Tāwūdī explained that "*ightiṣāb*" meant "*ikrāh*"[969] while Kashnāwī's use seems rather ambiguous. He stated that:

> Whoever commits *ghaṣb* on a female (*ightaṣbahā*), and then commits *zinā* with her, he should receive the *ḥadd* of *zinā*. And if she were free, he should [pay] her a dower equal in value to that of her peers and if she were a slave, he should [pay] the depreciation in her value, whether she were a virgin or not.[970]

The term "*ightaṣbahā*" in the above quotation could mean either that the culprit had abducted or forced a female in some fashion and then sexually penetrated her against her will or that he sexually coerced her and then penetrated her against her will (*zanā bihā*).[971]

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[965] Dasūqī, *Ḥāshiya*, 3: 443.
[966] Ibid., 4: 318, 3: 459.
[967] Khalīl, *Mukhtaṣar*, 2: 285; al-Ābī al-Azharī, *Jawāhir*, 2: 285.
[968] Tusūlī, *Bahja,* 2: 672.
[969] Muḥammad al-Tāwūdī, *Ḥulá al-maʿāsim li-fikr Ibn ʿĀṣim wa huwa sharḥ urjuzat Tuḥfat al-ḥukām*, printed with ʿAlī ibn ʿAbd al-Salām al-Tusūlī, *al-Bahja fī sharḥ al-Ṭuḥfa ʿalá al-urjuza al-musammāh bi Tuḥfat al-ḥukām li Ibn ʿĀṣim al-Andalusī* (Casa Blanca: Dār al-Rashād al-Ḥadītha, 1991), 2: 672.
[970] Kashnāwī, *Ashal*, 3; 64-65.
[971] Ibid.

Regardless of how jurists used both terms, it is important to note that Mālikī jurists used derivatives of *ikrāh* to indicate the act of sexual coercion in their sections on *ghaṣb* and *zinā*.[972]

As mentioned earlier, the Mālikī school had advocated the combination of punitive and restorative justice in the sense of corporal/capital punishment together with financial reparation for rape. Their stance was based on the notion that the alleged coercer had infringed on the rights of God and the rights of a human being and that redress to one should not trump redress to the other.[973] Ibn Rushd had stated that those jurists advocating one form of redress only had based their opinion on two principal arguments. The first being that two forms of redress could not be combined. Thus, in the presence of a right of God and a right for a human being, redress to God trumped that to the individual. Moreover, a *ṣadāq* was due in lawful unions as a form of "*ʿibāda*" (religious requirement) and was not payment *in lieu* of sex; whereas rape was not a lawful union and hence should not be paid for. [974] In the Mālikī school, however, financial restitution for sexual violation was a point agreed upon by all jurists. They called such restitution "*ṣadāq*" or "*ṣadāq al-mithl*" because they had demanded the payment of an indemnity equal in value to the dower received by the victim's kin.[975]

Reparation, however, was not contingent on the *actus reus* of *ghaṣb* in all cases. Rather, *ghaṣb* or abduction had to be followed by a sexual act, as we saw above, for an indemnity to be called for.[976] Reparation had to be made in cases of sexual coercion or in cases of consensual

[972] Ibn Rushd, *Bidāyat*, 2: 491, 652-653; Khalīl, *Mukhtaṣar*, 2: 153, 284; al-Ābī al-Azharī, *Jawāhir*, 2: 153, 284; Tusūlī, *Bahja*, 2: 672-673; Tāwūdī, *Ḥulá*, 2: 672-673; Kashnāwī, *Ashal*, 3; 64-65.
[973] Ibn Rushd, *Bidāyat*, 2: 491.
[974] Ibid., 2: 491, 653.
[975] Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 3: 143; al-Ābī al-Azharī, *Jawāhir*, 2: 151; Nafrāwī, *Fawākih*, 2: 285; Tusūlī, *Bahja*, 2: 672; Tāwūdī, *Ḥulá*, 2: 672; Kashnāwī, *Ashal*, 3; 64-65.
[976] Dasūqī, *Ḥāshiya*, 3: 443.

sex if the female had been a minor, of limited mental capacity or a slave.[977] What this also means is that jurists distinguished between two forms of *ghaṣb* or abduction whereby one form was for sexual purposes and the other was not. Like *ikrāh*, here too we find jurists arguing for the nullification of female consent in order to classify certain instances of *ghaṣb* as strict liability offences. By doing so, they precluded an argument from consent by the culprit and made liability contingent on the *actus reus*. In doing so, they took cognizance of the female's age, mental capacity and status.

The status of the female played an important role in the determination of reparation. Whereas an indemnity for sex with a slave woman was *de rigueur*, whether the latter had consented or had been coerced, the case of a free woman was different. As property (*māl*), a slave woman's consent or coercion to sex was considered immaterial because the indemnity was *in lieu* of the depreciation to her value and the unlawlful usage of her body, which was the property of another and had to be compensated for. A free woman, by contrast, was not the property of another. Accordingly, some jurists maintained that a free woman who had consented to sex was not to receive an indemnity unless she had bolstered her claim with tangible corroborative evidence of *ghaṣb*, as we shall shortly see.[978] Even though the indemnity, in both cases, would have resulted from the sexual act, the underlying wrong (*mal*) may have been different.

The question that presents itself, here, is: why? Why did jurists demand corroboration in the case of a free woman and not in the case of a slave? The answer to that question may lie in the difference between the definition of *ghaṣb* and that of *ikrāh*. *Ikrāh*, was defined as a

[977] Tusūlī, *Bahja*, 2: 672-673; Tāwūdī, *Ḥulá*, 2: 672-673.
[978] The different forms of corroboration will be explored in the section devoted to it towards the end of this chapter.

coercive act, whereas *ghaṣb* was defined as usurpation, asportation, seizure and/or abduction. Therefore, could jurists have demanded corroboration in order to ascertain whether the female in question had really been forced or abducted against her will, or if she had in reality eloped with her lover?[979]

In the Shāfiʿī school, civil and punitive justice could have been combined.[980] Māwardī, for example, maintained that if someone had deflowered a virgin with an object (a piece of wood), that person would have received a discretionary punishment by a judge (*taʿzīr*) but would not have received the *ḥadd* for his crime. He would have also had to pay his victim a discretionary indemnity (*ḥukūma*). If, however, that person had sexually coerced his victim, he would have received the *ḥadd* in addition to paying his victim a dower equivalent to that received by her female peers. The dower had to be that of a virgin, Māwardī emphasized.[981] On the other hand, if the female in question had consented to sex, the additional indemnity for defloration would not have been required because "her willingness amounts to permission."[982] The Shāfiʿī position on indemnities will be elucidated in greater detail in the next section on the *diya*.

Similarly, in the Ḥanbalī school, the *mahr* could have been combined with the *ḥadd*. The Ḥanbalī position on indemnities, like that of the Shāfiʿīs, is explored in detail in the following section on *diya*, where I hope to present as accurately as possible the placement of this discourse in the primary sources. Given that neither the Shāfiʿīs nor the Ḥanbalīs (unlike the Ḥanafīs) had separate sections on *ikrāh* and that they did not include the sexual coercion of

[979] I am grateful to Prof. Setrag Manoukian for alerting me to the link between *ghaṣb*, bride kidnapping and elopement. The murky link between *ghaṣb*, on the one hand, and abduction or elopement, on the other hand, is a topic worthy of further research.
[980] Nawawī, *Rawḍat*, 7: 166; Māwardī, *Ḥāwī,* 16: 30.
[981] Māwardī, *Ḥāwī,* 16: 30.
[982] Ibid.

free females under *ghaṣb* (as the Mālikīs had done), they had therefore discussed the indemnity for the sexual violation of free females in their chapters on the *diyyāt*.

It is noteworthy that gender considerations may have worked for the benefit of female victims, in the area of indemnity, who were offered one, but not male victims who do not seem to have been offered an indemnity. Moreover, since *liwāṭ* was recognized as a different category from *zinā* by some schools, this meant that coerced male penetration did not *ipso facto* entail the *ḥadd* punishment. The forced penetration of a female did not *ipso facto* entail the *ḥadd* punishment either (unless a confession was secured or the testimony of four witnesses could be obtained) but at least, in theory, there was the possibility of corporal punishment being handed out to the coercer. However, in some *Sunnī* schools, *liwāṭ* was not considered *zinā* and hence did not warrant the same punishment which meant that, in theory, there were even less chances for a male sexually coercing another male to receive corporal punishment for his deed.

The reason(s) for this difference between the Mālikīs and the other schools with respect to the scope of the category of *ghaṣb* and the Mālikī inclusion of free individuals under the rubric of this category remains unclear. It is noteworthy that some Mālikī jurists had not insisted on asportation, abduction or the physical removal of an object or a person from one place to another, for *ghaṣb* to legally obtain. Rather, they had maintained that *ghaṣb* could obtain *in loco* without necessarily asportation or the excessive use of force.[983]

[983] This point had been made in the last chapter. Please see the following for examples of Mālikī thought on the legal definition of *ghaṣb*: Dasūqī, *Ḥāshiya*, 3: 442; Bannānī, *Ḥāshiya*, 6: 136; Zurqānī, *Sharḥ*, 6: 136; Tusūlī, *Bahja*, 2: 653-656.

## The *Diya*

This section delves into the discourse on genital injuries and the different indemnities that were required as reparation for them, especially when sexual injuries were combined with sexual coercion and defloration. Although numerous issues were raised in this discourse, I would like to focus on the views of the different schools concerning sexual injuries in general and marital sexual injuries in particular, the fault criterion of intent as well as the implication of the *ʿāqila* in the payment of the *diya*. I shall start with a word concerning the terms used in this discourse before offering a brief overview of sexual injuries.

Jurists used the term "*ifāḍa*" or the verb "*ifḍāʾ* " or their derivatives to indicate the act of causing a perineal tear to a woman. They also distinguished between a first, second or third degree perineal tear as well as tears to a woman's vulva.[984] Although they all advocated the payment of a *diya*, jurists differed on how much was to be paid and in compensation for what. In many instances the *diya* could have been partial (valued at a third of a complete *diya*) or full for a first or third degree perineal tear or damage to a female vulva. Whereas Ḥanbalī jurists had required a third of a *diya* for genital injuries and a full *diya* for damage to a vulva,[985] most Shāfiʿī jurists usually called for the payment of a full *diya* for perineal tears.[986] Mālikī jurists also required the payment of a full *diya* as reparation for damage to a female vulva as well as a *ḥukuma* for perineal tears.[987] A *diya* was also required by Ḥanafī jurists for perineal tears. [988]

[984] Zarkashī, *Sharḥ*, 3: 59; Mardāwī, *Inṣāf*, 10: 82, 110; Ibn Qudāma, *al-Mughnī*, 9: 651-653; Ghazālī, *Wasīṭ*, 4: 80; Maḥallī, *Sharḥ*, 4: 142; Ramlī, *Nihāyat*, 7: 341-342; Shirbīnī, *Mughnī*, 5: 325-326; Nawawī, *Rawḍat*, 7: 166; Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 4: 37,41; ʿIllaysh, *Taqrīrāt*, 4: 273.
[985] Zarkashī, *Sharḥ*, 3: 59; Mardāwī, *Inṣāf*, 10: 82, 110; Ibn Qudāma, *al-Mughnī*, 9: 651-653.
[986] For a detailed account, please see Shīrāzī, *Muhadhdhab*, 2: 267; and to a lesser extent: Ghazālī, *Wasīṭ*, 4: 80; Maḥallī, *Sharḥ*, 4: 142; Ramlī, *Nihāyat*, 7: 341-342; Shirbīnī, *Mughnī*, 5: 325; Nawawī, *Rawḍat*, 7: 166.
[987] Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 4: 37; ʿIllaysh, *Taqrīrāt*, 4: 273, 277-278. A full *diya* was required for full damage and half a *diya* for partial damage to the vulva. For more, please see: ʿIllaysh, *Taqrīrāt*, 4: 273.
[988] Ḥalabī, *Multaqá,* 4: 275-276; Shaykh Zāda, *Majmaʿ*, 4: 276; Kāsānī, *Badāʾiʿ*, 10: 464.

Some Shāfiʿī jurists also argued that the tear did not have to be the result of sexual intercourse but could have been the result of other means such as digital penetration or penetration with an object and could have been the result of *zinā* or *shubha*.[989] In all these cases, the payment of a full *diya* would have been required.[990]

In addition to the payment of a *diya* for genital injuries, some jurists required the payment of a dower for rape as well as an indemnity called *arsh* for defloration. These three different indemnities were suggested in cases of rape that had resulted in defloration and or genital injuries. Ibn Qudāma, for example, maintained that if a man had "coerced a woman into *zinā* thereby causing a perineal tear, he had to pay a third of a *diya* as well as a dower equivalent to that of her peers because it happened as a result of intercourse that was not allowed."[991] In such cases did the rapist have to pay a third indemnity for defloration as well? According to Ibn Qudāma, yes such a man would have had to pay a third indemnity according to many Shāfiʿī jurists but would not have been required to do so by jurists from the other schools.[992] Jurists from the other schools had argued that the indemnity for defloration was usually subsumed within the dower, particularly since the dower of a virgin was usually greater than that of a non-virgin.[993]

Indeed, many Shāfiʿī jurists (particularly late jurists) did not subsume the indemnity for defloration within the dower but recognised it as a separate indemnity.[994] ʿUmayra, for

[989] Maḥallī, *Sharḥ*, 4: 142; Ramlī, *Nihāyat*, 7: 341; Shirbīnī, *Mughnī*, 5: 325; Nawawī, *Rawḍat*, 7: 166.
[990] Ramlī, *Nihāyat*, 7: 341; Shirbīnī, *Mughnī*, 5: 325; Nawawī, *Rawḍat*, 7: 166.
[991] Ibn Qudāma, *al-Mughnī*, 9: 653.
[992] Indeed, many Shāfiʿī jurists did not subsume the indemnity for defloration within the *mahr*. See for example, Ramlī, *Nihāyat*, 7: 342; ʿUmayra, *Ḥāshiya*, 4: 412; Shirbīnī, *Mughnī*, 5: 326; Nawawī, *Rawḍat*, 7: 167.
[993] Ibn Qudāma, *al-Mughnī*, 9: 653.
[994] Ramlī, *Nihāyat*, 7: 342; Shirbīnī, *Mughnī*, 5: 326; Nawawī, *Rawḍat*, 7: 167.

instance, maintained that: "We have declared that the *arsh* for defloration is not subsumed within the *mahr*."[995]

Early jurists like Shīrāzī and Māwardī, however, did subsume the *arsh* for defloration within the dower.[996] They did so because they had required the payment of a dower for a virgin which was greater than that of a non-virgin.[997] Other/later Shāfiʿī jurists had required the dower of a non-virgin when combined with the payment of an *arsh* for defloration. Indeed, both Nawawī and Shirbīnī cited the presence of both opinions in their school.[998] This intra-school difference thus marks an area of legal development within Shāfiʿī thought. Within this discourse, Nawawī and Shirbīnī equally emphasized that a coerced woman who had been deflowered had to receive an indemnity equal to the dower of a non-virgin as well as an *arsh* for defloration, even though some jurists had required the payment of a dower for a virgin.[999]

To sum up, if defloration had been the result of *zinā* or coercion then the "most valid" opinion by Nawawī's time had required the payment of an *arsh* for defloration in addition to the dower of a non-virgin.[1000]

The Mālikī position resembled the Shāfiʿī one in some respects. Accordingly, a perineal tear (*ifḍāʾ*) was not subsumed under the *mahr*, [1001] i.e. it required a separate indemnity. This indemnity could have been in the amount of a full *diya* or a *ḥukūma*, since both opinions

[995] ʿUmayra, *Ḥāshiya*, 4: 142.
[996] Shīrāzī, *Muhadhdhab*, 2: 257; Māwardī, *Ḥāwī*, 16: 30.
[997] Ibid.
[998] Shirbīnī, *Mughnī*, 5: 326; Nawawī, *Rawḍat*, 7: 167.
[999] Nawawī, *Rawḍat*, 7: 167; Shirbīnī, *Mughnī*, 5: 326.
[1000] Nawawī, *Rawḍat*, 7: 167.
[1001] Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 4: 41; ʿAdawī, *Ḥāshiya*, 4: 41; ʿIllaysh, *Taqrīrāt*, 4: 277-278; Dasūqī, *Ḥāshiya*, 4: 278; al-Ābī al-Azharī, *Jawāhir*, 2: 269.

existed within the Mālikī school.[1002] Moreover, restitution was required whether the offender had been a husband or a *ghāṣib*.[1003]

An exception to the above was expressed by Dasūqī who had argued that if the female had been willing and her partner had been a stranger to her (*ajnabī*) [meaning that he was not a husband or an owner], then no indemnity was required.[1004] A *ḥukūma* was an indemnity the value of which was to be determined on a case by case basis.[1005] Therefore, if the tear were inflicted on a female who was a stranger to the perpetrator (*ajnabiyya*), the latter had to suffer the *ḥadd*, pay a *mahr* equivalent to that of the victim's peers as well as pay a *ḥukūma*. This *ḥukūma* was to be paid by the offender himself, even if it amounted to more than a third of a *diya*.[1006] Requiring an offender to pay more than a third of a *diya* out of his pocket (and not to be helped by the latter's support group as was usually the case when an indemnity exceeded a third of a *diya*), meant that Khurashī had considered the offence to have been intentional (*ʿamd*)[1007] and therefore wanted to make the penalty harsher for the offender.

Similarly, if the tear had been caused by a husband then it required an indemnity separate from the *mahr*.[1008] If, however, that indemnity had exceeded the third of a *diya*, then it could have been paid by either the husband or his support group.[1009]

Defloration did not require a separate indemnity in Mālikī thought and was subsumed within the dower, whether it had been caused by a husband or another.[1010] However, if

[1002] Dasūqī, *Ḥāshiya*, 4: 277-278; al-Ābī al-Azharī, *Jawāhir*, 2: 269.
[1003] Dasūqī, *Ḥāshiya*, 4: 278; ʿIllaysh, *Taqrīrāt*, 4: 278.
[1004] Dasūqī, *Ḥāshiya*, 4: 278.
[1005] See for example: Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 4: 41; ʿAdawī, *Ḥāshiya*, 4: 41; ʿIllaysh, *Taqrīrāt*, 4: 277.
[1006] Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 4: 41.
[1007] ʿAdawī, *Ḥāshiya*, 4: 41.
[1008] Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 4: 41; ; ʿAdawī, *Ḥāshiya*, 4: 41; ʿIllaysh, *Taqrīrāt*, 4: 278; Dasūqī, *Ḥāshiya*, 4: 278.
[1009] Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 4: 41.

defloration had been the result of digital penetration, it required a separate payment,[1011] particularly if it had been caused by a husband who had digitally deflowered his wife and then divorced her before consummation.[1012]

Ḥanafī jurists too necessitated the payment of a *diya* for perineal tears.[1013] Ḥaṣkafī stated that if someone had injured a female thereby making her suffer from a perineal tear, that person would have had to pay her an indemnity ranging from a third of a *diya* to a full one depending on the extent and severity of her tear.[1014] Moreover, if someone had deflowered a virgin and had equally inflicted a perineal tear on her, or had caused a perineal tear to a female in general, two legal scenarios were envisaged.[1015] If the female had consented to sexual intercourse, no restitution would have been required and they would have both received the *ḥadd*.[1016] If, however, the female had been sexually coerced, the offender would have had to pay her an *arsh* and would have received the *ḥadd* as well.[1017] This *arsh* could have ranged from a third to a full *diya* depending on the extent of her injuries.[1018] In addition to the *diya*, Shaybānī had required the payment of a dower.[1019] The combination of the *arsh* and/or *diya* with the *ḥadd* in the above case demonstrates the combination of corporal punishment with the indemnity as justice for the victim. Unlike the *mahr*, which Ḥanafī jurists did not combine with the *ḥadd*, the *diya* for genital injuries was combined with the *ḥadd*. While both scenarios called

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[1010] Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 4: 41; ʿAdawī, *Ḥāshiya*, 4: 41; ʿIllaysh, *Taqrīrāt*, 4: 278; al-Ābī al-Azharī, *Jawāhir*, 2: 269.
[1011] Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 4: 41; ʿAdawī, *Ḥāshiya*, 4: 41; ʿIllaysh, *Taqrīrāt*, 4: 278.
[1012] Ibid.
[1013] Ḥalabī, *Multaqá,* 4: 275-276; Shaykh Zāda, *Majmaʿ*, 4: 276; Kāsānī, *Badāʾiʿ*, 10: 464.
[1014] Ḥaṣkafī, *Durr*, 6: 604.
[1015] Ḥaṣkafī, *Durr*, 6: 604; Kāsānī, *Badāʾiʿ*, 10: 465.
[1016] Ibid.
[1017] Ibid.
[1018] Ibn ʿĀbidīn, *Radd*, 6: 604; Kāsānī, *Badāʾiʿ*, 10: 465.
[1019] Kāsānī, *Badāʾiʿ*, 10: 465.

for civil and corporal punishment, Ḥanafī jurists allowed for the combination of redress in the case of injury but not in the case illicit sexual intercourse without injury.

Although Ḥanafī jurists were unanimous in necessitating reparation for perineal tears to a non-wife, the case of a wife seems to have been different. While Abū Yūsuf had called for the payment of an indemnity to a wife, Abū Ḥanīfa and Shaybānī did not.[1020] Accordingly, some jurists did not oblige a husband to pay an indemnity for a perineal tear.[1021] The rationale for the non-payment was based on the fact that the tear was the result of a consensual act,[1022] while the rationale for payment rested on the argument that consent had been given for sexual intercourse and not for sexual injury, hence the necessity for reparation.[1023]

In that respect, Ibn ʿĀbidīn mentioned that payment was not necessary if the wife had reached the age of majority, had consented and could withstand sexual intercourse.[1024] If, however, the wife had been a minor, had been coerced (*mukraha*) or could not have endured sexual intercourse, then reparation had to be made towards her;[1025] a statement which underscores the recognition of individual factors such as age, consent and physique by some jurists.

Two opinions existed within the Ḥanafī school concerning the burden of restitution. While Abū Ḥanīfa and Shaybānī had called for the sharing of this burden by requiring the support group to pay for the indemnity, Abū Yūsuf did not. [1026] According to the latter, as cited

[1020] Ibn ʿĀbidīn, *Radd*, 6: 604; Kāsānī, *Badāʾiʿ*, 10: 466.
[1021] Ibn ʿĀbidīn, *Radd*, 6: 604.
[1022] Ibn ʿĀbidīn, *Radd*, 6: 604; Kāsānī, *Badāʾiʿ*, 10: 466.
[1023] Kāsānī, *Badāʾiʿ*, 10: 466-467.
[1024] Ibn ʿĀbidīn, *Radd*, 6: 604.
[1025] Ibid.
[1026] Kāsānī, *Badāʾiʿ*, 10: 466-467.

by Kāsānī, a perineal tear had to be the result of an act "that exceeded the norm" and was thus considered "intentional" and must be paid for by the offender himself.[1027]

The implications of such a stand were twofold, financial and legal. Legal because defloration was recognised as a separate offence requiring reparation *an sich* irrespective of its context whether coerced or consensual. The financial implication was that a raped virgin would have been theoretically granted by Shāfiʿī jurists a *mahr* for the rape and an *arsh* for defloration as well as a possible *diya* if she had sustained injuries as well. Although indemnities cannot or could not make up for rape and its consequences, the compounding of three punishments by Shāfiʿī jurists (and two indemnities by other jurists) underscores the gravity which such an offence seems to have been accorded.

Moreover, the indemnity for a perineal tear was not reserved for sexual violence outside of wedlock but extended to the marriage bed as well. Accordingly, a number of jurists had maintained that if sexual intercourse with a wife could not be achieved except if a perineal tear were to ensue, the husband did not have the right to have sexual intercourse with his wife in such a case and she did not have to allow him.[1028]

Furthermore, if a man had sexual intercourse with his wife and as a result of which she suffered a first degree perineal tear, that man had to pay his wife an indemnity in the amount of a third of a *diya*, according to Ḥanbalī jurists, [1029] but a full *diya* according to Shāfiʿī jurists. As Shirbīnī stated: "Concerning her perineal tear… as a result of an offence (*jināya*) whether intentional, through *shubha* or by mistake through sexual intercourse or another [mean] by a

[1027] Ibid.
[1028] Maḥallī, *Sharḥ*, 4: 142; Ramlī, *Nihāyat*, 7: 342; Shirbīnī, *Mughnī*, 5: 326.
[1029] Zarkashī, *Sharḥ*, 3: 59; Mardāwī, *Inṣāf*, 10: 82, 110; Ibn Qudāma, *al-Mughnī*, 9: 651-653.

husband or another, a *diya* meaning her *diya* [is required]."[1030] Shirbīnī further added that he had stated "another" in order to indicate the *zāniya*, whether the latter had been willing or coerced.[1031]

The fact that female willingness or consent to sexual intercourse did not grant the male the right to genital tears was emphasized by some jurists.[1032] The nullification of consent, as a legal tool, may have been tied to the payment of the *diya* since it precluded an argument from consent by an offender wishing to avoid payment. To emphasize this point, jurists had criminalised perineal tears in all contexts (as we saw above). A case in point is the following statement by Nawawī that:

> The obligation of a *diya* for perineal tears resulting from intercourse is the same whether [the doer] is the husband, a *shubha* or a *zānī*. The husband settles the dower for intercourse leading to a perineal tear...and a dower equivalent to that of her peers for a man who had sex with her through *shubha* and the same for the *zānī* if she had been coerced, as well as the *ḥadd*.[1033]

Furthermore, sexual precedence did not negate the payment of an indemnity for genital injuries. A full *diya* was required, by the Shāfiʿī Shubrāmalsī, even if the spouses had had sexual intercourse numerous times before.[1034] Additionally, if a man had known that his wife could not tolerate sexual relations and that she would suffer injury as a result but nevertheless intentionally had sex with her, the sexual act would have been considered intentional and the indemnity would have been entirely paid by him. If, however, he had not known that sexual relations would or could lead to injury then the act would have been considered quasi-intentional and his support group would have been required to help him

[1030] Shirbīnī, *Mughnī*, 5: 325.
[1031] Ibid.
[1032] Shirbīnī, *Mughnī*, 5: 325; Nawawī, *Rawḍat*, 7: 166.
[1033] Nawawī, *Rawḍat*, 7: 166.
[1034] Shubrāmalsī, *Ḥāshiya*, 7: 341.

with the indemnity.[1035] These opinions, however, applied to wives who were minors or who were thin and could not tolerate sexual intercourse, according to Ḥanbalī jurists,[1036] but not according to others.

Indeed, even though age and the state of a wife's health were important factors in Shāfiʿī thought, they were not necessary. Nawawī, for example, asserted that the *diya* for perineal tears differs in severity depending on the nature of the act. If sexual intercourse is undertaken with a female who is young or weak and with whom it is highly probable that intercourse would lead to a perineal tear, then the act was judged to have been "purely intentional."[1037] Similarly, the act could have been an intentional mistake if it had been probable that sexual intercourse would not have led to a perineal tear, or it could have been a pure mistake in the case of mistaken identity.[1038] Each of the above categories had important ramifications on the value of the indemnity and its nature as well as the means and method of payment of which.

The reference to intent in the above is worth noting particularly since it impacted the severity of punishment. A person causing deliberate harm to his wife was fined a greater amount than one who may have acted with a lesser degree of intent but who may have been nonetheless negligent or reckless towards his wife.

The discourse on intent and marital violence can also be related to marital coercion. As we saw in chapter two, coercion by a husband towards his wife had been legally recognised by jurists. Moreover, the presumption of consent to sexual intercourse implicit in the marriage

[1035] Shubrāmalsī, *Ḥāshiya*, 7: 341; Zarkashī, *Sharḥ*, 3: 59; Mardāwī, *Inṣāf*, 10: 82, 110; Ibn Qudāma, *al-Mughnī*, 9: 651-653.
[1036] Ibn Qudāma, *al-Mughnī*, 9: 651-653; Zarkashī, *Sharḥ*, 3: 59.
[1037] Nawawī, *Rawḍat*, 7: 166.
[1038] Ibid.

contract (and voiced by jurists in the discourse on marriage/*nikāḥ*) seems to have been circumscribed by jurists. As mentioned above, a wife fearing sexual injury had the right to refuse sexual relations with her spouse. Similarly, age and health were factors that jurists took into consideration. Although a marriage contract was conceived as one allowing unlimited access to a wife's sexuality, such access does not seem to have been unfettered by some jurists more than others.[1039]

Whereas a partial *diya* was paid by the aggressor from his own funds, the full *diya* had to be paid by him and his support group (*ʿāqila*) in view of its enormous value.[1040] Even though the support group was often made up of one's agnates, it sometimes included members of one's guild, army unit or neighbourhood. As such the payment of a full *diya* by a support group often meant the involvement of a larger community in paying for the harm done unto the victim. Reparation in this case involved both the offender and his support group. Could it thus have helped in the prevention of recidivism? Could it also have helped the victim through community involvement and recognition of the harm done unto her?

Discourse on indemnities was not limited to the *furūʿ* but existed in the *fatāwá* as well. The Ḥanafī Qāḍī Khān, for example, mentioned that if a man had killed a female as a result of intercourse, he would have received the double punishment of a full *diya* as well as the *ḥadd*. A combined double punishment was also mentioned by ʿAdawī who had stated that an opinion within the Mālikī school had advocated the payment of a full *diya* by the offender's support

[1039] Marital sexual violence and reparation for it can be found in archival records as well. For example, in an Egyptian case from 1280/1863, a certain Fatūma was killed as a result of sexual intercourse with her husband Bajarī al-Sīwī who had confessed to the act. Consequently, he was asked to pay a *diya* from his own funds [to her kin] within a period of three years. Case number 126, date: 6 Dhū al-Qiʿda 1280. Dār al-Wathāʾiq wa al-Kutub al-Qawmiyya, Dīwān Majlis Aḥkām Miṣr, Ṣādir al-Dawāwīn, Old record number 234, new record number 46, p. 77.
[1040] For more on the support group, please see Peters, *Crime and Punishment*, 55.

group[1041] in addition to a discretionary punishment (*adab*) if the female had died as a result of sexual intercourse, particularly if she had been a minor (*ṣaghīra*).[1042]

In the Ḥanafī school, two opinions existed concerning a wife who dies as a result of sexual intercourse. While Abū Ḥanīfa and Shaybānī did not require the payment a *diya*, Abū Yūsuf had required its payment as reparation.[1043] The latter's rationale was that even though death had come as a result of a consensual act, consent had been given for the sexual act and not for the ensuing death hence reparation had to be made. Reparation for the death was to be made by the support group while reparation for the perineal tear was to be made by the offender out of his own money.[1044]

In the same vein, if someone had committed *zinā* with a slave who had suffered a perineal tear and as a result she died, the offender had to pay her owner her value in addition to receiving the *ḥadd* punishment.[1045] It is thus worth noting that the criminalisation of perineal tears was not predicated on their context. Indeed, perineal tears were recognised as offences irrespective of their context, whether marriage, *shubha*, *zinā* or coercion.

From the above presentation, it seems that Shāfiʿī opinion was the most advantageous to victims of rape and sexual violence because it allowed for the payment of three different indemnities to the victim. Such a theoretical stance could have given victims much needed leverage in their negotiations of a civil settlement.

[1041] ʿAdawī, *Ḥāshiya*, 4: 41.
[1042] Ibid.
[1043] Kāsānī, *Badāʾiʿ*, 10: 467.
[1044] Ibid.
[1045] Ibn ʿĀbidīn, *Radd*, 6: 604.

In order to gather information on the indemnities to be paid for sexual violation and genital injuries, a number of legal categories were consulted. The reason for this being school differences concerning the scope of certain categories as well as the classification of legal concepts under different headings by different schools. Thus, for the Ḥanafī discourse on the *mahr*, I consulted their chapters on *ikrāh* because they were the only school to have separate chapters on duress. Moreover, because they did not extend the category of *ghaṣb* to free individuals, information on harm inflicted on free individuals was to be gleaned from their chapters on the *diyyāt*. The other three schools did not have separate chapters for *ikrāh*, consequently, they included this concept under different categories.

The Mālikī school did not have a separate chapter on duress, so jurists included instances of sexual coercion alongside sexual *ghaṣb*, even though both categories were based on different wrongs. Moreover, because the Mālikīs were the only jurists to include free individuals under the scope of *ghaṣb*, they were able to gather different forms of sexual violation, in the sense of *ikrāh* as well as *ghaṣb*, as well as different individuals (free and slave) within the discourse on sexual *ghaṣb*.

The Shāfiʿīs and Ḥanbalīs shared textual and conceptual characteristics with both the Ḥanafīs and the Mālikīs. Like the Ḥanafīs, they did not include free individuals under the rubric of *ghaṣb*. Moreover, similar to the Mālikīs, they did not have separate textual chapters for *ikrāh*. Consequently, they gathered their discourse on the different indemnities for sexual coercion and genital injuries in the sections on the *diyyāt*. What all this demonstrates is that school differences were textually inscribed in their works, in the sense that conceptual differences led different schools to adopt different textual methodologies in structuring their thought.

Fidelity to a certain *madhhab*, meant the adoption of its textual as well as conceptual classification of crimes.

Finally, I would like to suggest that reparation for sexual violation came in the form of graded justice in the sense that the indemnity was calculated on the basis of the average dowry paid to the victim's peers, such as her kinfolk (*mahr al-mithl*). There was no fixed amount to be paid, which may have benefited a rich victim whose kin would have demanded a hefty dowry, but did not benefit a poorer victim particularly if she had been coerced by a wealthier individual. According to this interpretation, the social class of the female victim played an important role in determining the amount to be paid. This stance is contrary to Ottoman legislation where fines were calculated according to the status of their perpetrators.[1046] By making fines proportionate to the status and income of the perpetrators, Ottoman fines ensured an equal payment to all victims (which would have certainly benefited poorer victims coerced by wealthier individuals) but would have been less advantageous to wealthier victims. The advantage that Ottoman fines could have offered is that they may have been more advantageous to females coerced by individuals who were of their same or higher status.

## Proof, Corroboration, and Probability

This section deals with the different burdens of proof required for the different legal categories previously discussed. I shall argue that different standards of proof existed concerning different acts of "rape" and sexual violation. Proof ranged from proof beyond a reasonable doubt in the case of the *ḥadd* of *zinā* (which necessitated the highest burden of

[1046] Heyd, *Studies In Old Ottoman Criminal Law*, 95.

proof), to proof though clear corroborative evidence in cases of *ghaṣb* (which necessitated a lower burden of proof) and lastly proof through a preponderance of evidence in cases of *ikrāh*, which required a balance of probability indicating that coercion could have taken place. These arguments will be based on both *furūʿ* and *fatāwá* works.[1047] Unfortunately, for the purposes of this section, only the most salient features of proofs, corroboration and *signa* (sing. *signum*/signs) found in the discourse on rape will be delineated.[1048]

Proof beyond a reasonable doubt was required by jurists from all schools regarding the *ḥadd* of *zinā*. Such proof was called for due to the severity of ensuing corporal and capital punishment in cases of conviction. Proof of *zinā* entailed the confession (*iqrār*) and self-incrimination of the *zānī* or proof beyond doubt in the form of eyewitnesses to the penetrative act.[1049] Indeed, the standard of proof for *zinā* had required the testimony of four adult male Muslim eyewitnesses of good repute and sound mind to the act of penetration.[1050] Moreover, due to the severity of punishment, multiple venues were devised in order to mitigate this draconian punishment. As such, the principle of lenity was devised in order to expand the area of doubt (*shubha*) concerning the facts or the legality of the case at hand.[1051] Jurists cited different mistakes of law or of fact that could have been raised to expand the parameters of

[1047] See for example, the *fatwá* cited by Imber, "*Zina*," 195-196.
[1048] The discourse on claims, corroboration, proofs, signs and witnesses is extremely extensive in the *furūʿ* works consulted for this dissertation, consequently, I decided to limit this section to the most salient features of that discourse. To do such discourse justice, extensive research needs to be undertaken; an undertaking which lies beyond the purpose and scope of this chapter.
[1049] Ibn Rushd, *Bidāyat*, 2: 651; Zarkashī, *Sharḥ*, 3: 108-110; Mardāwī, *Inṣāf*, 10: 175-177.
[1050] Shafiʿī, *al-Umm*, 6: 143; Kāsānī, *Badāʾiʿ*, 9: 202-207; Ibn ʿĀbidīn, *Radd*, 4: 7; Qayrawānī, *Risālat*, 2: 282; Nafrāwī, *Fawākih*, 2: 282; Ibn Rushd, *Bidāyat*, 2: 651-652; Zarkashī, *Sharḥ*, 3: 108-110; Zarkashī, *Sharḥ*, 3: 109-111.
[1051] For an extensive exposition of juridical doubt, please see Rabb, "Lenity." For examples of elements constituting "doubt/*shubha*", please see: Ḥalabī, *Multaqá*, 2: 228-234; Shaykh Zada, *Majmaʿ*, 2: 228-234.

doubt.[1052] In addition, automatism and duress were elements that jurists recognised as mitigating factors against the *ḥadd*.

Automatism was mentioned by jurists of different schools within the discourse on the *ḥadd* of *zinā*. It was regarded as ground for doubt in mitigating the *ḥadd* for a female accused of *zinā,* [1053] as well as a male who could have confessed to *zinā* but whose state of mind was questioned.[1054] In the same category, one may include Mardāwī's[1055] and Zarkashī's expansion of mitigating factors such as insanity as well as "whatever causes a person to lose his mind such as sleep, fainting, taking a medication, or inebriety."[1056] Unfortunately, automatism has not received the scholarly attention that it deserves.

Proof of *zinā* revolved around the act of penetration and its licitness or illicitness. By making illicit penetration axiomatic to the definition and proof of the offence, jurists thereby conceived of this offence as a sexual one. In other words, the *mal* of *zinā* was the illicitness of the sexual act and not the violence, coercion or seductive means used in its attainment. *Zinā* was thereby conceived as a crime of sex and proof revolved around the sexual act.

The conception of rape as a crime of sex was referred to earlier in this dissertation. As we saw earlier, Ruggiero had mentioned that in Renaissance Venice debate arose in a particular rape case when authorities hesitated between the conception of rape as a crime of sex or one of violence.[1057] Similarly, Gravdal had mentioned that rape victims in pre-modern

[1052] Marghinānī, *Hidāya*, 2: 366-373; Kāsānī, *Badā'i'*, 9: 166-176; Sarakhsī, *Mabsūṭ*, 9: 38; Ibn Rushd, *Bidāyat*, 2: 642-644.
[1053] Ibn Rushd, *Bidāyat*, 2: 652-653; Ḥaṭṭāb, *Mawāhib*, 6: 294
[1054] Zarkashī, *Sharḥ*, 3: 109; Mardāwī, *Inṣāf*, 10: 175.
[1055] Mardāwī, *Inṣāf*, 10: 175.
[1056] Zarkashī, *Sharḥ*, 3: 109.
[1057] Ruggiero, *Eros*, 89.

France were sometimes punished for having sex done unto them.[1058] Victim punishment was also found in pre-modern England by Carter.[1059]

Duress was always mentioned within the discourse on *zinā* as ground for doubt in mitigating the *ḥadd* for both males and females.[1060] Consequently, does the mention of duress make *al-ikrāh ʿalá al-zinā* a crime of *zinā* or one of *ikrāh*, i.e. does it make rape a sexual offence or one of coercion with all that these classifications entail? The answer to that question may be that rape was an offence that straddled both categories (hence its name) depending on a number of variables such as:

1. Proof: Was there proof in the form of eyewitnesses who could have testified to penetration in order to punish the criminal actor(s) through the *ḥadd*? Did the witnesses fulfill all the necessary requirements in terms of number, character, gender as well as manner of witnessing?

2. Did penetration occur? As we saw earlier, jurists had employed different terms to denote different sexual acts: *waṭʾ* had indicated a sexual continuum whereas *zinā* was used solely for penetration. Therefore, for a rapist to be punished through the *ḥadd*, penetration had to have taken place, any sexual act short of penetration could not be punished through the *ḥadd* in theory.

3. Was penetration illicit or not? The legal status of the parties, the nature of their relationship as well as the (il)licitness of that relationship were some of the factors that impacted the status of the sexual act. Moreover, was the illicitness of penetration due to its

[1058] Gravdal, *Ravishing Maidens*, 127.
[1059] Carter, *Rape in Medieval England*, 112-113, 126. See also: Vigarello, *A History of Rape*, 35- 36.
[1060] Sarakhsī, *Mabsūṭ*, 9: 54; Nawawī, *Rawḍat*, 7: 315, 318; Ibn Rushd, *Bidāyat*, 2: 652-653.

circumstance or *an sich*? For example, the forcible penetration of a non-consenting female to whom the rapist was not united through (quasi)marriage or (quasi)concubinage would have been considered forcible *zinā* meriting the *ḥadd* because in such a case penetration was illicit *an sich* and the *zinā* would have been a *malum in se*. However, the penetration of a non-consenting wife during Ramadan or the pilgrimage would have still been recognised as unwanted penetration meriting religious atonement in the form of a *kaffāra* but not the *ḥadd*.[1061] Penetration in such a case would have been a *malum prohibitum* but not a *malum in se*.

4. Lenity or doubt: Could doubt be raised concerning the illicitness of the sexual act in terms of ignorance of the law, the circumstances surrounding the act, the state of mind of the actors etc.?

5. Injury: Was the penetrated victim injured or not? Whereas some schools had allowed for the combination of civil and criminal punishment, the Ḥanafīs had not thereby transforming the case into a civil one if an indemnity were to be paid.

*Zinā*, as a sexual offence, was thus conceived as one straddling both *mala in se* and *mala prohibita* depending on a great number of variables. It was a legal category that encompassed different offences of a penetrative nature that called for the highest burden of proof. While *ikrāh* was always mentioned within the discourse on *zinā*, such mention may not have necessarily meant that rape was considered *zinā* if proof for it did not exist. In other words, if coerced sexual penetration could have been proven through the stringent proofs required by *zinā,* then *zinā* in such a case would have been recognised. If, however, rape could not be proven through the highest burden of proof but through a lower burden of proof, then *zinā*

[1061] *Al-Fatāwá al-Hindiyya*, 5: 49; Shīrāzī, *Muhadhdhab*, 1: 247, 289.

would not have been recognised and rape would have been recognised as either *ghaṣb* or *ikrāh*, the decisive factor being the nature of available proofs.

In cases of sexual *ghaṣb*, a different kind of proof was required, namely, proof through corroborative evidence (*bayyina*) that did not necessarily amount to proof beyond any doubt. It is this kind of proof that we shall now explore but first a word concerning scholarship on this topic. Scholarship on sexual *ghaṣb* and its corroboration can be attributed to the seminal contributions of Serrano and Azam, who had both consulted important Mālikī sources on this question and analysed thoroughly different facets of the corroboration for *ghaṣb/zinā*.[1062]

A particular difficulty in analysing this topic is that Mālikī jurists sometimes mentioned proofs in the sections on *ghaṣb* and sometimes they mentioned them in the sections on *zinā*, and they often used derivatives of the term "*ikrah*" to denote coerced sex in both sections. [1063] Consequently I shall resort to both sections because the lines between all three catgories seem to have converged at times. Jurists tried to expand the parameters of acceptable proofs beyond the confession of the *zānī* or the required witnesses to the sexual act by introducing a number of corroborative proofs that offered a high degree of probability but not absolute certainty.

The *bayyina* for sexual *ghaṣb/zinā* was a vast category that included witnesses, incriminating corroborative evidence as well as *signa* (signs). As such, a *bayyina* may have been first-hand eyewitnesses or witnesses who had seen or heard the victim being carried or forced against her will but who had not necessarily witnessed the sexual act, or witnesses who had

[1062] Azam, *Sexual Violation*, 201-238; Serrano, "Rape."
[1063] See for example, Ibn Rushd, *Bidāyat*, 2: 491, 652-653; Dasūqī, *Ḥāshiya*, 3: 359, 4: 318-319; Khalīl, *Mukhtaṣar*, 2: 153, 284-285; al-Ābī al-Azharī, *Jawāhir*, 2: 153, 284-285; Mawwāq, *Tāj*, 5: 292 and 6; 294 where sexual coercion was mentioned in the discourse on *ghaṣb* as well as that on *zinā* and derivatives of the term "*ikrāh*" were sometimes used to indicate sexual coercion.

seen the victim bleeding and/or screaming after the crime.[1064] Moreover, the number of witnesses acting as a *bayyina* could have been different from the number of witnesses acting as *shuhūd* in cases of *zinā.* While a *bayyina* for *zinā* comprised four witnesses according to Zurqānī,[1065] Nafrāwī, on the other hand, stated that a *bayyina* casting doubt in a case of sexual violation did not have to amount to four witnesses. He stated that:

> A just *bayyina* must testify, it was said two [witnesses] and some ...said one [witness] because this is a *khabar* (report) and his *khabar* leads to doubt (*shubha*) which leads to the dropping of the *ḥadd*.[1066]

As such, the number of witnesses in cases of *zinā* was different from the number in cases of *ghaṣb*. To prove *zinā,* four witnesses were required but to mitigate it through *shubha* or to raise a claim of *ghaṣb*, one or two witnesses were needed. While both Zurqānī and Nafrāwī used the term "*bayyina*" to refer to witnesses, the number of required witnesses differed considerably depending on the nature of the offence.

Linguistically, while both *bayyina* and *shuhūd* meant witnesses, a legal difference might have existed concerning their number and their testimony. The *shuhūd* in *zinā* had to be eyewitnesses to sexual penetration whereas those acting as *bayyina* for *ghaṣb* had to testify that the raped female had resisted to the utmost. Qayrawānī stated that:

> If a pregnant woman were to say that she had been coerced (*istukrihat*), she is not to be believed and receives the *ḥadd* unless a *bayyina* testifies that she had resisted until he had overcome her, or she came calling for help at the time or she came bleeding.[1067]

The above quotation includes some of the most salient Mālikī requirements of *ghaṣb*, namely, utmost resistance to an attacker (not reasonable resistance or fear), raising the hue

[1064] Nafrāwī, *Fawākih*, 2: 284; Qayrawānī, *Risāla*, 2: 284.
[1065] Zurqānī, *Sharḥ*, 8: 81.
[1066] Nafrāwī, *Fawākih*, 2: 284.
[1067] Qayrawānī, *Risāla*, 2: 284.

and cry, the prompt reporting of the rape and physical signs of struggle and/or injury.[1068] To these requirements, other jurists added other elements such as *signa* of struggle or injury.

*Signa* such as bloodstains or torn clothing also constituted proof as *bayyina*, as well as material evidence in the form of a piece of the defendant's clothing that the plaintiff had snatched away.[1069] To bolster a claim of *ghaṣb*, some jurists had also called for the prompt reporting of the crime and/or required the plaintiff to cling to the defendant (*taʿaluq*) until help arrived.[1070] The reputation and personal character of the accused and/ or the victim were also elements that jurists took into consideration as corroboration for *ghaṣb*.[1071]

Conviction of sexual *ghaṣb* had resulted in civil restitution in the form of an indemnity equal to the dower received by the victim's peers, as outlined in the previous section on the different indemnities. Hence, I would like to suggest that because the outcome was less severe than the *ḥadd*, in most cases, the required burden of proof was less stringent. Corroboration for *ghaṣb*, required proof of force and resistance, i.e., it catered to the definition of *ghaṣb* as a crime of violence where force was used to overcome the will of the victim. Such a requirement is consistent with the definition of *ghaṣb* as an offence anchored in usurpation and violence, with or without asportation. The defining element of the *mal* of *ghaṣb* being force in overcoming the

[1068] Abī al-Ḥassan, *Sharḥ Abī al-Ḥassan li-risālat ibn Abī Zayd,* 2: 298.
[1069] Nafrāwī, *Fawākih*, 2: 284.
[1070] ʿIllaysh, *Taqrīrāt*, 3: 459; Dasūqī, *Ḥāshiya*, 4: 319; Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 3: 148; Nafrāwī, *Fawākih*, 2: 284; Abī al-Ḥassan, *Sharḥ Abī al-Ḥassan li-risālat ibn Abī Zayd,* 2: 298; Khalīl, *Mukhtaṣar*, 2: 153; al-Ābī al-Azharī, *Jawāhir*, 2: 153; Mawwāq, *Tāj*, 5: 292, 6; 294.
[1071] Khurashī, *al-Khurashī ʿalā Mukhtaṣar Sīdī Khalīl*, 3: 148; Khalīl, *Mukhtaṣar*, 2: 153; al-Ābī al-Azharī, *Jawāhir*, 2: 153; Dasūqī, *Ḥāshiya*, 4: 319; ʿIllaysh, *Taqrīrāt*, 3: 459; Abī al-Ḥassan, *Sharḥ Abī al-Ḥassan li-risālat ibn Abī Zayd,* 2: 298; Mawwāq, *Tāj*, 5: 292 and 6; 294. The fear of false accusations was also depicted by Sir Mathew Hale. The latter's influence on past and current Common Law legislation with regards the fear of false accusations as well as the impossibility of rape within marriage has been well documented. See, Lisa Cardyn, "Hale, Sir Mathew," in *Encyclopedia of Rape*, ed. Merril D. Smith (Westport, Connecticut: Greenwood Press, 2004): 94-95 and to a lesser extent Elizabeth R. Purdy, "Marital Rape," in *Encyclopedia of Rape*, ed. Merril D. Smith (Westport, Connecticut: Greenwood Press, 2004): 122-123.

will of the victim. Hence, the latter had to demonstrate through tangible corroborative evidence that resistance had taken place. Without corroboration, the victim could have been accused of *zinā*, which was a sexual offence, or of *qadhf* (calumny), or she could have been accused of eloping with the accused male and then claiming (or her kin accusing the latter of) abduction and demanding that they get married, for example.

Corroboration for *ghaṣb* thus bolstered the definition of the offence as one of violence. As mentioned at the beginning of this dissertation, various definitions of rape have existed throughout history, some anchored in violence and some not. Contemporary legislation, particularly in the Common Law tradition, has emphasised the violent aspect of the crime. As modern research has shown, the conceptualisation of rape as a crime of violence carries both advantages and disadvantages.[1072] One of the advantages being the legal recognition of the violent aspect of the crime while the disadvantages range from the paucity of evidence in a crime that often takes place behind closed doors, to victim reactions which vary considerably according to their age, status, gender and health among others, as well as the fact that the majority of rapes are not physically violent. The majority of rapes are what Estrich has defined as simple rapes where the will of the victim is overcome by non-violent means.[1073]

Consequently, the Mālikī position on corroboration of sexual *ghaṣb* can be said to have carried both advantages and disadvantages for the victim. It conceptualised *ghaṣb* as a violent offence and expanded proof for it to include corroborative evidence in addition to/ or in lieu of the traditional witnesses thereby allowing more victims to claim both kinds of redress. However, by defining sexual *ghaṣb* as a crime of violence, it precluded all the rapes that were

[1072] Please refer to the Introduction on this point.
[1073] Estrich, *Real Rape.*

not forceful in nature. It precluded situations where the will of the victim was overcome through non-violent means, however coercive they may have been. While it is true that Mālikī jurists expanded proof to include corroboration and did not limit proof to its highest form i.e. that beyond a doubt, they nevertheless focused on a particular kind of rape.

Similarly, Mālikīs demanded in their discourse on *ghaṣb* the utmost resistance of victims rather than reasonable resistance. Moreover, they did not take into account an important subjective element, namely, fear of the attacker. The prompt reporting of the attack was also an element that was demanded by Mālikī jurists but may not have been an easy task for victims.

Proof through a preponderance of evidence was required in cases of sexual duress. *Ikrāh*, as a category, had taken cognizance of a broad sexual continuum that was not limited to penetration and often resulted in civil redress through monetary reparation. Consequently, I would like to suggest that because the outcome was less severe than the *ḥadd*, the required proof was concomitantly lower. In fact, as we shall see, the proof required for sexual duress was lower than that for both *ḥadd* and *ghaṣb*. Proof of sexual coercion, on the other hand, rested on a number of variables that followed three distinct trajectories, namely, those pertaining to the context of the crime and the kind of duress used, those pertaining to the coercer and those pertaining to the coerced.

As we saw earlier, different kinds of duress were legally recognised by jurists such as duress by force, duress *per minas* through explicit or implicit threats, duress to the person as well as duress to one's kin. Similarly, hunger and economic necessity were equally recognised

as valid forms of duress. Jurists had emphasised that if any of these different coercive measures had existed, then duress was said to obtain legally.[1074]

In addition, jurists recognised power as well force in the discourse on duress. As such, a coerced did not have to prove through corroborative evidence that force was actually used against her/him, but that the coercer had the power (*qudra*) to unleash that power. The power of the coercer rather than the latter's age, gender or *mens rea* was the defining factor in recognising a coercer as such.[1075] Furthermore, several subjective elements regarding the victim were legally recognised such as fear, physique, the ability to withstand pain, a sense of dignity, class and language register.

By expanding the number of acceptable proofs, jurists were thus able to decide upon a case through a preponderance of evidence rather than corroboration or witnesses. While corroboration insured a high degree of certainty and witnesses elevated proof to an even higher degree of certainty, proof through a preponderance of evidence did not provide the same level of certainty. Consequently, because the degree of proof was lower than the other two, redress for sexual coercion may have been mostly civil/monetary rather than corporal/capital in nature.

Lowering the burden of proof thus carried both advantages and disadvantages. A lower burden of proof facilitated recourse to justice particularly since justice was sought through victim appeal. Justice, however, may have been an indemnity rather than a more severe punishment for the rapist. A lower burden of proof anchored in the circumstances and context

[1074] Please refer to chapter one for an extensive exploration of this point.
[1075] Supra notes 336 to 340.

of the crime may have thus been more advantageous to non-violent rapes as well as acquaintance rapes.

Nowadays, in our contemporary period, acquaintance rapes account for the majority of rape cases[1076] and often do not lend themselves to corroborative evidence in terms of violence, resistance, witnesses etc. Was acquaintance rape more prevalent in the past as it is now, vis à vis stranger rape or violent rapes? By looking at the amount of space and effort that jurists had devoted to *ikrāh* vis à vis the other categories, that may well have been the case. Jurists had devoted considerable textual space to coercion in its myriad forms.

In the above, I suggested that three standards of proof co-existed concerning unwanted sexual crimes. These standards of proof were devised for different legal categories, required different forms of evidence and resulted in different forms of redress. They ranged from proof beyond a reasonable doubt to proof through corroborative evidence and lastly proof through a preponderance of evidence.

The existence of different standards of proof, together with the existence of different legal categories, different contextual definitions, different *mal* as well as different terms to denote the various conceptions of "rape", all of these elements bolster my argument that rape was not conceived as a simple offence. Rather, these elements suggest that instead of a single crime, "rape" existed as different crimes depending on its context. It was called different names and different proofs were devised for each one.

[1076] For example: Schmid, "Date Rape/Acquaintance Rape," 54-56.

## Pregnancy

According to a study cited in the *Encyclopedia of Rape*, the rate of pregnancy resulting from coerced sex is higher than that in consensual sexual relations.[1077] Did such results obtain in the past as they do now? Perhaps they did, or perhaps they did not. Unfortunately though, Mālikī legal opinion in the sources under purview did not regard pregnancy as proof that rape had been committed.[1078] To the contrary, as several scholars have noted, pregnancy was often seen (and is still sometimes seen) as proof of consensual sex, particularly if the victim could not provide corroboration of rape.[1079] I do not dispute these scholarly findings, particularly Azam's which demonstrated that Mālikī opinion on this subject was not uniform.[1080] Notwithstanding Mālikī acceptance of pregnancy as proof of *zinā,* some Mālikī jurists do not seem to have accepted this opinion whole-heartedly, according to Azam.[1081]

It is equally important to note that jurists from the other schools disagreed with their Mālikī counterparts on this issue. As mentioned earlier, the Shāfiʿī jurist Māwardī had stated that the Mālikī rationale was "wrong/ *khaṭaʾ*" and that pregnancy could be attributed to several kinds of sexual relationships.[1082] Similarly, Mardāwī maintained that the official

[1077] Jonathan A. Gottschall and Tiffany A. Gottschall, "Are Per-Incident Rape-Pregnancy Rates Higher Than Per-Incident Consensual Pregnancy Rates?" *Human Nature: An Inter-disciplinary Biosocial Perspective* 14, no.1 (2003): 1-20 quoted from Tonya Marie Lambert, "Pregnancy," in *Encyclopedia of Rape*, ed. Merril D. Smith (Westport, Connecticut: Greenwood Press, 2004): 155.
[1078] For examples of Mālikī statements on the relationship between pregnancy, *zinā* and the *ḥadd*, please see: Mālik, *Muwaṭṭaʾ*, 2: 647; ʿIllaysh, *Taqrīrāt*, 4: 319; Qayrawānī, *Risālat*, 2: 282, 284; Ibn Rushd, *Bidāyat*, 2: 651-652; Mawwāq, *Tāj*, 6: 294; Nafrāwī, *Fawākih*, 2: 284; Dasūqī, *Ḥāshiya*, 4: 319.
[1079] For more on pregnancy and rape, please see: Weimann, "Divine Law," 429-465; Peters, *Crime and Punishment*, 15, 123, 167; Jones-Pauly, *Women Under Islam*, 260-270; Azam, *Sexual Violation*, 2-4, 204-209, 216-219; Kamali, "Punishment in Islamic Law," 210-213; Munir, "Is Zina bil-Jabr a Hadd, Taʿzir or Syasa Offence?" 98-99; Mir-Hosseini, "Criminalising Sexuality," 14; Serrano, "Rape," 167, 169, 171.
[1080] Azam, *Sexual Violation*, 216-219.
[1081] Azam, *Sexual Violation*, 218-219.
[1082] Māwardī, *Ḥāwī,* 17: 45. See also: Nawawī, *Rawḍat*, 7: 316.

opinion of the Ḥanbalī school was that whoever becomes pregnant and does not have a husband or an owner does not receive the *ḥadd* on the basis of her pregnancy.[1083]

I would like to contribute to this discourse by suggesting a possible origin to such bias. I would like to suggest that the assumption by some pre-modern jurists that pregnancy constituted proof of consensual sex might have stemmed from contemporaneous medical opinion. In particular, I would like to suggest Galenic medical opinion. I would like to make this suggestion based on my readings of scholarship on the legal history of rape in the English and American contexts where pregnancy was regarded as proof of consensual sex on the basis of Galen's medical opinions. According to Tonya Marie Lambert:

> Late medieval and early modern English law courts employed the Galenic model of reproduction, which denied the possibility of pregnancy resulting from rape. Galen, an ancient Greek physician, believed that both men and women produced "seed." A woman only released her "seed" upon orgasm, which in turn only happened if the experience had been enjoyable and consensual. The belief that women could not conceive if raped was carried to the British American Colonies.[1084]

Similarly, Donna Graves asserted that New England Puritans believed that pregnancy had to be the result of a pleasurable sexual experience, without which conception could not have occurred. As such, if a woman had accused someone of rape and was later found out to have been pregnant, she would have been charged with either adultery or fornication.[1085] Likewise, Regan Sheldon affirmed that during the seventeenth and eighteenth centuries, it was

[1083] Mardāwī, *Inṣāf,* 10: 184.
[1084] Tonya Marie Lambert, "Pregnancy," in *Encyclopedia of Rape*, ed. Merril D. Smith (Westport, Connecticut: Greenwood Press, 2004): 155.
[1085] Donna Cooper Graves, "Rape History In The United States: Seventeenth Century," in *Encyclopedia of Rape*, ed. Merril D. Smith (Westport, Connecticut: Greenwood Press, 2004): 179.

commonly assumed by Common Law jurists that "rape could not result in pregnancy; conception entailed women's consent."[1086]

Given the influence of Greek medicine on Islamic medicine, could Greek ideas on the relationship between pain, pleasure and conception have influenced pre-modern Islamic jurists, some of whom were actually physicians? To test this hypothesis, I examined the thought of a jurist who had written a book on conception and child rearing, namely, the Ḥanbalī Ibn Qayyim al-Jawziyya (d. 1350 C.E.).

In his book on conception and child rearing, Ibn Qayyim referred to Hippocrates extensively and to Galen to a lesser extent.[1087] Moreover, in the section on conception, Ibn Qayyim referred to Hippocrates' book on the foetus which had mentioned that orgasm had to take place if conception were to ensue.[1088] Ibn Qayyim, however, did not agree with Hippocrates on this matter stating that it is God's will that ensures conception and not the reason proffered by Hippocrates.[1089] Ibn Qayyim's statement was also in line with his school's opinion, as we saw earlier in Mardāwī's statement on this subject.[1090] To gauge the influence of Greek medicine on Islamic legal thought regarding conception, extensive research must be undertaken; research which may prove or refute such an influence. Unfortunately, such research lies beyond the scope of this dissertation.

In this section, I wished to contribute to the discourse on rape and pregnancy by suggesting a possible origin to such bias; a bias which may have originated in

[1086] Regan Sheldon, "Indentured Servitude," in *Encyclopedia of Rape*, ed. Merril D. Smith (Westport, Connecticut: Greenwood Press, 2004): 106.
[1087] For example: Ibn Qayyim al-Jawziyya, *Tuḥfat al-mawdūd bi-aḥkām al-mawlūd* (Bombay: Sharafuddin & Sons, Indo Arab Press, 1961), 140, 147,148, 150, 156, 170-171.
[1088] Ibn Qayyim, *Tuḥfat al-mawdūd*, 171.
[1089] Ibid.
[1090] Supra note 1076.

contemporaneous medical opinion. Although several scholars have examined the relationship between pregnancy and rape, the origin of legal bias on this matter as well as the link between contemporaneous medical thought on conception, in particular Galenic medicine, and the legal discourse on rape have not been explored, to the best of my knowledge.

## The Structure of *Furūʿ* Works

In terms of structure, we find that discussion of the different outcomes was placed in various sections of the *furūʿ*. For example, for the *mahr* in Ḥanafī sources, I looked at the sections on *ikrāh*. For the indemnity for sexual injuries in Shāfiʿī and Ḥanbalī sources, I explored their chapters on the *diyyāt*, and for Mālikī reparation, I consulted their sections on *ghaṣb*. Similarly, when considering the *ḥadd*, the definition of a virgin or the indemnity to be paid, I resorted to the sections dealing with these issues and not the section on *ikrāh*. Unlike contemporary legislation on rape, we do not find the different forms of justice (both punitive and restorative) concentrated within the sections on rape. Rather, the different outcomes were mentioned in different sections such as the *ḥudūd*, the *diyyāt* and *nikāḥ*.

The fact that the different outcomes and means of justice (both restorative and punitive) were elucidated in different sections of the *furūʿ*, points to the conception of these works as organic units whereby information was diffused rather than centralised. The discourse on unwanted and forcible sexual act was disseminated throughout the *furūʿ* and knowledge of the different aspects of this discourse required the consultation of numerous sections of the *furūʿ*. Indeed, this discourse straddled the *ʿibādāt* (the penance required following the unwanted sexual act), the two quarters on the *muʿāmalāt* (the indemnities and

the status of the victim) as well as the *ḥudūd*. This dissemination of knowledge meant that a reader wishing to obtain a full picture of the topic had to read numerous sections and sub-sections of the *furūʿ*, otherwise that reader would have gleaned a very partial and skewed picture of the topic. For example, if we were to consider the section on *zinā* only, we would be left with the understanding that rape was defined solely as a crime of sex, that the volition of the victim was not legally recognised and that proof was centered on the sexual act rather than the unwanted nature of that act thereby denying the victim any means of redress. Similarly, the section on *ghaṣb* on its own would lead to the understanding of rape as a property crime that would be erased once a suitable indemnity would have been negotiated and paid. *Ghaṣb*, as a category, thus emphasised the sexual object versus the sexual subject. Proof of *ghaṣb* was anchored in external, "objective" corroborative evidence such as bloodstains, proof of force or abduction as well as utmost resistance on the victim's part. Consequently, ignoring this organic unity of texts would have led to the presumption that "rape" did not exist in the *furūʿ* or, at best, that it had existed as a simple offence encompassed within a single legal category.

Recognition of the organic unity of texts, thus meant a greater effort on the part of readers as well as a presumption by the authors of *furūʿ* works of their interlocutors' familiarity with the structural architecture of the *furūʿ*.

So, why did jurists structure their discourse on "rape" in such a manner? A hypothesis may be that they wished to align the outcome and/or punishment for sexual coercion with punishment for other criminal offences. Thus, if somebody deflowered a virgin consensually or coercively, for example, the outcome would have been exactly the same regardless of the means used. Indeed, we find in the discourse on *mahr* repeated statements to the effect that a

dowry had to be paid for the mere (ab)use of a female body regardless of (non)consent or the means used.

As a result, by placing the discourse on sexual coercion and violence with other acts of duress as well as other punitive or restorative measures, jurists thereby placed sexual coercion and violence on the same footing as other crimes of duress or violence, and not on lesser footing. In other words, they placed the definition of forcible sexual acts on a par with other definitions of duress as well as other forms of punishment, restitution or reparation for what they deemed to be comparable offences. Consequently, I would argue that jurists had opted for parity and comparability in terms of the classification of crimes that they had deemed similar in terms of a number of variables such as their *mal*, *ratio legis*, context, means, definition or outcome, rather than uniqueness in terms of criminal classification.

The parity and comparability of offences of a sexual nature with other offences is at a stark contrast with our contemporary classification of rape as a single unique offence terminologically and epistemologically. This contrast or rupture between past classification and modern classification may help explain why the presence and diversity of "rape" has eluded many contemporary scholars. If a scholar were looking for a single legal category pertaining to a simple offence that is not differentiated in terms of its *actus reus*, context, means or redress, that scholar would not have found one. Rather, what exists in the primary sources is a number of offences of a sexual nature that are complex and mutually differentiated.

## Concluding Remarks

In this chapter, I developed my earlier argument that "rape" was not a single, simple offence by exploring some of the different outcomes envisaged for this complex crime. I expanded the discourse on redress by arguing that justice for rape was not limited to punitive justice (in the form of the *ḥadd* meted out to the aggressor) but included restorative measures towards the victim as well. These measures included both restitution and reparation.

Restitution appeared in the discourse on the status of the female victim following her rape, particularly in the Ḥanafī discourse. Numerous Ḥanafī jurists had argued for the *de jure* recognition of the raped female as a virgin. In other words, they tried to restore to the victim the status that she had enjoyed before her violation. Whereas jurists from the other schools did not go as far their Ḥanafī counterparts, their position nevertheless carried a certain advantage to the victim, namely, her recognition as a *thayyib* which meant that she could not be married against her will, in theory. In outlining this discourse, I pointed to the usage of two different terms to denote a virgin. There was the tem "*bikr*" which was used for *de facto* and *de jure* virgins and there was the term "*ʿadhrā*'" which was used exclusively for *de facto* virgins. My section on the status of the victim, marks a contribution to scholarship on this issue linguistically (in terms of the different terms used for a virgin) and legally (in terms of underscoring the usage of restitution as a means of justice).

In the same vein, I suggested that reparation towards the victim came in the form of different indemnities granted to the latter. Not all schools granted victims all of the indemnities. Rather, the Shāfiʿī and Ḥanbalī schools seem to have been the most generous. These indemnities were to be paid for unwanted sexual acts as well as sexual violence and

injury, even if that violence were spousal. Consequently, I suggested that spousal sexual violence was recognised *de jure* by jurists. This recognition carried a number of implications such as the circumscription of sexual acts on the basis of individual factors pertaining to the wife such as her health, physique and age. It also meant that the (implicit or explicit) consent to sexual relations found in the marriage contract was circumscribed by jurists and was not unfettered. Similarly, it meant that spousal sexual violence was not treated as a domestic issue beyond the purview of the law.

In the section on pregnancy, I wished to contribute to scholarship on this issue by suggesting that the legal bias on the part of some Mālikī jurists may have stemmed from contemporaneous medical knowledge. In particular, I suggested Galenic medical knowledge. I also indicated that such bias existed in other legal traditions on the basis of Galen.

In his study of the rights of God versus the rights of people, Emon observed stark differences between the *Sunnī* schools. Whereas the Shāfiʿīs and Ḥanbalīs had championed the rights of people, the Ḥanafīs prioritised the rights of God while "protecting defendants" and the Mālikīs maintained an intermediate position between both rights.[1091] The findings of this chapter seem to agree with Emon's research to a great extent. The Shāfiʿīs and Ḥanbalīs were the ones to award the most indemnities to the victim of rape in addition to their acceptance of the combination of civil and criminal punishment. The combination of punishment was also accepted by Mālikī jurists. The Ḥanafīs, on the other hand, had called for the separation of punishment. As I showed through extensive direct quotations of Ḥanafī works, Ḥanafī jurists were not opposed to civil reparations in the form of an indemnity equal to the amount of *mahr* that the victim's kin would have received. Rather, Ḥanafī jurists were opposed to the

[1091] Emon, "Ḥuqūq," 391.

combination of punishment, i.e. the *ḥadd* in addition to the indemnity. My understanding of the Ḥanafī position is thus in direct contrast to Azam's who had maintained that the Ḥanafīs were not in favour of civil redress preferring instead to view rape as solely a *ḥadd* crime warranting four witnesses to the sexual act and punishable by means the *ḥadd* only.[1092]

In the section on corroboration and proofs, I persisted with the theme of legal and terminological plurality permeating the discourse on rape. I did so by suggesting the presence of three different kinds of proofs for the three different categories of sexual violation, namely, *zinā, ghaṣb* and *ikrāh*. I argued that *zinā* demanded certainty in the form of proof beyond doubt through four eyewitnesses to the sexual act; *ghaṣb* demanded a lower burden of proof though corroborative evidence; while *ikrāh* required the lowest burden of proof in the form of a preponderance of evidence. The degree of certainty or probability as well as the nature of available evidence determined to a large extent the classification of the crime as well as ensuing punishment or redress. The higher the degree of certainty, the more severe the punishment became.

In his study of certainty and probability in the context of Prophetic precedents, Hallaq demonstrated the elaboration and acceptance of different degrees of certainty and probability that were thought to lead to certain or probable knowledge.[1093] Hallaq's findings bear a strong resemblance to the discourse on corroboration and evidence that I found in the discourse on the different kinds of rape. Jurists imagined a sliding scale of proofs ranging from utmost certainty to strong or less strong probability and tied this scale to the degrees and kinds of punishment or redress for rape.

[1092] Supra notes 51, 52 and 934.
[1093] Wael Hallaq, "On Inductive Corroboration, Probability and Certainty in Sunnī Legal Thought," in Nicholas Heer ed. *Islamic Law and Jurisprudence* (Seattle: University of Washington Press, 1990): 3-31.

Finally, in his research on signs as forms of evidence, Johansen emphasised the acceptance of circumstantial evidence by jurists. Even though Schacht and Coulson had maintained that circumstantial evidence was not deemed legally acceptable in Islamic legal discourse, Johansen affirmed that such evidence was resorted to and accepted by jurists. Moreover, he pointed to an earlier study by Brunschvig that had demonstrated the usage of such forms of evidence.[1094] In addition, Johansen pointed to the role that a person's reputation (as a witness) played in the juridical process.[1095] Johansen's findings on circumstantial evidence as well as reputation can be equally seen in the discourse on rape in terms of the acceptance of circumstantial evidence such as bloodstains and signs of struggle. In terms of reputation, the discourse on *ghaṣb* highlighted the role that reputation played in terms of both plaintiff and defendant. Circumstantial evidence was not only accepted but seems to have been continually expanded by jurists.

[1094] Baber Johansen, "Signs as Evidence: The Doctrine of Ibn Taymiyya (1263-1328) and Ibn Qayyim al-Jawziyya (d. 1351) on Proof," *Islamic Law and Society* 9, no. 2 (2002): 173.
[1095] Ibid., 169.

## Conclusion

In this study, I argued that jurists of the four *Sunnī* legal schools did not view rape as a simple offence in Islamic *furūʿ* works, but as a complex differentiated one that straddled numerous legal categories. To demonstrate my argument, I examined different categories, different definitions of the offence, different outcomes as well as different terms used to denote wanted and unwanted sexual acts. I suggested that the pluralism, which characterized the theoretical formulation of various elements of Islamic law and the existence of different methodologies within the legal schools and different fields and sub-fields of legal activity was equally crucial to the discourse on the offence of "rape."

I did not adopt a single definition for rape, whether anchored in violence, the vitiation of consent, the negation of the victim's will, seduction or sex. Rather, I joined numerous scholars of "rape" who have questioned the definition and classification of rape as a single monolithic offence. Consequently, whenever the term "rape" was used in this study, it was used in the very broad sense recently coined by Pillay as "a crime of coercion."

In the introduction, I began with two reviews of the literature; one focusing on the study of rape within the field of Islamic law and a second one on the study of rape in medieval and Renaissance Europe. Moreover, in the section on methodology, I painted with very broad strokes the major trends in the study of rape in contemporary jurisprudence underscoring the work of Estrich, Wertheimer, Tadros, Gardner and Shute among others.

Jurists, as I showed in the first two chapters, devoted much attention to the definition of rape as a crime of duress vis à vis other definitions of rape. The implications of such an array of thought, such as the different kinds of duress (*per minas*, to kin, complete and partial and

economic duress) were critical in emphasizing victim experience (fear, language register, class, the ability to withstand pain). Moreover, the acknowledgement of victim experience points to an awareness of the sexual subject versus the sexual object. Acknowledging victim experience was also important in underscoring the disparities of power between the coercer and the coerced, especially in the discourse on power (*qudra*) versus force. The very fact that rape was defined as a crime of duress without the requirements of force, consent or will led to an extremely expansive definition of rape. Such an expansive definition bypassed corroborative evidence of utmost resistance on the victim's part and made proof of the vitiation of consent contingent on the context of the crime and the presence (or absence) of a number of elements that could establish duress rather than force. The *mal* of duress was thus anchored in the vitiation of consent by some jurists or the harm principle by other jurists. Such an expansive definition fits what Tadros has called "Rape without Consent" in a completely different context. It fits such a name because it highlights legal precedents for a definition of "rape" without the requirements of consent, force or will. Highlighting this legal precedent could be useful for contemporary scholars of "rape" who have questioned current definitions based on consent or force.

The category of duress took cognizance of a very broad sexual spectrum that recognised, as legally repugnant, sexual acts that fell short of penetration and that extended beyond the protection of virginity. Importantly, sexual coercion within licit relationships was recognised to a certain extent. In order to demonstrate this sexual spectrum, I examined the different terms used to describe sexual acts (*waṭʾ*, *jimāʿ*, *zinā*, and *ityān*) and concluded that they were used to signify different sexual acts. They were not used synonymously. This distinction

between the different terms denoting sexual acts could be considered a contribution to the field.

A close look at the structure of *furūʿ* works, in my view, shows that they function as organic textual units, whereby ignorance of one or more parts, could lead to a lop-sided understanding of the subject of rape. As such, if one were to consider *ghaṣb* only, one would get the impression that rape was treated solely as a property offence. Similarly, *zinā* on its own would denote a sexual offence while *ṣiyāl* could be seen to favour stranger rapes. Together, however, they form a nuanced collage of the different forms and contexts of "rape."

When examining the categories of *ghaṣb* and *ṣiyāl* in chapter three, I noted that whereas *ghaṣb* pertained to offences against property, *ṣiyāl* pertained to assaults and violent offences. The introduction of the legal category of *ṣiyāl* to the scholarly discourse on rape should be seen as a contribution to the understanding of rape under Islamic law. By placing rapes and attempted rapes within these two categories jurists thereby expanded the definition and *mal* of rape. In *ghaṣb*, the *mal* of rape was anchored in the usurpation and usage of another's body. Accordingly, rape was viewed as an indemnifiable tort to be compensated for through an indemnity equal to the *mahr* that the free victim's kin would have received. This discourse evoked the body as property argument in terms of self-ownership as well as the ownership of another's body as property (*māl*), in the case of a slave victim. Not all schools, however, had regarded the rape of a free female as *ghaṣb*. Indeed, it was only the Mālikīs who had done so. The reason for this difference between the Mālikīs and their counterparts from the other three schools, concerning the scope of *ghaṣb,* was not clear.

Within the discourse on *ṣiyāl*, attempted rapes were discussed by Shāfiʿī jurists. The latter were the only ones to devote textual space and a separate textual category to *ṣiyāl.* While assaults existed within the thought of other schools as well, the Shāfiʿīs were the only ones to have a separate category entitled *ṣiyāl.*

Interestingly, jurists raised the issue of attempted rapes as crimes of seduction within this category. Rape, as crime of seduction, is one where the victim's will is overcome through non-violent means such as lies and false promises. The term "*rāwadahā ʿan nafsihā*" was used in this context to suggest the seductive means used to obtain sex. It thus points to awareness of the different means used to overcome the will of the victim whether through force or seduction and that these diverse means were legally recognised by jurists. In other words, means other than force existed *de jure*. The existence of rape as a crime of seduction and within the legal category on assaults is a contribution to the field.

In this study, I also expanded the notion of justice for rape beyond the punitive and suggested that concrete restorative means were to be found in legal theory. These means, which I discussed in chapter four, included both reparation and restitution. There was the discourse on the legal status of victims and the attempt by some jurists to restore the victims to their former status by recognising a rape victim as a *de jure* virgin, even when she was not factually so. The Ḥanafī recognition of a rape victim as a *de jure bikr* as well as the distinction between a *bikr* and an *ʿadhrāʾ*, would form a welcome contribution to scholarship on virginity.

Different indemnities were suggested as financial compensation for rape victims. Not all schools espoused all of the indemnities and indeed not all schools favoured the combination of civil and criminal punishment. Notably, the Ḥanafīs favoured the separation of punishment.

Unlike the conclusions drawn by Azam, I found that rape could have been treated by Ḥanafī jurists as an indemnifiable tort. The separation of punishment, the nullification of female consent and the rationale for the payment of an indemnity were treated by Ḥanafī jurists as important elements shaping the legal delineation of rape and compensation.

Furthermore, I suggested the existence of different standards of proof for the different categories of rape. Whereas *zinā* called for proof beyond any doubt, *ghaṣb* required strong corroborative evidence and *ikrāh* asked for a preponderance of evidence. These different proofs ranged from absolute certainty to strong probability to reasonable probability. Consequently, these differences in terms of certainty versus probability engendered different outcomes for both plaintiff and defendant.

The issue of pregnancy following rape, examined in chapter four, led me to suggest the presence of a contemporaneous medical bias as the basis of the view that rape could not result in pregnancy. This suggestion, in turn, can contribute significantly to the study of rape in Islamic legal works.

I also demonstrated that legal theory recognized different kinds of rape. Through several examples, I pointed to the legal recognition of acquaintance, spousal and stranger rapes. The diversity of definitions pointed to the pragmatic awareness of the many different contexts of rape. Importantly, it was not only stranger rapes or violent rapes that were legally recognised but the more widespread acquaintance rapes.

In terms of the study of the *furūʿ*, I underscored the textual architecture of these legal works. I argued that the method that jurists used to structure their works played an integral role in shaping the schools' methodologies. I suggested that school differences went beyond

the doctrinal and were inscribed in the respective architectures of their works. For example, the Ḥanafīs were the only jurists to devote chapters to the category of duress and the Shāfiʿīs were the only ones to have chapters on assaults. While the other schools equally broached the subjects of duress and assault, they did not devote separate textual units to them. Rather, they subsumed them *inter alia* among other topics. I have thus contributed to the field by showing the exclusiveness of textual categories to certain schools.

Through the elucidation of the meaning of the different terms given for sexual acts, I underscored the importance of the *ʿibādāt* to the discourse on rape. Had I ignored the *ʿibādāt*, I would not have distinguished between the different connotations of the different terms. I would not have recognised a difference between *al-ikrāh ʿala al-zinā* and *al-ikrāh ʿalā al-waṭʾ*, for example. Whereas the first term denoted forced penetration, the second denoted forced coitus which could have included a wider spectrum of sexual acts. The first term regarded forced penetration as legally prohibited whereas the second term extended prohibition to a wider sexual spectrum. This has highly significant implications in the case of a sexually violated victim whose violation did not include penetration but who had been sexually molested nevertheless. Whereas the first term raised the bar for the recognition as well as the prohibition and punishment of sexual duress, the second term lowered that bar considerably. Consequently, ignoring the important insights gleaned from the *ʿibādāt*, would have led to a partial understanding of the topic. The *ʿibādāt* were thus integral to the rest of the *furūʿ* in terms of legal insights. The importance of the *ʿibādāt* and their role in elucidating legal doctrine is a contribution to the study of the *furūʿ*.

In terms of legal terminology, I emphasised the linguistic diversity of terms that appear at first blush to be synonymous but in fact denote distinct legal connotations. Cases in point

include the aforementioned terms used for sexual intercourse as well as the differences between *ʿadhrāʾ* and *bikr, bayyina* and *shuhūd*, *riḍā* and *qubūl*. *Riḍā*, I argued, signified both affirmative and performative consent.

The classification of rape under different legal categories, each anchored in a different *mal* with a different legal term to denote it, as well as the diverse outcomes and burdens of proof required for the different categories, all of these elements led me to conclude that "rape" was not viewed as a single offence but as different offences. Each offence had its own name, *mal*, burden of proof and outcome. Unlike our classification of rape as a single crime, pre-modern jurists had opted for legal diversity regarding the different kinds of rape. Instead of including all the different kinds of rape under a single category, they designated different terms for the different "rapes" and classified them differently. Jurists seem to have thus opted for parity and comparability in terms of classification and outcome with offences that shared the same *ratio legis* as the context or means of rape, for example. Accordingly, rapes were put on a par with other crimes which resulted in a greater variety in terms of definition and outcome. I noted, however, that one could also argue that "rape" did not emerge into an independent legal category in such a way that merited its inclusion, with all these diverse contexts and associated elements and conditions under one category as in the case of the chapters on *nikāḥ* and *ṭalāq*, which recognize several distinct types of marriages and divorces.

This legal and linguistic plurality may have resulted in a greater number of tools available to judges and litigants concerning this offence. Together, these tools may have helped in casting a wider net as far as the tailoring of justice was concerned. Rather than viewing them as competing categories, I chose to view them as complementary tools to combat a complex crime that often takes place behind closed doors. Importantly, while legal

theory often strove toward equity (as it was formulated within the juristic tradition), as well as the preservation of the dignity and integrity of those identified as victims, its rubric cannot be divorced from gendered, patriarchal, and class dynamics. As such, jurists worked within a system marked by asymmetric power relations between men and women, as well as owners and slaves. The *sharīʿa*, being the product of a pre-modern social setting, does not claim to embrace modern values of gender equality or the idea that the law is theoretically blind to sex, class or race. Rather, jurists perceived notions of socio-economic balance and harmony as essential goals. They were more concerned with minimizing offences, infractions and abuses to ensure that the *maqāṣid* (aims) of the *sharīʿa*, hence, integrity of one's life, offspring, possessions, and personal dignity, were safeguarded.[1096]

[1096] For more on the "*maqāṣid*," please see Wael Hallaq, "*Maqāṣid* And The Challenges Of Modernity," *Al-Jāmiʿah* 49, no.1 (2011):1-31.

# Appendix

In this appendix, I shall provide biographical information on many of the jurists cited in this study as well as the names of their books that were used in this dissertation. In compiling this appendix I have resorted to the *Encyclopaedia of Islam* as well as the biographical information sometimes provided at the beginning of some *fiqh* works. The appendix is arranged by school affiliation and in alphabetical order.

## The Ḥanafī school:

Abū Ḥanīfa al-Nuʿmān ibn Thābit al-Kūfī (d. 150/767) was the founder of the Ḥanafī school of law. He lived most of his life in Kūfa.

Abū Yūsuf: Yaʿqūb ibn Ibrāhīm al-Anṣārī al-Kūfī (d. 182/798) was a prominent jurist and judge as well as a pupil of the school's founder Abū Ḥanīfa, whose opinions Abū Yūsūf sometimes diverged from.

Afghānī: ʿAbd al-Ḥakīm al-Afghānī (d. 1908) was a late Ḥanafī jurist. Aghānī was born in Afghanistan and died in Syria where he had taught for nearly a quarter of a century. He was the author of *Kashf al-ḥaqāʾiq sharḥ Kanz al-daqāʾiq.*

ʿAynī: Maḥmūd ibn Aḥmad al-ʿAynī (d. 855/1451) was the author of *Al-Binãya fī sharḥ al-Hidãya.* He was a Ḥanafī jurist active in Mamlūk Cairo where he occupied the posts of chief Ḥanafī judge, inspector (*muḥtasib*) of pious foundations and professor at the Muʾayyada school (*madrasa).*

Bābartī: Muḥammad ibn Maḥmūd al-Bābartī (d. 786/1384) was a Ḥanafī jurist who lived and died in Egypt. He wrote a famous commentary on the *Hidãya* entitled *Sharḥ al-ʿInãya ʿalá al-Hidãya.*

Ḥalabī: Ibrāhīm ibn Muḥammad al-Ḥalabī (d. 956/1549) was the author of *Multaqá al-abḥur fī furūʿ al-*ḥannafiyya which became, according to the second edition of the Encyclopaedia of Islam, "the authoritative handbook of the Ḥanafī school in the Ottoman Empire."

Ḥaṣkafī: Muḥammad ibn ʿAlī al-Ḥaskafī (d. 1088/1677) was an Ottoman jurist and the author of *Al-Durr al-mukhtār sharḥ Tanwīr al-abṣār.*

Ibn ʿĀbidīn: Muḥammad Amīn Ibn ʿĀbidīn (d. 1198/1784) wrote the famous *Radd al-muḥtār.* Ibn ʿAbidīn lived in Syria towards the end of Ottoman rule and was one of the most distinguished Ḥanafī jurists of his time.

Ibn Nujaym: Zayn al-Dīn ibn Nujaym (d.970/1563) was the author of *Al-Baḥr al-Rāʾiq sharḥ Kanz al-daqāʾiq* which is a commentary on Nasafī's important work *Kanz al-daqāʾiq*. He died in Cairo.

Kāsānī: ʿAlāʾ al-Dīn Abī Bakr ibn Masʿūd al-Kāsānī (d. 587/1189) wrote *Kitāb Badāʾiʿ al-ṣanāʾiʿ fī tartīb al-sharāʾiʿ*. Kāsānī was born in Central Asia where he studied but later moved to Syria till his death.

Marghinānī: Burhān al-Dīn ʿAlī ibn Abī Bakr ibn ʿAbd al-Jalīl al-Marghinānī (d. 593/1197) was the author of the famous *Al-Hidāya sharḥ Bidāyat al-mubtadī.* Marghinānī came from a long line of Ḥanafī scholars from Marghīnān, Farghana which is in present day Uzbekistan.

Nasafī: Abū al-Barakāt ʿAbd-Allāh ibn Aḥmad al-Nasafī (d. 710/1310) was the author of the important Ḥanafī work *Kanz al-daqāʾiq* which generated many commentaries. He was born and died in Uzbekistan.

Qāḍī Zāda: Shams al-Dīn Aḥmad ibn Qawḍar (d. 1045/1635) was an Ottoman jurist who penned *Natāʾij al-afkār fī kashf al-rumūz was al-asrār*.

Sarakhsī: Shams al-Dīn al-Sarakhsī (d. *ca*. 490/1096) is the author of *Kitāb al-Mabsūṭ*. Sarakhsī lived, studied and taught in Transoxania.

Shaybānī: Muḥammad ibn al-Ḥassan al-Shaybānī (d. 189/805) was a famous Ḥanafī jurist and one of the students of Abū Ḥanīfa. His views often diverged from that of his eponym.

## The Ḥanbalī school:

Ibn Mufliḥ: Burhān al-Dīn Ibrāhīm ibn Muḥammad (d. 784/1479 or 80) was a leading Ḥanbalī jurist and the author of *Al-Mubdiʿ sharḥ al-Muqniʿ*. He lived most of his life in Damascus.

Ibn Qayyim al- Jawziyya (d.751/1350) was born and died in Mamlūk Damascus where he became a student of the famous jurist Ibn Taymiyya. He was a prolific author who wrote*Tuḥfat al-mawdūd bi-aḥkām al-mawlūd* among others.

Ibn Qudāma: Muwaffaq al-Dīn ʿAbd-Allāh ibn Aḥmad ibn Qudāma (d. 541/1147) was the author of *Al-Mughnī.* He was born near Jerusalem but lived most of his life in Damascus.

Khiraqī: ʿUmar ibn al-Ḥusayn ibn ʿAbd-Allāh al-Khiraqī (d. 334/946) was one of the first Ḥanbalī jurists and the author of the first *oeuvre* of Ḥanbalī *fiqh*, namely, *Mukhtaṣar al-Khiraqī.* He was born in Baghdad but later moved to Damascus.

Mardāwī: ʿAlī ibn Sulaymān ibn Aḥmad al-Mardāwī (d.885/1480 or 81) was influential in Egypt and was the author of *Al-Inṣāf fī maʿrifat al-rājiḥ min al-khilāf ʿalá madhhab al-imām Aḥmad ibn Ḥanbal*.

## The Mālikī school:

Bannānī: Muḥammad al-Bannānī (d. 1194/1780) came from a long line of Mālikī scholars from Fes. He wrote a commentary on Zurqānī's gloss of Khalīl's *Mukhtaṣar*. It was entitled: *Ḥāshiyat sīdī Muḥammad al-Bannānī.*

Dardīr: Aḥmad al-Dardīr (d.1201/1786) was an Egyptian jurist, *muftī* and *ṣūfī*. He taught at al-Azhar and was the author of *al-Sharḥ al-ṣaghīr*.

Dasūqī: Muḥammad ibn ʿArafa al-Dasūqī (d. 1231/1815) was an Egyptian jurist and the author of *Ḥāshiyat al-Dasūqī ʿalá al-Sharḥ al-kabīr.*

Ḥaṭṭāb: Muḥammad ibn Muḥammad ibn ʿAbd al-Raḥmān al-Ḥaṭṭāb (d. 954/1547) was a Mālikī author of *Kitāb Mawāhib al-Jalīl li-sharḥ Mukhtaṣar Khalīl.* Beirut: Dār al-Fikr, 1992.

Ibn Rushd: Muḥammad ibn Aḥmad Ibn Rushd (d. 595/1198) was a famous Cordovan polymath. He wrote *Bidāyat al-mujtahid wa nihāyat al-muqtaṣid*, among others. Ibn Rushd was a scholar of law, philosophy and theology as well as the natural sciences.

ʿIllaysh: Muḥammad ibn Aḥmad ʿIllaysh (d. 1299/1882) was a distinguished Azhar scholar and the author of *Taqrīrāt al-ʿalāma al-muḥaqiq al-shaykh Muḥammad ʿIllaysh.*

Khalīl ibn Isḥāq al-Jundī (d. 776/1374) was a renowned Egyptian Mālikī jurist. His famous *Mukhtaṣar al-ʿalāma Khalīl,* became a major reference work within the Mālikī school and received numerous later commentaries.

Khurashī: Muḥammad ibn ʿAbd-Allāh al-Khurashī (d. 1101/1689 or 90) was an Egyptian Mālikī scholar and teacher at al-Azhar. He wrote a commentary on Khalīl's Mukhtaṣar entitled *Ḥāshiyat al-Khurashī ʿalā mukhtaṣar sīdī Khalīl.*

Mālik ibn Anas: Founder of the Mālikī *madhhab*, Mālik ibn Anas lived in Medina and was the author of *al-Muwwaṭṭaʾ*. He died in 179/795.

Mawwāq: Muḥammad ibn Yūsuf al-ʿAbdarī al-Mawāq (d. 897/1492) was a Mālikī jurist from Granada. He was the author of *al-Tāj wa al-iklīl li-Mukhtaṣar Khalīl.*

Qayrawānī: Ibn Abī Zayd al-Qayrawānī (d. 386/996) was a renowned Mālikī jurist from Qayrawān. He was a prolific author who penned the famous *Risālat ibn Abī Zayd al-Qayrawānī.*

Ṣāwī: Aḥmad al-Ṣāwī (d. 1241/1825) was an Egyptian Mālikī scholar and the author of *Bulghat al-sālik li-aqrab al-masālik*.

Tāwūdī: Muḥammad al-Tawūdī (d. 1207/1792) wrote a commentary on Ibn ʿĀsim's famous oeuvre entitled *Ḥulá al-maʿāsim li-fikr Ibn ʿĀṣim wa huwa sharḥ urjuzat Tuḥfat al-ḥukām.*

Tusūlī: ʿAlī ibn ʿAbd al-Salām al-Tusūlī or Tasūlī (d. 1278/1861) wrote a commentary on Ibn ʿĀsim's famous work which was entitled *Al-Bahja fī sharḥ al-Ṭuḥfa ʿalá al-urjuza al-musammāh bi Tuḥfat al-ḥukām li ibn ʿĀṣim al-Andalusī.*

Wanshārīsī: Aḥmad ibn Yaḥyá al-Wansharisī (d. 914/1508) was a Mālikī jurist who taught in Fes. He is the author of the famous compendium of Mālikī *fatāwā* entitled *Al-Miʿyār al-Muʿrib*.

Zurqānī: ʿAbd al-Bāqī al-Zurqānī (d. 1099/1688) was an Egyptian Mālikī jurist. He wrote a famous commentary on Khalīl's *Mukhtaṣar* entitled: *Sharḥ al-Zurqānī ʿalá Mukhtaṣar sīdī Khalīl.*

## The Shāfiʿī school:

Anṣārī: Zakariyā al-Anṣārī (d. 926/1520) was a renowned jurist, teacher and judge in Mamlūk Egypt. He wrote *Tuḥfat al-ṭulāb bi-sharḥ TaḥrīrTanqīḥ al-lubāb*, among others.

Baghawī: Abū Muḥammad al-Ḥusayn ibn Masʿūd ibn Muḥammad al-Farrāʾ (d. 510/1117, 515/1121, or 516/1122) a Shāfiʿī scholar and author of two famous *ḥadīth* collections

Bayjūrī: Ibrāhīm al-Bayjūrī or Bājūrī (d. 1276/1860) was an Egyptian jurist and teacher who became the shaykh of al-Azhar from 1847 till his death. He was alsothe author of *Ḥāshiyat Ibrāhīm al-Bayjūrī ʿalá Sharḥ Ibn al-Qāsim al-Ghuzī ʿalá Matn al-shaykh Abī al-Shujāʿ*, among others.

Ghazālī: Abī Ḥāmid Muḥammad ibn Muḥammad al-Ghazālī (d.505/1111) was the renowned author of *Al-Wasīṭ fī al-madhhab* and was associated with the Khurāsānian branch of the school.

Maḥallī: Jalāl al-Dīn Aḥmad ibn Muḥammad al-Maḥallī (d. 864/1459)was a renowned Egyptian scholar and jurist who lived and died in Mamlūk Cairo. He wrote *Sharḥ al-Maḥallī ʿalá Minhāj al-ṭālibīn*, among others.

Marṣafī: Muḥammad al-Marṣafī (d. 1306/1890)wa san Egyptian scholar and teacher. After following a traditional course of study at al-Azhar and teaching there for a number of years, Marṣafī was chosen by ʿAlī Mubārak to teach at the modern Dār al-ʿUlūm college. He was the author of *Nafāʾis wa laṭāʾif muntakhaba min Taqrīr al-shaykh Muḥammad al-Marṣafī ʿalá Ḥāshiyat al-Bujayrimī.*

Māwardī: Abī al-Ḥassan ʿAlī ibn Muḥammad al-Māwardī (d. 450/1058) lived most of his life in Baghdad under two ʿAbbāsid caliph. He was a renowned teacher, judge and the author of *al-Ḥāwī al-kabīr,* among others.

Muzanī: Ismāʿīl ibn Yaḥyá al-Muzanī (d. 264/877) was a student of al-Shāfiʿī who penned a famous *Mukhtaṣar* of Shāfiʿī thought. He was active in Egypt.

Nawawī: Yaḥyá ibn Sharaf al-Nawawī (d. 676/1277) was a prominent jurist in Mamlūk Damascus. He authored *Minhāj al-ṭālibīn* and *Rawḍat al-ṭālibīn*.

Qalyūbī: Shihāb al-Dīn Aḥmad b. Aḥmad al-Qalyūbī (d. 1069/1659) was an Egytian pupil of Shams al-Dīn al-Ramlī and an eminent authority within his school during his lifetime. He wrote numerous works, among which was his commentary on Maḥallī's commentary on Nawawī's *Minhāj*, which was printed with ʿUmayra's commentary and entitled: *Ḥāshiyatān al-Qalyūbī wa ʿUmayra ʿalá Sharḥ al-Maḥallī ʿalá Minhāj al-Ṭālibīn.*

Rāfiʿī: ʿAbd al-Karīm ibn Muḥammad al-Rāfiʿī (d. 623/1226). This Shāfiʿī scholar was born in Kazwīn and was the author of *Fatḥ al-ʿazīz sharḥ al-Wajīz,* among other works.

Ramlī: Shams al-Dīn Muḥammad ibn Aḥmad al-Ramlī (d. 1004/1595) was a prominent Shāfiʿī jurist who lived and died in Mamlūk Cairo. He wrote *Nihāyat al-Muḥtāj ilá sharḥ al-Minhāj fī al-fiqh ʿalá madhhab al-imām al-Shāfiʿī.*

Shāfiʿī: Muḥammad ibn Idrīs al-Shāfiʿī (d. 204/820) was the founder the Shāfiʿī school of law. He wrote *Kitāb al-Umm*, among others.

Shīrāzī: Abī Isḥāq Ibrāhīm ibn ʿAlī al-Firūzabādī al-Shīrāzī (d. 476/1083) was born in Persia but lived most of his life in Seljūk/ʿAbbāsid Baghdad. He wrote *Al-Muhadhdhab fī fiqh al-Imām al-Shāfiʿī,* which became a key reference work within his school. He was associated with the Iraqi branch of the school.

Shirbīnī: Muḥammad ibn Muḥammad al-Khaṭīb al-Shirbinī (d. 977/1570) was an Egyptian jurist and a prolific author. He wrote a famous commentary on Nawawī's *Minhāj* entitled: *Mughnī al-muḥtāj ilá maʿrifat alfāẓ al-Minhāj* as well as *Al-Iqnāʿ fī ḥall alfāẓ Abī al-Shujāʿ.*

## The Ẓāhirī school:

Ibn Ḥazm, ʿAlī ibn Aḥmad (d. 456/1063) was a Cordovan jurist and polymath who wrote *Al-Muḥallá.* Ibn Ḥazm was credited by Goldziher of "illuminating, almost single-handedly in the Mālikī milieu, the literalist or Ẓāhirī school." E.I 2

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