SEX AND THE LEGAL SUBJECT:
WOMEN AND LEGAL CAPACITY IN *ḤANAFĪ* LAW

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ABSTRACT

This study of *ahliyya* (legal capacity), illustrates how femaleness features as a category of law and further how sex difference determines the legal capacities of women. It originates in concerns for equality in South African debates on state recognition of Muslim marriage. Theoretically and methodologically, it is located in the interdisciplinary space of feminist studies and Islamic law, draws on feminist theories of sex difference and employs feminist methods of reading texts to theorise the differential treatment of women in classical and contemporary legal theory (*uṣūl al-fiqh*) and positive law (*furū' al-fiqh*). Reading classical legal theory texts taught in a *Ḥanafī madrasas* and contemporary adaptations of classical law I make apparent the 'imaginary configurations', 'metaphoric networks' and points of tension through which the texts convey ideas about the woman of Islamic law.

In the complex formulation of the female legal subject I find that classical Ḥanafī legal theory does not explicitly distinguish female legal capacity from male legal capacity; femaleness does not feature amongst the nineteen impediments to legal capacity. Nonetheless classical legal theory and positive law both distinguish between male and female legal subjects. The challenge in studying legal capacity and sex difference is to ponder the intersection of these two paradigms, the theoretical non-distinction of women's legal capacity from other forms of legal capacity and the distinctions between men and women in positive law generally. I find that the normative legal subject of the historical law is a free, adult, male yet, unlike the enslaved male and the infant or minor male, the female legal subject is not similarly distinguished by virtue of a differentiated category of legal capacity; gender is not a distinguishing legal category of the theoretical legal subject. Implicitly, however, in the classical legal text social

norms come to work as natural conditions that attach to ideas of femaleness. Accordingly, it is incorrect to assume the absence of a distinctive category results in the absence of distinctive legal subjectivity for women. Rather distinctive legal capacity does not necessarily arise from a distinct category of legal incapacity. Instead, the law locates bodies in a matrix of other social categories, viz. reason, age, social class, life experience and marital status, so as to disrupt the symmetry of biology and sex differentiated legal capacity. It relies instead on a discursive construction of femaleness that formulates uneven legal capacities for women. The social facts that attach to women's bodies inform us of the ideological system that produces the female subject of the legal text.

Contemporary legal theory, contrary to its classical precursor, either imposes severe restrictions upon women as legal subjects or pretends to the absence of distinction between female and male legal subjects. The pretense denies the differential treatment of women in the law while the restrictions result in a category of 'imperfect legal capacity' for women. Further, comparing classical and contemporary approaches, the former frames a distinct but discursive female legal subject, multiply and situationally constituted.

However, both historical and modern approaches occlude the obvious impediment to legal capacity that marriage effects on female legal subjects, notably limitations on a wife's legal capacities within the marriage and the marital authority of husbands to manage the sociality, mobility, and spirituality of wives, ownership of the marital bond being a uniquely male legal capacity.

Finally, contemporary legal theory frames inflexible determinates of female legal subjectivity and eventually produces essentialist and existential understandings of

women. This illustrates the modern representation of women's legal capacity as not merely a modern manifestation of historical legal thought, but indeed modern in its origin and formation.

APERÇU

Cette étude découle du souci d'équité dans les débats sud-africains quant à la reconnaissance étatique du mariage musulman. D'un point de vue théorique et méthodologique, le projet se situe dans le champ interdisciplinaire des études féministes et du droit islamique. Il puise dans les théories féministes sur les différences entre les sexes et emploie des méthodes féministes de lecture des textes pour théoriser le traitement différentiel des femmes dans les théories classique et contemporaine des sources du droit (*uṣūl al-fiqh*) et le droit positif (*furū' al-fiqh*). Une lecture des textes classiques faisant partie du curriculum d'une *madrasa ḥanafite* ainsi que des adaptations contemporaines du droit classique nous a permis de dégager les configurations imaginaires, les réseaux métaphoriques et les points de tension que portent ces textes au sujet de la femme dans le droit islamique. Avec le traitement d'*al-ahliyya* (la capacité juridique) comme point focal, nous avons exploré comment la féminité est considérée comme une catégorie du droit et comment la différence de sexe détermine la capacité juridique de la femme.

Rendant compte de la complexité de la femme en tant que personnalité juridique, nous constatons que la théorie classique des sources du droit n'établit pas une distinction explicite entre la capacité juridique de l'homme et celle de la femme. En effet, la féminité ne figure pas parmi les dix-neuf empêchements à la capacité juridique. Toutefois, autant la théorie classique des sources du droit (*'usûl al-fiqh*) que le droit positif (*furû` al-fiqh*) distinguent entre les sujets de droit mâle et femelle. L'étude de la capacité juridique et des différences entre les sexes pose l'enjeu d'une réflexion sur la croisée de ces deux paradigmes, à savoir l'absence de distinction théorique entre la capacité juridique de la

femme et les autres catégories de capacité juridique et la différenciation entre l'homme et la femme dans le droit positif islamique en général. Nous remarquons que le sujet de droit normatif du droit islamique classique est un mâle adulte libre. Cependant, contrairement à l'esclave mâle ou encore à l'enfant mâle mineur, le sujet de droit femelle n'est pas l'objet d'un traitement spécifique en termes de formes différentielles de sa capacité juridique. Selon les usages provenant des normes linguistiques et des pratiques juridiques, le genre n'est pas considéré comme une caractéristique juridique distincte du sujet de droit. Néanmoins, dans le texte juridique les normes sociales fonctionnent comme des conditions naturelles liées à des idées concernant la féminité. Ainsi, il serait erroné de présumer que l'absence d'une catégorie distincte donne lieu inévitablement à l'absence d'une subjectivité juridique distincte.

Certes, le droit traite essentiellement du corps, mais il le situe au sein d'une matrice d'autres catégories sociales, à savoir : la raison, l'âge, la classe sociale, l'expérience de vie et la situation matrimoniale troublant ainsi la symétrie entre la biologie et la capacité juridique différenciée selon le sexe. Il repose sur une construction discursive de la féminité qui établit des capacités juridiques différentes pour la femme. Les faits sociaux reliés au corps de la femme nous éclaircissent quant au système idéologique qui donne lieu au sujet féminin du texte juridique. La théorie contemporaine des sources du droit, contrairement à son précurseur classique, impose de sérieuses restrictions aux femmes en tant que sujets de droit ou prétend l'absence de distinction entre les femmes et les hommes en tant que sujets légaux. Les restrictions se basent sur des idées concernant la féminité, associées au corps de la femme, et définissent une catégorie pour les femmes dite de « capacité juridique imparfaite ». L'allégation nie le traitement différentiel des

femmes dans le droit. En comparant les deux approches, nous constatons que la théorie classique des sources du droit érige pour la personnalité juridique de la femme un cadre distinctif, mais discursif multiple et circonstanciel. Alors que la théorie contemporaine établit des déterminants rigides de la subjectivité juridique de la femme aboutissant somme toute à des interprétations essentialistes et existentielles de la femme.

Notre analyse démontre que la présentation moderne de la capacité juridique de la femme n'est pas simplement une interprétation contemporaine de la pensée juridique historique, mais est moderne aussi bien dans son origine que dans sa construction. L'intention n'est guère de prétendre à un texte juridique historique exempt du biais patriarcal. En effet, l'approche moderne est cohérente avec l'approche classique en ce qu'elle entretient, à l'instar de cette dernière, une orientation patriarcale. En conclusion, l'approche historique et l'approche moderne occluent le compromis distinct que le mariage procure à la capacité juridique d'une femme, notamment sa capacité juridique au contrat; la propriété du lien conjugal est une capacité juridique de l'homme uniquement et la femme est, tout aussi uniquement, sous l'autorité conjugale de l'époux.

LIST OF TRANSLITERATION

Table of the system of transliteration of Arabic words and names used by the Institute of Islamic Studies, McGill University.

B	=	ب	Z	=	ز	f	=	ف
t	=	ت	s	=	س	q	=	ق
th	=	ث	sh	=	ش	k	=	ك
j	=	ج	ṣ	=	ص	l	=	ل
ḥ	=	ح	ḍ	=	ض	m	=	م
kh	=	خ	ṭ	=	ط	n	=	ن
d	=	د	ẓ	=	ظ	h	=	ه
dh	=	ذ	‘	=	ع	w	=	و
r	=	ر	gh	=	غ	y	=	ي

Short: a = ◌َ ; i = ◌ِ ; u = ◌ُ

Long: ā = ا ; ī = ي ; ū = و

Diphthong: ay = اي ; aw = او

*Hamza = ’ *(not standard but applicable in this study)

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DEDICATION

To the women of South Africa whose liberation remains on hold twenty years after our transition to democracy, it would be presumptuous to assume my work will change much, as far as I hope is that in deepening the conversation we may remain hopeful until we reach our goals and finally find the justice we seek.

Chapter One:

Introduction, Theory and Method

Every word is King on a throne,
it's subjects, the meanings that placed it there.
(Shabbir Banoobhai)

A. Introduction

I trace my academic interest in Islamic law to debates surrounding the legal recognition of Muslim marriage after the end of apartheid and with the election of the first democratic state in South Africa in 1994. By Islamic law I refer to the combination of Islamic legal theory (*uṣūl al-fiqh) and* positive law (*furū' al-fiqh*), which together form a legal paradigm that shapes the lives of Muslims across the globe.[1] In the heated debates that have ensued from 1994 until now matters of positive law such as *ṭalāq* (unilateral male divorce), polygyny and inheritance have shared space with matters more relevant to Islamic legal theory such as legal capacity for contract, proprietary ownership and sexual autonomy. These matters have in turn shared space with matters of concern for South African law such as constitutional requirements for equality, the potential conflict in the intersections of religious and secular law and the role of the state in legislating upon

[1] I translate *uṣūl al-fiqh* as legal theory as it is a common translation of the term in English writing on the matter. Other translations include 'jurisprudence' and 'roots of law' but legal theory prevails. Unless explained otherwise, in the chapters that follow, *ahliyya* refers to legal capacity, legal theory refers to *uṣūl al-fiqh* and positive law to *furū' al-fiqh*.

[2] For an assessment of the history of the recognition of Muslim marriages and a study of the different views that have emerged in the community see Ebrahim Moosa, "Prospects for Muslim Law in South Africa: A History and Recent Developments," *Year Book of Islamic and Middle Eastern Law* 3(1996). Also see Waheeda Amien, "Overcoming the Conflict between the Right to Freedom of Religion and Women's Rights to Equality: A South African Case Study of Muslim Marriages," *Human Rights Quarterly* 28, no. 3 (2006).

[3] For an edited collection of essays covering a wide spectrum of legal frameworks in the Mediterranean region between the fourteenth and nineteenth centuries see Jutta Gisela

matters of religion.[2] My concerns came to rest upon matters of legal capacity or, more precisely, how the law determines what a person may legally do. I was then accustomed to a narrative of Muslim women who, by contrast to European women of medieval times, had independent legal capacity to own and trade in all forms of property. Their legal capacity to secure contractual and other entitlements was thought unique to the Muslim world in medieval times and Muslims have taken pride in this distinction as indicator of an advanced legal culture.[3] I was familiar with these historical references, yet local legal scholars emphasised ideas of marital control and women's legal incapacity in the positive laws of marriage and divorce. Furthermore, outside the South African debates on Muslim Personal Law, in international geo-political debates, while Muslim women and European women function as oppositional poles in discussions on women's rights and legal autonomy, Muslim women are no longer considered the privileged holders of a superior legal capacity to European women. Instead, in the paradigm of a liberal women's rights framework, Muslim women ae frequently cast as the oppressed class of Muslim society.

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[3] For an edited collection of essays covering a wide spectrum of legal frameworks in the Mediterranean region between the fourteenth and nineteenth centuries see Jutta Gisela Sperling and Shona Kelly Wray, *Across the Religious Divide: Women, Property and Law in the Wider Mediterannean (Ca.1300-1800)* (New York; London: Routledge, 2010). Rapoport also recounts the surprise with which German and Italian travellers encountered Muslim women's capacities for divorce and property, see Yossef Rapoport, *Marriage, Money and Divorce in Medieval Islamic Society* (Cambridge; New York: Cambridge University Press, 2005). For a study of Europe's changing perceptions of Muslim women see Mohja Kahf, *Western Representations of the Muslim Woman: From Termagant to Odalisque.* (Austin: University of Texas Press, 1999).

The dissonance of these competing claims brought me to a study of Islamic law with the aim of understanding how the law defines women and how the jurists determine what women may legally do. Metaphorically, these question guides my study. In the hopes of a deeper understanding of the woman of Islamic law I examine the female legal subject of Islamic law and how ideas of femaleness operate in Islamic legal manuals. My study compares contemporary assessments of women's legal capacity to classical approaches noting firstly how 'woman' and femaleness feature in the law and secondly the affects of these two approaches on women's struggles for equality at present.

B. Overview

I define the Muslim female legal subject as the female individual addressed in the legal manuals of legal theory and positive law, historical and contemporary. To develop our understanding of whom this subject is, the category 'woman' and how she is constituted in legal manuals, is the core work of this study. I examine how the text envisions the woman addressed by the law by asking about the normative person of Islamic law and how this person differs (if indeed) from the female legal person? We enquire how sex difference features in the constitution of law's person and we examine what might make a legal subject female. I concern myself with what distinct capacities are available or unavailable to women because they are female. I am interested in what differentiates the legal facilities available to men and women as subjects of the law.

Embedded in both legal theory and positive law literature are the outlines of how the law imagines the female person it addresses. Thus the woman of Islamic law emerges in various places and in varied ways. My first task is to capture the complexity of her presence by assessing how the female subject of Islamic law is constructed through the

discursive operations of sex difference and social fact. My second task is to bring these formulations to bear in the discussions on gender based legal reform as it pertains to the constitution of Muslim women as subjects of the law today. I hope to identify, at the intersection of these two discussions, an understanding of how the female subject of Islamic law is constituted.

I begin this study from the premise that a Muslim woman is a subject of the law in that she is addressed by the law. Following the norms of jurisprudence all individuals addressed by the law have legal capacity, i.e. *ahliyya*.[4] Accordingly, our study of *ahliyya* focuses on how the law formulates distinct legal capacities for Muslim men and women. Because these distinctions are not uniform or consistent, we must also pay attention to their fluctuations and origins. Our study of the absence and presence of distinctions between women and men gives us insight into some of the major determinants in constituting women as legal subjects. Amongst the conclusions I arrive at is that the female legal subject may be understood as multiple, situational and further distinguished by marriage. I evaluate these findings in light of the critical study of women in Islamic law which displays a variety of approaches to the female legal subject, amongst them a complementary, dual, unequal and at times contradictory female legal subject. Combining insights from the legal manuals with insights from critical study of women and law allow us to theorise the female legal subject of the legal texts.

The study is shaped by two sets of literature. The one set originates in the field of Islamic law and includes legal manuals of legal theory and positive law. The other set emerges from the critical study of Islamic law and is limited to the studies of legal

[4] ibn Abī Saʿīd ibn ʿUbayd Allāh al-Ḥanafī al-Ṣadīqī Jīwan, *Nūr Al-Anwār Maʿa Ḥāshīyat Qamar Al-Aqmār* (Delhi: Kutub Khanah Rashidiyah, 1960).

change, women and the law, and the legal person. My method is to evaluate the first set of literature in terms of concerns raised by the second as well as my own concerns on the constitution of the Muslim female legal subject in contemporary South African society. Theoretically and methodologically, this project is located in the interdisciplinary space of feminist studies and Islamic law. It draws on feminist theories of sex-difference to analyse the differential treatment of men and women in the law and employs feminist methods of reading texts, limiting the analysis to concepts in their textual rather than applied forms.

C. Theoretical Framework

1. A Mismatch of Expectation and Reality: Not Really Equal

Critical feminist legal studies draw attention to the law's ability to simultaneously produce and conceal the individual addressed by the law thus making the identity of the legal subject elusive. Functioning on the premise of neutrality, law's subject is ostensibly every individual yet the varied experiences of people who encounter the law reveal otherwise. For many Muslims Islamic law is a system of justice and fairness. Further, contemporary and classical scholars have theorised that Islamic law is occupied with the primary objectives of preserving life, lineage, property, dignity and faith.[5] Muslim women, like Muslim men, access the law with this promise in mind. Some women emerge with a sense of justice and others, however, frequently, with a bitter sense of injustice. Where justice appears to have been eluded because the pleader was female, the

[5] Ṭāha Jābir ʻAlwānī, *Source Methodology in Islamic Jurisprudence: Uṣūl Al-Fiqh Al-Islām*, trans. Yusuf Talal DeLorenzo and A. S. Al-Shaikh, New rev. English ed., Research Monographs / International Institute of Islamic Thought (Herndon, Va.: International Institute of Islamic Thought, 1994); M. Khalid Masud, *Islamic Legal Philosophy: A Study of Abū Isḥāq Al-Shāṭibī's Life and Thought* (Delhi: International Islamic Publishers, 1989).

mismatch of expectation and reality makes apparent gender and related aspects of legal differentiation. Having trusted in the law's justice, proof to the contrary proves unfair differential treatment based on sex difference and discriminates against women. To illustrate, a South African woman enters a marriage contract which specifies procedures to circumvent summary dissolution of the marriage through the pronouncement of *ṭalāq*. Having signed and concluded the contract, years later her husband ignores the conditions enumerated in the contract and one day pronounces *ṭalāq*, summarily concluding the marriage and leaving her divorced. Her appeals to local legal scholars go unheeded. The contracted procedures of consultation, family mediation and mutual regard are easily ignored in favour of the letter of the law which, she is told by the legal scholars, exists external to the contract. In their view the husband has merely exercised his legal capacity to unilaterally end the marriage. Other distinctions between male and female legal counterparts are found in the laws on inheritance, leadership, sexuality and witnessing. A daughter may legally receive only half her brother's share in their parent's estate. Women may not exercise state leadership while men may. Women historically did not have sexual access to the males slaves they own as men have to the female slaves they own. Modest women may not marry without a guardian as men may and women generally may not act as witness in *ḥadd* (prescribed) cases as men may.[6]

This reality, however, is frequently countered by the truism that spurs the work of Muslim advocates for legal reform who argue that Muslim women and men are considered equal in the sight of God and that the law must give effect to this equality.

[6] A useful English language reference for contemporary positive law (*furū' al-fiqh*) is the English translation of *al-Qudūrī's* text, Muḥammad Āshiq Ilāhī al-Barnī, *At-Tashīl Ad-Darūrī of the Masāil of Qudūrī*, trans. Mufti Afzal Hoosen Elias (Karachi: Zam Zam Publishers, 2008).

Indeed at times it does and at times the truism is realised through the law. While the law certainly distinguishes between male and female legal subjects in some areas of law in other areas it appears to make no such distinction. Men and women both hold equal spiritual accountability before God for fasting, prayer and pilgrimage. Women, as men, may hold property, trade it and bequeath it.

Yet in each suggestion of equality in the law there is also a distinction between men and women which gestures toward potential inequality. While women and men must fast and pray, women may not do either during menstruation. While men and women may hold property women may not inherit in the same capacity as their male counterparts so that brothers and sisters inherit differently, as do husbands and wives and mothers and fathers in most instances. When the law does not give effect to the equality of women it suggests that, while equal before God, women are not equal in the law. The lack of recourse upon unilateral divorce is one illustration of the inequality. If a husband may unilaterally terminate a contact of marriage how do we explain that the pair are equally partners to the marriage contract and further, how do we understand a wife's legal capacity in a marriage? Are they equal? May we consider men and women equal in the law when a brother and sister cannot inherit equally, when state leadership is exclusively male or when the law allows legal interdiction or limitations upon women's legal capacities in the marriage contract?

What do these distinctions and the mismatch between Muslim women's expectations of justice and equality and their experiences of injustice and inequality tell us about how sex difference features in the constitution of law's person? What is it that differentiates the legal facilities available to men and women in the law and what determines the

distinct capacities available or unavailable to women because they are female? Further, what do the variations in the legal facilities available to men and women tell us about how the law envisions female subjects?

2. Muslim Women Are Equal before God and Unequal before the Law

The dynamic of gender equality in Islamic law is read by a substantial portion of reformist Muslims as a divinely ordered affirmative framework for the realization of women's rights.[7] The presence of a sexually undifferentiated spiritual subjectivity, evident in theological discussions, historically and presently accompanied by the selectively equal treatment of women in some spheres of law suggest to reformers and activists that Islamic law includes a core of gender justice. Whether this gender justice has been realised or not separates advocates for gender based legal reform from advocates for normative applications of Islamic law, each with a different view of the legal facilities available to Muslim women. Normative interpretations are content with the existing legal framework. Reformists struggle with the tension between what they see as a divinely ordered equality between men and women and legal inequalities that emanate from women's experiences with the law. Shaheen Sardar Ali represents the dichotomy as a

[7] An example is Azizah Yahia al-Hibri, "Muslim Women's Rights in the Global Village: Challenges and Opportunities," *Journal of Law and Religion* XV, no. 1&2 (2000). By contrast, more conventional readings of Islam argue against equality and in favour of the popular alternative equity. Nonetheless, the sentiment that Islam provides an ideal framework for gender relations prevails. Along these latter lines are L. I. al-Faruqi, *Women, Muslim Society, and Islam* (Indianapolis, IN: American Trust Pub., 1991)., Z. Kausar, *Women in Feminism and Politic[S]: New Directions Towards Islamization* (Selangor, Malaysia: Women's Affairs Secretariat (WAFA), IIUM, 1995). Also see A. R. Doi, *Women in Sharī'a (Islamic Law)* (UK: Taha Publishers Ltd., 1989). In this reading the disconnection between the text and the practice is not as evident or it works in different ways. Kausar, for example, separates Islam into its traditional and religious manifestations and suggests a discontent between these two manifestations of women's tights in Islam arguing against the first in favour of the second.

tension between women who are "equal before Allah and unequal before man", aptly, the subtitle of her book *Gender and Human Rights in Islam and international Law*.[8] Trusting in the former, Muslim women frequently encounter the latter. The disparity has prompted numerous feminist reform efforts either through national legislative systems or by re-reading historical legal texts and the primary sources of the law, Qur'an and *ḥadīth*.[9]

My intention here is neither to prove nor disprove any of these convictions. It is rather to explore one particular aspect of Muslim women as legal subjects, i.e. *ahliyya* (legal capacity), and to discern from the way *ahliyya* is constructed in jurisprudence and implemented in positive law who is the 'woman' of Islamic law. More specifically, it is to explore how the female legal subject is produced in the law. My investigation is potentially the beginning of a larger project toward a theory of sex difference in Islamic law which is either for another time or for others to follow through. For now, my project only seeks to understand the woman of Islamic law as far as an analysis of legal capacity allows. How is she imagined? What attributes and capacities are assigned to her?

Knowing the female legal subject in these terms will allow us to understand why it is that women may be equal as souls but unequal as bodies, as Muslim feminist reformers suggest.[10] If men and women are considered equal then how do we explain that women and men may not have the same legal capacities, for to be equal is not just to be considered equally accountable and responsible over our lives, thoughts and actions,

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[8]See Shaheen Sardar Ali, *Gender and Human Rights in Islam and International Law: Equal before Allah, Unequal before Man?* (The Hague: Boston: Kluwer Law International, 2000).

[9] Reforms include the Mudawwana reforms in Morocco in 2004, Divorce and *Khul'* (compensatory dissolution) law reform in Egypt in 2000 in Egypt and attempts at *Ḥudūd* law reform in Pakistan in 2006.

[10] Ali, *Gender and Human Rights in Islam and International Law: Equal before Allah, Unequal before Man?*

before Allah, but also to have the legal capacity for equal access to all the matters that control our lives, thoughts and actions and all matters that shape our legal accountability to Allah.

3. Muslim Women in Islamic Law as Muslim Female Subjects

Islamic legal theory or jurisprudence is the specific area of Islamic law where the nature and characteristics of *ahliyya* are outlined. Therefore, an assessment of female legal subjectivity in Islamic law necessarily begins with a study of *al-ahliyya,* the Islamic legal concept referred to as legal capacity. Much like western statutory law, the parameters for legal capacity include age, mental competence and freedom. However, Islamic law has different premises from western law and these are naturally reflected in the discussions of legal capacity.[11] A series of up to nineteen impediments to legal capacity define the legal facilities available to legal actors. Some are divinely determined and thus beyond human control, and others are within the control of the legal individual. The legal individual is further defined in the operations of positive law, which demonstrates how ideas of legal capacity are translated into laws that establish the legality of an act.

A preliminary reading of classical legal theory indicates that female legal capacity is not explicitly separated out from male legal capacity and femaleness does not feature amongst the nineteen impediments to legal capacity. Nonetheless classical legal theory and positive law both distinguish between male and female subjects. The challenge in studying legal capacity is to ponder upon the intersection of these two paradigms, the non-distinction of women's legal capacity from other forms of legal capacity and the

[11] Most significantly, the final legal authority in Islamic law is God whereas in conventional European or secular legal systems the state is the final legal authority.

distinctions between men and women in positive law generally. To do this I examine ideas of femaleness in terms of how women's bodies feature in the legal texts.

4. Feminist Strategies for Reading Silence

I frame my study in terms of 'sex' and 'sex difference' in line with Judith Butler's [12] critique of the discursive nature of sex and to heed the warnings of feminist scholarship about gender as a historical category.[13] We cannot, Rebecca Flemming explains, assume the distinctions between the body and the meaning of the body to extend through time, nor can credible scholarship emerge from an uncritical application of contemporary categories to historical sites. Therefore I am careful in this study not to impute values to the scholars and texts under study, rather to allow the texts to tell us what values they hold and with what visions of maleness and femaleness they operate.

Feminist scholarship, through an analysis of the literary aspects of writing and concern with the "points of tension within a text",[14] offers valuable reading strategies that allow for in-depth and nuanced examinations that lay bare the assumptions, imaginaries and unspoken grammar of historical texts.

In the absence of women's voices in legal texts, feminist reading methods are attentive to the operative grammar of discourse. As Luce Irigaray explains, this mode of analysis entails:

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[12] Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1999).

[13] Flemming cautions us, "just as the Aristotelian body is not the body of modern sex in any number of ways . . . so that which bears down on this body… is hard to think of as gender, even in an analytical sense" Rebecca Flemming, *Medicine and the Making of Roman Women: Gender, Nature, and Authority from Celsus to Galen* (Oxford ; New York: Oxford University Press, 2000), 16.

[14] Genevieve Lloyd, "Introduction," in *Feminism and the History of Philosophy* (New York: Oxford University Press, 2002), 4.

> an examination of the operation of the "grammar" of each figure of discourse, its syntactic laws or requirements, its imaginary configurations, its metaphoric networks, and also, of course, what it does not articulate at the level of utterance: **its silences**.... repeating/interpreting the way in which, within a discourse, the feminine finds itself defined as lack, deficiency, or as imitation and negative image of the subject ...we interpret at each "moment" the specular makeup of discourse, that is, the self-reflecting (stratifiable) organization of the subject in that discourse.[15]

In addition, Michelle Le Doeuff employs the notion of the 'imaginary', a rhetorical term that constitutes the assumptions upon which a text rests.[16] The imaginary refers to figures, imagery and analogical structures in knowledge. It is

> ... symptomatic of an (intellectual and political) elision: it marks those places within texts where the discourse is unable to admit its founding assumptions and must cover them. It signals, thus, a crucial vulnerability within texts and arguments, a site for what remains otherwise unspeakable yet necessary for a text to function.[17]

Using these strategies, I will take us through a reading of primary legal manuals for ways in which femaleness finds itself defined within the discursive constructions of Islamic legal theory and Islamic positive law. In doing so, my aim is to make apparent the "imaginary configurations", "metaphoric networks" and "points of tension" within the

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[15] Luce Irigaray, *This Sex Which Is Not One* (Ithaca, N.Y.: Cornell University Press, 1985), 74-80.
[16] E Grosz, *Sexual Subversions: Three French Feminists* (Sydney: Allen & Unwin, 1989), xix.
[17] Ibid.

texts, to examine what is said, what remains un-articulated "at the level of utterance" and to explore the "silences" of the text for the messages they convey about the woman of Islamic law. I employ a specular scheme, using the text as a mirror that reflects back not only what is seen but, more importantly, the perspective from which the observer defines what is seen.

Given the theoretical privilege of Muslim women in Islamic law over European women in European law, how well do these adapted reading strategies apply when reading Islamic legal texts? My reading of Islamic texts is not at all a comparison between Islamic law and western law and therefore I do not read the norms of western law into the Islamic text. Instead the reading strategies I use allow for an examination of the text in its original context for what are the discernible assumptions and views of the scholar writing the text and so, with the necessary adjustments for context, these reading strategies are easily portable into new reading spaces. Reading in this way I hope to find where and how sex difference features when the text addresses the female legal subject. I examine what about being male or female determines the legal facilities available to men and women. In this way I hope to discern how maleness and femaleness of the subject determines the distinct capacities made available to them in law.

5. Sexing the Subject of the law

The legal subject of contemporary women's rights discourse is generally characterized as an individual whose basic humanity grants her a legal agency on equal terms with her male counterpart. This discourse of equality functions on the assumption of a legal agent as a neutral subject undifferentiated by sex. Feminist jurisprudence, however, argues that the neutral subject of the law is in fact heavily endowed with

masculine characteristics and that it is the male person that is the normative subject of legal thought. 'Sexing the subject' is a feminist legal project that emerged in the late nineties in the context of third wave feminism, characterized by shifting legal analytic categories from 'gender' to 'sex'[18] and aimed at deconstructing the historical positioning of women in the law.[19] It is an act of theory,[20] a method of inquiry, an act of "witnessing and documenting the effects of history and practice".[21] It is not about essentialised definitions of women.[22] Arguments for 'sexing the subject' have developed along two strains: first by exploring the ways in which the law assigns a particular sex identity to a subject as though sex identities are natural to persons and second by exploring how the male sexed person comes to be the normative subject of the law. Finally it suggests possibilities for de-sexing or re-sexing law and the legal subject.[23] Exploring the historical and contemporary understandings of 'woman', Ngaire Naffine, a key proponent of this project, takes issue with the inclusion of 'woman' under the concept 'legal person' which functions under the presumption of a male norm and a normative 'man of law'. The law, she says, "gets specific when it considers women because women are the non-

[18] Nicola Lacey, "On the Subject of Sexing the Subject," in *Sexing the Subject of Law*, ed. Ngaire Naffine and Rosemary J. Owens (North Ryde: NSW: LBC Information Services, 1997), 65.
[19] Katherine O' Donovan, "With Sense, Consent or Just a Con? Legal Subjects in the Discourse of Autonomy," in *Sexing the Subject of Law.*, ed. Ngaire Naffine and Rosemary J. Owens (North Ryde: NSW: LBC Information Services, 1997), 48.
[20] Margaret Davies, "Taking the inside Out: Sex and Gender in the Legal Subject," in *Sexing the Subject of Law.*, ed. Ngaire Naffine and Rosemary J. Owens (North Ryde: LBC Information Services, 1997, 1997), 26.
[21] O' Donovan, "With Sense, Consent or Just a Con? Legal Subjects in the Discourse of Autonomy," 50.
[22] Lacey, "On the Subject of Sexing the Subject," 71.
[23]For collection of essays, see Ngaire Naffine and Rosemary J. Owens, *Sexing the Subject of Law* (North Ryde, NSW :: LBC Information Services, 1997).

standard case which therefore requires definition".[24] As a suggestion for de-sexing or re-sexing the law her project aims to "alter the dynamics of sexual difference recognized in the law"[25] and promote legal thought that does not align sex and gender with body parts.[26] Arguing for a relational subject, Naffine suggests that a subject "who is not in fact singular but equipped with many natures in transformation could well encompass women" and allow for the very categories of male and female to dissipate.[27]

My current project utilises many tools for sexing the subject as a necessary precursor to trying to alter the dynamics of sexual difference. For now, it confines itself to understanding just how Islamic law, captured in legal manuals, constructs its female legal subject, and more specifically, how the category "woman" operates in these manuals of law, with the aim of bringing to light the apparent mismatch between Muslim women's legal expectations and legal realities.

6. Embodied Subjects

Accordingly, this analysis attends to the meanings and social proscriptions assigned to embodied subjects. Denise Riley and Joan Scott provide some useful tools to understand meaning and representation as we study women.[28] Meaning is mutable and in understanding how categories such as 'women' work in relation to other categories (viz.

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[24] Ngaire Naffine, "The Body Bag," in *Sexing the Subject of Law*, ed. Ngaire Naffine and Rosemary J. Owens (North Ryde: LBC Information Services, 1997), 88.
[25] Davies, "Taking the inside Out: Sex and Gender in the Legal Subject," 27.
[26] Ibid., 45.
[27] Ngaire Naffine, "Can Women Be Legal Persons," in *Visible Women: Essays on Feminist Legal Theory and Political Philosophy* ed. Susan James and Stephanie Palmer (Oxford: Hart, 2002), 89-90.
[28] Denise Riley, *"Am I That Name?": Feminism and the Category of "Women" in History* (Minneapolis: University of Minnesota, 1988).; Joan W. Scott, "Gender: A Useful Category of Historical Analysis," *The American Historical Review* 91, no. 5 (1986).

men or human), we are able to discern the particular meaning of what is entailed in being a woman in a given time and place.

For Scott, gender is a shifting category of analysis; it is the meaning of sex difference that emerges in the relationship between male and female and, she reminds us, bodies do not have inherent or consistent meanings. Scott resists ideas of consistent and antagonistic sexual polarity and allows us to historicise sexual difference as we deconstruct it.[29] We achieve this by examining the dynamics in "the relationship between male and female experience in the past" and, further, in connections "between past history and the current historical practice".[30] Scott's reminders are useful as we examine historical and contemporary texts. We must bear in mind the contingency of meaning in the female body and be alert to the dynamic of male and female experiences we observe in the text if we are to genuinely historicise the meaning of sexual difference rather than impose contemporary meanings upon past practices.

Riley argues, for 'women's experience' as a category of analysis that allows for the most specificity and flexibility in the study of women in various times and spaces. She locates the site of this experience in the body but also considers the body an unsteady marker.[31] It is only "intelligible in relation to whatever else supports and surrounds it".[32] As the 'location of the sexual' the body is historically mutable and never above or below history.[33] Riley requires that we understand the various ways in which the body has been

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[29] Scott, "Gender: A Useful Category of Historical Analysis," 1065.
[30] Ibid., 1055.
[31] Riley, *"Am I That Name?": Feminism and the Category of "Women" in History*, 106.
[32] Ibid., 104.
[33] Also, "women's body is opaque" she argues, and "circulates inexorably among the categories which sometimes arrange it in sexed ways, sometimes not". Ibid., 107.

experienced and to question the extent to which the body and the gender of its bearer are co-extensive.[34]

Scott alerts us to the dynamic of relationship between male and female experience and Riley to the temporality of the sexed body. Much like Butler, their observations also upset our traditional associations of sex and gender and require that historical analysis be cognisant of the contingent meanings of sex difference. Scott and Riley foreground the mutability of the body as a function of sex difference, whether that difference is thought to proceed from or to the body. Their observations require that our analysis of women in historical texts must be located upon women's experiences with attention to the temporal and spatial meanings assigned to sex difference, women's bodies in dynamic relationship with their surroundings and the dynamic of male and female experience.

7. Juridical Power and Social Fact

Judith Butler also comments on the mutability of the body and further on the discursive construction of what she calls the juridical subject. Butler analyses the juridical subject of feminism by interrogating the category 'women' and argues for the constructed nature of sex which, in her view, does not exist before or after its discursive production.[35] As the location of sex, the body itself, she says is constructed and does not have a signifiable existence prior to the mark of gender.[36] Nonetheless, "certain cultural configurations of gender take the place of 'the real'" and subsequently become consolidated and naturalized.[37] Therefore, to problematize the construction of the subject,

[34] Ibid., 104.
[35] Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge Press, 2008), 8.
[36] Ibid., 12.
[37] Ibid., 45.

according to Butler, is to offer a critical study of the categories of identity that are 'engendered, naturalized and immobilized' in juridical structures.[38]

Butler argues about difference by problematizing the normativity of sex and proposing that sex, like gender, is also discursively constructed. By separating sex from gender, deconstructing sex, and exposing the foundational categories of sex, gender and desire, she makes a genealogical critique of the "political stakes" associated with designating a cause or origin to identity categories. The origin of identity categories in the body promotes the sexualisation of the body "the naturalization of women with sex difference", which is in turn used to justify social proscriptions upon the female body. [39]

What political operations produce and conceal what qualifies as the female legal subject of Islamic law?[40] Juridical systems of power, according to Butler, *produce* the subjects that they eventually come to represent through 'exclusionary practices' that do not 'show' after they have been established. She explains that

> law produces and then conceals the notion of a 'subject of law' in order to invoke that discursive formation as a naturalized foundational premise that subsequently legitimates that laws own regulatory hegemony.[41]

Therefore, to assess the discursive construction of the female legal subject we must pay attention to how the body, the location of sex difference, functions through the mark of gender that is constitutive of its existence. Further, we must note how cultural configurations of gender become naturalised and immobilised as the real.[42] In doing this

[38] Ibid., 7.
[39] Ibid., xxx1.
[40] Ibid., 8.
[41] Ibid., 2-3.
[42] Ibid., 45.

we may hope to 'decentre' the 'woman' of Islamic legal thought, not so much to locate the origins of 'woman' in Islam, but rather to locate the politics of those origins, in Butler's words, to uncover what is at stake in ascribing these origins to the 'woman' of Islam. In the law under study here those origins are intimately tied to the body and so we must also examine how the body operates or does not operate in the constitution of women as subjects in the legal texts.

Drawing upon Scott, Riley and Butler, this study is attentive to points of domination, oppression and discrimination and also attentive to the possibility that points of difference may not entail domination, oppression or discrimination. More precisely, I am aware that the dynamic of sex difference may function to both dominate and privilege subjects and further, that more than sex may operate in domination, oppression and discrimination of the legal subject. Other categories of differentiation are also in operation and my study is necessarily attentive to these.

Oyeronke Oyewumi's[43] study of social fact and social organisation identifies categories of differentiation beyond sex difference and allows for this analysis. Along similar lines to Butler's trouble with the gender and sex dichotomy, Oyewumi disrupts the seamlessness of sex as a category. She argues that if indeed gender is constructed then it is natural to assume too that it is differently constructed in different times and places.[44] Resisting what she calls the 'bio-logic' of western gender theory, Oyewumi advances an alternative theory of sex difference which is not located upon the body, but in other social

[43] Oyèrónke Oyewùmí, *The Invention of Women: Making an African Sense of Western Gender Discourses* (Minneapolis: University of Minnesota Press, 1997).
[44] Oyeronke Oyewumi, "Visualising the Body: Western Theories and African Subjects," in *African Gender Studies*, ed. Oyeronke Oyewumi (London: Palgrave: Macmillan, 2005), 11.

categories.[45] As much as I am interested in the body as a determinate of legal subjectivity, I am also interested in other spaces where law's individual may be discursively constituted and Oyewumi's analysis is useful for this.

I align Oyeronke Oyewumi and Judith Butler to allow for a theoretical analysis of the operations of sex and gender in Islamic law. I rely on Butler's questions regarding sex as a natural and unconstructed category and on Oyewumi's critique of bio-logic and body-based reasoning as a means of sexual differentiation. I find that Islamic legal thought, though focused on the body, also locates the body in a matrix of other social categories, viz. reason, age, social class, life experience and marital status, in a manner that also disrupts the symmetry of biology and gender. It also relies on discursive constructs of other categories which Oyewumi calls 'social facts'. In the spaces between Butler's troubles and Oyewumi's appeals, I find room for a theory of sex difference that retains the presence of the body but relocates its coordinates into the realm of other social facts.

Oyewumi's 'social fact' allow us to unpack the additional layer of contingency that determines women's legal positioning in classical Islamic law. Critical of the application of Western gender theories and categories to other, amongst them African, "societies without recourse to their own world-sense" she offers a locally situated theory of difference that challenges the proclivity to "deploy the concept 'women' as a given rather than as a part of the "whole ideological apparatus".[46] Therefore, I pay attention to Oyewumi`s work for two reasons; first as a critique of the hegemonic application of western critical frameworks to non-western spaces and second for the analytic tool which

[45] Ibid., 11.
[46]Oyewùmí, *The Invention of Women: Making an African Sense of Western Gender Discourses*, 78.

she calls social fact. In the first instance I am cautious about applying what may be considered a western perspective on gender categories to a realm of study that is clearly different and to a large extent geographically divorced from the western epistemic paradigm. However, even as I am aware of this caution I am also aware of a history of interaction of western and Islamic thought, philosophy and other aspects of intellectual organisation at the very early stages of Islam, some of which is borne out by discussions of Aristotelian and Galenic thought in Muslim texts on sex-difference and sexual generation. Nonetheless, western and Muslim cultures have not developed along a singular trajectory neither do they occupy politically neutral positions in relation to each other in contemporary global geo-politics. Accordingly, a degree of scepticism is healthy when applying western analytic categories to non-western worlds. More importantly, however is the value of examining non-western legal thought for alternative meanings of sex difference. If we are to heed the above advice of Scott, Riley and Butler above to genuinely historicise the meanings of sex difference, not to assume that bodies and genders co-extensive, not to ignore the dynamic of male and female experience and to be conscious of the contingency of the meaning of sex difference then we require tools that allow historical practices to instruct us in what they mean.

Therefore my second and more important interest in Oyewumi stems from her use of the concept 'social fact'. Women's experiences of the world are one such social fact, and in the dynamic interactions of Muslim men and women in legal texts I hope to uncover other social facts that animate Muslim legal thought. While Joan Scott tells us to pay attention to the relationship between male and female and Denis Riley stresses experience located in the operations of the female body, Oyewumi fashions a tool with which to do

this analytical work. By uncovering the social facts that attach to women's bodies and their legal capacities I hope to access the ideological system that produces the female subject of the legal texts.

I am, however, also critical of Oyewumi. While her work makes the valuable distinction between biological facts and social facts, she seems to conflate biological bodies with sexual bodies. To the extent that Butler distinguishes the two, Oyewumi's categories fall short of finally dismissing the idea that Yoruba society does not also have a bio-logic.[47] Still, my critique does not detract from her idea of social fact, which is a useful tool for understanding how the categories of male and female work in the texts under discussion here. Bodily and worldly experiences are central elements in the determination of social norms and privileges available to males and females. The social fact of the ideological system of sex difference in Islamic law remains to be assessed. I don't imagine there to be a singular social fact as Oyewumi argues age is for Yoruba

[47] While the bio-logic of western systems is sexual, it can also be said that at least to the extent that age is premised upon an individual's bodily age, the bio-logic of Yoruba society is chronological, a logic based on time and the timing of events in relation to the collective life of a group of people. While this logic is not sexual, it is nonetheless a logic based on the timing associated with births and marriages. While the seniority of birth may not be sexualized i.e. not differentiated upon the premise of sex difference, the seniority of marriage for instance is certainly premised not only upon the timing that different females join their new families, but on the biology of the in-marrying body. Only biologically female bodies undergo this sort of hierarchical integration into a non-biological lineage. It is by virtue of not being biologically male that women lose their 'chronological age' and become newborns in the new marital lineage (ibid., 46.). With the passage of time females earn new levels of seniority, while males ordinarily remain in the lineage retain their 'chronological age'. Consequently a male with an older body is always older in the spaces he lives in, an older female however may be considered junior to much younger females and males – in what appears as a dislocation of chronological age and seniority. From my reading of Oyewumi, this is an exclusively female condition. Only females can become dislocated from their chronological age upon marrying and co-opted into a new marriage age. Males upon marrying do not encounter a similar dislocation.

culture. Indeed they may be more numerous. In anticipation, as we come to understand the female subject of Islamic law we will also develop insights into how these social facts are integrated into the legal texts. We will witness how femaleness features amongst the social facts attached to women in ways that determines women's capacities as legal subjects.

Using these theoretical tools to examine legal capacity we will pay attention to the role of women's bodies in the determination of what legal capacities and acts are available to women and what capacities are precluded by virtue of being female. As we do this we will ask about the assumptions that are assigned to female and male bodies and also about the assumptions the law makes about relations between male and female bodies and male and female activities.

D. Choice of Legal Texts

The selection of legal texts in this study is guided by the opening text, Ihsan Ahmad Nyazee's *Outlines of Islamic Jurisprudenc*e.[48]Reading Nyazee's definitions of legal capacity I found his analysis included a summary of 'women's legal capacity' where women are categorised as unique legal subjects with imperfect legal capacities. My interest in the historical origins of Nyazee's thought lead me to read into the legal tradition from which Nyazee emerges viz. the *Ḥanafī* discursive legal tradition of the Indian subcontinent. My first encounter was a classical legal theory text, *Nūr al-Anwār* of *Mulla Jīwan*,[49] which is part of the *Dars Nizami,* the curriculum of the *Ḥanafī Deobandi* discursive legal tradition in *madrasas* in South Africa and across the Indian subcontinent.

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[48]Imran Ahsan Khan Nyazee, *Outlines of Islamic Jurisprudence*, 3rd ed., Nyazee Law Series (Islamabad: Advanced Legal Studies Institute, 2005).
[49] Jīwan, *Nūr Al-Anwār Ma'a Ḥāshīyat Qamar Al-Aqmār*

The contrast between Nyazee's modern articulation of women's legal capacity and Jīwan's historical presentation decided these two texts as integral parts of this study. To flesh out the positive law that these two jurisprudence texts rely on I necessarily drew upon the *Hidāya* , also part of the *Dars Nizāmī* and of the *madrasa* curriculum today.[50] Both *Nūr al-Anwār* and *Hidāya* continue to be taught in the curricula of *Ḥanafī Deobandi madrasas* in South Africa and the subcontinent. Nyazee's text is also prescribed in law schools in Pakistan and India. It is amongst the few English language texts of Islamic legal theory and easily available in various printings in Islamic bookstores in South Africa and other Muslim diaspora spaces.

E. Chapter Outline

This chapter sets out the theoretical framework for my study at the intersections of feminist theory and Islamic law. Chapter Two begins with contemporary legal theory and showcases two approaches to women's legal capacity, i.e. Nyazee's 'women have imperfect legal capacity' approach and Zahraa's 'women and men have the same or in-distinct legal capacities' approach. Chapter Three shifts from contemporary to classical legal theory to establish the genealogy and baseline for the study of legal capacity using an 18th century legal theory text. It defines the parameters of *ahliyya* (legal capacity) through the *badan* (body) and the *'aql* (intellect) and their relevance to the female legal subject who, the text explains, is of lower intellect but not affected by her reproductive biology. The fourth chapter stays with this text to examine how sex-difference features in the production of the female legal subject in classical legal theory, noting the absence of a category of legal incapacity for women and contrasting it with the differentiation of

[50] Alī ibn Abū Bakr al-Marghīnānī, *Al-Hidāya: Sharḥ Bidāyat Al-Mubtadī*, ed. Ashur Hafīz and Muhammad Tamīr (al-Qahirah, Misr: Dar al-Salam, 2000).

women in discussions on marriage. It also highlights the male normative subject of Arabic grammar. Chapter Five continues the examination of the female legal subject, this time using a classical text of positive law. Chapter Six uses the critical study of women in Islamic law to assess the findings of the study of the classical legal texts and concludes by arguing that marriage acts as a form of legal incapacity for women. Chapter Seven contrasts the legal category women in classical legal theory and contemporary legal theory on legal capacity. Chapter Eight concludes the study by returning to the South African debate on Muslim Personal Law from which it argues for the continued discursive production of the female legal subject conditioned against patriarchal interpretation by contemporary norms of equality.

F. Conclusions of this Study

Embedded in my approach is an unannounced political project: to resuscitate from the text a heretofore occluded female legal subjectivity, which I ultimately hoped was not pejoratively different from male legal subjectivity. This project has not been entirely realised, yet it has not been entirely thwarted. My unexpected reward in this study is the complexity of the female legal subject, rich material for theorising women as subjects of law, only some of which I have the opportunity to bring to conclusion below.

Who, do I conclude is the female subject of the law? I find that the normative legal subject of classical Islamic law is a free, adult, male. The enslaved male and the infant or minor male are both distinguished as different types of subjects by virtue of differential forms of legal capacity available to each but the female legal subject is not similarly distinguished. Upon the conventions that accrue from linguistic and legal practice gender is not a distinguishing legal characteristic of law's subject. Implicitly, however, in the

classical legal text social norms come to work as natural conditions that are attached to male and female bodies. So I come to conclude that it is incorrect to assume the absence of a distinctive category of femaleness results in the absence of distinctive legal subjectivity for women.

Further, had women been explicitly distinguished as legal subjects in the classical law we might not have a problem seeing such explicit distinctions continuing in contemporary legal theory. Classical doctrine on *ahliyya* lacks a specific legal category 'women' and does not address women's legal capacity as a distinct form of legal capacity, however, modern legal discussion creates these categories or argues that they are insignificant. Nonetheless, I conclude that the historical absence of a legal category 'femaleness' or 'women', allows for flexible notions of femaleness outside of marriage. Therefore classical legal theory frames a distinctive but discursive female legal subject that is multiply (meaning over many times) and situationally constituted, and this is born out, for example, in laws on witnessing, property, and marriage. In addition, I find that laws on marriage and the treatment of marriage in classical legal theory suggest a unique, at times existential, legal capacity, especially for married women.

The contemporary legal texts, I find however, work with a notion of female disability that is much stronger than classical law. Nyazee's category of 'imperfect legal capacity' for women is the example I use here.[51] Such strong sexing of the female subject in contemporary laws, I find, limits the parameters of femaleness and leads to inflexible determinates of appropriately female legal behaviour. Further, it moves toward essentialised and existential definitions of women. The modern legal text explicitly

[51]Nyazee, *Outlines of Islamic Jurisprudence*. 2005

categorizes woman as a different type of legal subject based on her female body and the difference is easily transmitted as imperfection or deficiency.

Through an analysis of the modern and historical legal texts, I conclude that the modern presentation of women's legal capacity is not merely a modern manifestation of historical legal thought, but is indeed modern in its origin and formation. I do not intend by this to suggest a historical legal text free of patriarchal bias. The modern approach is consistent with the classical approach where it maintains a patriarchal orientation. Rather, I find that contemporary approaches to women as subjects of law are more essentialist and rigid in their formulations of sex difference and they offer fewer options for equal legal capacity for men and women. By contrast, historical representations of legal theory are theoretical spaces where it is not necessary to categorise 'women' or 'femaleness' as an impediment to legal capacity. I call this a discursive approach. Contemporary legal theory and sentiment however, appear less amenable to the absence of a category of legal capacity for women. Instead they either impose severe restrictions upon women as legal subjects by referring to them as imperfect or they pretend that there is no distinction between women and men as legal subjects. As scholars of the law who draw upon historical legal texts to theorise women's legal capacity in contemporary times, I suggest we maintain the historical flexibility and fluidity of legal capacity as well the discursive approach to women as subjects of law. Conditioned by contemporary norms of equality between women and men a contemporary discursive approach to women may yield greater options for equality and bring greater challenges to the patriarchal associations of contemporary thought on women's legal capacity.

Finally, in spite of its patriarchal associations the doctrine on legal capacity rests on the notion of an undifferentiated spirituality, which suggests that Islamic law includes a core of spiritual equality between women and men or an inner essence of gender justice that has not been fully recognized. The result is often expressed as a dichotomy or a tension in Islam between a theological or an internal equivalence of men and women and a legal or external inequality of the two or as Sardar Ali says "equal before Allah and unequal before man". [52] My analysis finds that the dichotomy might be more correctly ascribed to a legal fiction that envisions equality between Muslim men and women when in fact the doctrine of legal capacity does make significant distinctions which derogate the legal capacities of women. Recognising this may bring us to new evaluations of the historical legal paradigm and new tools for our collective work toward equality as scholar-activists.

[52] Ali, *Gender and Human Rights in Islam and International Law: Equal before Allah, Unequal before Man?*

Chapter Two:

Producing the Female Legal Subject in Contemporary Islamic Legal Theory

A. Introduction

My interest in the study of women in Islamic law having been initiated in the South African debates on Muslim Personal Law, the final shape of this dissertation was determined when I read Nyazee's *Outlines of Islamic Jurisprudence* on the theory of legal capacity (*al-ahliyya*).[53] In this and subsequent publications of the text Nyazee presents classical Islamic legal theory in a modern paradigm by drawing parallels between Islamic law and modern legal thought.[54] Thus Nyazee provides accessible legal texts for "studying *uṣūl al-fiqh* in the modern age".[55] Nyazee produces his own contemporary formulation of Islamic legal theory which he adapts from classical Islamic legal theory. In the midst of his discussion of legal capacity I found that Nyazee references 'women's legal capacity' which he categorises as 'imperfect (*nāqiṣ*) legal capacity',[56] one of four categories, the remaining two being complete (*kāmil)* legal capacity,[57] deficient (*qāṣir*) legal capacity[58] and defective legal capacity.[59] Intrigued by this categorisation, I read further on legal capacity, primarily a classical legal text, Mulla Jīwan's *Nūr al-Anwār*, a commentary of Imam Nasafī's *Manār al-Anwār,* both found in

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[53] Imran Ahsan Khan Nyazee, *Outlines of Islamic Jurisprudence*, 1st ed. (Rawalpindi: Advanced Legal Studies Institute, 1998).
[54] Nyazee, *Outlines of Islamic Jurisprudence*; Imran Ahsan Khan Nyazee, *Islamic Jurisprudence: Uṣūl Al-Fiqh* (Islamabad: International Institute of Islamic Thought : Islamic Research Institute, 2000).
[55] Nyazee, *Islamic Jurisprudence: Uṣūl Al-Fiqh*, 9.
[56] Nyazee, *Outlines of Islamic Jurisprudence*, 41.
[57] Ibid., 40.
[58]Ibid., 41.
[59] Ibid., 48.

the *Qamar al-Aqmār,* a super-commentary by Muḥammad ‘Abd al-Ḥalīm al-Laknawī.[60] The contrasting presentations of legal capacity in Nyazee’s contemporary text and Jīwan’s historical text inspired this inquiry into the definition of women as subjects of Islamic law.

Nyazee is a scholar of Islamic law trained in the Ḥanafī tradition in Pakistan. His *Outlines of Islamic Jurisprudence* is intended as a means of commuting between the classical and contemporary legal traditions, translating classical law concepts into contemporary paradigm for the application of Islamic law.[61] His more recent *Theories of Islamic Law*, mainly available online, frequently cites the respected legal scholar al-Sarakhsī, (d. 410/1097) for whom he also has high praise.[62] His texts are now part of the English language *Ḥanafī* legal tradition often prescribed for law students at university campuses in Pakistan and India. The texts make an ideal point of access to Islamic legal theory for legal specialists not trained in Islamic law or in the classical languages of instruction i.e. Urdu and Arabic, but who must also manage the various aspects of positive Islamic law that have been codified into state laws.

This chapter begins with a study of legal capacity in Nyazee’s text with attention to his characterisation of ‘women’s legal capacity’. It then compares Nyazee’s narrative to another contemporary discussion of women’s legal capacity to examine how the female legal subject is produced in contemporary narratives of Islamic legal theory. The second

[60] Jīwan, *Nūr Al-Anwār Ma‘a Ḥāshīyat Qamar Al-Aqmār*
[61] Nyazee, *Outlines of Islamic Jurisprudence*.
[62] Imran Ahsan Khan Nyazee, "Theories of Islamic Law: The Methodology of Ijtihād." (Pakistan: International Institute of Islamic Thought, 2000), http://www.nyazee.org/islaw/theory/

narrative is Mahdi Zahraa's[63] study of women's legal capacity which draws extensively from Mustafa Zarqa, the mid-twentieth century Syrian legal scholar recognised for adapting classical Islamic law for contemporary legal practice.[64] My occupation here is not so much with the legal scholars as it is with their approach to the legal definition of 'women' as subjects of law who hold legal capacity. I am interested in how the law determines its subject even as it produces it. The narratives of women in the discussion on legal capacity in contemporary Islamic legal theory either characterise women as imperfect legal subjects or attempt to write away the significance of sex-difference in the doctrine of legal capacity. Nyazee makes femaleness a source of imperfect legal capacity. Sex difference is significant in this approach and women in this approach are considered 'imperfect' legal subjects. Zahraa paradoxically suggests femaleness is irrelevant to legal capacity even while he explains why it isn't. In the paradox of significance and insignificance, in Zahraa's narrative women also become indistinct subjects of law. I both these narratives of legal capacity the law operates under the premise of neutrality in producing its subject, as though the subject exists before the law operationalises it, while in effect the operations of the law produce the subject that law legislates for.

B. Legal Capacity and Production of the Female Legal Subject

Ihsan Ahmad Nyazee's discussion of legal capacity is part of a discussion of the subject of the law (*maḥkūm 'alayh*), which he describes as one of the three conceptual components of Islamic law; the other two being *al-ḥukm* (classification of laws and

[63] Mahdi Zahraa, "The Legal Capacity of Women in Islamic Law," *Arab Law Quarterly* 11, no. 3 (1996).
[64] Mustafa Ahmad al-Zarqa, *Al-Madkhal Al-Fiqhi Al-'Ām*, 6th ed., 2 vols. (1959).

nature of rules), *al-maḥkūm fih* (rights). The *maḥkūm 'alayh* is the *mukallaf,* the person who possesses legal capacity whether directly or through delegated authority.[65] *Ahliyya*, or legal capacity, is "the ability or fitness to acquire rights and exercise them and to accept duties and perform them".[66]

1. Producing the Legal Subject: Origins of the Female Subject

Nyazee begins by distinguishing legal capacity for acquisition (*ahliyyat al-wujūb*) from legal capacity for execution (*ahliyyat al-adā'*).[67]The first occurs as a result of being a human person and the second is acquired through *'aql* (reason) and *rushd* (discrimination).[68] Reason or discernment is confirmed by puberty.[69] Legal capacity, he explains, is divided into three types; complete (*kāmila*), deficient (*qāṣira*) and imperfect (*nāqisa*).[70]

> Complete capacity for acquisition [*ahliyyat al-wujūb*] is found in a human being after his birth. This makes him eligible for acquisition of all kinds of rights and obligations. Complete capacity for execution (*ahliyyat al-adā'*) is established for a human being when he or she attains full mental development, and acquires the ability to discriminate. This stage is associated with the external standard of puberty …[71] For a person to acquire complete capacity for execution, in addition to puberty, the possession of *rushd* (discrimination: maturity of actions) is

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[65] Nyazee, *Islamic Jurisprudence: Uṣūl Al-Fiqh*, 109.
[66] Nyazee, *Outlines of Islamic Jurisprudence*, 40.
[67] Ibid., 39.
[68] Ibid., 39.
[69] Ibid., 39.
[70] Ibid., 39.
[71] "The physical signs indicating the attainment of puberty are the commencement of ejaculation in a male and menstruation in a female. In the absence of these signs puberty is assumed at fifteen in both males and females according to the majority of jurists and at fifteen for males and seventeen for females according to Abū Ḥanīfa", (ibid., 40.).

stipulated as well. On attaining complete capacity an individual acquires both civil and criminal responsibility, just as he acquires an ability for the '*ibādāt* [worship].[72]

Deficient capacity, he continues, occurs where requirements for legal capacity are not present, as in the case of a foetus who has not been born yet, in the time before "full mental development" as for a child, or where the attribute of being a human is missing entirely, as for corporate entities.[73] Deficient capacity for acquisition characterises the unborn child (*janīn*), the dead person, whose death obligations are performed by others on his behalf and the fictitious person (such as the treasury (*bayt al-māl)*) or an endowment (*waqf)),* which lacks *dhimma,* a covenant with the Lawgiver.[74] The fictitious person cannot be expected to enter into such a covenant primarily because it cannot perform religious duties".[75]A minor (*ṣabī*), he explains, possesses complete capacity for acquisition but lacks the capacity for execution until puberty, is free from criminal liability and is not obligated in matters of worship.[76] His capacity for execution is further

[72] Ibid., 40. The conditions laid down by the *Ḥanafīs*, he tells us, indicate an individual passes through three stages with respect to his capacity of execution. 1. The first stage is from birth till the attainment of discretion which is considered to be age of seven years. During this stage the child is assumed to lack 'aql and discretion completely, and is ineligible for the assignment of a capacity for execution. 2. The second stage commences from the age seven and continues to actual puberty or the legal age of puberty whichever is earlier. Deficient capacity is normally assigned during this stage, as the individual possesses a certain amount of *'aql* and discretion. 3. The final stage commences from actual physical puberty is the legal age determined for it, whichever is earlier. On reaching this age the individual is assigned complete capacity for execution. An exception arises in the case of *safāh* (indiscretion) and the individual may be placed under interdiction for some time. *Rushd* (discretion), as stated, is a condition for attaining this stage in addition to puberty, (ibid., 40.).
[73] Ibid., 41.
[74] Ibid., 41.
[75] Ibid., 42. Emphasis is in the original.
[76] Ibid., 41-43.

divided into three types; a guardian may act on behalf of the minor in purely beneficial transactions, purely harmful transactions are not permitted to him or on his behalf, and transactions vacillating between profit and loss must be ratified by a guardian.[77] Imperfect (*nāqiṣ*) capacity, Nyazee tells us, occurs where the basis of capacity (being human and having discretion) are present but external attributes do "not permit the recognition of the legal validity" of an act.

> Capacity for acquisition may be perfect or imperfect. Imperfect capacity is attributed to slaves and women.[78]

Before I continue into the matter of imperfect capacity, a brief summary of the distinguishing characteristics of Nyazee's presentation of legal capacity will be useful. He explains:

a. that complete legal capacity for acquisition and execution requires reason and discretion (*'aql* and *rushd*) and must be accompanied by puberty or the age determined for puberty, whichever comes first, puberty being ejaculation in males and menstruation in females
b. there is the possibility for deficient capacity in the absence of the above three conditions, as for the unborn child, the dead person, the fictitious person, the minor and the mentally incompetent
c. there is further the possibility for imperfect capacity even where the three conditions of reason, discrimination and puberty are present, as they are for slaves and women and

[77] Ibid., 43-44.
[78] Ibid., 44-45.

d. there is finally the possibility for defective legal capacity arising from natural causes or acquired through human causes[79]

Obligation, reason, discernment, puberty, financial loss and benefit, and the nature of a legal command are the key terms of Nyazee's general treatment of legal capacity.

2. Imperfect Legal Capacity

Nyazee explains imperfect legal capacity as a condition that applies to slaves and women. The reference to slaves is dismissed in a summary few lines; a slave may not possess the right of ownership, even though a slave owns the capacity for obligations related to worship and criminal offences.

The reference to women is detailed.

> A woman is said to possess imperfect legal capacity. Those who hold this view deny her the right to be the head of state, the right to be *qādi*[judge], and the right to testify in cases being tried under *ḥudūd* [penal law] and *qiṣāṣ* [retribution] provisions. In addition to this, she does not have the right to divorce, like the right given to a man, she is given a share in inheritance that is equal to half the share of male heirs, and the *diyya(sic)* [compensatory payment], paid in compensation of her death is half of a man. These provisions have lead Orientalists, like Joseph Schacht, to observe that in Islamic law "a woman is half a man". Women who are struggling for the emancipation of women and the acceptance of their rights in

[79] Here he introduces his fourth form of legal capacity, defective capacity, where he brings together the causes for deficient and incomplete capacity with a list of impediments to legal capacity and he divides these into 'natural' and 'acquired' causes. Natural causes of defective capacity are minority (*ṣighar*), mental incompetence (*junūn*), idiocy (*'atāh*), sleep and fits of fainting (*nawm*, *'ighmā'*), forgetfulness (*nisyān*), death illness (*maraḍ al-mawt*). Acquired causes of defective capacity are: intoxication (*sakr*), jest (*hazl*), indiscretion (*safah*), coercion and duress (*ikrā*), mistake and ignorance (*khaṭa'*, *shubha* and *jaḥl*), (ibid., 40-53.).

> Muslim countries have objected seriously to such a status granted to them. Demanding equality with men, they maintain that the status of women should be the same as that of men, by which they mean their legal capacity should not be considered imperfect or deficient in any way. The purpose here is not to argue from one side or the other but to identify the legal issues involved. Reasons or solutions will become obvious once these issues are grasped.[80]

Nyazee presents an idea of imperfect capacity for women, and also creates doubt about its veracity noting this is what is "said" to be rather than what is. He acknowledges objection to the distinction of women's legal capacity as "imperfect or deficient in anyway" and finally promises "reasons or solutions" for what is "said" to be. Thus, the opening statement to his presentation of women's legal capacity characterises women's legal capacity as a matter that Orientalists object to and something that is contested by women who struggle for emancipation. Similar contentions appear in only one other characterisation of legal capacity, the fictitious person. There, he explains, the concerns of the modern world require that modern scholars work hard "to accommodate" the fictitious person into Islamic law".[81] Accommodations to the modern world, however, do not entail similar relief for the list of imperfections that formulate women's legal incapacities. Included in the list are evidence, inheritance, right to divorce, *diyya*, judicial office and being head of state.[82] We follow his discussion and analyse their effects on women's legal capacity.

[80] Ibid., 45.
[81] Ibid., 43.
[82] Ibid., 46-8.

The differential treatment of women's evidence, he explains as a matter of women being "spared the burden" of providing evidence which, he explains further, is not a right. Rather, women are "spared the duty of this burden" in order to "waive the penalty of *ḥadd* (penal matters), which is an extreme punishment, and to show mercy to the accused in an indirect way".[83] In other words, women do not give evidence so as to spare the accused from the consequences of evidence brought against them. Whereas the earlier references to legal capacity pertain to obligation, reason, discrimination, financial benefit or loss, and whether the *khiṭāb* (communication of a law) is addressed to the individual,[84] here the criteria of analysis pertains to relief for someone other than the individual who's legal capacity is under discussion. The criteria for determining for women's imperfect legal capacity in giving evidence is the effect it will have on another person i.e. the person against whom a woman might offer evidence. The criteria have shifted from the individual carrying legal capacity to an outside party who may be affected by a woman's legal capacity.

The discussion on judicial office and heads of state links with findings on women's evidence. He explains that the jurists argue a woman cannot adjudicate in matters where she cannot give evidence. Accordingly a woman may not adjudicate in *ḥadd* (penal) maters if she cannot bring evidence in *ḥadd* (penal) matters. By a further extension of the argument, a woman can also not lead a state when the head of the state is necessarily tasked with implementing *ḥudūd* (penal laws). In all these matters, the argument relies on historical juristic consensus and not on matters of obligation, financial loss or benefit,

[83] Ibid., 46.
[84] Ibid., 40-6.

reason, discernment or puberty, which are the criteria in the doctrine of legal capacity outlined earlier in the text.

In the absence of these measures, to what extent does the preceding discussion on reason, discernment and puberty apply to women? There the concern is for the *khiṭāb*, the command of the law, and what qualifies the person addressed by the law, the *mukhāṭab,* and the obligation (*taklīf*) that is inherent to a legal subject. Similar ideas are part of the discussion on the legal capacity of the child, the mentally incompetent and other types of subjects. However, none of these matters apply in the discussion on women's legal capacity where the quality of femaleness may disqualify a person from observing obligations that are otherwise addressed to the generality of legal subjects and believers. For instance, where giving evidence is a matter of obligation established by law and part of maintaining legal order, protecting the rights of others and holding society accountable, as Nyazee tells us, how does the preclusion of women from this capacity affect women's obligations and responsibilities as members of society who are also subjects of the law? Further, what about women renders them ineffective in this regard? Nyazee's presentation is unclear on both matters, as are the jurists he refers to. Their collective silence suggests the reason the jurists assign women imperfect legal capacity is that women are female. The text never instructs us on what femaleness means in the law, instead we come to understand what the jurists consider the meanings of femaleness as we read the constraints on women's legal capacity. Describing women as subjects with imperfect legal capacity excludes them from the main 'body' of the law, which we would be correct to assume by now is a male (and a free) body. Through such exclusionary practices the law produces an imperfect subject such that it appears as a "naturalised

foundational premise".[85] In this narrative the discussion of women's legal capacity begins with lack as though this lack or imperfection is normal and natural for women. The narrative produces women with imperfect legal capacity even before it produces women with the basics of legal capacity.

How are we to understand these proscriptions on women's legal capacity in terms of how an individual acquires an obligation (*taklīf*)? Nyazee explains, there are two major conditions for obligation, knowledge that an act must be performed or avoided and capability to perform the act.[86] There is no mention of sex difference in the discussion on obligation. Therefore, when a woman possesses both yet is precluded from fulfilling a religious or financial obligation because of her femaleness, we would not be incorrect in assuming that the law assesses the obligations of those people who are women differently. The restrictions on women's legal capacities impact on women's legal obligations and accountability to the Lawgiver, God, and to society. It further raises concern for the nature of women's obligations. It affects a much-altered state of legal capacity for women, yet the distinction does not arise from a woman's actual capacities and abilities but from the effect of her femaleness. In matters of witnessing the restriction on a woman's legal capacities arises out of a concern for the people she may witness against over a concern for her full participation in the requirements that come with obligation (*taklīf*). By Nyazee's argument a women's complete legal capacity to witness is curtailed so as to protect the legal liability of people she may witness against!

On inheritance, Nyazee explains that women receive half the share of men in inheritance because the legal system of Islam places a higher financial burden on men

[85] Butler, *Gender Trouble: Feminism and the Subversion of Identity*, 2-3.
[86] Nyazee, *Outlines of Islamic Jurisprudence*, 35-6.

who are required to maintain their families and relatives. The implication is that women do not inherit as men so as to either balance the benefits of the financial care they receive from their male relatives or to excuse women from the burden of financial maintenance of the family, a duty upon men but not women. Men must also pay a marital dower and once that obligation is added to the duty to maintain his wife and the family, collectively these are severe financial burdens upon men. These are reasons for restricting women's capacities for inheritance. Here again there is no reference to the technical matters that affect legal capacity outlined in his earlier discussion. The concern here, as with witnessing, is with relieving women of a burden. The suggestion is tempered with critique on the feasibility of women's claims to the financial obligations due to them from men suggesting that perhaps the argument may not hold much salience in contemporary times. However, once again there is no reference here to how these matters pertain to issues of reason, discrimination and puberty. Rather, the argument rests upon what jurists consider appropriate burdens for men and women, i.e. the jurists' decisions are determined by assessments of maleness and femaleness.

The unilateral male capacity to repudiate a wife and thus terminate a marriage i.e. *ṭalāq*, we read, is balanced by the female access to alternate forms of divorce.[87] The *ṭalāq* is a vivid illustration of the contrast between male and female legal capacities as well as the difference between a marriage contract and any other contract between a man and a woman, illustrating how a woman's marital contracting capacities differ from her other contracting capacities. The text, however, misses this point and an opportunity to explain

[87] He suggests rulers exercise their discretion to make one of these mandatory i.e. *tamlīk*, (a woman's contracted ownership of the right to divorce), (ibid., 48.). The later edition of the book has an extended version of the discussion on *tamlīk*. See Nyazee, *Islamic Jurisprudence: Uṣūl Al-Fiqh*.

that the distinction distinguishes women's capacities as legal subjects who contract. Earlier in the discussion on legal capacity we read in detail on the minor child's capacity to contract and later we also found a discussion on the capacity of the person who is *majnūn* (mentally incompetent) to contract. Here, rather, commentary is restricted to the historical jurists who are unanimous that a woman does not have an automatic right to divorce her husband.[88] The broader implication of this consensus is that, with regard to marriage, a woman does not have an automatic right to terminate a contract once she has entered into it.[89] This distinction between male and female legal capacities is important to how we understand women as contracting legal agents and as legal subjects. The inability to terminate a contract is a substantial curtailment of legal capacity and, given that other discussions of contractual capacity are referenced by reason, discrimination, puberty, profit and loss it is worthwhile to note the absence of similar terms here. Nyazee may well have also made these assessments here but in the absence of such references the only apparent reason for the different legal capacities is that she is a woman.

Diyya brings attention to the economics of death and the differential value jurists place on female and male death and injury. The difference in *diyya* (compensatory payment for death) paid for causing the death of a woman and that paid for causing the death of a man is also explained as the majority consensus of the jurists but here Nyazee takes the opportunity to discuss equality referencing a tradition from the Prophet "For a

[88] Nyazee, *Outlines of Islamic Jurisprudence*, 48.
[89] Nyazee offers no explanation for this, but Kecia Ali's study of marriage in the formative years of is an excellent source for the historical origins of these laws. See Kecia Ali, *Marriage and Slavery in Early Islam* (Cambridge, Mass.: Harvard University Press, 2010).

believing person a hundred camels".[90] He makes an argument for equality explaining that women in today's time work, as men do, and earn an income at times in excess of men for which reason laws on *diyy*a and *qiṣāṣ* (retribution) in Pakistan do not distinguish between men and women. Nyazee takes the opportunity to reflect on what the difference in *diyya* implies for a woman's status but his analysis puts to rest what may be a significant point of entry into historical juristic views of women as members of society and families, and juristic assessment of women's legal capacity.[91] He explains that *diyya* is considered a right of the heirs, not a right of the individual.

Summarily, the discussion of women's imperfect legal capacity only occasionally references the theoretical aspects of legal capacity which Nyazee defined earlier in the text i.e. reason, discrimination, puberty, profit and loss. Also, it does not reference the capacity for obligation for *'ibādāt* (worship) or the capacity to own property as when discussing defective capacity later in the text.[92] By contrast, the discussion on each of the indicators of defective capacity includes its effects on the capacity for execution *(ahliyyat al-wujūb)*, on the capacity for acquisition *(ahliyyat al-adā')* and at times also the effect on obligation *(taklīf)*. None of this features in the discussion on the imperfect legal capacity which Nyazee assigns to women.

In Nyazee's presentation of legal capacity women are legal subjects distinguished from male legal subjects by virtue of their differential capacities for evidence, inheritance, *ṭalāq*, *diyya* (payment for death for injury) and their capacity for judicial and

[90] Nyazee, *Outlines of Islamic Jurisprudence*, 48.
[91] Ibid., 46-48.
[92] It is also significant that Nyazee's presentation lacks a discussion on menstruation and post partum bleeding (*ḥaiḍ wa nifās*) which forms part of historical discussions on legal capacity. We will see the effect of this absence in later chapters.

state offices. Yet none of these distinctions are justified in terms of what technically qualifies the legal capacities of a subject i.e. reason, discrimination, puberty, obligation, profit and loss. Instead women occupy a distinctive and imperfect legal capacity because of various other reasons, amongst them that women not be implicated in the severe punishments associated with accusing people of *ḥadd* (prescribed crimes), whether as witness, judge or state leader, and in order to relieve women of financial responsibilities for themselves and families in inheritance matters and, in matters of divorce and retribution, because a woman is a female.

Nyazee uses sex-based distinctions from positive law to argue for sex-based distinctions in the theory of legal capacity. Positive law becomes the determinant of woman's legal capacity in the various matters that make women's legal capacity deficient. Thus positive law creates the theoretical subject of the law as it defines it. In this way, the quality of femaleness itself comes to be characterized by a specific type of legal capacity and the category "woman" is in turn defined as a category of legal subject that has imperfect legal capacity. The instances where women's legal capacity is not differentiated from men's or where women have what Nyazee calls complete legal capacity do not form part of his analysis of women's imperfect legal capacity. When women's legal capacity is presented in this way the points of complete legal capacity are arguably diminished and the overall effect is to characterise women generally with *ahliyya nāqiṣa, imperfect,* legal capacity.

The collective effect of Nyazee's presentation is to construct a category of legal subject 'woman' by distinguishing 'legal capacity for women' and further to categorise this as imperfect. In spite of some variation, for the most part the discussion is consistent.

The general thrust of the work is to align Islamic legal norms with Western law and this presentation of women's legal capacity may be considered part of that general intent. Perhaps this is why there is a separate category for women's legal capacity. In the absence of previous historical distinctions between male and female legal capacity and any previous characterization of women with " imperfect capacity" (as we will see later), is this presentation perhaps mimicking Western paradigms of law that historically distinguished women's legal capacities from men and continued to do so well into the last century? Or is Nyazee perhaps giving expression in the form of legal theory to the popular *ḥadīth* narrative that associates women with imperfection and, in doing so, also transforming the idea of imperfect religion and reason (*nāqiṣ al-dīn wa nāqiṣ al-'aql*) which the *ḥadīth* argues for into imperfect legal capacity (*nāqiṣ ahliyya*)?[93] The *ḥadīth* correlates women's deficiencies in evidence, prayer and fasting with menstruation and weak mindedness. We will make note of the associations with the *ḥadīth* for now and return to it regularly. This characterisation of women's legal capacity as *nāqiṣ* or imperfect is the precise point of concern of our study as we try to discern how the law envisions women as legal subjects. Nyazee's classification makes legal capacity an

[93] Narrated Abū Said Al-Khudrī: Once Allah's Apostle went out to the *muṣalla* (to offer the prayer) of *'Īd al-Fiṭr or 'Īd al-Aḍḥa* . Then he passed by the women and said, "O women! Give alms, as I have seen that the majority of the dwellers of hell-fire were you (women)." They asked, "Why is it so, O Allah's Apostle?" He replied, "You curse frequently and are ungrateful to your husbands. I have not seen anyone more deficient in intelligence and religion than you. A cautious sensible man could be led astray by some of you." The women asked, "O Allah's Apostle! What is deficient in our intelligence and religion?" He said, "Is not the evidence of two women equal to the witness of one man?" They replied in the affirmative. He said, "This is the deficiency in her intelligence. Isn't it true that a woman can neither pray nor fast during her menses?" The women replied in the affirmative. He said, "This is the deficiency in her religion", (Muhammad Ibn Ismail Bukhari, *The Translation of the Meanings of Sahih Bukhari: Arabic-English*, trans. Muhammad Muhsin Khan (Al-Medina al-Munauwara: Islamic University, 1973), Volume 1, Book 6, Number 301.).

effective and necessary consequence of sex-difference to the point of an inextricable disability. A child may grow out of deficient capacity with the onset of reason, discrimination and puberty. Similarly, a slave may be released, no longer enslaved and therefore qualify to own property. Women, however, unless they change their sex, remain permanently female and therefore permanently proscribed by imperfect legal capacity by virtue of being female.[94]

We should also take note that Nyazee's presentation lacks a discussion on menstruation and post partum bleeding (*ḥaiḍ wa nifās*) which form part of historical discussions on legal capacity. The effect of this omission, we will see in later chapters, is to perpetuate a notion of female disability that is associated with the physical biology of women's bodies. By contrast, and I will return to this in the analysis of classical legal theory, the historical discussion on menstruation and post partum bleeding successfully dispel the notion of physical disability and legal imperfection that Nyazee's articulation of women's capacity implies. will see later that, whereas Jīwan and Zarqa insist that menstruation and post-partum bleeding (ḥaiḍ wa nifās) do not impact legal capacity, the effects of which would be to dispel the notion of legal imperfection that Nyazee seems to import, Nyazee excludes *ḥaiḍ wa nifās* but argues through other means for differentiated legal capacity for women. Ironically, even though his classification avoids addressing matters of reason and body, *'aql wa badan*, which is what the majority of traditional scholarship on legal capacity rests upon, he assigns a specific type of legal capacity to

[94] Kecia Ali (2010) makes similar observations. Further, Iran permits sex change operations but restricted to male to female. Women may not change sex to male.

women, the effect of which is to associate femaleness, or having a female body, with imperfect legal capacity (*ahliyya nāqiṣa*).[95]

To contextualise and contrast the imperfect female legal subject with the general understanding of women and legal capacity I draw comparison with another narrative of women's legal capacity, namely Mahdi Zahraa's presentation of "The Legal Capacity of Women in Islamic Law". [96]

3. Indistinct Legal Capacity

Our second narrative of "The Legal Capacity of Women in Islamic Law"[97] begins with the premise that the doctrine of legal capacity clearly indicates equal rights for women. Mahdi Zahraa's argument takes the form of an article, the first half being a general discussion of legal capacity followed by a specific discussion on women. His analysis of legal capacity relies heavily on Mustafa Zarqa's[98] mid- century reformulations of historical legal thought into a contemporary paradigm. Amongst the distinguishing features of Zarqa's presentation of legal capacity are:[99]

a. the separation of legal capacity for execution (*ahliyyat al-adā')* [100] into two categories, civil (*madanī*) and religious (*dīnī*). He calls these *ahliyyat al tasarruf* (capacity to transact) and *ahliyyat al-ta'abbud* (capacity for worshi*p)* respectively

[95] We return to this again later in this study.
[96] Zahraa, "The Legal Capacity of Women in Islamic Law."
[97] Ibid.
[98] al-Zarqa, *Al-Madkhal Al-Fiqhi Al-'Ām*; Ahmed Mustafa al-Zarqa, *Al-Madkhal Al-Fiqhi Al-'Ām*, 2 vols., vol. 2 (Damascus: Dar Al-Qalam, 2004).
[99] Zarqa defines *ahliyya* as an individual characteristic endowed by God rendering the individual suitable for legal commands, al-Zarqa, *Al-Madkhal Al-Fiqhi Al-'Ām*, 738, Vol. 2.
[100] He defines this as "the ability of a person to initiate actions, the consideration of which depends on a sound mind", Zahraa, "The Legal Capacity of Women in Islamic Law," 247; al-Zarqa, *Al-Madkhal Al-Fiqhi Al-'Ām*, 738, Vol. 2.

b. the observation that *ahliyya* does not always create obligation. Accordingly he makes a distinction between an impediment that affects an individual's legal capacity and an obstacle or a lack that precludes an individual exercising an obligation and does not affect legal capacity.[101]

Mustafa Zarqa discusses women in his broader discussion of impediments to legal capacity and distinguishes menstruation and post partum bleeding as conditions or obstacles to meeting the requirements of an obligation. Accordingly, they are not impediments to legal capacity. These, he explains, are 'conditions' which preclude performing obligations that are conditional upon *ṭahāra* (ritual cleanliness).[102] As a result some obligations fall away, such as prayer, and some don't, such as fasting. However

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[101] Zarqa separates the progress of the individual from conception to discernment into five stages; the foetal stage (*al-ijtinān)*, childhood (*al-ṭufūla*), the stage of discernment without responsibility (*taklīf*) which he calls *al-tamyīz*, puberty and maturity,(al-Zarqa, *Al-Madkhal Al-Fiqhi Al-'Ām*, 248, Vol.1.). Though traditional scholarship recognizes the discerning minor (*al-mumayyiz)*, Zarqa makes a point of distinguishing the responsibility (*taklīf*) and legal capacity (*ahliyya*) of the discerning minor in terms of religious matters. This allows him to distinguish between deficient legal capacity and merely missing the conditions requisite for meeting an obligation or the 'presence of an obstacle'. The first, he says, pertains to *sharī'a* requirements or conditions which are legal and the second to contractual requirements or conditions which are contractual/transactional, (ibid., 397, Vol.1.). Accordingly, he reformulates the impediments (*'awāriḍ*) to legal capacity, which Nyazee calls defects, arguing that legal capacity does not always create obligation. Obligation rests upon 'a cause for the obligation' (*al-sabab*). Fulfilling the obligation depends upon the 'available conditions' to meet the obligation (*sharā'it*) and the 'absence of obstacles' (*mawāni*') in meeting the obligation. Matters that present obstacles, matters that preclude necessary conditions and matters that negate the possibility of obligation do not negate or affect legal capacity; they only negate the obligation. What negates legal capacity, according to Zarqa, is what has an effect on an individual's intellectual faculty and aptitude, conditions such as mental incompetence (*junūn*), mental disability (*'ata*) or unconsciousness (*'ighmā'*), or matters that effect one's legal powers such as restrictions on the ability to transact as in *al-safah*, death illness (*marad al-mawt*) or excessive spending (*iflās*). These are impediments,(ibid., 397, Vol.1.). He also removes a large portion of the traditional impediments to legal capacity such as jest, ignorance, death, forgetting, error and menstrual and post-partum bleeding from the concept of deficiency.

[102] Ibid., 854, Vol. 2.

they do not imply deficient legal capacity therefore he does not consider menstruation and post-partum bleeding impediments to legal capacity.[103]

Drawing on Mustafa Zarqa, Mahdi Zahraa defines legal capacity as "a required set of qualifications in accordance with which the person becomes able to acquire rights, bear obligations and conduct actions and transactions that are able to produce their legal effects".[104] In other words, to possess legal capacity, the candidate must be a person, able to acquire rights, to bear obligations and finally, to conduct legally effective actions and transactions. The person is "the entity able to receive the divine legal aspects of *sharī'a*". A natural person is a living person and therefore every individual is a person.[105] He explains that "*ahliyyat al-wujup"* exists in every living being regardless of sex.[106] Discretion capacity (*ahliyyat al-adā'*) or what Nyazee refers to as legal capacity for execution), Mahdi Zahraa says, can be obsolete (*ma'dūma*, denoting the absence of discernment), restricted (*nāqiṣ*, denoting discernment but the absence of physical or mental maturity) or full (*kāmil*, denoting discernment and maturity).[107] By contrast to

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[103] Ibid., 854, Vol. 2.
[104] Zahraa, "The Legal Capacity of Women in Islamic Law," 245.
[105] Ibid., 246. Legal capacity, according to Zahraa, depends on age and mental capacity of the individual. It has two major aspects and five different levels. It is constitutive by the two aspects of *ahliyyat al-wujūb*, defined as the ability to acquire rights and bear obligations and the second is *ahliyyat al-adā'*, discretionary capacity or the ability to initiate actions using discretion and comprehension,(ibid., 246-7.)
[106] Nyazee calls this 'legal capacity for acquisition'. Zahraa calls this 'eligibility capacity'. He also uses the Turkish pronunciation "*wujūp*" rather than the Arabic '*wujūb*'.
[107] Zahraa, "The Legal Capacity of Women in Islamic Law," 247-8. Zahraa adopts much of Zarqa's understanding of legal capacity. There are five levels of legal capacity; the foetus, childhood, discernment, puberty and maturity,(ibid., 247-8.) Zarqa defines puberty as the attainment of physical ability, which enables the person to practice physical and religious duties, and mental ability, which enables the person to have the mental faculties and comprehension that are necessary to recognise good and bad, benefit and loss and the responsibility and aftermath of actions and transactions", (ibid., 250.footnote #35; al-Zarqa, *Al-Madkhal Al-Fiqhi Al-'Ām*, 770.). At puberty the child

Nyazee, Mahdi Zahraa does not locate women's legal capacity in any of these single categories. Rather, after an extensive discussion on the doctrine of legal capacity, the various levels of legal capacity, impediments to legal capacity (which are divided into natural and incidental defects) the discussion turns to "special questions relating to women" and these are divided into three parts; civil and transactional legal capacity, marriage contracts, and 'other aspects of women's legal capacity' mostly pertaining to 'religious' matters. [108] The discussion begins arguing:

> … it is evident that Islamic jurists and scholars do not give any weight whatsoever to the sex of the candidate of *al-ahliyyah*. In fact, not one single Islamic jurist has stated or indicated that femininity is a defect of Islamic legal capacity.[109]

His intention is to show that sex-difference plays no role in determining legal capacity and women are indistinct in their legal capacities from men. Yet, as we will see, even if as we are told the jurists do not give weight to the sex of a candidate and do not indicate that sex is a defect, sex-difference may operate to prejudice the legal capacities of women. There are two areas of caution when assessing the place of sex difference in law. Firstly, the law can easily slip into assuming the sex of the legal subject to be male. The subject of the law when thought to be neutral is frequently in fact a male legal subject

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becomes responsible for religious obligations but does not possess full legal capacity to act until maturity. The distinction between puberty and maturity (*rushd*) is notably subtle. Zahraa uses Zarqa's definition of *rushd;* "the ability to see and foresee risks and accordingly make reasonably good decisions regarding one's own actions and transactions", (Zahraa, "The Legal Capacity of Women in Islamic Law," 250.footnote #35; al-Zarqa, *Al-Madkhal Al-Fiqhi Al-'Ām*, 772-8.) He notes two types of defects; natural defects are of four categories insanity, mental derangement, unconsciousness and terminal illness. Incidental defects are in three categories; intoxication, spendthriftness and bankruptcy, (Zahraa, "The Legal Capacity of Women in Islamic Law," 251-3.)

[108] Zahraa, "The Legal Capacity of Women in Islamic Law," 245.

[109] Ibid., 256.

endowed with masculine characteristics.[110] Zahraa's references to women in his general presentation of the doctrine of legal capacity pertain only to criteria for determining puberty[111] and *rushd* (mental maturity).[112] The remainder of the text prior to the special questions relating to women is apparently neutral. This brings up the second point of caution, which is to be aware of the degree to which the absence of sex difference is a real absence and where it is a convenient fiction that allows significant points of distinction between men and women to go unnoticed.

Assuming the scholars do not recognise sex difference, they would run the risk of occluding its effects on the exercise of legal capacity. To illustrate, the criteria to prove mental maturity, Mahdi Zahraa tells us, requires proof of a child's discernment. Proof pertains to both religious and transactional matters and the latter may be more available to boys who socialise outside the home than to girls who socialise inside. Therefore, girls and boys may not have similar opportunities to prove themselves financially discerning. The social segregation of girls in homes may adversely affect their acquisition of complete legal capacity in financial transactions. Zahraa recognises this when he references restrictions on women's legal capacity in the *Mālikī* school where women may

[110] Lacey, "On the Subject of Sexing the Subject," 65.
[111] Puberty is characterised by nocturnal emissions for boys and menstruation for girls. Puberty may be factual and failing that presumed. The *Ḥanafīs* set the minimum age for consideration of puberty at twelve for boys and nine for girls and, failing actual puberty, upon age 17 for both males and females according to one *Ḥanafī* narration or 18 for boys and 17 for girls in another narration.
[112] He uses Zarqa's definition of maturity, "the ability to see and foresee risks and accordingly make reasonably good decisions regarding one's own actions and transactions", Zahraa, "The Legal Capacity of Women in Islamic Law," 250., citing al-Zarqa, *Al-Madkhal Al-Fiqhi Al-'Ām*, 772-8. Zarqa, 1959, pp. 772-778). The jurists apply the criteria of mental maturity to both males and females.

be under interdiction well into marriage where after they must prove their financial discernment, but he also explains away these differences.[113]

That no scholar may have stated femininity is a defect to legal capacity, as Mahdi Zahraa points out, does not mean that femininity does not feature in determining the legal capacity of women. Nyazee's presentation on legal capacity makes obvious how it may. Zahraa, however, is keen to show that it does not, with the result that he argues that women and men have equal or undifferentiated legal capacities. He does this, as we will see, even as he explains why women do have different legal capacities.

The discussion on women's civil and transactional legal capacity begins thus:

> … mature women have full legal capacity to conduct their own civil actions and transactions whether they are married or single.[114]

The jurists are unanimous that a woman's relatives have no right "to supervise or even to interfere with her in her civil and financial affairs" in transactional matters.[115] Yet, as he explains, some scholars argue otherwise. They make reference to Qur'an 2:6[116] and

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[113] Zahraa, "The Legal Capacity of Women in Islamic Law," 256. He contests the *Mālikī* view on married women's capacity to manage property and argues that Mālik only restricted a women's capacity to make charitable contributions. Portions over 1/3 require a husbands permission. He concludes by refuting Mālik's view, however, this does not in any way do away with it. See the following for arguments to the contrary and which support the *Mālikī* view David Powers, "Parents and Their Minor Children: Familial Politics in the Middle Maghreb in the Eight/Fourteenth Century," *Continuity and Change* 16 no. 2 (2001). Also Maya Shatzmiller, *Her Day in Court: Women's Property Rights in Islamic Law and Society* (Cambridge, Mass: Harvard University Press. , 2007).

[114] Zahraa, "The Legal Capacity of Women in Islamic Law," 256.

[115] Ibid.

[116] "Make trial of the orphans until they reach the age of marriage. If then you find them sound in judgement, release their property to them, but consume it not wastefully nor in haste against their growing up. If the guardian is well-off let him claim no remuneration but if he is poor let him have for himself what is just and reasonable. When you release their property to them take witnesses in their presence, but all sufficient is God in taking

extend to women the instruction to test the judgement of minor orphans before giving them legal capacities over their property.[117] The perceived restrictions upon women's transactional capacities prompt Zahraa's reference to this aspect of legal capacity. It illustrates that even in the absence of a specific restriction on women's legal capacities, as Zahraa argues, restrictions do occur. These points of distinction in women's legal capacity appear in spite of Zahraa's conclusion that "not one single Islamic jurist has stated or indicated that femininity is a defect of Islamic legal capacity".[118]

Moving to marriage matters, the distinction becomes evident again. He uses an established legal distinction of a woman's sexual history to separate a *thayyib* (previously married) woman from a *bikr* (virgin) woman: for the *Ḥanafīs* and *Ẓāhirī's*[119] both may marry on their 'single will'.[120] In practice, however, the guardian maintains a role in the marriage and the contract. The role of the guardian in marriage implies, according to Zahraa, "an overlapping legal sphere" where both guardians and women have similar

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account", (Abdullah Yusuf Ali, *The Holy Qur'ān: Translation and Commentary* (Durban: Islamic Propogation Centre International, 1993), 180.).

[117] Zahraa, "The Legal Capacity of Women in Islamic Law," 256.

[118] Ibid.

[119] He also makes references to other schools of law where the *thayyib (*non-virgin) woman may not marry without her guardian. We don't include them here since we have limited our focus to the *Ḥanafī* school of law.

[120] Zahraa, "The Legal Capacity of Women in Islamic Law," 258. The former can choose her partner but for the *Shāfi'īs, Mālikī*s and *Ḥanbalīs,* her will to marry must be combined with that of her male relatives. Generally, the virgin (*bikr)* who is a minor, is like her male counterpart and both are under compulsory guardianship (*wilāyat al-ijbār)* and may be compelled into marriage without their consent before maturity. Both may also exercise the choice of puberty (*khiyār al-bulūgh)* and exit the marriage at puberty, (ibid., 259.). A mature virgin (*bikr)* however, is under guardianship by choice (*wilāyat al-ikhtiyār)* or shared-consent guardianship *(*wilāyat *al-mushāraka)*, in the former she consults her guardian, and in the latter she seeks his permission. He concludes the section on women's capacity with the defect of coercion, arguing that consent of a woman under coercion renders a marriage void, (ibid., 260-1.). However, he is un clear her as to whether he refers to a women who is a virgin or not.

rights[121] but, the argument goes further, this does not give "an extra right" to the guardian at the expense of the woman. Accordingly, we are told, in legal manuals the restrictions resulting from the role of the guardian do not feature in the discussion on legal capacity but in the section on marriage.[122] The textual and theoretical separation of these two aspects of legal capacity tells us about how the jurists envision marriage and women's contractual capacities in marriage. Jurists do not consider the limitations on women's legal capacities in marriage as limitations on legal capacity generally. Yet, from the argument here it is obvious that marriage based restriction on legal capacity are indeed restrictions upon a women's legal capacity.

As I noted in the discussion on the imperfect female legal subject earlier, the inability to enter into a marriage contract independently or the inability to terminate a marriage contract once entered into are significant limitations upon legal capacity. Nyazee offers no explanation for these limitations other than 'being a woman' and Zahraa explains that the restrictions on women pertain to the sacred nature of the marriage institution.[123] Accordingly, we are told, scholars protect it from hasty, inexperienced or hasty decisions.[124] Yet this form of marital guardianship over a virgin or previously married adult woman is not replicated in guardianship for a virgin or previously married adult man. Neither does this guardianship, as Zahraa explains it here, rest in the mother or

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[121] Similarly, in Christine de la Puente's analysis of *Mālikī* law the individual woman and her guardian have shared guardianship. Christina De La Puente, "Juridical Sources for the Study of Women," in *Writing the Feminine: Women in Arab Sources*, ed. Randi Deguilhem and Manuela Marín (London; New York; New York: I.B. Tauris in association with the European Science Foundation ; In the United States and Canada distributed by St. Martin's Press, 2002).
[122] Zahraa, "The Legal Capacity of Women in Islamic Law," 263.
[123] Ibid., 257.
[124] Ibid., 257.

grandmother of the virgin or previously married woman.[125] The guardianship over women for marriage is effectively 'sexual guardianship' in that it is determined by the sex of the guardian, the sex of the person under guardianship, a woman's prior sexual experience and is exercised so as to determine her potential sexual experience. These aspects of guardianship and their impact on the legal contracting capacities of a woman escape the analysis that contemplates sex difference has no effect on legal capacity. By contrast, the scholars are doing more than protecting marriage from inexperienced or hasty decision-making. Rather they formulate legal capacity in marriage to favour male oversight over female sexuality. Further, the jurists use a woman's sexual experience to distinguish women's legal capacities in marriage. Similar proscriptions do not apply to a virgin man and his marriage.

Turning to the last area of law, women's legal capacity in religious matters, Mahdi Zahraa discusses menstruation, pregnancy and post-natal periods[126] and women's consequent exemption from prayer, fasting, sexual intercourse and circumambulating the *Ka'ba*. Jurists are not unanimous on the effects of menstruation, pregnancy and post-natal periods on women's legal capacity during these periods.

> Some scholars claim that women's legal capacity during these periods is restricted, whereas others feel that women enjoy full legal capacity because their exemption from certain religious duties affects only their religious performance. Al-Zarqa' arguing in favour of the latter view (correctly), states that the main underlying principle of legal capacity impediment is the presence of a defect in

[125] The father and grandfather of a *Ḥanafī* woman have a right to object to a woman's marriage on the grounds of a defect such as the absence of *kafā'a* (social and religious compatibility), (ibid., 268.).
[126] Ibid., 262.

> the comprehension or mental faculty of a person. Menstruation, pregnancy and post-natal periods do not affect such faculties. Women's legal capacity, therefore, is not affected during these, or any similar periods … The exemption of women from certain religious practices during the said periods is, in fact, not caused by the presence of legal capacity impediment but rather caused by the absence of certain conditions or presence of certain hindrances that are inherent in such religious exercises.[127]

Mahdi Zahraa uses Mustafa Zarqa's argument to establish that the conditions attendant to menstruation, childbirth and post-partum bleeding do not affect her comprehension or mental faculty and therefore do not indicate an impediment or defect in a woman's legal capacity.[128] All jurists consider menstruation, and by extension we may also include postnatal bleeding, impediments to ritual purity (*ṭahāra)* necessary for religious practices such as fasting and prayer thus precluding women from these obligations during these times.[129] Zahraa, however, adds a second layer of argument to the jurists' argument on ritual purity. He explains that the impediments caused by menstruation and post-partum bleeding are due to pain and hardship associated with menstruation, pregnancy and the period after childbirth. These exempt women from certain religious duties. By Mahdi Zahraa's analysis two matters affect women's capacities for religious obligations, the demands of ritual purity, which he draws from Mustafa Zarqa and other jurists, and relief from hardship and pain, which he adds himself. Zahraa further explains the restrictions on marital capacity and those that arise from menstruation and postpartum bleeding as

[127] Ibid., 262.
[128] Ibid., 262.
[129] Ibid., 262.

"safeguards but not restrictions to women's legal capacity".[130] They are intended to secure the establishment of healthy family units and are a response to the pain and hardship caused by menstruation, pregnancy and post-partum bleeding.

Mahdi Zahraa's approach here departs from Nyazee's approach where matters relating to evidence, divorce, inheritance, political and legal leadership, amongst others, all make their way into a category of legal capacity identified specifically with women and slaves. Zahraa, by contrast, is careful about not separating women's legal capacity from men's and his presentation does not permit us to easily define a category of women's legal capacity. However, Zahraa's presentation also attempts to explain away the impact that the positive law rulings have on women's legal capacity. Yet, the numerous distinctions between men and women, particularly in marriage, make the distinctions between male and female legal capacity obvious. When positive law limits the civil and transactional capacities, marital capacities and religious practices of individuals who are beyond puberty and in full possession of reason and discernment they effectively restrict the legal capacities of these individuals. Yet, because these individuals are also women, the law dismisses these effects on legal capacity and treats them instead, as Zahraa tells us, as safeguards and forms of relief. Nyazee speaks similarly on relieving women of the burdens of obligation. However, menstruation and post-partum bleeding do not feature at all in Nyazee's reading of legal capacity. Mahdi Zahraa's assessment, in addition to Nyazee's, however, includes the bodily aspects of being female, even though he argues against any connection between menstruation, pregnancy and post-partum bleeding and a woman's mental abilities. The restrictions on religious capacities through

[130] Ibid., 262.

the biological effects of childbearing make women's physical bodies the source of religious limitations. The jurist's reasons for limiting women's marital and religious capacities relate to what the jurists think are appropriate norms of female behaviour i.e. to marry in a manner approved of by a guardian and to perform spiritual acts only when free of the biological consequences of childbearing. In his analysis marriage and the physicality of menstruation and childbirth distinguish women's legal capacities. Zahraa's presentation of women's legal capacity is a narrative where a woman's legal capacities are ideally suited to her femaleness and the restrictions of a woman's legal capacity are directly connected with being female. Furthermore this approach transforms the jurists' concerns for ritual purity to a concern with protecting women from hardship.

Summarily, the narrative where sex difference is insignificant precludes the tendency to consider women's legal capacity as a specific category of legal capacity just as the narrative of imperfect female legal subjects allows. Yet the former also does not convince that women's legal capacities are equal to men's legal capacities. It suggests, instead, two new aspects of legal capacity, that of women as marrying subjects and that of women as bleeding and childbearing subjects.

C. Conclusion: Defining the Woman of Contemporary Legal Theory

In both presentations a woman's legal capacity is associated with being female and therefore distinct from men, making a woman's legal capacity fixed with sex difference. Nyazee's presentation on women's legal capacity shifts from the bases of legal capacity (i.e. reason, discrimination, obligation and puberty) to social norms of masculinity and femininity, amongst them the interests of the family, financial burdens, economics, relieving women of pain, stress or other hardship and women's presence in public space.

Zahraa, by contrast, focuses on women's bodies to explain religious restrictions on women's legal capacity and then to also argue against the connection between women's bodies (menstruation, pregnancy and post-partum bleeding) and woman's mental abilities redirecting us to religious norms of ritual purity. For marriage matters however he returns to social norms and rights of guardians. In spite of not mentioning women's bodies, Nyazee makes a more radical shift to women as physical bodies because he never explains the restrictions on women beyond explaining that they apply to women because they are female. In Nyazee's presentation of women's legal capacity, the discussion is primarily focused on women as legal subjects whose femaleness acts as a qualifier, invariably pejorative, to a woman's capacities.

Zahraa conditions any attempt to separate women's legal capacity from other forms of legal capacity by explaining that the limitations apply only to marriage and the physical states associated with childbearing, but in doing so his analysis risks dismissing the significance of being female. Mustafa Zarqa, by contrast, refers to women to clarify that *ḥaiḍ wa nifās* is not an impediment to legal capacity but an obstacle to realising an obligation. As a result Zarqa eliminates *ḥaiḍ wa nifās* from his list of impediments to legal capacity which, incidentally, Nyazee also does by omitting it from the list of defects that qualify as defective legal capacity.

The presentation of women as imperfect legal subjects separates women into a distinct category and extends it to its furthest but also most pejorative conclusion so as to almost render the quality of 'femaleness' a matter of imperfect (*nāqiṣ*) legal capacity. Femaleness becomes an embodied disability rather than an occasional legal obstacle or impediment to the fulfilment of some acts at some times based on social and religious

norms. The strongest effect of distinguishing women's legal capacity from the legal capacity of other subjects is to innovate the category 'imperfect legal capacity' for women and to create a sex differentiated legal capacity for women. Amongst the effects of naming women's *ahliyya* imperfect is also to bring to mind classical Greek philosophical notions of femaleness as imperfection and the deprivation of masculinity. These ideas are not foreign to Islamic philosophy. They feature in the philosophies of Ibn Sīnā (d. 428/1037), Ibn Rushd (d.595/1198) and other noted philosophers in line with Aristotelian notions of women as imperfect men. We don't see the idea reflected explicitly in the narrative of imperfection, but cannot avoid a whiff of it in the subtext; women have imperfect legal capacity and men have perfect legal capacity.

By contrast, the argument that sex difference is not a point of distinction for legal capacity attempts to remove the significance of femaleness from the doctrine of legal capacity by presenting the doctrine as though it is neutral toward men and women, when the doctrine is in fact framed upon a masculine norm. As Zahraa showed, it relies on notions of female fragility, the integrity of the family and the sacred nature of marriage. In Zahraa's narrative female legal subjects appear to be neutral and normative when they are not and, in Nyazee's narrative they are considered inherently imperfect.

Further, Nyazee's presentation produces the female legal subject as a though she is as the law says she is, not recognising that the law also determines the legal subject as the law requires her to be. Both narratives work with the assumption that the law is merely recording the 'facts' of what femaleness entails rather than selecting and thereby creating these facts as well as encoding them into law. The presumption is that the law is not producing facts. However, women are not imperfect or perfect in legal capacity before or

after the law such that the law only records their perfections or imperfections. Rather, the law in its narrative of women's legal capacities also produces women as having perfect, imperfect or undifferentiated legal capacity. Thus the law determines the female subject even as it produces it.

The associations between a women's sexuality and her legal capacities in marriage and sexuality are also significant points of legal proscription, yet the jurists do not consider them significant for the doctrine of legal capacity and therefore the restrictions are not included in the doctrine of legal capacity. By excluding the limitations on women's marital capacities from discussions on legal capacity, the law maintains a *façade* of non-distinction between men and women, and Zahraa's analysis illustrates this well. This results in a further façade of equality in the legal capacity of men and women, which is also what Mahdi Zahraa argues toward. The effect is to occlude the points at which sex difference determines differential legal capacities for law's subjects.

We observe too that the restrictions on women's marriage contracting capacities do not emerge from the technical requirements of legal capacity, namely the capacity for obligation, the possession of reason, discernment and puberty. What then are the reasons for limiting women and not men from the full capacities to enter into and terminate a contractual marriage that both parties consent to?[131] Neither of the two narratives offer satisfactory explanations. The analysis here and Zahraa's separation of marriage from civil transactional and religious matters open a space for us to consider separating women's legal capacities in marriage, as wives or potential wives, from women's legal

[131] He concludes his discussion on marriage with a note on consent. The large majority of scholars, according to Zahraa, are agreed that under physical or social coercion, a woman's consent to marry is not valid and the marriage is void at inception (ibid., 261.).

capacities extraneous of marriage, namely the two other categories he mentions here, civil and transactional legal capacity, and religious legal capacity. We make note of this here and return to it in Chapter Six.

The two chapters that follow here continue with the inquiry just set up. We will make a similar inquiry into the legal subject by examining a historical presentation of legal capacity.

Chapter Three

Producing the Legal Subject in Classical Islamic Legal Theory

A. Introduction

Following the study of contemporary narratives of women's *ahliyya* the next three chapters attempt a similar assessment of women's legal capacity using legal texts from the historical legal tradition. Unlike contemporary legal thought, the classical legal texts do not offer a neat summation of women's legal capacity as contemporary narratives do. Rather, to understand what the jurists of the past thought about women as subjects of law we must begin first with a study of the legal doctrine of *ahliyya* and from there assess how jurists conceptualise women as subjects of law. Once we have made these assessments the final two chapters of this study will offer some theoretical frames for understanding how the law conceptualises women as legal subjects.

The two classical legal texts I use here are from the curriculum of the traditional sciences used widely in the Indian subcontinent, the *Dars Nizāmī*.[132] I examine legal theory, in two chapters (Chapters Three and four) using *Nūr al-Anwār* of Mulla Jīwan (d.1718), an early eighteenth century commentary on an earlier thirteenth century text.[133] To study positive law, which I cover in the Chapter Five, I use The *Hidāya* of Marghīnānī (d. 593/1197).[134]

This chapter and the next explore the discursive construction of the female legal subject in a historical legal text to assess the nature of the legal subject first to understand what constitutes the legal subject and next to determine how sex difference features in constituting law's subject. I have selected *Nūr al-Anwār* as a text that features in the

[132] See below for more detail on the curriculum.
[133] Jīwan, *Nūr Al-Anwār Ma'a Ḥāshīyat Qamar Al-Aqmār*
[134] Using a classical text by al-Marghīnānī, *Al-Hidāya: Sharḥ Bidāyat Al-Mubtadī*.

discursive tradition of the *Ḥanafī* legal school, which Nyazee and Zahraa whom we met in the previous chapter also belong to. *Nūr al-Anwār* also continues to be taught today in the curriculum of the *madrasas* of the *Ḥanafī Deoband* fraternity. I focus on the section of Jīwan's text that follows the heading "*mabḥath al-ahliyya*" (discourse on legal capacity). As I examine how the text constructs the female legal individual, I will proceed chronologically establishing this section of the text as a reading space that a reader enters in at one point and emerges out of at another. In this way the text becomes a field that the reader traverses by experiencing words and meanings in a manner that causes new words to coalesce with words and meanings that have come before. I work in a framework whereby the reader moves from beginning to end developing a picture that is at first minimal and uni-dimensional with few contradictions and complexities. Later, having proceeded further into the text, the reader becomes enmeshed in the complexities and nuances of the text through the rhetorical dynamic of words and meanings interacting with each other. Once the reader emerges out of the text at the end of the reading the text comes into perspective as the entirety of the text comes into view. Now the reader must make judgments in order to extract meaning from the text as a comprehensive piece of writing that captures the intent of a writer. Reading through the section on legal capacity from beginning to end, I focus first on the legal individual that emerges from the text generally and next on the woman or the female legal subject that emerges from the text.[135]

[135] I am aware that my reading covers only a section of the text. I limit myself to this section of the text because of its direct relevance to the legal subject. To read the entire texts in the detailed way I have here is potentially a project for a later, much larger stretch of time.

I examine the textual production of the female legal subject with the following questions:

1. Who is the subject of Islamic law?
2. How does sexual difference feature in the construction of the person of the law?

This chapter addresses the first question and the next chapter the second question. I begin this chapter by locating the text in its legal and historical contexts i.e., within the *Ḥanafī* school and the social contexts of its two authors. Next I locate the text in its South African milieu where ideas of women in Islamic law are relevant to debates on state recognition of Muslim marriage.

Summarily, it emerges that the legal subject is an individual whose capacities are determined by legal accountability (*dhimma*), sufficiency of reason or intellect and sufficiency of body. Reason is determined by grades (viz. grades of spirituality, knowledge, political power, social space and sex difference) and these grades establish social and legal authority. Jīwan ranks women lowest amongst the grades and his categories of reason suggest a metaphor of authority for the remainder of the text. Sufficiency of the body originates in accountability (*dhimma*) and is confirmed by puberty which, in the presence of reason establishes complete legal capacity for an individual.

Our comparison between the historical and contemporary texts are sustainable to the extent that the texts converge to form part of the discursive tradition of *Ḥanafī* legal thought. Jīwan and Nyazee both feature in the *Ḥanafī* legal tradition of the subcontinent, the former representing a historical approach to legal theory and the later a modern adaptation of classical Islamic legal theory. Further, historical and modern narratives of

legal theory converge where modern legal systems legislate in the framework of Islamic law, as in South African debates on Muslim marriage, or in informal spaces where Muslim communities make daily practice of the application of Islamic laws, especially laws pertaining to marriage, divorce and inheritance. The South African case is one instance of this convergence. The conclusion of these two chapters combined with that of the preceding chapter will offer us some idea of how the female legal subject is produced in *Ḥanafī* legal thought over time. It will show us the transformations in legal theory and definition of women as legal subjects that accompany the movement of classical legal theory into a contemporary legal paradigm.

B. *Nūr al-Anwār*: Imām Nasafī and Mulla Jīwan

Mulla Jīwan's commentary establishes its pedigree through Nasafī's source text which is well established in the *Ḥanafī* discursive tradition. His text maintains the historical boundaries of the *Ḥanafī* legal framework even as he establishes his own reading.[136] Historical legal texts are taught in *madrasas* that are committed to the historical tradition of Islamic sciences. They must confirm and re-establish the historical boundaries of legal thought and further, also maintain their relevance for new scholars who train to apply historical legal norms in contemporary legal contexts. In this way the texts of the past, their metaphors and paradigms of thought, come to bear upon Muslim experiences of the law today.

[136] For how commentary texts establish unique approaches to historical thought while maintaining the boundaries of historical thought, see Rumee Ahmed, *Narratives of Islamic Legal Theory*, Oxford Islamic Legal Studies (Oxford: Oxford University Press, 2012).

1. Locating Imam Nasafī and his al-Manār in the Ḥanafī School

By way of locating Mulla Jīwan's *Nūr al-Anwār*, we must first identify the author and context of the source text of his commentary, Imam Nasafī's *Manār al-Anwār.* [137] Born in Nasaf (presently Southern Uzbekistan), Ḥāfiz al-Dīn Abū al-Barakāt 'Abdullāh ibn Aḥmad ibn Maḥmūd al-Nasafī (d.710/ 1310) was representative of the eastern *Ḥanafī* tradition, in particular the Bukhara group.[138] The scholars at Bukhāra did not become a distinct *Ḥanafī* group until two hundred years after the passing of their predecessor Abū

[137] In addition to the Iraq-based Baghdad group of the *Ḥanafī* school, *Ḥanafī* scholarship proliferated in a number of central Asian locations, forming, for instance, the Balkh group in Khurasān, the rival Bukhara and Samarqand groups of Transoxania, and the Jurjanj of Khwarazm, (Wilferd Madelung, "The Westward Migration of Hanafi Scholars from Central Asia in the 11th to 13th Centuries," *Ankara Üniversitesi Ilâhiyat Fakültesi Dergisi* 2(2002): 42.). With the death of Qudūrī in 428/1037, the pre-eminence of the Bahgdad group declined and the "centre of gravity" of the *Ḥanafī* school moved eastwards to the *Ḥanafī* centers of central Asia", (ibid., 42.). Part of the reason for the ascendancy of the central Asian groups was their popularity with the Seljuq Turks who, upon converting to Islam, had become strongly attached to the Transoxanian *Ḥanafī* school tradition. They identified Islamic orthodoxy with the *Ḥanafī* tradition and tended to revere its scholars, (ibid., 43.). Seljuq sultans employed eastern *Ḥanafī* scholars as advisors, envoys and diplomats and the professorial chairs of new *madrasas* were frequently offered to eastern *Ḥanafī*s, (ibid., 43.). Generally, Madelung argues that between the 11th and 13th centuries there *wa*s a stream of movement of eastern *Ḥanafī* scholars to*wa*rd the western Islamic lands as they were favoured by the Seljuq Turks. Later, there was further migration after the Mongol invasions of the 13th century.

[138] Nasaf is in the proximity of Bukhāra, and in the thirteenth century this would have meant about four days travel. The history of the Bukhāra School outlined here is based on a paper by Eyyup Said Kaya, "Continuity and Change in Islamic Law: The Concept of Madhhab and the Dimensions of Legal Disagreement in Hanafi Scholarship of the Tenth Century," in *The Islamic School of Law : Evolution, Devolution, and Progress*, ed. P. J. Bearman, Rudolph Peters, and Frank E. Vogel (Cambridge, Mass.: Islamic Legal Studies Program Distributed by Harvard University Press, 2005). Kaya defines the *madhhab* as neither "a complement of legal norms" nor "a group affiliation", but as "a certain form of legal reasoning … a reasoning applied within a particular juristic legacy", (ibid., 39.). He concludes: "This reasoning was the axis of both continuity and change in classical Islamic law"(ibid., 40.) Bernard Weiss takes a more formal view and defines the *madhhab* as "the doctrine or method of an individual scholar… by reason of adhering to guiding principles laid down by [the founder]", (Bernard Weiss, "The Madhhab in Islamic Legal Theory," in *The Islamic School of Law : Evolution, Devolution, and Progress*, ed. P. J. Bearman, Rudolph Peters, and Frank E. Vogel (Cambridge, Mass.: Islamic Legal Studies Program Distributed by Harvard University Press, 2005), 2.).

Ḥafs al-Kabīr (d.217/832),[139] a senior member of the government of Bukhāra as well as a student of Muḥammad al-Shaybānī, one of the two students of Abū Ḥanīfa accredited with popularising the *Ḥanafī* school of legal thought. In the tenth century, Bukhāra was one of the biggest cities in Transoxania and already a pre-eminent site of *Ḥanafī* scholarship. The Bukhāra group experienced its Golden Age in the eleventh century producing the most influential *Ḥanafī* scholars of the next few centuries.[140] The jurists of the Bukhāra group followed the lead of Abū Yūsuf and al-Shaybānī and pursued *ḥadīth* study more than other groups. As a result *ḥadīth* study in the Bukhāra circle was a substantial and in some instances the most significant aspect of legal education.[141] In contemporary times, *Deoband* legal thought too relies heavily upon *ḥadīth* study. The curriculum of the *madrasas* focuses the better part of the final years on *ḥadīth* study.

Hafiz al-Din Abū al-Barakāt al-Nasafī, as he is more commonly known, arrived on the scene almost hundred years after the last of the great *Ḥanafī* scholars associated with the eleventh century flourishing of the Bukhara group. He taught in Kirmān, migrated to Baghdad closer to the end of his life, and died in Ijāj in Khuzistān.[142] Amongst his teachers were al-Kardarī (d. 642/1244-5) and Ḥusām al-Dīn al-Sighnāqī (d. 714/1314-15)

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[139] Kaya, "Continuity and Change in Islamic Law: The Concept of Madhhab and the Dimensions of Legal Disagreement in Hanafi Scholarship of the Tenth Century," 28.
[140] The Bukhara school includes al-Halwānī (d.448/1050), the al-Bazdāwī brothers (d.482/1089), al-Hasirī (d.500/1107), Abu al-Mu'īn al-Nasafī (d.508/1114), Khāharzāda (d.483/1090), al-Sarakhsī (d.483/1090), Sadr al-Shahīd Ibn al Maaza (d.536/1141), 'Alā' al-Dīn al-Samarqandī (d.538/1144) and their disciples.
[141] Kaya, "Continuity and Change in Islamic Law: The Concept of Madhhab and the Dimensions of Legal Disagreement in Hanafi Scholarship of the Tenth Century," 37.
[142] Ghulam Muhyid Din Sufi and Arthur Pearse Howell, *Al-Minhaj, Being the Evolution of Curriculum in the Muslim Educational Institutions of India* (Lahore (Punjab) India: Shaikh Muhammad Ashraf, 1941), 22.

a commentator on the *Hidāya* was amongst his students.[143] Among his writings were *Kitāb al-Wāfī*,[144] an extensive book of *fiqh* modeled on the *Hidāya* of Marghinānī.[145]

Abū al-Barakāt al-Nasafī adhered to *Māturīdī* theological tradition [146] which, though close to the *Ash'arī*[147] on many points, maintained more rationalising views. It affirms both reason and revelation as sources of knowledge while subjecting reason to the confines of revelation.[148] His *Tafsīr Madārik al-Tanzīl wa Ḥaqā'iq al-Ta'wīl* [149] would

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[143] I. Poonawala, A.J. Wensinck, and W Heffening, "Al- Nasafī," in *Encyclopaedia of Islam, Second Edition.* , ed. P. Bearman, et al. (Brill, 2009). His other teachers were Ḥamīd al-Dīn al-Ḍarīr (d. 666/1267-8) and Badr al-Dīn Khāharzāde (d. 651/1253) and his other students included Muẓaffar Dīn Ibn al-Saʿātī (d. 694/1294-5) (ibid.).

[144] In 684/1285 he composed a special commentary on *Kitāb al Wāfī* called *Kitāb al-Kāfī* , delivered in the form of lectures in Kirmān in 689/1290. In addition, he wrote a synopsis of *al-Wāf ī* called *Kanz al-Daqā'iq,* upon which various commentaries were written (ibid.). See 'Abd Allāh ibn Aḥmad al-Nasafī, Muḥammad I'zāz (commentator) 'Alī , and Na'īm Ashraf Nūr Aḥmad, *Kanz Al-Daqā'iq* (Karachi: Idārat al-Qur'an wa al-'Ulūm al-Islāmīyah, 2004).

[145] al-Marghīnānī, *Al-Hidāya: Sharḥ Bidāyat Al-Mubtadī*.

[146] "Abu 'l-Barakāt al-Nasafī (d. 710/1310) composed a popular brief treatise *ʿUmdat al-ʿAqīda li-Ahl al-Sunna* with his own commentary entitled *K. al-Iʿtimād fi 'l-iʿtiqad*", (W. Madelung, ""Māturīdiyya" " in *Encyclopaedia of Islam* (Brill Online, 2012).).

[147] A school of theology distinguished from the *Mu'tazilī* school whose popularity it challenged through alternate views on rationality, the createdness of the Qur'an, freewill and the attributes of God.

[148] Much like the jurists of the Balkh group, the jurists of Bukhāra were also opposed to *Mu'tazilism*. Khalid Blankinship explains that the teachings of Abū Manṣūr al-Māturīdī (d. 333/944), flourished in Turkestan and the Muslim East and were adopted by most Ḥanafī scholars. "While close to *Ash'arī* on many points, *Māturīdī* continued to maintain more rationalizing views on many others." The school argued that "human works, although decreed by God, were ultimately attributable to their human authors", and that the ability to act both precedes the act and is also simultaneous with the act", (Khalid Blankinship, "The Early Creed " in *The Cambridge Companion to Classical Islamic Theology*, ed. T. J. Winter (Cambridge: Cambridge University Press, 2008), 54.). On the connections between *uṣūl al-fiqh* and *uṣūl al-din* i.e. *kalām* see Zysow's dissertation which "de-emphasized" that link. Aron Zysow, "The Economy of Certainty: An Introduction to the Typology of Islamic Legal Theory" (1984). Also see Murteza Bedir who argues that "the *Ḥanafī uṣūl* tradition, up to the 6th century of the *hijra*, preserved a distinctive character, which can be characterised, on the one hand, by its insistence on keeping the science of *uṣūl al-fiqh* as an independent endeavor as regards to *kalām*, and on the other hand, by its excessive obsession with the substantive law (*furū' al-fiqh*), in

retain its popularity until the present, as would *Kanz al-Daqā'iq* and the source of the text we study here, *Manār al-Anwār fī Uṣūl al-Fiqh*,[150] the last two written in the latter part of the thirteenth century and incorporated into the eighteenth century *Dars Nizāmī*[151]. Aaron Zysow is of the opinion that his *al-Manār* stems from Bazdāwī's (d. 482/1089) *Kanz al-Wuṣūl ila Ma'rifat al-Uṣūl*.[152] This connects it to a chain of *Ḥanafī* texts that link contemporary and classical legal thought. Bazdāwī's *Uṣūl* forms part of the intellectual genealogy that constitutes the *Ḥanafī* legal theory tradition preceded by *Al-Fuṣūl fi al-*

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that virtually every principle of *uṣūl* has been put to the test of *Ḥanafī corpus juris*, with a view to reaching a legal system comprised of consistent and coherent *uṣūl* (legal theory) and *furū'* (practical jurisprudence)", (Murteza Bedir, "Is There a Ḥanafi Uṣūl Al-Fiqh?," *Sakarya Üniversitesi İlahiyat Fakültesi Dergis* 4(2001): 165.).

[149] Abd Allah ibn Ahmad al-Nasafi and Zakariya Umayrat, *Tafsir Al-Nasafi, Al-Musammā, Madarik Al-Tanzīl Wa-Haqāiq Al-Ta'wīl*, Madarik Al-Tanzil Wa-Haqaiq Al-Tawil (Bayrut, Lubnan :: Dar al-Kutub al-Ilmiyah, 1995). His *tafsīr* is said to have been one of the most popular amongst the Sunnis according to Sufi and Howell, *Al-Minhaj, Being the Evolution of Curriculum in the Muslim Educational Institutions of India*, 23.

[150] 'Abd Allāh ibn Aḥmad al-Nasafī, *Matn Al-Manār Fī UṣŪl Al-Fiqh* (Dimashq: Dār Sa'd al-Din lil-Ṭibā'ah wa-al-Nashr wa-al-Tawzī', 2010).

[151] A curriculum of study developed by Indian scholars in eighteenth century Mughal India for the study of the Islamic sciences which continues in various forms today. For a full bibliography of more on the *Deoband* madrasas see Muhammad Qasim Zaman, "The Ulama and Contestations of Religious Authority " in *Islam and Modernity : Key Issues and Debates*, ed. Muhammad Khalid Masud, Armando Salvatore, and Martin van Bruinessen (Edinburgh: Edinburgh University Press, 2009); Muhammad Qasim Zaman, *The ʿulama in Contemporary Islam: Custodians of Change* (Princeton, NJ: Princeton University Press, 2002). Also, Barbara Daly Metcalf, *Islamic Revival in British India: Deoband, 1860–1900* (Princeton, NJ: Princeton University Press, 1982).

[152] Aron Zysow, "Mu'Tazalism and Māturidism in Hanafi Legal Theory," in *Studies in Islamic Law and Society,*, ed. Bernard G. Weiss (Leiden ; Boston [Mass.]: Brill, 2002), 238. Pazdah (or Bazdah) is 10 miles from Nasaf, (Sufi and Howell, *Al-Minhaj, Being the Evolution of Curriculum in the Muslim Educational Institutions of India*.) Bazdāwī "dealt with *uṣūl* in general. Later *Ḥanafī* scholars took great interest in the book and wrote many commentaries on it. The best and most important of which is by 'Abd al Aziz al-Bukhārī's (d. 830)" *Kashf al-Asrār*, ('Alwānī, *Source Methodology in Islamic Jurisprudence: Uṣūl Al-Fiqh Al-Islām*. , Alāʾ al-Dīn ʿAbd al-ʿAzīz ibn Aḥmad al-Bukhārī, *Kashf Al-Asrār ʿan Uṣūl Fakhr Al-Islām Al-Bazdawī*, ed. Ed. Muḥammad al-Muʿtaṣim billāh al-Baghdādī, 4 vols. (Bayrut: Dar al-Kitāb al-ʿArabī, 1991).

Uṣūl, an introduction to the *Aḥkām al-Qur'ān* of Jaṣṣāṣ (d. 370/1020),[153] the *Uṣūl* of Karkhī (d. 340/950),[154] and the *Uṣūl* of Dabūsī (d.340/950).[155] Subsequent to Bazdāwī's *Uṣūl* there is also Sarakhsī's (d. 423/1029) *Uṣūl*.[156] Imām al-Shāfi'ī[157] is thought to have produced the first legal theory but collectively, Sarakhsī, Bazdāwī, Jaṣṣāṣ Karkhī and Dabūsī form part of an tradition of legal theory referred to as the *Ḥanafī* school of law[158] distinct from the *Mutakallimūn* tradition represented by the *Shāfi'ī, Mālikī,* and *Ḥanbalī* scholars. Collectively these texts constitute a discursive tradition that shares in a commonality of deductive reasoning and language, and which have come to define early *Ḥanafī* jurisprudence.[159] Nasafī's location amongst them confirms his pedigree in the *Ḥanafī* legal tradition as Mulla Jīwan's commentary on Nasafī's text confirms his.

Manār al-Anwār fi Uṣūl al-Fiqh[160] would survive to become a popular legal theory text and would eventually feature in Timūrid, Mughal and Ottoman curricula.[161] Nasafī

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[153] Ahmad ibn Ali Jassas and Muhammad Muhammad Tamir, *Uṣūl Al-Jassas: Al-Fusūl Fi Al-Uṣūl* (Bayrut: Dār al-Kutub al-Ilmīyah, 2000).
[154] According to 'Alwāni his book on *uṣūl* consists of a limited number of pages that were printed with Abū Zaid al-Dabūsī's book, *Ta'sīs al-Naẓar* "Establishing Opinion". 'Alwānī, *Source Methodology in Islamic Jurisprudence: Uṣūl Al-Fiqh Al-Islām*, 31. See the next footnote.
[155] 'Ubayd Allāh ibn 'Umar ibn 'Īsá al-Dabūsī, *Ta'sīs Al-Naẓar* (Al-Qāhirah: Zakarīya 'Alī Yūsuf, 1972).
[156] Muhammad ibn Ahmad al-Sarakhsī and al-Afghani Abu al-Wafa, *Uṣūl Al-Sarakhsī*, Lajnat Ihya Al-Maarif Al-Numaniyah. Silsilat Al-Matbuat ; 9 (Haydarabad al-Dakkan; Cairo: Lajnat Ihya al-Maarif al-Numaniyah; Matabi Dar al-Kitab al-Arabi, 1953).
[157] Muḥammad ibn Idrīs al-Shāfi'ī (d. 204/820), *Al-Imam Muḥammad Ibn Idrīs Al-Shāfi'Ī's Risāla Fī Uṣūl Al-Fiqh: Treatise on the Foundations of Islamic Jurisprudence*, trans. Majid Khadduri (Cambridge :: Islamic Texts Society, 1987).
[158] Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge, UK :: Islamic Texts Society, 2003), 8.
[159] 'Alwānī, *Source Methodology in Islamic Jurisprudence: Uṣūl Al-Fiqh Al-Islām*; Muhammad Abu Zahrah, *The Four Imams: The Lives and Teaching of Their Founders* (London: Dar Al-Taqwa, 2001); Kamali, *Principles of Islamic Jurisprudence*.
[160] al-Nasafī, *Matn Al-Manār Fī UṢŪl Al-Fiqh*.

himself wrote two commentaries on his *Manār al-Anwār,* one of which is *Kashf al-Asrār*.[162] The syllabus of Ottoman *madrasas* incorporated the *Manār al-Anwār* through Ottoman commentaries and super-commentaries.[163] By early on in the 15th century the *Manār* had already earned its place in curricula of legal theory. Bruckmayr locates it, then already, in the *mashyakha* (lists of teachers) of students of Timurid origin. In a parallel development in the South Asian context it was already one of "the two main *uṣūl al-fiqh* works" in the period prior to Sikandar Lodi, the other work being the previously cited Abū l-Ḥasan al-Bazdāwī's *Kanz al-Wuṣūl*.[164] Given its popularity and established status in earlier legal scholarship, the subsequent eighteenth century incorporation of Nasafī's *Manār* into the *Dars Nizāmī,* through Mulla Jīwan's commentary, *Manār al-Anwār,* completed in the eighteenth century, is not unexpected.[165]

2. Mulla Jīwan and Nūr al-Anwār in the Ḥanafī School

While early Muslim legal tradition in North India drew on well established Central Asian, Safavid and Hijāz precedents, by as early as the thirteenth century local scholars

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[161] Philipp Bruckmayr, "The Spread and Persistence of Maturidi Kalam and Underlying Dynamics," *Iran and the Caucasus* 13, no. 1 (2009): 64.

[162] al-Nasafi and Umayrat, *Tafsir Al-Nasafi, Al-Musammā, Madarik Al-Tanzīl Wa-Haqāiq Al-Ta'wīl*. According to Heffening, he also wrote a number of commentaries including two on the *Kitāb al-Nāfiʿ* of Nāṣir al-Dīn Samarqandī (d. 656/1258) entitled *al-Mustaṣfā* and *al-Manāfiʿ*, a commentary on the *Manẓūma* of Najm al-Dīn Abū Ḥafṣ al-Nasafī (d. 537/1442-3) on the differences of opinion between Abū Ḥanīfa, his two pupils, and al-Shāfiʿī and Mālik entitled *al-Mustaṣfā*, as well as a synopsis entitled *al-Muṣaffā*. In addition he wrote a commentary on the Qur'an called *Madārik al-Tanzīl wa Ḥaḳā'iḳ al-Ta'wīl* (printed in 2 vols., Bombay 1279, Cairo 1306, 1326) and a creed called *al-ʿUmda fī Uṣūl al-Dīn* (also called *al-Manār fī Uṣūl al-dīn*: Ḳurashī, Ibn Duqmāq). This became known in Europe from Cureton's edition (*Pillar of the creed*, London 1843). Poonawala, Wensinck, and Heffening, "Al- Nasafī."

[163] Francis Robinson, *The 'Ulama of Farangi Mahall and Islamic Culture in South Asia* (London: C. Hurst, 2001), 241.

[164] Bruckmayr, "The Spread and Persistence of Maturidi Kalam and Underlying Dynamics," 71..

[165] Robinson, *The 'Ulama of Farangi Mahall and Islamic Culture in South Asia*, 250.

also produced their own scholarship.[166] Representative of this tradition was Mulla Jīwan, born in 1047/1637, to a family whose ancestry could be traced back to Makka and which had settled in the area of Lucknow. He was eventually appointed amongst the teachers of the Mughal ruler Aurangzeb.[167] He is said to have lectured in Delhi and Ajmer. He also accompanied Shah ʻĀlam, the son of Aurangzeb, when he was appointed governor of Lahore and remained with him until the governor's death. He was finally appointed to the Dakkan as *Qādi Askar*, where he served in Aurangzeb's army for five years.[168]

In addition to his *Nūr al-Anwār* , Mulla Jīwan also wrote a *tafsīr* of the Qur'an, *Tafsīr al-Ahmadiyyah fi Bayān al-'Ayāt al-Sharīʻa*.[169] *Nūr al-Anwār* was written during one of two trips to the Hijāz, reportedly within a period of two months and seven days in Medina.[170] What prompted Mulla Jīwan to take Nasafī's *Kitāb al-Manār* for commentary has not been studied, neither what thereafter prompted it's assimilation into the

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[166] Alan Guenther, ""Hanafi Fiqh in Mughal India: The Fatāwá-I ʻĀlamgīrī," in *India's Islamic Traditions*, 711-1750," in *India's Islamic Traditions, 711-1750* (Delhi Oxford: Oxford University Press, 2002), 210. For more on the history of Muslims in the region see the Richard Foltz, *Mughal India and Central Asia*, Moghal India (Karachi :: Oxford University Press, 1998).Foltz (1998) and Richard Maxwell Eaton, *India's Islamic Traditions, 711-1750* (Delhi: Oxford: Oxford University Press, 2002).

[167] "He is the author of: (i) *al-Tafsīrāt al-Aḥmadiyya fī bayān al-āyāt al-sharʿiyya*, compiled in five years 1064-9/1653-8 while he was still a student (ed. Calcutta, 1263 A.H.); (ii) *Nūr al-Anwār*, a commentary on *al*-Nasafī's *Manār al-Anwār* on the principles of jurisprudence, written at the request of certain students of Medina in a short period of two months, also frequently printed; (iii) *al-Sawāniḥ*, on the lines of Jāmī's [*q.v.*] *al-Lawāʾiḥ* written in the Ḥijāz during his second visit in 1112/1700;(iv) *Manāqib al-Awliyāʾ*, biographies of saints and *mashāyikh* which he compiled in his old age at his home-town. The work contains a supplement by his son ʿAbd al-Qādir and a detailed autobiographical note (for an extract see *Nuzhat al-khawāṭir*, vi, 21); (v) *Ādāb-i Aḥmadī* , on *ṣūfism* and mystic stations, compiled in his younger days.", (Bazmee Ansari, "Jīwan," in *Encyclopaedia of Islam, Second Edition*, ed. Th. Bianquis P. Bearman , C.E. Bosworth , E. van Donzel and W.P. Heinrichs (2009: Brill, 2009).)

[168] Justice Mohammad Munir, "Mulla Ahmad Jiwan a Mufassir of the Holy Qur'an," (Lahore2009), 16.

[169] Ibid., 13.

[170] Ibid.

curriculum, the *Dars Nizāmī* , the 18th century curriculum of religious sciences named after its originator, Mulla Nizām al-Dīn Muhammad (d.1161/1748) of *Faranghi Mahal*, a mansion in Lucknow bequeathed him by Aurangzeb. We know that Nizām al-Dīn was amongst the scholars commissioned by Aurangzeb to produce *Fatāwa 'Ālamgirī,* as it came to be called, a compendium of Islamic law. Jīwan was also amongst Aurangzeb's teachers, and therefore it is likely that the two scholars would have been in contact, at least through their professional interests, and it is easy to imagine Nizām al-Dīn incorporating a colleague's newly completed text into his new curriculum. Indeed, it was through Jīwan's commentary and its incorporation to the *Dars Nizāmī,* that Nasafī's *Kitāb al-Manār* entered the curriculum of the *Deoband* school of the Indian subcontinent. Having entered into the South Asian curriculum of Muslim scholars, Mulla Jīwan's *Nūr al-Anwār* continues to feature in the curricula of the *Deoband madrasas* whether in South Asia, North America, the UK or South Africa.

3. Nūr al-Anwār and the Deoband Tradition in South Africa

Nūr al-Anwār features in the curricula of South African *madrasas* because the *madrasas* offer a course of study modelled in large part upon the *Dars Niẓāmi*. *Nūr al-Anwār* is introduced into the curriculum during the fourth year of the *'ālim* course of the *Dār al-'Ulūm Deoband* in India.[171] In their first year interacting with the text, students are taught the first sections of the text, and they continue to study it in the subsequent

[171] *Deoband* thought is characterised by a commitment to *Ḥanafī* school of law, *Māturīdī* theology and study of *ḥadīth*. The curriculum of the school rests on the *Dars Nizāmī*, a curriculum developed in the 18th century by Mullah Nizām al-Dīn Muhammad, founder of the *Farangi Mahal* School in Lucknow. The *Deoband* school adjusted this curriculum reducing the texts dealing with logic and philosophy and focusing on *ḥadīth* studies. A comprehensive bibliography on the *Deoband* schools is available here http://www.academicroom.com/bibliography/deoband-madrassa-bibliography.

years until they complete their reading of it.[172] The *Deoband* connection with South Africa is perhaps the most longstanding international connection of this Indian- based scholarly tradition, dating back to the early nineteenth century when Indian migrants to South Africa also brought *Deoband* affiliated *'ulamā'* to South Africa to meet the local community's religious needs. Other scholars, representing the *Barelvi* tradition, also took on a leadership role and two groups have come to be distinguished by their doctrinal positions on salutations to the Prophet, means of commemorating his birth, and associations with shrines and saints. The *Barelvi* school is amenable to such local expressions of Islamic devotional culture while the *Deoband* school conforms to more formalistic expressions of religious culture and a more rigid segregation of genders.

The '*ulamā*' of different persuasions and their growing influence in the eastern regions of the country soon led to the institutionalisation of South African *'ulamā',* first in 1923 through formation of a body of legal scholars called "Jamiatul Ulama Transvaal". Today it is called "Jamiatul Ulama South Africa" and flourishes in much of the eastern region of the country with branches in six of the nine provinces and a membership in excess of 800 scholars and *huffāz* (individuals who have memorised the Qur'an). In 1955 "Jamiatul Ulama of Natal" was established and continues today in the Kwa-Zulu Natal region as "Jamiatul Ulama KZN". Both organisations are closely associated with the *Deoband* tradition and hold significant influence. Other groups of religious scholars, such as "Sunni Jamiatul Ulema", predominantly *Barelvi* in orientation, were established in

[172] The school has posted a generic syllabus on its website. Follow the link "system of education"; consulted 26 August 2009. http://www.darululoom-Deoband.com/english/index.htm

1978. All of these organisations have participated, to varying degrees, in the debates on Muslim Personal law in South Africa and the state's recognition of Muslim marriage.

Until the later years of the twentieth century training for '*ulamā'* was only available outside of South Africa. Subsequently, *madrasas* orientated upon the *Dars Nizāmī* were established in South Africa, the first in 1973 in Newcastle. Today it is possible for a male South African student to follow the entirety of the basic scholar ('*ālim*) and advanced scholar (*'ālim fāḍil)* course in South Africa. The course is not taught in the women's *madrasas* in South Africa and is therefore not available to female students.[173] Of these *madrasas,* six include the study of *Nūr al-Anwār* in their curricula but they differ on when they introduce the text. Generally the text is introduced between the third and fifth years depending on how much of the book is taught.[174] In most instances the book is introduced during the fourth year of a six-year course of study. Some schools teach the text for only one year while others spread its teaching over several years. In some instances the entire book is taught[175] though often only sections of the book are covered.[176] Students study the text reading line-by-line with a teacher who explains the

[173] In contrast to the Eastern regions which at first imported religious scholars and only later developed local scholars, the western regions developed their own scholars much earlier on. The region also has a much longer history of Muslim presence, originating in the seventeenth century. The *Shāfi'ī* school of law predominates the western regions of South Africa and there religious scholars developed at first by leaving the country for foreign qualifications from Islamic universities abroad. The "Muslim Judicial Council" was established in 1945.

[174] This is for "Madrasa 'In'āmīa" at Camperdown, "Darul-Uloom al-Arabia Al-Islamia", "Jamia Mahmudia" in Springs, "Darul Uloom Zakarīa" and the central Dar al-'Ulūm *Deoband* of India in Delhi.

[175] The "Madrasah Taleemuddin" in Isipingo begins the *Nūr Al-Anwār* in the third year and continues teaching it until the fifth year of study.

[176] At the "Darul Uloom al-Arabia Al-Islamia" in Azaadville only *Bāb al-Qiyās* is taught during the fourth year. In year four and continuing to year five, students enter the *Hidāya Alī ibn Abū Bakr al-Marghīnānī, Aḥmad ibn 'Alī Ibn Ḥajar (d. 852AH) Asqalānī, and*

text and resolves its grammatical, syntactical and legal difficulties as they arise. The purpose of study is to familiarise the student with the legal reasoning of the classical scholars and thereby instill a similar reasoning and logic which students are in turn expected to apply in their future interpretations of the law. In this way students are taught to adopt the reasoning of the text and expected to replicate it in their future careers as Islamic scholars. While legal scholars perform commentary upon source texts to "recreate the texts of old and re-instantiate the boundaries of legal theory enumerated by their predecessors"[177] students learning the traditional legal sciences must also maintain the boundaries of the legal paradigm established by the school they study in. *Madrasa* education similarly entails a process of affirming the historical texts and maintaining its boundaries. Legal scholars earn their scholarly credentials through adherence to the historical legal text, and through a similar form of modelling in the process of their *madrasa* studies students are also taught not to depart too far from the historical boundaries of the school. And so students replicate not only the legal thought of the historical text but also the discursive formations of the historical text. They are required to also replicate the images, representations, and the dynamics of power embedded within the text. In this way the traditional transmission of knowledge in the *madrasa* systems allows the continuity of historical legal paradigms in contemporary Muslim legal practice. By graduating from the *madrasas* students qualify as religious scholars, '*ulamā',* who become members of local judicial bodies, independent scholars who offer

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*Muḥammad 'Abd al-Ḥayy (d. 1304AH) Laknawī, Al-Hidāya: (Ma'a Al-Dirāya Ma'a Al-Ḥāshiya), 2 vols., vol. 2 (Lāhor: Maktaba Raḥmāniya n.d.).*At "Madrasah Taleemmudeen" in Isipingo Beach and the "*Darul Uloom Islamia*" in Port Elizabeth, it is begun in the third year. In Port Elizabeth the teaching continues into the fourth year and at "Madrasah Taleemudeen" the book continues to be taught until the fifth year.

[177] Ahmed, *Narratives of Islamic Legal Theory*, 154.

religious advice and guidance for local communities, take leadership roles in mosques, and officiate at marriages and mediate or confirm divorces.

Outside of these schools, Muslim and non-Muslim professionals, amongst them lawyers, social workers, gender analysts and social justice activists also contribute to the landscape of Muslim legal practices in South Africa.[178] The primary concern for legal reformists is in the application of historical legal paradigms in contemporary contexts and accounting for contemporary realities. Accordingly, they argue for legal change and gender based legal reform. I attend to these concerns in subsequent chapters but mention them here to remind ourselves of the relevance of the text and its transmission to the course of daily Muslim legal practice, legal change generally and matters relevant to stet recognition of Muslim marriages. The intersections of the historical and contemporary legal paradigms speak to the production of women as subjects of the law and the representations of women in Islamic law more specifically.[179] Mulla Jīwan's *Nūr al-Anwār* is amongst the category of historical legal texts used in contemporary context and so we take up *Nūr al-Anwār* for an assessment of the historical framework for legal capacity.[180]

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[178] See Chapter Eight for more on this.

[179] For an analysis of some of the concerns with the way in which the law conceptualises women see Aziza al-Hibri, "Family Planning and Islamic Jurisprudence," in *International Conference on Population and Development at the United Nations* (The Religious Consultation on Population, Reproductive Health & Ethics, 1993); al-Hibri, "Muslim Women's Rights in the Global Village: Challenges and Opportunities."; Ziba Mir-Hosseini, "The Construction of Gender in Islamic Legal Thought and Strategies for Reform," *HAWWA* 1, no. 1 (2003); Z. Mir-Hosseini, "Islamic Law and Feminism: The Story of a Relationship," *Yearbook of Islamic and Middle Eastern Law* 9(2002); Ziba Mir-Hosseini, *Marriage on Trial: A Study of Islamic Family Law: Iran and Morocco Compared*, Society and Culture in the Modern Middle East (London; New York; New York: I.B. Tauris ; St. Martin's Press [distributor], 1993).

[180] Jīwan, *Nūr Al-Anwār Ma'a Ḥāshīyat Qamar Al-Aqmār*

C. *Ahliyya* in *Nūr al-Anwār*

I begin with a brief background to the study of *ahliyya* (legal capacity). The foundational legal philosophy of Islam is that God is the source of law and the individual human is the intended recipient of the law. The triangle of the Lawgiver, the law and legal subject manifests in Islamic jurisprudence as *al-ḥākim* (the Lawgiver or Sovereign Ruler), *al-ḥukm* (the law), and *al-maḥkūm ʻalayhi* (the legal subject).[181] As the supreme Lawmaker, *al-Shārʻi*, God is the originator of the law, *al-sharīʻa*[182] Islamic jurisprudence examines the intersections of this triangle in discussions on the nature of human obligation to the laws of God. Discussions on the connection between law and the Lawgiver include an analysis of the source of obligation and the nature of the individual obligated by the Lawgiver to the law. Collectively, the triad of law (*ḥukm*), Lawgiver (*ḥākim*) and individual (*al-maḥkūm ʻalayhi*) form the pillars (*arkān*) that sustain the *ḥukm sharʻī*, 'the value of the law'.[183] Like scaffolding supporting a much larger structure, these concepts form the basic principles of the law. They explain the existence of the law, obligation and the basic assumptions upon which the law's structures and systems are built. The discussion on the final, and for our purposes most significant, aspect of the three, the individual obligated by the law (*al-maḥkūm ʻalayhi*), is addressed only in the

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[181] Kamali, *Principles of Islamic Jurisprudence*.
[182] Qur'an 6:57 "Verily, the law is God's", (Ali, *The Holy Qur'ān: Translation and Commentary* For the connection between "the *ḥukm* proper" or the transcendental judgement and the empirical *ḥukm*, a temporal judgement or a jurists ruling see Ebrahim Moosa, "Allegory of the Rule (Ḥukm): Law as Simulacrum in Islam?," *History of Religions* 38, no. 1 (1998). In an *Ashʻarī* framework, he explains "the *ḥukm* is in one sense the rule of humans, the empirical activity of rule finding by the jurist and in another sense the eternal rule of God. The story of God's eternal decree in prefiguring the moral acts of human beings is an essential dimension to the discourse of Islamic law", (ibid., 19.). By contrast, "[a]ccording to the *Māturīdī* school, *ḥukm Allah* is "the eternal attribute of Allah and His action"" (ibid., 9 and footnote#29.).
[183] Kamali, *Principles of Islamic Jurisprudence*.

very final stages of most legal theory texts and frequently in a section on legal capacity (*al-ahliyya*).

As an overview of the presentation of legal capacity in texts of classical legal theory, discussions on *ahliyya* generally begin with an analysis of *'aql* (reason) which is established as the foundation of legal capacity.[184] Next the discussion straddles the border between theology (*uṣūl-al-din*) and legal theory (*uṣūl al-fiqh)* by drawing a connection between an individual's existence, belief and capacity for obligation. Here theological differences amongst the *Mu'tazilī, Ash'arī* and other theological traditions become significant criteria for when an individual becomes accountable for belief. From here, the discussion extends to the origin and nature of obligation, explicated by the concept *dhimma* (human inviolability or accountability)[185] and the capacity to act upon an obligation, i.e. legal capacity or *ahliyya*. From this follow the different types of legal capacity i.e. *ahliyyat al-wujūb*, which is the legal capacity for acquisition and may also be referred to as the capacity for obligations due to and from a person, and *ahliyyat al-adā'*, which is the legal capacity for execution or the capacity to act. Jīwan follows this with a detailed exposition of the numerous impediments (*'awāriḍ*) to legal capacity which may preclude accountability for obligation. These impediments are separated, some are considered *samāwī* (natural or given by God) while others are considered *muktasib* (acquired). For each impediment the text defines the impediment and its implications for legal capacity. Nasafī's *matn* (source text) takes exactly that form and Mulla Jīwan's

[184] See also *Uṣūl* of Sarakhsī, al-Sarakhsī and Abu al-Wafa, *Uṣūl Al-Sarakhsī*. Also *Uṣūl* Bazdāwī al-Bukhārī, *Kashf Al-Asrār ʿan Uṣūl Fakhr Al-Islām Al-Bazdawī*. They follow similar patterns.

[185] I use *dhimma* as the notion of inviolability and accountability of the individual subject of law. This recognises that an individual by virtue of their existence and the primordial covenant with God has the capacity for obligations due to others and to themselves.

sharḥ (commentary) follows it closely. There are eleven God-given or natural impediments and eight impediments are acquired.[186] Having located the text in its legal, historical and contemporary pedagogical context, the remainder of the chapter turns to the first of the two questions that animate our investigation into this text.

D. Who is the Subject of Islamic law?

We begin with an exploration of reason, which is where Jīwan begins and which he also grades in four categories. From there we follow Jīwan to the basic elements of legal capacity, i.e. reason and puberty. The *matn* (source text) of Nasafī is in bold type and the *sharḥ* (commentary) of Jīwan is in regular type.

1. *Al-'Aql (Reason)*

Nasafi and Jīwan begin the discussion on *ahliyya* thus:

> ***Al-'Aql* indicates the existence of *ahliyya*** since an utterance cannot be understood without reason and the utterance of one who does not understand is unseemly. **The explanation of this is in the s*unna*.**[187]

Jīwan continues, elaborating thus:

> Reason is created in different grades ... The best in reason amongst people are the Prophets and the friends of God or saints (*awliyā'*), then the scholars (*'ulamā'*)

[186] The eleven *al-'awāriḍ al-samāwīya,* or 'given impediments' are: *al-ṣighar* (minority), *al-junūn* (mental incompetence), *al-'atāh* (mental deficiency), *al-nisyān* (forgetfulness), *al-nawm* (sleep), *al- ighmā'*(unconsciousness), *al-riqq* (slavery), *al-maraḍ* (illness), *ḥaiḍ wa nifās* (menstruation and post partum bleeding), *al-mawt* (death). The nine *al-'awāriḍ al-muktasaba* or acquired impediments are: *al-jahl* (ignorance), *al-sakr (*drunkenness), *al-hazl* (jest), *al-safar* (travel), *al-safāh* (Nyazee calls this spendthrift. We may also translate it as foolishness or recklessness), *al-khaṭa'* (error), *al-ikrāh* (force), (Jīwan, *Nūr Al-Anwār Ma'a Ḥāshīyat Qamar Al-Aqmār* 281-314.).

[187] Ibid., 281.

and the wise people/rulers (*al-ḥukamā'*), then the public (*al-'awām*) and then the nobles/rulers (*umarā')* then the rural people (*al-rasātīq*) and women (*al-nisā'*)[188]

Jīwan establishes reason (*'aql*) as the basic element upon which legal capacity functions since comprehending a command from God is a necessary aspect of acting upon it. He elaborates the nature of reason and its relationship to people in different social categories. Thereafter, Jīwan's concern is with the relationship of reason and obligation. Confirming his association with Abū Ḥanīfa and Abū Manṣūr al-Māturīdī, he explains that his position on the relation between obligation, the command and reason is not very far from the *Mu'tazilī* position. The distinction being that the *Māturīdī* require knowledge to develop out of reason, which knowledge, *ma'rifa*, is the subsequent site of obligation. "According to them reason makes belief incumbent and according to us it leads to knowledge (*ma'rifa*)".[189] Contemplation and experience are the two avenues for knowledge, following which an individual becomes accountable for belief. Reason, Jīwan says, must be accompanied by knowledge before an individual is held accountable for belief.[190]

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[188] Ibid., 281.
[189] Ibid., 281.
[190] Nasafī comes from the Bukhāra school and is associated with *Māturīdī kalām*. Jīwan says that his position on the relation between obligation, the command and reason is not very far from the *Mu'tazilī* position, and in line with Abū Ḥanīfa and Abū Mansūr, (ibid., 281.). This is an excerpt from his discussion on legal capacity (the bold text is Nasafī's source text and the rest is Jīwan's commentary). "Thus there is no difference between us and the *Mu'tazilī* accept in the detail. According to them reason makes belief incumbent and according to us it leads to knowledge (*ma'rifa*). The correct opinion is the word of Abū Mansūr and the *madhhab* of Abū Ḥanīfa which the author recalls saying **We say for those who have not had the call to Islam reach them, they are not responsible** *(ghayr mukallaf)* **by virtue solely of reason. If they do not affirm faith or disbelief they are excused. For one did not have the time for contemplation and argumentation If God helps him through an experience and gives him some time to think about the consequences, he is not excused even if the call has not reached him.**

Returning to his discussion on the grades of reason, we note that Jīwan proposes differential associations between reason and various forms of authority. He argues that there is a gradation of reason. The gradation is not a part of Nasafī's *matn* (source text). It is distinctly Jīwan's gloss on the nature of reason which sets up a hierarchy beginning with the prophets and ending with women. The hierarchy is a pyramid of four categories with two groups in each category: the Prophets and the friends of God or saints, the scholars and the wise people/rulers, the public and the rulers/nobles, the rural people and women.[191] Jīwan's pairing suggests a relationship between the two elements of each pair.

[This is] because thought and the time spent in contemplation is equal to a call to Islam in terms of arousing the heart from the sleep of negligence by [virtue of] observing clear signs. For the limits of this concession, there is no proof to rely upon because it differs according to differences in people. It may be that a discerning person (*'āqil*) is guided in a short time by what will not guide others. It is said that he is given 3 days in accordance with the concession given to the apostate; and the proof [for this] is weak… **The faith of the discerning child is not valid according to them and according to us it is valid, even though he is not rendered responsible *(mukallafan)* through it,** because obligation (*wujūb*) is created by virtue of a command. It falls away from the discerning child through the saying of the Prophet "the pen is lifted for three people – the child until maturity, the mentally incompetent until recovery and the sleeper until waking", (ibid., 281.).

[191] There are two ways to read the classification that Jīwan proposes here.

Category	Arabic	Interpretation1	Interpretation2
First	*al-Anbiyā' wa al-Awliyā'*	Prophets and Saints	Prophets and Saints
Second	*al-'Ulamā' wa al-**ḥukamā***	Scholars and **Rulers**	Scholars and **Wise People**
Third	*al-'Awām wa al-**Umarā'***	The Populace and **the Nobles**	The Populace and **The Rulers**
Fourth	*al-Rasātīq wa al-Nisā'*	Provincial People and Women	Provincial People and Women

I use the second interpretation because the word *ḥukamā'* is less frequently used as a plural for ruler *(ḥākim)*, and is a common place reference to wise people, further to which is the preferred use of *umarā'* in reference to the collective of rulers and the ruling class. The association of *ḥukamā'* (as wise people) with *'ulamā'* is common and has precedence over the association of the rulers and the *'ulamā'*. Also, the first interpretation reifies the ruling class in an unfamiliar way, creating a split between rulers and nobles. While it is possible that they may represent different social classes, the social class structures of the

In addition, we may also assume that the order of the two elements in each pair bears significance; thus the prophets precede the saints, the scholars precede the wise people, the populace precede the rulers and the rural or provincial people precede women.

In the first category (prophets and saints) the relationship appears to be somewhat natural – prophets and saints are frequently associated with each other as they travel a similar path of spiritual discipline striving toward the divine. The hierarchy implicit in the precedence of the prophets over the saints also seems natural – the Prophet (peace be upon him) is thought to be amongst the best of people. In this first category we find a connection between reason and proximity to the divine or spiritual authority.

In the second category (scholars and wise people) the scholars follow the prophets of the earlier category, recalling the *ḥadīth* which establishes the authority of the *'ulamā' (scholars)* as inheritors of the authority of the *anbiyā'* (prophets).[192] Since reason is here a premise for authority, according to Jīwan, a similar situation persists in the status of their reason. The second category is premised on the connection between reason and

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time do not reflect this sort of a distinction as clearly. For more on this see John F. Richards, *The Mughal Empire,*, New Cambridge History of India (Cambridge University Press, 1995), 1961. He argues that nobles modeled themselves upon the "style, etiquette and opulence of the emperor", (ibid.). suggesting their association as a class, however stratified the class may be within. Finally, on a purely pragmatic scale, and in accordance with the presumption that the text is intended to be pragmatic, the second reading yields a more compact and normative classification than would the associations of the populace and nobles that privileged the former over the latter. By contrast a second reading privileges the populace over the rulers or rather the ruling class as a whole (not just above the nobility who would be a sub-group amongst them). We may well read this as Jīwan's argument for precedence of the scholars over the rulers and for political leadership to follow the needs of the populace, potentially also a reflection of Jīwan's views on the nature of political and religious power.

[192] "… **The learned are the heirs of the Prophets,** and the Prophets leave neither dinar nor dirham, leaving only knowledge, and he who takes it takes an abundant portion", (Bukhari, *The Translation of the Meanings of Sahih Bukhari: Arabic-English*. Volume 1, Book 6, Number 301.).

knowledge, i.e., it operates through the commonality of epistemic authority of the prophets and the scholars. I also separates the scholars in to two types, those who are formally trained and the wise people whose knowledge is informal. Jīwan's relative arrangement of the two is perhaps also his view on the superiority of the former. Further, the scholars represent a nexus of spiritual and political authority. Religious scholars are not esteemed only for their intellectual or reasoning capacities, but also for the moral authority they hold which stems, in large part, from their personal piety. In Jīwan's scheme, the scholars are also a bridge between the first and third categories of people, i.e. between the prophets and saints on the one hand and the people and their rulers on the other. The scholars bridge the gap between spiritual and political authority.

The third category, the combination of the populace and the rulers, is less instinctive. It appears intended to juxtapose the dual aspects of civic authority, the people and their rulers, and yet to privilege the people above the rulers. It proposes an unexpected association between the general population and the ruling class and an even more unexpected precedence of the general populace over its rulers. The arrangement is either reflective of the social milieu that prevailed in his time or an expression of Jīwan's preference for what ought to prevail.[193] While the power of the scholars during

[193] Rumee Ahmed shows that legal theory is indeed not a juristic reflection of the world as it exists, rather of what jurists argue could and should exist, (Ahmed, *Narratives of Islamic Legal Theory*, 152-8.) If we apply Ahmed's analysis then this category in Jīwan's commentary is perhaps an implicit critique of the ruling class and an indication of Jīwan's political philosophy; the scholars, formal and informal, precede the people who, in turn, precede their rulers. His classification may be understood in the context of the declining power of the '*ulamā* in the time that preceded him. The Mughal period witnessed a marked decline in the power of the '*ulamā*, a process begun by Akbar, and not remedied even during the rule of Aurangzeb, in spite of it being a more pious time, (Sajida S. Alvi, "Religion and State During the Reign of Mughal Emperor Jahangir (1605-27): Nonjuristical Perspectives," *Studia Islamica* 1989, no. 69 (1989): 109 citing ;

Aurangzeb's pietistic rule was greater than it was in the time of his predecessors, Aurangzeb maintained their distance from political authority.[194] In Jīwan's analysis scholars preceded the rulers and the populace is the mediator between the two. The authority of the populace stands between the spiritual and epistemic authority of the first category and the political authority of the rulers of the third category.

The final category and the two groups in it, provincial or rural people and women, are for us the most intriguing. They are also the most significant for our purposes. The *rasātīq* are defined as provincials,[195] people who are distinguished by their geographic

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Aziz Ahmad, "The Role of Ulema in Indo-Muslim History," *Studia Islamica*, no. 31 (1970): 7.). Aurangzeb struggled to correct his predecessor's religious openness with his own policies of religious conformity. However, while the power of the '*ulamā* 'during Aurangzeb's pietistic rule was greater than it was in the time of his predecessors, Aurangzeb maintained their distance from political authority. According to the memoirs of Jahangir, he thought of sovereignty as "a gift of God" intended to "ensure the contentment of the world", rather than propagation of Islam and the establishment of the *sharī'a*, (Alvi, "Religion and State During the Reign of Mughal Emperor Jahangir (1605-27): Nonjuristical Perspectives," 102.). He diffused the power of the *'ulamā'* to influence state policy and Aurangzeb is said to have been more accommodating of the *'ulamā'* but was careful to exclude them from policy making, preferring to empower the administrative officials and fief-holders, (Ahmad, "The Role of Ulema in Indo-Muslim History," 9.). While Aurangzeb made strides in pleasing the orthodoxy, he was also careful that they did not progress sufficiently that they might act as an independent voice in state policy, consequently Aurangzeb's reign brought the *'ulamā'* closer to centers of power but did not locate them entirely within, (M. L. Bhatia, *The Ulama, Islamic Ethics, and Courts under the Mughals: Aurangzeb Revisited* (New Delhi: Manak Publications, 2006).). As a member of the *'ulamā'*, himself a teacher of Aurangzeb, it is not surprising that Jīwan mentions them before the rulers, perhaps reflecting the situation as he would have liked it to be.

[194] Alvi, "Religion and State During the Reign of Mughal Emperor Jahangir (1605-27): Nonjuristical Perspectives," 102-09.

[195] *Rasātīq* does not appear to be Arabic but it Bustani says *rustāq* is similar to *ruzdāqī* which he defines (p333) as *al-sawād*. He also defines it as *al-qurai* which he says in Farsi is also *ruzdāqāt* or *razādī. (*Butrus Bustani, *Muhit Al-Muhit : Qamus Mutawwal Lil-Lughah Al-`Arabiyah* (Bayrut: Maktabat Lubnan Nashirun, 1987), 334.). Hans Wher defines *al-sawād* as 'arable land' or a 'rural area' and also 'majority' or 'multitude' and he defines *al-qura* as 'village', (Hans Wehr, J. Milton Cowan, and Collection Thomas Leiper Kane, *A Dictionary of Modern Written Arabic : (Arab.-Engl.)* (Wiesbaden:

separation from the centralized spiritual, epistemic and political authority represented by the first three groups. But what prompts Jīwan's association of provincials with women? The single point of convergence is their socio-spatial location. The two groups represent people who live outside those sites in a society where authority is conventionally located. The provincials live outside of city centers while the women occupy domestic or harem spaces, sections of the home restricted to women and domesticity. Both lend a spatial dimension to the intersections of reason and authority.

Further, this last group, women, represents, for the first time in Jīwan's classification, a different sex from the other categories or groups. Their separation from the three preceding groups, their association with the provincial people as well as their location at the opposite end of the prophets suggests that rather than intending to combine the last two groups of people because of the distance between them and most forms of social power, perhaps Jīwan simply wanted to make the point that women's reason ranked the lowest. For Jīwan, women, collectively speaking, had the least claim to spiritual, epistemic, political or other form of authority that reason might acquire. It also suggests that women everywhere whether amongst the rulers, scholars or saints had less spiritual, epistemic and political authority than even the provincial men who lived outside the cities.

Harrassowitz, 1979).). Francis Steingass's English Persian dictionary defines *rustāq as "*a village, market-town, encampment of tents or huts, a villager, a commander of a file of men, a corporal*"*, (Francis Joseph Steingass, Francis Johnson, and John Richardson, *A Comprehensive Persian, English Dictionary : Including the Arabic Words and Phrases to Be Met with in Persian Literature Being Johnson and Richardson's Persian, Arabic and English Dictionary* (Lahore: Sang-e-Meel Publications, 2000), 574.). Finally, drawing upon these definitions for our purposes, r*asātīq* appears to be an arabicized version of the Farsi word, altered to describe an individual associated with a village or a rural area, (Bustani, *Muhit Al-Muhit : Qamus Mutawwal Lil-Lughah Al-`Arabiyah*, 309.).

In addition to the logical breakdown of the categories, the grammatical structure of the sentence suggests that women are also different from the groups that make up each of the categories, being distinguished only by sex difference. Though the word *'ulamā'* could imply male and female scholars, as could 'wise people', 'rulers' and 'populace', the isolation of women as a group separate from the other people in the lists implies that he does not envision women amongst the preceding groups. Thus, he mentions them separately, explicitly differentiating them from every other category. The effect of this is to do more than separate women and the provincials from the others for, as the only group differentiated by sex, the compound effect is to combine together all women, regardless of which other group of society they belong to, and to separate them from all the groups above, which grammatically also become all male groups. Consequently the most significant aspect of Jīwan's category 'women' is that it is a sex differentiated or a biological category. The remaining categories function on different forms of authority viz. the spiritual authority of the prophets and saints, the epistemic and moral authority of the scholars and wise people, the popular authority of the masses, the political authority of the rulers and the authority (or lack thereof) of location of the provincials. Unless we make the assumption that women also comprise a separate social class, representing a unique form of authority, it appears as though this distinction revolves entirely upon biology, formulating an association of biological sex difference with the lowest grade of reason.

My primary concern in this study is with women as legal subjects and so we pause to explore some possibilities for Jīwan's relegation of women to the bottom grades of reason. Why are women separated in this way? Were *Mughal* women a separate social

class who represented a sex-differentiated form of authority distinguished by their physical location, much in the same way that the provincials are separate from central city structures? The idea may have some currency, given the institutional, literary and legal norms that circumscribed women's public presence in this period. The making of Akbar's regime of state order is said to include the "routinization" of imperial space and practice as well as "the creation of new subjects (especially female)".[196] Amongst the changes was an official statute of the royal household, a regimen that created segregated spaces for women, institutionalised the *ḥaram* and officially designated women "*pardeh-giyan*", secluded.[197] Thus we note that spatially women were separated from non-familial men.

Were women offered separate legal treatment? Legal texts frequently make special considerations for women in their dealings with the judiciary, upper class women being exempt from appearing in courts as these are public spaces. This does not mean that women did not appear in courts or that Muslim women everywhere represented themselves in courts. Annelies Moors,[198] Lesley Peirce,[199] and Judith Tucker[200] give detailed accounts of how all classes of Ottoman and Arab women utilised the courts,

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[196] Ruby Lal, *Domesticity and Power in the Early Mughal World*, Cambridge Studies in Islamic Civilization (Cambridge: Cambridge University Press, 2005), 176.
[197] Lal also shows how, in spite of the constricting spaces for women, the Akbar's harem "was by no means closed off from the world, unconcerned with politics, or bereft of power or interest in public affairs", (ibid., 177.).
[198] Annelies Moors, *Women, Property and Islam : Palestiniam Experiences, 1920-1990* (Cambridge: Cambridge University Press, 1995).
[199] Leslie P. Peirce, *The Imperial Harem: Women and Sovereignty in the Ottoman Empire* (New York: Oxford University Press, 1993); Leslie P. Peirce, *Morality Tales: Law and Gender in the Ottoman Court of Aintab* (Berkeley, CA: University of California Press, 2003)..
[200] Judith E. Tucker, *In the House of the Law: Gender and Islamic Law in Ottoman Syria and Palestine* (Berkeley, Calif.; London: University of California Press, 1998).

personally and through their legal agents.[201] Further, unlike men, positive law gave all women a unique legal capacity to retain agents to act in legal matters, even without the agreement of the opposing party. While men could only appoint legal agents to act on their behalf after securing an agreement from the opponent in a case, women could do so without obtaining such an agreement. Marghinānī's *Hidāya* illustrates this in the discussion on agency.[202] Thus the jurists acknowledged that upper class women seldom appeared in public spaces[203] the law on appointing an agent (*wakīl*) suggests that women were expected to appoint agents to act on their behalf to avoid appearing in public.

The institutionalization of the *ḥaram*, the allowance for women to avoid public court appearance and the automatic facility to appoint agents on her behalf illustrate some of the mechanisms that confirmed a separation between women's public and private presence. Literary custom also replicates this spatial separation by removing women to the final category of a matter under discussion. It is a common literary (*adab*) practice, evident in the structure of biographical sources, to write about women separately from men. Biographical sources typically begin with various classes of male individuals after which they proceed to record the lives of women, most frequently collectively in the latter chapters of the text, followed by other marginal types of people, such as the blind,

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[201] The political aspects of this perspective fit well with the increasing institutionalization of the *ḥaram* in early Mughal society and with the varying *ḥaram* cultures in Ottoman, Safavid Muslim lands. The study of these various *ḥaram* cultures reveals that while the division of spaces may be determined by sex difference, the sex differentiated space does not necessary imply a sexual division of authority that falls neatly upon a public/private or political/domestic/or inside/outside sort of divide.

[202] We deal with this aspect of legal capacity in detail in Chapter Five.

[203] For more on the links between reason, witnessing, reason and limiting women's public presence see Mohammad Fadel, "Two Women, One Man: Knowledge, Power, and Gender in Medieval Sunni Legal Thought," *International Journal of Middle East Studies* 29, no. 02 (1997).

the mentally incompetent and heretics. Might Jīwan have been doing the same here? Might he have simply created a category apart from all others? It is possible except that the remainder of his classification does not follow a further literary practice of biographical literature, namely, alphabetical listing.

While these social, legal and literary norms indicate, to some extent, that female social authority was indeed distinct from male social authority, they do not reveal much about the nature of that distinction. Studies of *ḥaram* culture[204] however dispel the idea that female social spaces were necessarily less significant spaces for negotiating authority. While the public-private divide, implicit in modern understandings of sex-differentiation of space, may suggest that women in *ḥaram* cultures were removed from locations of power, studies of *ḥaram* culture suggest that the privacy of the *ḥaram* may not have been pervasive. Rather the exercise of political power from *ḥaram* spaces demonstrates that these homo-social spaces affected the exercise of public political and social authority, whether through networks of patronage or by virtue of the relationships between women and their sons. Even with the increasingly institutionalised *ḥaram* of Mughal culture[205] there is little argument that women were excluded from the exercise of political or other forms of social authority. Jīwan, however, does not seem to have shared this opinion. By his account, women are a separate social collective and, as such, they have the least social authority, hence the lowest grade of reason.

But neither the institutionalisation of homo-social female spaces, nor the legal dispensations aimed at maintaining women's seclusion, nor even the literary realisation

[204] Lal, *Domesticity and Power in the Early Mughal World*. Peirce also highlights the role of seniority amongst women of the Ottoman *ḥaram* in determining political succession. See Peirce Peirce, *The Imperial Harem: Women and Sovereignty in the Ottoman Empire*.
[205] Lal, *Domesticity and Power in the Early Mughal World*.

of these practices in the textual practice of separating women out from the main body of a text, would also have confined all women to a homogenous group of individuals, with undifferentiated forms of social authority. The idea is not easily sustained, whether inside or outside of the *ḥaram,* given the various life circumstances of women and the presence of women in most of the groups that Jīwan lists before them. Nonetheless, Jīwan's combination of all women as the final element in a four-tiered categorisation of eight types of reason establishes a 'metaphoric network'[206] within the text. It establishes at the outset an opinion on women and reason and, as readers, it signals to us what may unfold as we read further. In this metaphor of reason and social authority prophets represent excellence and women represent its opposite with the lowest levels of reason. Jīwan offers no legal explanation for distinguishing women as he does and his distinction is not premised upon legal explanation.

His suggestion recalls for us Nyazee's category of imperfect legal capacity and indeed the limitations on women's evidence in penal matters resonates here. It alludes easily too to the well known and oft-quoted *ḥadīth* which draws a correlation between reason and sex difference, and which we already mentioned in our discussion on Nyazee. I suggested there that Nyazee's association of women with *ahliyya nāqiṣa*, imperfect legal capacity, proposes an extension of the *ḥadīth* association of women with deficient or imperfect reason and imperfect religion (*nāqiṣ al-'aql* and *nāqiṣ al-dīn)* into the realm of legal theory to argue for imperfect legal capacity (*nāqiṣ ahliyya)*. The *ḥadīth* is most popular for its reference to women as *nāqiṣ al-'aql wa al-dīn*, deficient in reason and religion. Deficient reason originates in restrictions on women`s witnessing and the

[206] See Irigaray, *This Sex Which Is Not One*, 74-80.

deficiency in religion originates in restrictions on ritual observation during menstrual and post-partum bleeding.[207]

Jīwan says the best reason is found in men who are prophets and the lowest reason in women. Prophetic reason and women's reason are the diametric opposites. Thus the *ḥadīth* of the prophet who pronounces upon women's reason is also confirmed in Jīwan's sentiment. This *ḥadīth* is explicit in the correlation between the *nāqiṣāt* (deficiencies) of women's reason and religion and features in a number of legal debates that pertain to women's intellectual capacities. In the debate on interdiction of the spendthrift (*safīh)* the *ḥadīth* allows jurists to include women amongst them.[208] Discussions on witnessing similarly rely on the *ḥadīth* to exclude women from some or most types of testimony, as with judgeship and state leadership.[209] The assumption that women are deficient or diminished in their ability for reason is widespread in legal sources and the correlation of this idea with the *ḥadīth* renders it also normative, with the result that it is not uncommon for scholars to argue that women are inherently weak-minded or deficient in their ability to reason. This is not to suggest that there are no dissenting opinions. The literature contesting women's deficient in intellect speaks to the presence of both opinions. Jīwan's analysis tells us which side of the debate he supported.

The legal debate includes linguistic and contextual analysis of the *ḥadīth*, reference to Qur'an, the veracity and intellect of the early female *ḥadīth* narrators and legal scholars,

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[207] See footnote # 93 for the *ḥadīth.*
[208] Powers, "Parents and Their Minor Children: Familial Politics in the Middle Maghreb in the Eight/Fourteenth Century."; Oussama Arabi, "The Interdiction of the Spendthrift (Al-Safāh): Human Rights Debate in Classical Fiqh," *Islamic Law and Society* 7, no. 3 (2000); Ebrahim Moosa, "The Sufahā' in Quranic Literature," *Der Islam* 75(1998).
[209] Fadel, "Two Women, One Man: Knowledge, Power, and Gender in Medieval Sunni Legal Thought."

historical limitations on women's public presence and social and commercial expertise. Arguing for women's intellect, it is said that the *ḥadīth* is not a statement on deficiencies in female intellect per se, rather a statement on women's testamentary competence assessed through women's experience and presence in public spaces, which result in the preferential status accorded to male witnesses.[210] Consequently, in a somewhat circular argument, based on the limitations of women's public social experience, scholars promote a preference for male witnesses, which is in turn intended to discourage women's public presence.[211] The discussions on women's intellect offer social observations on women's political and social authority and their presence in public spaces rather than an assessment of the technicalities of discernment, maturity and legal capacity. Nyazee offers a similar social analysis that speaks to ideas of femaleness. Without considering matters of reason, obligation and maturity he permits exemptions from witnessing, judging and leadership as a relief and protection against these burdensome obligations. Jīwan also offers us a social assessment. He tells us that in their absence from recognised sites of social authority women ought to be considered as having the lowest form of reason. The *ḥadīth* makes a similar correlation when it moves to the limits on women's testimony to an assessment on the existential nature of women.[212] These correlations tell us the meanings assigned to women's public presence and experiences and the social value associated with women's intellectual activities. The *ḥadīth* is both a statement on the inferior intelligence of women and useful for

[210] Ibid; De La Puente, "Juridical Sources for the Study of Women."
[211] Mohammad Fadel offers a detailed explanation of why in matters of evidence "two women equals one man", see Fadel, "Two Women, One Man: Knowledge, Power, and Gender in Medieval Sunni Legal Thought."
[212] See footnote # 93for the *ḥadīth*.

discouraging women's participation in legal spaces that are not also exclusively female spaces. It is also a commentary on the impact of the natural processes of female reproductive biology on female piety. The statement on menstruation argues that reproductive biology and the natural processes of bleeding associated with carrying and birthing children impact women's piety. Bleeding from the womb limits women's ritual practice and so menstrual bleeding results in diminishment of a woman's religion.

Despite the historic and contemporary debate, the sentiment that women possess deficiencies in reason (based on their limited scope for witnessing) and in religion (due to the limitations that menstruation places on their ability to pray throughout the month), persists in contemporary Muslim scholarship. Local literature produced by respected legal scholars who translate *fatāwa* literature brought in from the Indian subcontinent makes no concession to equality in this regard. The *ḥadīth* is prominent in discussions on why women may not be leaders and is easily combined with Qur'an 4:34 which is translated to establish categorical male leadership over women; "men are *qawwamūn* ('rulers') over women"[213]. The superiority of men over women, it is argued, is two-fold, "*zaati*"[214] or essential and "*aardhi*"[215] or temporary, thus men are naturally superior to

[213] Mufti Afzal Hoosen Elias, *Women Are Different*, trans. Mufti Afzal Hoosen Elias (Karachi: Zam Zam Publishers, 2008), 112. Qur'an 4;34 may otherwise be read thus, "Men are the protectors and maintainers of women because God has give the one more (strength) than that other, and because they support them from their means. Therefore the righteous women are devoutly obedient and guard in (the husband's) absence what God would have them guard. As to those women on whose part you fear disloyalty and ill-conduct, admonish then (first), (next), refuse to share their beds, (and last) beat them (lightly) but if they return to obedience seek not against them means (of annoyance), for God is most High, Great (above you all).", (Ali, *The Holy Qur'ān: Translation and Commentary*

[214] Elias, *Women Are Different*, 112.

[215] Ibid., 112.

women and also superior because men maintain women.[216] A woman, they opine "is similar to a developing child in her instinctive ignorance and curiosity".[217]

Returning to Jīwan, it is possible that he offers us insight into what may also have been a popularly held view or that he is revealing to us the social milieu in which his doctrine of legal capacity operated.[218] We cannot be entirely sure of this but what we can establish quite certainly are the social facts, or the ideological apparatus, that inform Jīwan's assessment of reason and its social correlates. His categories of reason reflect his associations of reason and authority and the legal imaginary at work in his text. They tell us how Jīwan conceptualised reason and women and if we return to the characterisation of legal theory as the product of religious obligation, devotion being the logic of the jurists justifications, then we may consider his characterisation of women's reason not as a record of what was, rather a description of "the way the world *should* work"[219] which is how Rumee Ahmed characterises legal theory.[220] Since Jīwan's categories are not reflective of Nasafī's source text, they are his commentary upon the source text.

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[216] Ibid., 112.
[217] Ibid., 114.
[218] The idea that women, as a biological group, also embodied a different sort of intellect is not isolated to Jīwan. The later Indian reformer Shah Waliullah (d. 1762) replicates this idea when discussing the different classes of individual, see ad-Dihlawi Waliallah and Marcia K. Hermansen, *The Conclusive Argument of God : Shah Wali Allah of Delhi's Hujjat Allah Al-Baligha* (Leiden [u.a.]: Brill, 1996). He makes two distinctions similar to Jīwan's. In the first distinction, he considers people who live outside of cities to be in an earlier stage of civilisational development than people who live within cities, (ibid., 117.). This idea echoes Jīwan's suggestion that the *rasātīq* have lesser degree of authority and consequently a lesser grade of *'aql*. Further, when discussing household management amongst the matters that define the second level of civilisational development, he says that women are by nature "the less intellectual of the two", (ibid., 123.). The woman "is the more completely obedient, while the man reasons more soundly", (ibid., 123.). The connection Shah Waliullah makes between reason and obedience resonates Jīwan's hierarchy of reason derived from authority.
[219] Emphasis in the original
[220] Ahmed, *Narratives of Islamic Legal Theory*, 152.

Commentary is the space where the legal theorist imagines the law as it should be applied in recognition that it is at that point not applied correctly.[221] Jīwan uses this statement not only to establish that that ʻ*aql* is differentiated by sex but also to establish that the discussion on legal capacity ought to work with the understanding that women have the lowest reason in society.

David Vishanoff's study of development in legal hermeneutics offers another perspective on reading sex-difference in legal texts, namely a discussion amongst early legal scholars on the "scope of address" of God's commands, where we find the suggestion that women are not necessarily amongst those intended in the address of God's command.[222] To illustrate, Abū al-Ḥusayn al-Baṣrī (d.478/1085) a *Muʻtazilī* scholar, was of the opinion that

> God must make his speech about menstruation clear to scholars because they are charged with understanding it, though not with obeying it; but he need not make it clear to women, because they are charged only with obeying the rules derived from it by the scholars.[223]

Much like Jīwan's separation of the categories scholars and women here, Abū al-Ḥusayn did not envision their overlap.[224] Whether Abū al-Ḥusayn might have made a similar analogy that applied to any other physical state that a scholar might not experience, is

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[221] Ibid., 152.
[222] David R. Vishanoff, *The Formation of Islamic Hermeneutics: How Sunni Legal Theorists Imagined a Revealed Law* (New Haven: Conn: American Oriental Society, 2011).
[223] Ibid., xviii. Vishanoff cites from Abū al-Ḥusayn Muḥammad b. ʿAlī. al-Baṣrī, *Al-Muʿtamad Fī Uṣūl Al-Fiqh*, ed. Khalil al-Mays, 2 vols. (Beirut: Dār al-Kutub al-ʿIlmiyya, 1983), 330-1, Vol.1.
[224] Vishanoff, *The Formation of Islamic Hermeneutics: How Sunni Legal Theorists Imagined a Revealed Law*, xviii.

unclear. If not then his sentiment is not very different from Jīwan's: women do not share the quality of reason of the scholars. We return to this as a point of technical grammar in the next chapter when we discuss the implications of a male grammatical norm.

For now though, Jīwan's four-fold categorisation instructs us on his worldview, how he thought the world ought to be and in the metaphor of reason and authority we have also become familiar with the discursive 'grammar'[225] of the text. Jīwan directs our attention from the very outset to a system of authority constructed upon the intersection of reason with a series of the variables, spirituality, knowledge, politics, social and spatial location and sex difference, which also come to form the implicit social boundaries drawn about the discussion on legal capacity. At the outset of the text on legal capacity we have a scaffold upon which we expect the remainder of the discussion on legal capacity to unfold. I expect to see these boundaries, especially the last one, resurfacing throughout the text. As we will find, at times these boundaries are visible and the distinctions above do appear explicitly while at other times they are implicit. They are all however significant to how we understand the references to women that feature in the remainder of Jīwan's commentary. Whereas other groups of people are determined by class and authority, the final group, women, is determined by sexual difference only. So I would not be mistaken in the conclusion that, for Jīwan, women as a collective ought to be considered different in terms of their reason and, *because* he also makes a direct link between reason and legal capacity, we might also expect to find that women are different in terms of their legal capacity.

[225] Irigaray, *This Sex Which Is Not One*, 74-80.

While the reality of women's lives placed them in a host of different social positions that would have dictated a similar variety in terms of the authority they held, for Jīwan, female sex difference entails an extreme difference in authority consigning women to the lowest level of reason and consequently the lowest level of authority – even lower than male provincials. In only five lines of commentary on half a line of the original text, Mulla Jīwan has explained that legal capacity is associated with *'aql* (reason), *'aql* (reason) has grades, prophets occupy the highest of these, and women occupy the lowest. Thus, our first observation on the subject of the law is that law's subject is an individual whose legal capacity is determined according to reason. Reason is determined by grades of authority which is differentiated by an individual's spiritual, epistemic, political, locational or spatial, and sexual identity. In the absence of a legal explanation for why sexuality is a unique distinction and also a comprehensive one that is not further defined, I have drawn upon other social, literary and legal practices to understand Jīwan's distinction of women thus. His idea earns support from the popular *ḥadīth* used to imply that differences in male and female testamentary capacities render women deficient in reason or intelligence and that women's reproductive biology, with its attendant restrictions on meeting the requirements for worship, renders them deficient in their religion. Reference to women's reproductive biology here raises our concern, first for what it implies about the role of a person's body in differentiating legal capacity. The next part of Jīwan's discussions tells us more about how the body determines legal capacity and in the textual matrix of body, reason and legal capacity we begin to witness how the text determines women as legal subjects.

2. Bulūgh (Puberty)

Before concluding his commentary on reason Jīwan explains that *bulūgh (puberty or sexual maturity)* also has a role in determining reason.

> However, the law (*al-shar'*) stipulates puberty (*bulūgh)* as the condition for achievement of reason (*i'tidāl al-'aql*).[226]

Bulūgh is defined as the physical and sexual maturity of male and female bodies. Linguistically, the term refers to the fullest realization of a thing, and it refers to people in two ways. The first is a reference to when an individual becomes old, i.e., when a person passes the age of forty and enters the later stages of life. The second refers to attaining puberty. Linguistically, and according to the renowned lexicographical work, *Lisān al-'Arab*, *bulūgh* implies a boy or a girl having a nocturnal emission (*iḥtalama*) and thus signalling the time at which they acquire responsibility (*taklīf*). [227] Technically, male *bulūgh* is determined by *iḥtilām* (nocturnal emission), *iḥbāl* (impregnating a woman) and *inzāl* (ejaculation), while female *bulūgh* is determined by menstruation (*ḥaiḍ*), *iḥtilām* (nocturnal emission) and *ḥabal* (pregnancy).[228]

Puberty or sexual maturity plays a definitional role in determining legal capacity, and there are certain assumptions about the body, its nature and its form associated with sexual maturity. In his reference to sexual maturity Jīwan addresses, for the first time, a matter of legal capacity that is not entirely dependent on intellectual maturity or reason,

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[226] Jīwan, *Nūr Al-Anwār Ma'a Ḥāshīyat Qamar Al-Aqmār* 281.
[227] Muḥammad ibn Mukarram Ibn Manẓūr, *LisāN Al-'arab* (Bayrūt: Dār Ṣādir. , 1955), 420., Vol. 8
[228] This is according to the Hidāya, amongst the positive law (*furū' al-fiqh*) texts of the *Dars Nizāmī* and which we will make further reference to in coming chapters. For more detail see *Kitāb al-Ḥijr* in *Hidāya* Mullā Aḥmad ibn Abī Sa'īd ibn 'Ubayd Allāh al-Ḥanafī al-Ṣadīqī Jīwan, *Nūr Al-Anwār Ma'a Ḥāshīyat Qamar Al-Aqmār* (Delhi: Kutub′khānah Rashīdīyah, 1960), 281.

bulūgh being a reference to physical maturity and *badan* (the body). By extension, the ultimate determinate of reason and therefore of legal capacity is sexual maturity (*bulūgh)*. This interplay of *badan*, *'aql* and *ahliyya* (of body, reason and legal capacity), prevails through the remaining discussion on legal capacity, as these three elements come to constitute the individual as a subject of the law.

The text continues by detailing the different types of legal capacity.

3. *Dhimma (Legal Accountability or Personality)*

Jīwan begins his discussion on the types of legal capacity by explaining that the first type of legal capacity *ahliyyat al-wujūb* (capacity for obligations due to and from the individual)[229] arises out of *dhimma* (human accountability to God). [230]

> *Dhimma* refers to the covenant which we acceded to with our Lord on the day of *mithāq* (covenant) with a pronouncement "Am I not your Lord", he said. 'Of-course/You are' we affirmed. Having admitted God's lordship on the day of Covenant we confirmed that all his laws are valid for us and are incumbent upon us or due from us. **A person is born and he has proper *dhimma* (is suitably**

[229] I translate *ahliyyat al-wujūb* as the 'capacity for obligations due to and from the individual person' whereas, as we saw earlier, Nyazee translates it as the 'capacity for acquisition' and Zahraa calls it 'eligibility capacity'. We use my translation from here on.

[230] Barber Johansen, Nyazee, and Zahraa also consider *dhimma* legal personality, a useful term when relating classical law to a modern paradigm of the individual but I find it perhaps less appropriate as we analyse the classical legal text in its classical context, moreso when we have not yet defined the notion of 'person'. Accordingly I prefer the translation 'legal accountability to God' for our purposes here. 'Legal personality' is an appropriate rendering of *dhimma* too especially in terms of the contemporary understandings of law and therefore we will use it later when referring to contemporary texts. For reference to the use of legal personality as *dhimma* see Zahraa, "The Legal Capacity of Women in Islamic Law."; Barber Johansen, "The Legal Personality (Dhimma) and the Concept of Obligation in Islamic Law: How to Separate Personal Obligations from Goods and Secure Credit for the Insolvent," in *Before and Beyond Europe Conference* (Harkness Hall, Yale University2011); Nyazee, *Islamic Jurisprudence: Uṣūl Al-Fiqh*.

protected) for obligations due from him and to him (*dhimma ṣāliha li wujūb lahu wa 'alayhī)* based on that previous covenant.[231]

Dhimma represents the human obligation to God that originates in the primordial covenant between God and humanity which covenant, offered to all creation, was accepted only by humanity [232] and whereby humanity affirmed God's lordship. All people are born partaking of the covenant and thus all people are born accountable to God.[233] The individual person is the seat of the obligation through which a person becomes accountable to God for obedience to God's law.[234] In keeping with Jīwan' and Nasafī's analysis *dhimma* reflects the accountability that emanates from the primordial human commitment to the lordship of God and to obey God's laws.

Legal capacity emanates from *dhimma* (accountability) and only humans are thus accountable.[235] *Ādam*, the first human, is the singular representative of all humanity and therefore *dhimma* is undifferentiated at birth and all humanity has accountability. Believers and unbelievers both have accountability but the unbeliever is not similarly accountable in religious matters. The slave and free are also both accountable but the

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[231] Jīwan, *Nūr Al-Anwār Ma'a Ḥāshīyat Qamar Al-Aqmār* 283.

[232] Jīwan makes no distinction here between men and women. Indeed there are points in legal theory or positive law that distinguish the ritual and spiritual obligations of men and women which may have consequences for the accountability of an individual. The assumption, however, is that the individual who took the covenant Ādam is the first human and representative of all humanity.

[233] For more on the covenant see Bernard Weiss, "Covenant and Law in Islam," in *Religion and Law : Biblical-Judaic and Islamic Perspectives* ed. Bernard G. Weiss Edwin B. Firmage, John W. Welch (Winona Lake: Eisenbrauns, 1990), 334.

[234]For more on this see Johansen, "The Legal Personality (Dhimma) and the Concept of Obligation in Islamic Law: How to Separate Personal Obligations from Goods and Secure Credit for the Insolvent."

[235] Johansen explains that a foetus does not have legal personality in the womb and therefore can have no obligations, but it does have rights due to it, such as emancipation (with its mother), succession (from its family), lineage (of its parents) and the benefit of bequests, (ibid., 5.).

slave's accountability is reduced because a slave is owned by another person. Men and women have the equal accountability for obedience to God and sex difference does not distinguish accountability to God. *Dhimma*, whether interpreted as accountability or legal personality appears much like the popular reform notion that women and men are considered 'equal before God' in that *dhimma* is without distinction amongst men and women. Reformist scholarship takes the idea that men and women are equally accountable to God as a starting point for equal treatment of men and women in the broad spectrum of law.[236] Unlike Muslims and non-Muslims or slaves and free people who are not equally accountable to God, men and women are. The primordial covenant and the Qur'anic narrative of Ādam and Hawwā' who jointly transgress God's command are part of the creation narrative of Islam. Together these two ideas offer a suitably non-discriminating account of human accountability and obligation to obey God which women's rights advocates also rely upon.[237] This is our second observation; *dhimma*

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[236] Abdullahi Ahmed An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law*, Contemporary Issues in the Middle East (Syracuse: Syracuse University Press, 1990); al-Hibri, "Muslim Women's Rights in the Global Village: Challenges and Opportunities."; Ali, *Gender and Human Rights in Islam and International Law: Equal before Allah, Unequal before Man*; Shaheen Sardar Ali, *Conceptualising Islamic Law, Cedaw, and Women's Human Rights in Plural Legal Settings: A Comparative Analysis of Application of Cedaw in Bangladesh, India, and Pakistan*, ed. Unifem South Asia Regional Office (New Delhi: UNIFEM-South Asia Regional Office, 2006); Kecia Ali, *Sexual Ethics and Islam: Feminist Reflections on Qur'an, Hadith, and Jurisprudence* (Oxford, England: Oneworld Pub., 2006); Mir-Hosseini, "Construction of Gender."

[237] See Barbara Freyer Stowasser, *Women in the Qur'an, Traditions, and Interpretation* (New York: Oxford University Press, 1994). However, this approach is not sustainable into the further moments of creation, namely the creation of Hawwā in the garden through a process where Ādam becomes two individuals differentiated by sex. These narratives of creation mark ontological distinctions between men and women which bear upon definition and legal capacity. Stowasser also offers a study of varied creation narratives.

(legal accountability to God) is inherent in all people and not differentiated between men and women.

4. *Anwā' al-Ahliyya (Forms of legal Capacity)*

Next he tells us that legal capacity is of two types. The first is *ahliyyat al-wujūb* (capacity for obligations due to and from the individual). This personal capacity for obligation *(ahliyyat nafs al-wujūb)*, which is an individual's suitability for obligations due from and to the individual[238] exists by virtue of *dhimma* (human accountability to God). All humans are accountable to God and capable of fulfilling obligations to others and of having others fulfil obligations to them.

The second type of *ahliyya,* Jīwan tells us,

> … is ***ahliyyat al-adā' (the capacity to act)***[239] **and it is of two types. [The first is] insufficient (*qāṣir*) based on insufficient**[240] **abilities (*al-qudrat al- qāṣira*) arising from insufficiency of the intellect and insufficiency of the body (*al-'aql al- qāṣir wa al-badan al- qāṣir*).** *Adā'* relates to two abilities, the ability to understand a command, and this is by means of reason, and the ability to act upon it, and this is by means of the body. If a person's ability is affirmed by means of these two, it [the capacity to act] is sufficient/complete (*kāmila*). It is compromised by insufficiency in [either of] these two. A person in the first stage of life lacks both abilities but has the potentiality for both and the ability to arrive at both. These happens bit by bit, until he matures, **like the discerning child (*ṣabī***

[238] Jīwan, *Nūr Al-Anwār Ma'a Ḥāshīyat Qamar Al-Aqmār* 283.
[239] Nyazee translates this as the 'capacity for execution' and Zarqa calls it 'discretion capacity'. I prefer the 'capacity to act' or the 'capacity to contract'.
[240] Here *qāṣir* works in contrast *kāmil.* I therefore translate them in relation to each other, *kāmil* as sufficient or complete and *qāṣir* as insufficient or incomplete. Nyazee, we saw in the last chapter, translates them as 'complete' and 'deficient' respectively.

'āqil). His body is weak but his intellect has the potential to be complete. **And like the mature person with a mental disability (*al-ma'tūh al-bāligh*)**, his mind is weak even if his body is complete.[241]

The first type of legal capacity, the capacity for obligations, rests upon the accountability of the individual. The second type, the capacity to act, rests upon reason and physical body of the individual. Sufficiency of reason or intellect entails the ability to comprehend a command and sufficiency of the body entails the ability to act on a command. People are born with the potential for sufficiency, in both intellect and body, and these elements develop gradually as an individual grows.

To explain how the capacity to act (*ahliyyat al-adā'*) functions, Nasafi directs us to its two types. The first is an incomplete or 'insufficient capacity to act'. It is the type of capacity that one would possess if either one's intellect or one's body were not mature, as with the discerning child (the child who has not attained puberty but who possesses discernment). Similarly, if an individual has grown to become an adult and yet there is insufficiency in their intellect that too implies insufficient capacity to act. This is in the case of the adult individual who has a mental deficiency, *al-ma'tūh al-bāligh*. The second form of capacity to act is called complete or 'sufficient capacity to act' (*ahliyyat al-adā' al-kāmila*) and rests "**upon sufficient capacity for reason and a sufficient body (*al-qudrat al-kāmila wa al-badan al- kāmil*)"** to act with.[242] **The "obligation to fulfill and to accept the commands"** of God rests upon sufficiency of intellect and body.[243] Therefore, the mental capacity to comprehend a command, accompanied by the physical

[241] Jīwan, *Nūr Al-Anwār Ma'a Ḥāshīyat Qamar Al-Aqmār* 284.
[242] Ibid., 284.
[243] Ibid., 284.

ability to enact the command, entails a complete capacity to act (*ahliyyat al-adā' al-kāmila*). However, these two elements in themselves are not sufficient for an individual to claim complete capacity to act. In addition to the physical ability to perform an act there is also puberty or sexual maturity, the legal requirement for determining sufficiency in the intellect and the body is puberty. In the absence of this "great event", a child's legal capacity to act remains incomplete (*qāṣir)*, becoming complete only upon puberty, and in its absence, an age determined for puberty.

> Since the acquisition of complete mental or physical capacities happens only after a great experience, the Legislator, in order to facilitate things, has established puberty as when reason most often becomes mature.[244]

To summarise, Jīwan explains legal capacity first in terms of its association with intellect since intellect determines an individual's ability to comprehend matters, but it is puberty and sexual maturity (not only physical ability) that determines the sufficiency of a person with intellect for incurring obligations. Next he separates legal capacity into two forms. The first, the legal capacity for obligation (*ahliyyat al-wujūb*), depends upon accountability or legal personality of the individual and this has been established by the covenant between God and humanity. The second is legal capacity to act (*ahliyyat al-adā'*) of which there are two forms. The first is insufficient legal capacity to act and occurs when either the body or the intellect is not sufficiently formed. The second form is complete legal capacity to act and implies sufficiency of the intellect and of the body. A further requirement for sufficient legal capacity to act (*ahliyyat al-adā'*) is puberty.

[244] Ibid., 284.

Thus, the third observation on the subject of the law; in addition to intellect or reason, the subject of the law is also constituted by reference to the body. Complete legal capacity is determined by the sufficiency of each of reason and body confirmed by puberty. Puberty (through nocturnal emissions for boys and menstruation for girls) entails the realisation of sufficiency in the intellectual and physical aspects of an individual and affirms complete legal capacity to act. Insufficiency in either body or intellect results in incomplete legal capacity to act.[245]

The body is now inextricably linked with legal capacity and sexual maturity is a determinate of the body's sufficiency for legal capacity. Accountability, the body, reason and puberty constitute the first layer of social determinates for legal capacity. Using Oyewumi's terminology we will refer to these as the first layer of social facts or ideological apparatus that determine the social organisation of the text on legal capacity.[246]

5. *Al- Umūr Al-Mu'tariḍa(Impediments)*

The dynamic of intellect and body, and the various factors to which these two aspects of a person are susceptible, determine the remainder of the discussion on legal capacity. After the discussion on the nature and forms of legal capacity Jīwan proceeds to discuss impediments to legal capacity (*al-umūr al-mu'tariḍa)*. These are a series of conditions

[245] Integrated into the sufficiency of reason and body are the dual aspects of human accountability to God and puberty. While accountability is the precondition for legal capacity, reason, puberty and sexual maturity are its realisation. Accountability entails the commitment to God made by all of humanity in pre-eternity, represented by the proto-human Ādam. Consequently, every individual is born with this accountability.
[246] Oyewumi, "Visualising the Body: Western Theories and African Subjects."

which alter or curtail an individual's legal capacity as they affect the sufficiency of intellect and body.[247]

The nature and form of these impediments are discussed further in the next chapter. For now, it is useful to highlight their classification.

> **"[T]he matters that impede legal capacity are of two types, *samāwī* (providential), [which]** depend on God without any choice for his servant. There are eleven: minority, mental incompetence,[248] mental disability, forgetfulness, sleep, unconsciousness, slavery, illness, menstruation, post-partum bleeding and death. After these come the acquired (*muktasib*) [impediments], which are the opposite of providential. There are seven: ignorance, drunkenness, jest, travel, foolishness [the spendthrift], error and coercion.[249]

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[247] The first discussion refers to children, who are by default insufficient in *'aql* and *badan*. Jīwan discusses six aspects of insufficient legal capacity (*al-ahliyya al-qāṣira*), explaining that when dealing with children, whose legal capacity is always *qāṣir* (insufficient), then the validity of their acts is determined by reference to the nature of the act and the nature of benefit derived from the act. In terms of the *ḥuqūq* Allah, acts such as belief are valid (*saḥīḥ*) and acts such as unbelief are unpleasant (*qabīḥ*) and not pardonable (*la yaj'al 'afwan*). Acts which are neither beneficial nor harmful revolve between these two values. Similarly, as regards what is not relevant to the rights due to God (*huqūq Allah)*, such as sale, marriage, manumission. The validity of the act performed by a child depends upon the benefit therein for the child. Beneficial acts which entail worldly benefit, such as accepting gifts are valid. Acts which entail definitive harm (*ḍarar muḥaddad*) such as unilateral repudiation (*ṭalāq*) and manumission entail are not valid. The validity of acts that are between the two are determined by the opinion of the child's guardian, (Jīwan, *Nūr Al-Anwār Ma'a Ḥāshīyat Qamar Al-Aqmār* 284-6.). If the scholars who write the theory of legal capacity indeed supported the opinion, as the *ḥadīth* narrates, that women's intellect *wa*s indeed insufficient then this would have been the place to discuss the nature and consequences of insufficient female legal capacity, but neither Nasafī nor Jīwan do that.

[248] Most translations use "insanity" for *junūn*. I have preferred "mental incompetence" as a less pejorative term.

[249] Jīwan, *Nūr Al-Anwār Ma'a Ḥāshīyat Qamar Al-Aqmār* 286.

Jīwan describes each impediment beginning with an explanation of its nature and its impact on the legal validity of an individual's acts based on the nature of the act, the duration of the impediment and the circumstance through which the impediment was acquired. The discussion in this section extends for approximately twenty pages. The eighteen impediments to the legal capacity of an individual cover a range of instances when either the intellect or body may be considered compromised rendering the individual either physically or intellectually unable to fulfill the obligations expected of them or achieve the benefits to which they are due.

The progression of the first eleven impediments reflect the passage of experiences, bodily and intellectual, throughout an individual's lifetime, beginning with minority or pre-pubescence (*ṣighar)* and ending with death (*mawt)*. They map a progression in the maturity of the body and the mind from childhood into adulthood concluding in death. Interspersed are the various contingencies of body and mind an individual may encounter in the course of life – mental incompetence, mental deficiency, unconsciousness, sleep, forgetfulness, slavery, illness, menstruation and post partum bleeding. The next eight impediments are contingencies that an individual may encounter during a lifetime.[250]

[250] To summarise, in terms of impediments affecting the intellect, the individual first is without intellect in the womb. At this stage there is no capacity to act (*ahliyyat al-adā'*) but there is capacity for obligations (*ahliyyat al-wujūb*) and so the foetus has a claim to inheritance and to property transacted in their name. Upon birth the child claims these as well as other obligations owed to or expected from the child and, given the child's bodily insufficiency, the expectation is that these are carried out on behalf of the child by a guardian. Furthermore, a child may also become discerning (*ṣabī 'āqil)*, one whose mind is developed but whose body is not, and claim a different status until puberty. Once a discerning child is proven to have attained physical maturity, i.e. puberty, the child may now be considered an adult, with all the attendant adult obligations, and with complete capacity to act (*ahliyyat al-adā' al-kāmila*). A child may also not become a discerning child but progress directly from the situation of a minority to that of an adult with complete capacity to act. Thereafter, the individual will move through some or all of the

The text constructs a legal subject through a progression from childhood, determined by an insufficient body and intellect under the guardianship of a parent, to adulthood, constituted by a fully sufficient intellect and a fully sufficient body affirmed by puberty. The capacity for obligations and the capacity to act are tightly integrated in the life-stages of an individual. Depending on where one stands in the cycle from birth to death, and between the stages of guardianship, mental competence, slavery and freedom, legal capacity shifts accordingly.

Amongst the impediments, two are sex-specific to women: *ḥaiḍ* and *nifās,* menstruation and post-partum bleeding. These are grouped together and are the only impediments that relate exclusively to women. The two references to women are notably limited to the bodily aspect of legal capacity. The remainder of the discussion on legal impediments does not separate into impediments that affect the intellect and the body, but the division is easily discerned:

- impediments to the intellect are mental incompetence, mental disability, forgetfulness, ignorance, jest, foolishness (prodigality), error
- impediments to the body: illness, menstruation, post partum bleeding, death, travel, force
- impediments to both intellect and body: minority, sleep, unconsciousness, drunkenness.

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intellect-related impediments during the natural course of life (mental incompetence, mental deficiency, sleep, forgetfulness, illness, unconsciousness, death), some of which may curtail the capacity to act and render it incomplete and others not. In terms of physical progression, the individual is at first physically unable to carry out the required activities. Then, following physical capability and maturity in the form of puberty, demonstrated by menstruation for females and sexual dreams for males, physical insufficiency ends and sufficiency begins.

Thus, by the end of the discussion on impediments to sufficient legal capacity, we come to our fourth observation on the subject of the law**:** that the impediments are conditions that affect the sufficiency of either the body or the intellect of an individual. The normative individual is a person who has full sufficiency of body and of intellect. Alterations of body and intellect through the various impediments affect an individual's legal capacity for actions and obligations. The general discussion on legal capacity imagines an individual who is not affected by any of the list of eighteen impediments.

In addition to our three earlier observations we see now that the normative subject of the law is predicated upon the body of a child that matures from childhood to adulthood, from insufficient legal capacity to act to complete legal capacity to act through the progressive development of the intellect and the body and with the potential to encounter any of a variety of eighteen impediments through which it may embody different forms of legal capacity. Only one amongst these impediments to legal capacity is sex-specific and this refers only to the biology of women. In the legal imaginary of the text a normative subject with complete legal capacity is reasoning and post-pubescent (an adult), in full control of their mental capacities (not mentally incompetent, unconscious, drunk, asleep, forgetful, in error or jesting), not enslaved, under no duress, not ill and close to death, and not menstrual or post-partum.

E. Conclusion

Combining the four observations, in response to who is the subject of Islamic law, I conclude that the subject is an individual whose legal capacity is determined according to reason or intellect, that reason is determined by grades of authority (viz. spiritual,

epistemic, political, socio-spatial and sexually differentiated forms of authority) amongst which women rank the lowest and that by virtue of *ḥadīth* tradition women are insufficient or deficient in intellect and deficient in religion. Jīwan's commentary reflects how women's intellectual authority is perceived. Tracing resonance of his commentary to *ḥadīth*, we also see how reproductive biology determines perceptions of women's piety.

Legal capacity is determined by the sufficiency of reason and of the body, in addition to which are the requirements of legal accountability and puberty. Legal accountability to God (*dhimma*) is not distinguished between men and women. However it is the precondition for legal capacity and conveys legal capacity for obligation while puberty, accompanied by sufficiency of intellect and body, conveys complete legal capacity to act (*ahliyyat al-adā' al-kāmila*). The normative subject of the law is predicated upon the body of an individual who matures physically and intellectually from childhood to adulthood, in the course of which the individual will encounter a number of impediments that convey different forms of legal capacity. Full or sufficient legal capacity rests in a legal individual who is free of the impediments that affect the sufficiency of either the body or the intellect. Accordingly, the normative subject of the law is a person who has full sufficiency of body and of mind, and hence full legal capacity (*ahliyya kāmila*) by virtue of being free of all the impediments to legal capacity. Only one amongst the eighteen impediments to legal capacity references sex difference and it addresses women's biology. Jīwan's categories of reason, where women's reason is of the lowest grade, reveal what Jīwan believes ought to be the situation.

The requirements for reason and puberty show how that the legal subject is discoursed through ideas of mental and physical sufficiency. Accountability, intellect,

body and puberty are the key elements, the ideological apparatus that organizes the jurists' thoughts on legal capacity. Further, women specifically have the lowest levels of reason and are identified with the only sex specific form of legal impediment to legal capacity. Because I have yet to uncover the discussion on menstruation and post-partum bleeding, for now we may assume that these are potential impediments to legal capacity. We recall too that the *ḥadīth* that says women's reasoning is *nāqiṣ* (deficient) also says that the deficiency arises out of menstruation.

Having elaborated broadly upon the normative nature of law`s subject, in the next chapter I move to our second question and focus more specifically on the role that sex–difference plays in determining the individual who has legal capacity. Here we will find how, in specifying female biology amongst the impediments, the text reveals an element of the 'discursive grammar' that may be otherwise obscured in our view of the intersections of body and reason in the legal capacity of women.

For now however I take note that, in spite of his low view of women's reason, Jīwan's presentation of legal capacity has yet to suggest a form of legal capacity that is exclusively female or specific to women, in the manner that the narrative of women as imperfect legal subjects did. Neither does Jīwan make any suggestions that sex-difference is insignificant to legal capacity, as Zahraa did.

Chapter Four

Producing the Female Legal Subject in Classical Islamic Legal Theory

A. Introduction

I come now to our second question; what matters of sex difference feature in shaping the legal subject of our text? Having uncovered two already (the low level of reason and the reference to menstruation and post-partum bleeding), I continue now exploring the explicit and implicit references to sex difference in the discussion on legal capacity. I examine the discussion on *ḥaiḍ wa nifās* (menstruation and post-partum bleeding) in much greater detail, and also explore Arabic grammar, *milk al-nikāḥ* (ownership of the tie of marriage) and desire.

Summarily, even as my earlier inquiry found that women have legal obligation like all believers, and in Jīwan's view women have low levels of reason, women are not categorised with a distinctive form of legal capacity. Here we will also find that menstruation and post-partum bleeding do not affect a woman's legal capacity and that legal capacity is not fixed but mobile and transient; an individual may inhabit multiple forms of legal capacity simultaneously and over time. Further, we will see that while women are not absent in a text that is grammatically male, women enter the text occasionally and the nature of their presence in the text reflects the social meanings assigned to women's bodies and intellect such that, as non-normative subjects, women easily become anomalous subjects of the law. Through a study of desire, we will see that in spite of the absence of a legal category 'femaleness' amongst the impediments to legal capacity the text suggests an unacknowledged form of legal capacity that is exclusive to women and evident in matters related to marriage and sexuality.

B. How Does Sex Difference Feature in the Legal Person?

1. Legal Capacity, Menstruation and Post-partum Bleeding

Given how Jīwan categorises women in terms of reason, a discussion on the legal capacity of women or even the various categories of male reason that initiate his discussion on legal capacity may have not been out of place later in his text. Also, following the suggestion that being female entails low reason it would not be surprising to find an allusion to female reason and body that also results in deficiencies in legal capacity. But, surprisingly, this is not what the text does; there is no specific discussion of women's reason, women's legal capacity, 'femaleness' or 'woman' as a legal category. Reason, as we saw, plays a significant role in determining legal capacity. It is one of the two criteria distinguishing complete and incomplete legal capacity yet there is no explicit reference to women's reason or indication that women have different legal capacity due to limited reasoning capacities.

The ideal place for this distinction would be in the list of impediments that affect an individual's legal capacity. Yet there is no clear statement matching, in either strength or form, Jīwan's first suggestion on women's low levels of reason. Only two of the impediments to legal capacity refer to women exclusively and the discussion of women here is significantly different from his earlier opinion on women's reason. Unlike the early section where Jīwan included much more of his own commentary on reason and its role in determining legal capacity, in the impediments that apply to women only he mostly confines himself to Nasafī's opinion. Menstruation and post partum bleeding are two different impediments but they are discussed together because, for the jurists, they operate similarly in terms of legal capacity.

The section reads:

> **Menstruation and postpartum bleeding** follow upon what came before. They are mentioned after illness because they are related with it since these two are an excuse (*'udhran)*. **These two do not negate** (*humā lā yu'dimān*) **legal capacity** not capacity for obligations and not capacity to act. That means that obligation for fasting and prayer have not fallen away due to these two [menstruation and postpartum bleeding]. **However ritual cleanliness (*taḥāra*) for prayer is a condition and in the absence of the condition the obligation for prayer is absent.**[251]

The primary import of this section is that menstruation and postpartum bleeding do not impact legal capacity. Rather, these render a woman unable to avail herself of conditions of cleanliness necessary to fulfill the ritual requirements for prayer and fasting, without which they are considered invalid. The impediment created by menstruation and postpartum bleeding occurs in the flow of blood that renders the possibility of ritual cleanliness, necessary for fasting and prayer, unavailable during the period of bleeding. The result does not create a change in *ahliyya* (legal capacity), because the obligation does not fall away; rather the impediment alters the terms of accountability for the obligation to pray and fast.[252] Accordingly, the aspects of a woman's reproductive biology represented by menstruation and post-partum bleeding are not considered impediments to her legal capacity for obligations or her legal capacity to act. By extension, a woman's reproductive biology is not an impediment to the sufficiency of her

[251] Jīwan, *Nūr Al-Anwār Ma'a Ḥāshīyat Qamar Al-Aqmār* 295.
[252] The discussion continues further detailing the reasons why women are responsible for making up the fasts but not the prayers that have been missed during the period in which they experience bleeding from the womb.

reason or the sufficiency of her body and therefore does not result in insufficiency for either legal capacity for obligations or legal capacity to act.

The discussion on menstruation and postpartum bleeding is the only discussion that is specific to female bodies as legal subjects, yet both Nasafī and Jīwan are categorical about the limited effect of menstruation and postpartum bleeding on legal capacity. In no way do menstruation and postpartum bleeding suggest a negation of legal capacity. Also surprisingly, there is no allusion to the deficiency of women's reason and potentially legal capacity here. In contrast to Jīwan's earlier commentary on women's low grade of reason, with no explanation except the implication that it is because women are female, the section on menstruation and postpartum bleeding does not meet our expectation of a similar distinction between men and women in legal capacity.

Neither do Nasafī or Jīwan make a correlation between the deficiency of reason and religion and the impediments to ritual cleanliness that arises out of the female biology that produces menstruation and postpartum bleeding. Rather, by being explicit that menstruation and post-partum bleeding do not negate legal capacity the jurists ensure that female reproductive biology is not implicated in women's legal capacity. In saying that menstruation and post-partum bleeding do not compromise legal capacity for obligations, we are returned to his earlier conclusions on legal capacity, namely the condition of human accountability to God (*dhimma),* indistinct between men and women and present upon birth. Neither does it compromise legal capacity to act, which is measured by sufficiency of body and of mind, nor does menstruation indicate insufficiency of body or mind. By implication menstruation and postpartum bleeding do not imply insufficiency in

either the original covenant or the condition of inviolability that arises out of it. They also do not indicate insufficiency in either reason or the body.[253]

How does this new information condition our earlier observations on the place of reason in legal capacity and the dynamic of legal capacity and body that determines legal capacity? We find that, while the subject of the law is constituted by reference to body and reason, and rests upon the sufficiency of each, menstruation and post-natal bleeding, two aspects of female reproductive biology, do not negate legal capacity. The legal capacity of a body that bleeds as it menstruates and after childbirth is not distinct from the legal capacity of a body that does not bleed to menstruate or to produce a child. In spite of this, neither of the two biological and potentially reproductive functions constitutes insufficiency of the body or of the intellect and therefore neither lead to the negation of legal capacity.

Then why do they feature here? What we are also told is that this body is different in its accountability for prayer and fasting. Jīwan explains that, like illness (*maraḍ*), these are also matters for which the law exempts certain obligations. They are placed here because menstruation and postpartum bleeding create temporary exemptions for women just as illness creates temporary exemptions for those unable to release themselves from the constraints of ill health. Illness and menstruation and postpartum bleeding are similar

[253] Recall, the publication of Jīwan's *Nūr al-Anwār* we use here is located in *Qamar al-Aqmār*, the *ḥāshiya* (marginalia) of Muḥammad ʿAbd al-Ḥalīm al-Laknāwī. In his marginalia, Laknāwī observes that the words "*lā yuʿdimān* etc." refers to the continuance of *dhimma*, discernment and bodily power (*li-baqā' al-dhimma wa-tamyīz wa-qudrat al-badan*), (Jīwan, *Nūr Al-Anwār Maʿa Ḥāshīyat Qamar Al-Aqmār* Note # 19, 295.). These are also the determinates of *ahliyya*. Their persistence and the idea that bleeding from the womb does not affect either is an important element of how women's legal capacity is imagined. The point of all three scholars is that bleeding from the womb does not negate legal capacity for obligations or legal capacity to act, however it does negate the capacity to achieve ritual purity.

categories of impediment. Explaining the nature of impediments, the author of the marginalia of our text Muḥammad Al-Laknawī, says in *Qamar* al-*Aqmār*:

> Impediments [refers to] the matters that … prevent legal capacity from continuing in that condition such as 'death' which diminishes legal capacity for obligations, such as 'sleep' which diminishes legal capacity to act, similarly the extreme impediments.[254]

The marginalia briefly describes the effects of the impediments which are recorded in greater detail in Bukhārī's (d. 730/1330) commentary on *Bazdāwī's* (d. 482/1089) *Uṣūl*. Bukhārī explains the three types as the loss of legal capacity for obligations (as in death) the loss of legal capacity to act, (as in sleep an unconsciousness), and a change in rules without a loss in legal capacity for obligations or legal capacity to act (as in travel).[255] Old age, middle age and such things, he tells us, are not amongst the impediments to legal capacity because they do not effect a change in rules.[256] Pregnancy and breast-feeding also entail changes in rules and these are included in the discussion on illness. Mental incompetence and unconsciousness, he explains, are also part of illness, yet they are enumerated separately because their numerous provisions require explanation.[257]

Thus we come to some understanding of the criteria for determining the list of impediments. Bukhārī explains further that the impediments are conditions that prevent legal capacity for obligations or legal capacity to act from being fixed because they effect

[254] Ibid., 286. Also see. al-Bukhārī, *Kashf Al-Asrār ʿan Uṣūl Fakhr Al-Islām Al-Bazdawī*, Vol. 4, 435-6.
[255] al-Bukhārī, *Kashf Al-Asrār ʿan Uṣūl Fakhr Al-Islām Al-Bazdawī*, Vol. 4, 435-6.
[256] Ibid., Vol. 4, 435-6.
[257] Ibid., Vol. 4, 435-6.

a change in rules.[258] The list of impediments, Bukhārī tells us, correlates to conditions that necessitate change of the rules or provisions associated with legal capacity.[259] Accordingly, upon extension of the threefold classification above, menstruation and postpartum bleeding feature in the third group; those impediments that cause a change of rules but no loss of legal capacity. In this regard, menstrual and post-partum bleeding are in the same category as illness.[260] Given that pregnancy and breastfeeding are succinct enough to be included under illness, we may well ask why menstruation and post partum bleeding are not also included in illness. They are after all amongst the shortest discussions amongst the impediments, not more than a few lines and easily incorporated into the discussion on illness. Yet menstruation and post partum bleeding are enumerated separately from other impediments.

In addition to Jīwan's reasons for including menstruation and postpartum bleeding amongst the impediments, we may suggest a further assessment. Sufficiency of the body is essential in determining legal capacity. Accordingly, in this list, the impediments that relate to the body are indicators of actual or perceived insufficiency. Menstruation and postpartum bleeding qualify as impediments because their presence creates an exemption

[258] Ibid., Vol. 4, 435-6.
[259] Ibid., Vol. 4, 435-6.
[260] This is not the only place where the text pays particular attention to a person's capacity for *ṭahāra* (ritual cleanliness) which is requisite for prayer and fasting. In the section of illness there is a discussion on an individual's ability to achieve a state of ritual cleanliness and the associated obligations. However, given the presence of menstruation and post partum bleeding here, there is another aspect of *ṭahāra* and bodily emissions that curiously does not feature in the jurisprudence on impediments to legal capacity, viz. sexual ejaculation which, much like the emissions of menstruation and post partum bleeding, also renders a person in a state of sexual un-cleanliness (*janāba)*, which precludes prayer until a state of ritual cleanliness is restored. This is not very different from the situation with menstruation, except that menstruation and post natal bleeding generally endure for a longer period of time, are not voluntarily accessed and exited and, more relevant to us, that these two are unique to female bodies.

from prayer and fasting. However, their separate enumeration gives them weight enough to also counteract any suggestion that menstruation and postpartum bleeding indicate an impediment that affects the sufficiency of the body or reason of women. Including menstruation and postpartum bleeding in the list of impediments effectively counteracts perceptions of incomplete legal capacity arising out of them. As a result of this inclusion, we become aware of an as yet undisclosed aspect of the discursive grammar of the text, namely that female bodies that bleed are not impediments to legal capacity.

Consequently, we may conclude that menstruation and postpartum bleeding are included here because the physical difference between male and female bodies, most apparent in the reproductive functions of menstruation and childbirth, may also prompt a concern on the legal sufficiency of bodies that are manifestly different in their biology and sexual reproductivity, viz., bodies that bleed in menstruation and after childbirth. The *ḥadīth* on women's deficiencies in fact makes direct reference to menstruation as the cause for women's deficiency in religion. In light of that, it is not unusual that the jurists make an explicit statement negating the implications of menstruation and postpartum bleeding for legal capacity. While it may have been possible to associate menstruation and postpartum bleeding with a deficient individual, in much the same way that the *ḥadīth* cited earlier suggested that bleeding rendered women deficient in their religion,[261] this was not the position of the classical scholars of legal theory. In other words, the scholars specifically dispel the assumption that bodies that bleed in this manner are innately affected in their legal capacity. In this counterintuitive instruction from the jurists we must also take note of how different historical moments have given different

[261] See footnote #93 above.

meaning to the body and its processes, here to menstruation and postpartum bleeding. While the *ḥadīth* argues that bleeding from the womb entails deficiency legal theory argues otherwise.

However, the specific reference to menstruation and postpartum bleeding also indicates that the normative human body of the legal text on legal capacity is not a female body, i.e. it is not a body with a womb or a body that may bleed from the womb during the natural course of life. Rather, female bodies, distinguished here by their reproductive biology and the bleeding associated with it, are different from the normative body because female bodies are exceptions to the rule. They require attention and clarification in the list of impediments to legal capacity, in much the same way as bodies that become ill which are also not the normative human bodies of the text.[262] Had these female bodies been the normative bodies of the law, that is, had the law been premised upon bodies that bleed routinely and that are routinely precluded from ritual cleanliness, the clarification on the menstruation and post partum bleeding might have featured in a discussion on ritual cleanliness, in the same way that Zahraa told us in the last chapter that the restrictions on women's capacities to contract and terminate marriage feature in the section on marriage and not on legal capacity.[263] Alternately, as we explained above, the clarification may have been easily accommodated in a discussion on illness. Perhaps also the clarification might not have been part of the impediments, in much the same way that the restrictions that emanate from other forms of ritual un-cleanliness shared by males and females do not feature amongst the impediments. The ritual un-cleanliness that

[262] If it was only the intent of the jurist to explain that menstruation and postpartum bleeding were impediments to ritual cleanliness (and not to legal capacity), then sexual ejaculation may also have featured here.
[263] Zahraa, "The Legal Capacity of Women in Islamic Law," 263.

follows sex i.e. *janāba*, for instance, creates similar impediments to prayer as the ritual un-cleanliness of menstruation and childbirth i.e. *ḥadath*, even though the two forms of ritual un-cleanliness are not legally the same. The ritual un-cleanliness that follows sex however is not enumerated with menstruation and childbirth.[264]

The scholars pay close attention to menstrual and post-partum bleeding because of their potential correlations with women's legal capacity, amongst them ideas of deficiency such as those that informs the *ḥadīth.* Their insistence explains the meanings that are ascribed to bodies with wombs and with bleed bleeding from the womb. These meanings are inscribed upon the female body generally. Contrary to expectation, the treatment of menstrual and post-partum bleeding as non-impediments to legal capacity presents a counter-intuitive treatment of the female body in legal theory. In our text the jurists quickly dispel the idea that the female body is itself potentially an impediment to legal capacity and relocate the potential impediment from the person whose body bleeds to the condition of ritual cleanliness that accompanies the obligation for prayer. We will bear this in mind when we encounter different presentations of the female body in the substantive law literature of the next chapter.

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[264] The ritual un-cleanliness there (called *janāba*) is dispensable and the individual remains responsible for later fulfilling the prayer obligations missed during the ritual un-cleanliness following sex. Menstruation and childbirth affect a different form of ritual un-cleanliness (called *ḥadath*) which is not, at least according to the jurists, within an individual woman's control. For this reason it is included amongst the God-given impediments (*samāwī*). Had the intention been to address ritual un-cleanliness, a specific section on the exemptions associated only with the ritual un-cleanliness of menstrual and post-partum bleeding would not have been necessary. Instead, the discussion would constitute the generality of discussions on exemptions or ritual un-cleanliness or even legal capacity and not require special attention in the impediments. On a separate note, one wonders what an analysis of menstruation and postpartum bleeding as impediments might be once we also account for medical means of managing menstrual and post-partum bleeding. At the time that the jurists wrote these impediments were considered *samāwī*, outside of human control. Today they may be managed medically.

More than a clarification of the impact of blood from the womb on ritual cleanliness, what else does this reference to menstrual and post-partum bleeding tells us about a female subject of the law? In encountering a female body, the text also encounters a body constituted by its difference from a male body. The difference in sexual reproductive function of this body may suggest physical insufficiency and therefore an impediment to legal capacity. The jurists correct any inclination toward this view. However the confirmation also confirms the female body as the non-normative body of the law. It is apparent from the reference to menstrual and post-partum bleeding that the normative subject of the law is a male subject and that normative legal capacity is fashioned upon the male body. This is also why Jīwan's earlier categorisation of reason takes care to enumerate the many degrees of reason for men and differentiate grades of reason and authority amongst men but only speaks of women as a singular collective with low reason encompassing the reason and authority of all women regardless difference amongst women. The best of reason is in men who are prophets and the lowest reason is in women. Tangentially, the linguistic consensus on the meanings of masculinity and femininity support a notion of opposites. To be male, in linguistic terms, is to be the opposite of what it is to be female and vice versa. We return to a linguistic analysis of this distinction later in the chapter. For now we recall that Jīwan's normative person has a male body which, depending on his location in the hierarchy of social authority, may occupy different levels of reason. Reason is also one of the two determining aspects of legal capacity. Opposed to this normative body is any person who has a female body regardless of their location in the hierarchy of social authority. Jīwan began his discussion by isolating women from other social classes exclusively by virtue of their

biology, reducing their reason to the lowest of social categories. However, in spite of this normatively male subject, Jīwan does not carry this link into the list of impediments or the discussion on menstruation and post partum bleeding. Even if women occupy the opposite pole of what it is to be male and have the lowest levels of reason, Jīwan does not appear to extend the privileged levels of male reason to a privileged male body.

The intersection of sex difference and legal capacity have until now produced the legal subject in three ways; there is Jīwan`s normative male person which occupies all ranks of reason, there is the female person which only occupies the lowest of ranks of reason and finally there is the female person whose bleeding during menstruation and bleeding after child birth do not negate her legal capacity. Jīwan offers us two distinct representations of women, one with inferior reason and the other with undifferentiated legal capacity. Both distinctions mark women's sexual distinctions from the normative subject, the first through reason the second through the body. The effect produces two different views of women. The first refers to all women who, either by virtue of their physical location outside the center of social and political power or by virtue of being female, (having a female body) occupy the lowest degree of reason, and potentially lowest legal capacity, reason being the basis of legal capacity. The second refers to all women who bleed from the womb but whose bleeding does not affect their legal capacity. The former distinction suggests being female necessarily implies diminished legal capacity and the latter disrupts that assumption showing that a female body does not affect legal capacity.

Accordingly the characterisation of the female subject of the law is not singular. Women in some instances are in opposition to the male subject and male reason and in

other instances there is no correlation between femaleness, reason and legal capacity. Women are both deficient in reason by virtue of their distance from social and political circles of power and uncompromised in legal capacity, even when their bodily states preclude ritual obligations. Rather than contradiction I read this as complexity, adding to the discursive grammar of the text. I find that in the 'juristic imaginary' of how the law ought to be, women's reason is diminished and women's bodies are not an impediment to legal capacity. The text offers complexity, multiplicity and an expanded narrative of femaleness rather than a singular unitary understanding of femaleness as lack or deprivation of legal capacity. Thus far women's reason and women's bleeding are two aspects of the narrative, and there is more.

The third element to the characterisation of women is less apparent in Jīwan's first allusion to women's low grade of reason, somewhat visible in the enumeration of impediments and pertains to the language of the text. I will return to this in detail below, for now we note that while it is apparent that the normative subject of the law is male, we would be incorrect to assume that the aspects of the text that do not address women specifically are not also thought to include women amongst the possible subjects of the law. Though the legal subject is normatively male, the entire text cannot be thought of as exclusive of women. Women feature generally and the law only specifies women when women are distinct from men.

Returning to the categories of impediments and the complexity of the legal subject we recall that Laknāwī[265] made reference to the three effects of impediments, to deny *ahliyyat al-wujūb* (legal capacity for acquisition), to deny *ahliyyat al-adā'* (legal capacity

[265] Jīwan, *Nūr Al-Anwār Ma'a Ḥāshīyat Qamar Al-Aqmār* 286.

for obligations due to and from a person) or to effect neither but to change the applicable rules. This suggests that the subject of the law is not static. If the impediments to legal capacity alter the provisions for legal capacity and thereby prevent legal capacity from being fixed, then the person obligated by the law and their legal capacity is also not fixed. Rather the individual operates in a fluid manner and a single individual occupies multiple capacities simultaneously as various life situations intersect and rules are adjusted accordingly. To be in a situation of menstrual and post-partum bleeding implies legal capacity that is different from when one is not in that situation, much as the legal capacity of a sleeping person is not the same as a waking person. The individual is therefore an unfixed legal subject constituted by a mobile legal capacity. Therefore, I find there are two aspects to the movement of legal capacity. First there is the body that moves from childhood into adulthood, through different stages of growth that effect reason and the body, so from one state of legal capacity to another. Simultaneous with this movement is a second movement that fluctuates due to the various contingencies of ordinary life.[266] It entails the loss and gain of one or other of the forms of legal capacity stemming from any of the states of being that are also impediments to legal capacity. Consequently, a person may exist with a multiplicity of legal capacities, forms of legal capacity, at any single moment. To illustrate, a person may simultaneously be ill, menstruating and laughing and on a journey causing them to occupy a matrix of capacities for prayer, fasting, contracting, bequest and other social and religious acts.

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[266] The *Hidāya* for instance says that old women may accompany the army to provide domestic services but young women may not. This is another illustration of the mobility of legal capacity as it changes during a lifetime. See Alī ibn Abū Bakr al-Marghīnānī, *Al-Hidāyah -the Guidance: A Translation of Al-Hidāyah Fi Sharḥ Bidāyat Al-Mubtadī, a Classical Manual of Hanafī Law*, trans. Imran Ahsan Khan Nyazee, 2 vols., vol. 1, Guidance (Bristol, England: Amal Press, 2006), Kitāb al-Siyar, Vol.2, 293.

We cannot forget, returning to the text, that neither Nasafī nor Jīwan create an explicit distinction between male and female legal capacity. There is no legal category 'woman' or 'femaleness' as there are 'slavery' and 'minority'. At no point in the theory of legal capacity is there any explicit or specific reference to women as distinctly different legal subjects with a distinctly different legal capacity. To support this, the text also does not suggest a singular view of women as legal subjects. Instead, to summarise the various suggestions on women we've encountered thus far, there is (a) the view that all humans have accountability to God which is not distinguished between men and women, (b) the view that women are opposite to men and their low grade of reason potentially diminishes their legal capacity and (c) that a woman's reproductive biology does not diminish her legal capacity. There is also the view of (d) the woman whose legal capacity is not fixed but inhabits multiple forms of legal capacity simultaneously and chronologically over time (synchronically and diachronically). Finally, (e) that there is no legal category 'woman' amongst the impediments. The first view speaks to the absence of distinction between male and female believers as legal subjects accountable to God. The apparent contradiction between the next two perspectives (b) and (c) is actually complexity arguing that women have lower grades of reason but that having a female body does not affect legal capacity. The fourth perspective (d) also creates the space to reconcile the (b) and (c). In that women's legal capacities are not fixed but simultaneously and chronologically multiple women's legal capacities, as men's, will also differ over time and in a single moment. We may argue for a similar analysis of the male legal subject; men too have unfixed and multiple forms of legal capacity. Unlike women, however, men are never considered distinctive because they are men, in the way

that Jīwan considers women different because they are women. The contrast of equal accountability to God and low reason resonate with the dichotomy of the heuristic 'equal before Allah but unequal before man'[267] and other dichotomies of women's legal subjectivity which we will encounter further in Chapter Six.

For now, arguing for legal reform, scholars such as Sardar Ali,[268] Hibri,[269]Mir-Hosseini,[270] and Kecia Ali[271] have also argued toward reform that would address the dichotomy between women's expectations of equality and experiences of inequality. Mir-Hosseini and Kecia Ali however have argued that the tension emanates from the absence of equality in classical law discussions on women. Some of that inequality is visible here in the exclusion of women's bodies from normative legal bodies and in the relegation of women's reason to the lowest ranks. The inequality remains as long as male bodies and not female bodies are normative, and as long as women's reason or women's bodies create pejorative conditions for women. Yet, there is also a suggestion of equality in the text, provided women are not distinguished by *dhimma* (the condition of human accountability) and women's bodies do not deny women legal capacity. In the multiplicity of legal capacity available to women the dynamics of reason and body establish legal capacity variably. The jurists manipulate ideas of sameness and difference

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[267] Ali, *Gender and Human Rights in Islam and International Law: Equal before Allah, Unequal before Man?*
[268] Ibid.
[269] al-Hibri, "Muslim Women's Rights in the Global Village: Challenges and Opportunities."
[270] Mir-Hosseini, "Construction of Gender."
[271] Ali, *Sexual Ethics and Islam: Feminist Reflections on Qur'an, Hadith, and Jurisprudence*.

of reason and body to discuss legal capacity as it pertains to women, even though they never categorically name women as distinctive categories of legal subjects.[272]

C. In the Absence of a Category, How do Women Become Present in the Text?

The fifth and final representation of women, i.e., the absence of a legal category "woman," may be the key to understanding how the law constructs women as subjects. In the absence of a sexually-defined impediment to legal capacity, we must take our examination of sex difference in the construction of the multiple representations of woman further. First we will examine the text grammatically and then we will examine the text using social norms and the meanings assigned to women's reason and bodies. This will address tensions in the grammatically normative subject of the law and the substantive nature of women's presence in the text. The absence of a category "woman" or "femaleness" akin to the categories "slave" and "minor" confirms that the text does not explicitly separate women or femaleness from other subjects of other forms of legalcapacity. Implicitly, however, a number of distinctions separate women from other legal subjects and femaleness from other forms of legal subjectivity. Summarily, a woman is a sexually differentiated legal subject but sex difference is not a categorical impediment to complete legal capacity. These distinctions operate in a variably productive tension that adds a further dimension to the complexity of the text; they indicate toward the the discursive grammar of the text, but also point us toward the Arabic grammatical structure of the text.

[272] To some degree this is also the case for men. A similar tension prevails between the men in Jīwan's early categorisation of men according to their *'aql* and authority and the men that appear later in the text where they are not distinguished by class or by authority. Except for slavery and childhood, no other aspect of authority features in the remainder of the text.

We first read that women are unequal in reason; next we read that women's bodies do not make them unequal. Now we will read for the Arabic words and grammatical forms that are used to make these statements. Here I examine the tension between the male body that is the premise of the text and the female body that enters the text occasionally; grammatical convention dictates that the text is written using masculine verbal forms with the assumption that this practice does not exclude women from the content of the verb and hence the text., however, I argue here that we cannot assume that the jurist always intends for women to be included in the text, and by extension, more specifically, we cannot assume that the jurists intends the female body or female reason to always be present in the text. Rather, the jurists always intend for the male body and male reason intellect to be present in the text and the female body and intellect must be brought into or *enter* the text. It does this at specific times and in particaualr wats which requires we pay attention to the different ways in which the female body and female intellect *become present* in the normatively male text.

I approach this discussion from three perspectives; the grammatical subject of the text, the nature of female presence in the text and the distinctive treatment of female subjects which, as we will find, are related to desire, sexuality and marriage.

1. The Grammatical Subject and Women's Entry into the Text

I begin with the tension between normative bodies that are male and sexually differentiated bodies that are female. When we read the grades of reason we realised at the end of the sentence that we could not make the assumption that Jīwan was speaking generally and referring to both men and women. Instead we saw that 'women' enter the text at a specific point in the gradation of intellect and that any assumption that women

are present in all the previous categories was grammatically incorrect. We found it wrong to assume that Jīwan intended women to be present in the first seven groups of people he mentions. More correctly, he intended that women are not present amongst the Prophets and the saints, the scholars and the wise people, the public and the rulers and the rural people.[273] However, this does not mean that all male references imply the exclusion of women. On the contrary, to assume that an Arabic language text that does not refer specifically to women naturally excludes them is grammatically incorrect. The grammatical norm in Arabic is that all plural references occur in the male form and always reference both men and women. Female references are used only when the intended subject is not male and by separating women as a group Jīwan's tells us he did not intended women in the other groups.

Notably, this mode of writing has the dual effect of being broadly inclusive while also being sex-specific and consequently exclusive. In this latter aspect, we may argue that the male reference also serves to make women invisible.[274] In its inclusive aspects, the use of the male form to refer to all people means that we can always assume that males and females are present in the text. Even when women are not mentioned specifically, unless otherwise instructed by the text, we may assume that a norm applies to men as it applies to women. By implication, until women enter the text specifically, the norm is considered applicable to both male and female individuals. Frequently therefore, as we found in Jīwan's example, a male reference is intended to mean that the norm under discussion is not equally applicable to a female in the same position. Therefore, in its second effect, the normative male reference is also male specific. The effect of a male norm is that it

[273] Jīwan, *Nūr Al-Anwār Ma'a Ḥāshīyat Qamar Al-Aqmār* 281.
[274] Thanks to Professor Quraishi-Landes for this observation.

universalises the male experience so that the lived experience that informs the text is also male-specific and exclusive of women's experiences. As a result, when women are referred to specifically, the female reference also differentiates women from the normative (i.e. male) subject making women non-normative subjects of the text. These sex specific and exclusionary effects of this mode of writing are a central focus of our study.

The received wisdom of contemporary grammatical usage where using the male form of a word implies a reference to all men and all women has a now obscure history of contestation in legal theory that pertains directly to the constitution of the individual obliged to obey the command of God. While present day assessments of gender in legal texts may veneer the gendered nature of the text and take the male norm to be inclusive of women, historically it was not always assumed to include women. In legal theory discussions on the general and the specific (*al-'āmm wa al-khāṣṣ*) scholars concerned themselves with the scope of reference of God's speech, i.e. who is the addressee of God speech [275] and the view that masculine plurals apply to both men and women, we find, was still uncommon by the beginning of the 11th century. Some scholars[276] argued that a text in the male grammatical form is, by default, addressed to all people who are or ever

[275] The theory of general and the specific (*al-'āmm wa al-khāṣṣ*) is part of the analytic process of extracting a rule from the texts that inform the law (*istinbāt al-ḥukm*).
[276] This was the position of ʿAbd al-Jabbār (d.415/1024), a *Mu'tazilī* scholar. By contrast, Ibn Khuwayzmindād (d. ca. 400/1010), a *Mālikī* scholar, "adopted the still rather uncommon stance that masculine plurals apply to both men and women by default", but he did not include slaves and unbelievers in the scope of the divine address. Vishanoff, *The Formation of Islamic Hermeneutics: How Sunni Legal Theorists Imagined a Revealed Law*, Note #234; 27; Abu al-Walid al-Baji, *Ihkam Al-Fusul Fi Ahkam Al-Usul*, ed. Ed. .Abd al-Majid Turki (Beirut: Dar al-Gharb al-Islami, 1986), 515.

will be "legally responsible agents".[277] Others, by contrast, rejected this view and argued that because there exist specific verbal forms for addressing them women are not included in masculine address.[278] The *Mu'tazilī* perspective, Mulla Jīwan tells us, is closest to his position on responsibility (*taklīf*) for belief.[279] Namely, general expressions establish application for the entire range of individuals and are therefore interpreted as general by default.[280]

Even taking the view that the male form includes references to both males and females and women are always included in the general masculine address, it is also true that the male form is, at times, a reference to an exclusively male subject. However, what is not immediately apparent in the use of the male norm (when writing about male and female bodies in the collective) is the substantive point of law at which the writer makes a grammatical turn from being inclusive of men and women to writing exclusively for a male legal subject using norms of experience that the writer associates only with male individuals. The grammatically inclusive male form and the grammatically exclusive male form are not distinguishable except by context. The rules of legal theory that make the distinction between the general and the specific, *al-'āmm wa al-khāṣṣ,* explain that

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[277] See Vishanoff's and his reference to al-Baṣrī, Vishanoff, *The Formation of Islamic Hermeneutics: How Sunni Legal Theorists Imagined a Revealed Law*, 127; al-Baṣrī, *Al-Muʿtamad Fī Uṣūl Al-Fiqh*, 190.Vol. 1

[278] This was the view of al-Bāqilānī (d. 403/1013), an Ash'arī scholar. See Vishnoff's discussion of Bāqilānī, Abū Bakr Muḥammad b. al-Ṭayyib al-Bāqillānī, *Al-Taqrīb Wa-L-Irshād (Al-Ṣaghīr)*. ed. ʿAbd al-Ḥamīd b. ʿAlī Abū Zunayd, 3 vols. (Beirut: Muʾassasat al-Risāla, 1998), 173.Vol. 2; Vishanoff, *The Formation of Islamic Hermeneutics: How Sunni Legal Theorists Imagined a Revealed Law*, 170.

[279] Jīwan, *Nūr Al-Anwār Ma'a Ḥāshīyat Qamar Al-Aqmār* 282.

[280] See Vishanoff, *The Formation of Islamic Hermeneutics: How Sunni Legal Theorists Imagined a Revealed Law*, 128.

context determines the specification. To illustrate, when Jīwan[281] shifts from a concern with the general property of the discerning minor (grammatically male (*ghulām*) but equally applicable to a female) to the specific property involved when the minor pronounces *ṭalāq* (unilateral repudiation) then the context (i.e. the legal premise that males only possess the capacity for *ṭalāq*) informs us that the text speaks only about *ṭalāq* as the male capacity for unilateral repudiation. The text is not also talking about *ṭalāq* as the female capacity to be repudiated unilaterally or about *ṭalāq* as the delegated female capacity for repudiation. We conclude this because *ṭalāq* entails loss of the *milk al-nikāḥ* (ownership of the tie of marriage) a form of proprietary ownership that is exclusively male. Even when a woman holds the delegated capacity for repudiation, *ṭalāq tafwīḍ*, her exercise does not entail the proprietary loss from which the jurists intend to protect the discerning minor male.[282]

In this example we see how the text shifts perspective easily from concerns that apply equally to male and female subjects (for example, the conditions for a minor to own and transact property) to concerns that apply only to male subjects and treat issues only through the male perspective (for example, referencing things that are considered to be exclusively male). Take, for example, *ṭalāq*, which is considered to be exclusively male property, with each mention of *ṭalāq* in Jīwan's text there is also a shift from the formerly

[281] Jīwan, *Nūr Al-Anwār Ma'a Ḥāshīyat Qamar Al-Aqmār* 284-6.
[282] We also note that the text expresses a concern for the divorcing male party and evaluates the effect of his *ṭalāq* on his proprietary rights, and not the divorced female party and the effects of the *ṭalāq* on her proprietary rights. If the latter, the discussion would extend to the proprietary consequences of *ṭalāq* for a female, namely *mahr* (dower)*, muṭ'a* (post marriage gift)*, nafaqa* (marital maintenance) and very important in the contract of *nikāḥ*, her proprietary capacities over her sex, *al-buḍ'*.

general discussion of legal capacity to a discussion that only applies to male subjects.[283] When discussing the *ṭalāq* transaction that a minor may enter, the criteria being the benefit of the transaction to the child, Jīwan measures the benefit from the perspective of the minor husband only. Using the premise that marriage entails ownership of the tie of marriage, he explains that the loss of this ownership would entail a loss of property and therefore not be beneficial to the minor husband. The text makes no assessment of the benefit or loss that a minor wife may incur in *ṭalāq*.[284] Further, in his treatment of *ṭalāq* Jīwan only measures the consequence of the pronouncement from the perspective of the male husband pronouncing *ṭalāq*. He never offers an assessment of the proprietary consequences of a female wife pronouncing the deferred *ṭalāq* or even of the female person being divorced. The text is consistent in its concern with the interests of the divorcing male party and evaluating the effect of *ṭalāq* on his property, and in the absence of any assessment of the effects of the *ṭalāq* on her property of the divorced wife. Had it there been concern for her the discussion would extend to proprietary consequences of *ṭalāq* for a female person, such as the *mahr* (dower), *muṭ'a* (post-divorce compensation)[285], *nafaqa* (marital maintenance), '*idda* (post divorce waiting), and, most importantly in the contract of *nikāḥ*, a woman's proprietary capacities over her sex, *al-bud'*.

[283] Similar moves happen when the text addresses *ṭalāq* for the minor, the slave, person who is mentally incompetent, the sleeping person or the jesting person. The individual transacting is always male and the benefit of the transaction and its implications for legal capacity are evaluated from the perspective of the husband pronouncing the *ṭalāq* and not the wife who receives the *ṭalāq*.
[284] Jīwan, *Nūr Al-Anwār Ma'a Ḥāshīyat Qamar Al-Aqmār* 284-6.
[285] The same word also means temporary marriage.

Reading from the beginning of the section of *ahliyya*, the switch from a general subject to a male subject brings an abrupt alteration of the reader's presumptions about the sex of the legal actor. Until this point, the discussion has appeared as a mostly gender undifferentiated (though male normative) analysis of benefit and loss to a minor child. Now, in assessing profit and loss, the reader is instructed also that *ṭalāq* represents a loss for the husband. We are not told whether it is also a loss (or benefit) for the wife that that is divorced. It is also left unclear how the principle of profit and loss would apply from the perspective of the wife were she the person pronouncing a delegated *ṭalāq*. As this is a matter of marriage and property and not only about property, we cannot make an assessment of profit and loss without recourse to the juristic understanding of marriage. It is apparent that the jurists are making implicit assumptions about sex difference and legal capacity to incur loss or benefit in marriage. The switch from an inclusive male and female reference to an exclusive male reference, both rendered possible by a single signifier, occurs without any identifiable grammatical or linguistic marker to make the switch apparent. It is only possible to identify the switch through a close reading of the text for its unspoken assumptions and at times this also requires prior knowledge of the law. A similar close reading and prior knowledge of the law is necessary, as we will soon find, in the discussion on the legal capacity of slaves where the text proceeds from the point of view of the sexual needs and proprietary interests of male slaves rather than the free women who may own them.

Thus, the text that uses a male signifier does not always refer only to males but is also not always inclusive of females. It makes reference to females in certain instances only, which instances need be deciphered from a close reading the text. Given that the signifier

for the generality of people is male, and further, that the female signifier only signifies females and never the generality of people, the linguistic convention of a normative grammatical subject renders the subject of law always a male subject, not only linguistically but legally. The normatively male grammatical subject of the text was contested in early formative legal literature. In more recent legal analysis, however, the exclusive nature of the male signifier is treated variously. The two contemporary approaches to women's legal capacity, which we discussed in the previous chapter, show us two approaches to the law's normative male subject. The framework where women have imperfect legal capacity establishes distinction between men and women as the norm; it recognises that the normative subject is male and imposes severe proscriptions upon women's legal capacities. The second framework argues men and women have equal legal capacity because the law does not distinguish women's legal capacity from men's. Yet it too takes the male signifier as an uncontested reference to all people obligated under the law but this time with the assumption that the text applies equally to men and women. The first approach recognises and reinforces the exclusive male norm thereby maintaining the patriarchal orientation of the law. The second approach glosses over male privilege as though it does not exist and so as to make it invisible. It assumes that the male grammatical norm applies equally to men and women. Not recognising the differences in how the law applies to men and women is also a patriarchal approach. Critical analysis of the law, by contrast, problematizes the use of the male signifier and its normatively male legal subject.[286] Where specific male grammar is used to exclude

[286] Mohammad Fadel, "Is Historicism a Viable Strategy for Islamic Law Reform? The Case of ʿnever Shall a Folk Prosper Who Have Appointed a Woman to Rule," *Islamic Law and Society* 18(2011).

women, analysts take issue with the male norm. Contemporary textual analysis prioritizes gender inclusivity and questions sex-based exclusions. This analysis calls attention to the consequence of positing a male grammatical subject, the effect of which is also to also imply a male substantive subject. I will pay more attention to the alternate readings of the law in Chapter Six.

Given that the male signifier reflects the gendered nature of the language, we may presume not to be free of it without a radical reform of the Arabic language. Nonetheless, we do have to account for contemporary concerns with gender inclusivity and demands for equality between men and women. The universal nature of human accountability to God, for instance, is expressed in normatively male terms and we assume accountability applies equally to men and women. Despite that spiritual equality, legal capacity for ritual acts differs for men and women in a number of instances, amongst these are legal capacity for congregational prayer,[287] for autonomy as a pilgrim, for choice in supererogatory fasting and exercise of the obligation for *jihād* (as combat).[288] These restrictions upon a woman's ritual practice do not equate with the idea of equal legal accountability to God, as suggested by the covenant between God and humanity and the consequent assumption that men and women are "equal before Allah". Therefore, it matters that in assessing the law for its treatment of sex difference we maintain sight of the grammatical male as the normative subject of the text so as not to assume that the text is neutral in its treatment of women. In this way we remind ourselves that where a legal

[287] "Congregational prayer is an emphatic *sunna* (*sunna mu'akkada*)", yet congregational prayer for women is disapproved, and "it is not permitted for men that they be led by a woman", see al-Marghīnānī, *Al-Hidāyah -the Guidance: A Translation of Al-Hidāyah Fi Sharḥ Bidāyat Al-Mubtadī, a Classical Manual of Hanafī Law*, Vol. 1, Kitāb al-ṣalāt, 135.
[288] Ibid., Kitāb al-Siyar, Vol. 2, 288 and 93.

matter entails two individuals, male and female, the writer nevertheless writes from the perspective of the male individual, using male experiences, the male person and male perspectives. This does not mean that women are excluded from the discussion. It means that the discussion is premised upon an individual that resembles a male person and male experience in most respects and anything that differs from that experience constitutes an exception or an anomaly for which the law may or not account. Even where it may not feature explicitly, sex difference always features implicitly in the discursive formation of the legal subject. The non-normative subject of the law is not the same as the normative subject and the two necessarily have a different standing in the law. Therefore the text does not operate under the assumption that the normative individual of the law is a person who is periodically not praying or fasting.

The female legal subject is different in other aspects too. She is potentially pregnant or giving birth, and is thus likely to embody two legal individuals, each with potentially independent and differing legal capacities, and also potentially in conflict. The jurists are not oblivious to pregnancy and its impact upon legal capacity. The *janīn* (foetus) represents the earliest stage of legal capacity and Jīwan uses Nasafī's discussion on *dhimma* (accountability) to discuss some aspects of the foetus's legal capacity.[289] The

[289] "A person is born and he has a proper condition of accountability (*dhimma*) for obligations due from him and to him (*dhimma ṣāliḥa li wujūb lahu wa 'alayhi*) based on that previous covenant. And as long as he is not born, he is part of the mother. He is freed when she is freed (as a slave) and enters into a sale by following with her. As an unborn, his condition of accountability (*dhimma*) is not valid so that he does not have to pay maintenance for his family, or to pay the price of something that a guardian buys on his behalf. [However] it is valid for the things that he has a right to in terms of liberation from slavery, inheritance, will and parental affiliation" (Jīwan, *Nūr Al-Anwār Ma'a Ḥāshīyat Qamar Al-Aqmār* 283.) Jīwan explains that the foetus is part of the mother and has no obligations for maintenance or for transactions by the guardian. Again the perspective is male. Maintenance is established as a dominantly male obligation and so

condition of accountability (*dhimma)* of an unborn child is not valid for obligations due from the child, but is valid for those due to the child *in vitro*.[290] What does this imply for a women's legal capacity when she is pregnant? Is it that of two individuals? The foetus does have a valid condition of accountability to God (*dhimma*) to receive obligations, while still part of the mother physically. Legally too, even without obligations, the foetus does have *dhimma* and therefore obligations due to it; it is freed with the mother, it inherits as an individual and it has the right to parental affiliation. What are the consequences of the legal capacity of the foetus to affiliation, inheritance and freedom on a pregnant woman's condition of accountability and legal capacity? Do these affect a mother's authority over her body, over the foetus, over her own life and over the life of the foetus? These matters are not part of the discussion on legal capacity, but we know from positive law that the affiliation of the natural guardian of the child rests with the father and not the mother.

The normative individual is a male who will always encompass just a singular legal capacity and never embody (meaning, "to hold within his physical body") another individual's legal capacity. That the pregnant or potentially pregnant woman is not law's normative person is not surprising, since pregnancy is not a perpetual or necessary state of being even for women, although pregnancy is necessary for humanity. Had the individual in law been a woman who ordinarily prays for three weeks in four because menstruation renders her regularly free of the obligations of fasting and prayer, a menstruating individual might have been as normative as a sexual individual and

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we do not know the juristic opinion on a female foetus whose interest would be in being maintained. Jīwan's narrative is also primarily from the perspective of the foetus, not of the mother whose body the foetus occupies.

[290] Ibid., 283.

menstruation as irrelevant as sexuality for the section on legal capacity. The impediments that result from having sex which also result in a state of ritual un-cleanliness but do not merit mention as separate category of legal capacity. Similarly, individuals under the dominion of marriage (wives) are also the normative subjects of the law. Thus the female individual is not central to the law's concept of the person. Further, impediments that make specific reference to other conditions of body and reason*,* viz., slavery and childhood also imply that the normative individual is a free individual, a sane individual and an adult individual with complete legal capacity over himself at all times. Individuals who are otherwise possess a form of legal capacity that derogates from this norm.

Given the preference in language for a male grammatical subject, it is not surprising that the substantive subject too is rendered male so that even when we set out to read the content of the section on legal capacity as not differentiating the legal capacity of males and females, we cannot. The text functions in accordance with a normative male subject both linguistically and substantively. While the grammatical intent and the overall appearance of the text may be inclusivity, the final effect is not. Even though, as Zahraa explained, the jurists do not say that women have different legal capacity from men, the normative subject is male. Sex difference is both explicit and implicit in the fashioning of the legal subject and women do not have the same legal capacity as men.

2. Women's Presence in the Text

My task generally here is to study the female subject of the law and uncover the meanings of sex difference which become evident in the relationship between masculinity and femininity promotes that task. Bodies, I observe, do not have inherent or consistent

meanings.[291] In order to historicise sex difference we must therefore investigate the dynamic of masculinity and femininity in the production of sex difference. We must examine how the text encodes norms of masculinity and femininity so that they come to appear natural and inherent to the male and female individuals of the text. In this way we come to know the unspoken assumptions of the text.

Further, the meaning that embodied existence assumes in the text tells us how women's bodies and intellect are perceived legally[292] and so our task is also to understand the meanings Jīwan and Nasafī attach to women's bodies and reason. To the extent that this is a text and not a socially observable event, our observations are restricted by what the text reveals to us of the dynamic of masculinity and femininity. We will find that reference to reason and body are not only references to the sufficiency or completeness of the physical form of the body or to the mental form of the intellect. They are also references to the meanings jurists assign to women's acts and reasoning and these meanings determine how women enter the text. The treatment of marriage captures the tension between the two views of women as degraded in reason yet unhindered by menstruation and post-partum bleeding. It shows the dynamic interaction of reason, body and sex-difference in the legal imaginary of the scholars and in the discursive formation of the law. It tells us the meanings women's acts and reasoning acquire in the text.

Given that the specifically bodily manifestations of sex difference i.e. menstrual and post-partum bleeding, do not create an altered form of legal capacity for women, what does? We suggest the jurist's view of women, the meanings they associate with women's bodies, and reason prompt Jīwan to present women as he does. To illustrate, the criteria

[291] Scott, "Gender: A Useful Category of Historical Analysis," 1055.
[292] Butler, *Gender Trouble: Feminism and the Subversion of Identity*.

for assessing women's intellect is not only the ability for intellection, as it may be for a child who reaches the age of discernment, it is also what Jīwan thinks about women's intellect. In this way Jīwan does not simply report a fact, rather, he makes an assessment of women and instructs us that woman's reason is of 'low level.' Rather than an essential quality of the body, low level of reason is a quality that is assigned to people whose bodies are female. Similarly, the *ḥadīth* we make reference to does not report an existing fact of women's deficient religion and reason. It discourses these ideas into form and tells or informs us that women's reason is to be considered 'deficient.' Similarly too, in the legal text, the assignation of certain qualities or values to women are unspoken acts of theorising which cause these meanings and values to enter the text without explanation or analysis from the jurist. Their function is to condition the reader to the jurist's assessment.

Accordingly, we conclude that the evaluation of an act, or the assignation of legal capacity for an act, relies both upon the person acting and the meaning jurists assign the act. To illustrate how meaning is assigned to a body rather than inherent to it, slaves (even sane adult slaves) who technically have the mental ability to comprehend and the physical ability to act upon a matter, do not have the legal capacity to act as their mental and physical abilities might allow. For, in addition to these two abilities, there is a third dimension to the evaluation of legal capacity that is not announced in the text but evident in the operations of the text. It is the meaning that jurists attach to the state of enslavement. Despite possessing the mental and physical maturity that may technically allow a slave to understand and act upon a matter, a slave is circumscribed by the status 'slave', a term encoded in the text with specific legal meaning. The ultimate legal validity

of a slave person's actions and intellection are determined by the status 'slave'. In spite of having the ability to comprehend and act, the fact that a slave's body is also owned makes the slave subject to a host of restrictions that preclude the capacity for certain transactions, thus diminishing a slave's legal capacity. While the ability to act or discern may refer specifically to the physical potential to act and the mental capacity for discernment, jurists also rely, implicitly, on an unspoken assessment of the values of a slave's actions and intellections. The meaning assigned to the action and reasoning of a slave determines the slave's legal capacity beyond the slave's actual capacities. Even when slaves have the ability to act and reason, they may not exercise complete legal capacity. To illustrate, in spite of the capacity for ritual obligation, a slave's legal capacity for obligation is incomplete in that slaves[293] are exempt from certain worship. Their legal capacity to act is incomplete as they are not permitted the ownership of most forms of property.[294] In this mismatch between the slave's actual capabilities and what the text says is the slave's capacity we witness something of a pantomime. The law pretends incapacity for the slave, even though the slave is mentally and bodily capable of these capacities.

Similarly, when Jīwan says that all women's reason is of a low grade he is not instructing us on what is, but on how he believes the distinction between women and men should be read. It is not a statement on the intellectual capacities of all people with female bodies but a statement on the socio-legal meaning assigned to all people who have female bodies. Therefore, for slaves and women, legal capacity is not only a function of mature

[293] We use the singular 'they' to remain gender neutral and avoid what we consider a less elegant usage, viz. 'he/she'.
[294] Slaves may not own property generally; however, as we will see later, they may own the property that is entailed in marriage and in the value of their lives.

reason and a mature body or the capacity to understand and act upon a command. Rather, actions gain meaning or value by virtue of the bodies they emanate from. While male and female or slave and free bodies may perform the same action, the value or meaning assigned to the action by the text is determined by the body that enacts it. The discussion on marriage and slavery below will illustrate this further. The meaning and value assigned to the actions of males and females shows that they are not only constituted technically i.e. by virtue of their intellectual and physical sufficiencies. Rather, they are also constituted by virtue of the meanings the text ascribes to their actions and bodies, as we will see in the positive law on slavery and sexuality.

3. Sex Difference and the Criteria for Marriage: Milk al-Nikāḥ (Owning the Marriage Tie)

The section on slavery, *al-riqq*, one impediment amongst nineteen, is not where we might expect to find insights to a discussion on the female legal person and there is no specific treatment here of women as legal subjects. But what appears in this section is a discussion on slavery and the legal capacity for proprietary ownership in marriage. We review this section informed by Kecia Ali's[295] study of marriage and slavery in early legal thought and her insights on the parallel legal paradigms of marriage and slavery. Slavery is the transactional model for the contract of marriage, both forms of contract being modeled upon the sales contract.

I draw upon Ali's analysis of marriage and slavery to explore the dynamic of body and reason in constructing sex difference. I am especially interested in knowing how women's bodies and reason enter the texts with meanings that appear uncontested and

[295] Kecia Ali, "Money, Sex, and Power: The Contractual Nature of Marriage in Islamic Jurisprudence of the Formative Period" (Duke University, 2002); Ali, *Marriage and Slavery in Early Islam*.

normative. For our purposes, an important distinction between the contracts of marriage and slavery is their effect on legal capacity. Slavery features amongst the impediments to legal capacity but marriage does not yet, as we will see here, both slavery and marriage restrict legal capacity. The presentation of women in marriage produces women who are also wives or potential wives as legal subjects normatively under the marital authority of men. I suggest here, and will elaborate further in a later chapter, that the effect of this marital authority is to fashion a distinct form of 'marital legal capacity' for women.

To explain, I begin with Jīwan and Nasafī's discussion on slavery.[296] Among the consequences of legal capacity is the capacity to own property, enslavement entails being owned and there one cannot, as a slave in jurisprudential terms, encompass both the qualities of being owned and of owning property, with the exception that a slave remains the owner of two types of property, the property entailed in his marriage and in his blood.[297] Enslavement entails loss of the capacity to own property (*milk al-māl*) but

[296] "Enslavement negates the ownership of property by virtue of one's being owned. Through [enslavement] there is the condition of being owned, and it is not possible to combine the two since ownership entails power and being owned entails incapacity ... [enslavement] does not negate other forms of ownership such as marriage (*nikāḥ*) and [one's] blood. The ownership of marriage [is necessary since it] takes care of necessary sexual desires and there is no means [for a slave] to achieving this (for a slave) through a concubine. Therefore [we are directed] to specify marriage [for an enslaved person]... It [enslavement] negates the full extent of legal capacity in terms of its benefits ... as with the condition of inviolability (*dhimma*) and guardianship (*wilāya*) and it is appropriate that his [a slave's] dhimma is wanting (nāqiṣ), [since] what is stipulated in religion of one who is not a slave or *mukātab* [a slave contracted for manumission] is not expected of him, neither is guardianship [by a slave] over one of us for the purpose of marriage. They [slaves] are not permitted, in terms of [entitlements to] women, that which is permitted for the one who is free.", (Jīwan, *Nūr Al-Anwār Ma'a Ḥāshīyat Qamar Al-Aqmār* 292-3.).

[297] Jīwan arrives at this discussion after explaining what forms of property a *mukātab* (a slave who has contracted his freedom for labour) may own. He explains that it may seem as though a *mukātab* may own a *surrīya* (a concubine), through whom he could address his sexual desire, but, because he cannot own property he also cannot a concubine and so,

maintains the capacity for ownership of one's self (*milk al-nafs*). [298] To explain why a slave man (and this is a further instance where the text shifts from speaking in general terms to speaking only about males) continues to own the property entailed in his marriage, Jīwan explains that a slave, like a free person, is subject to natural sexual desires. But, being precluded from ownership by virtue of being owned, he does not possess the capacity to own another slave, namely a concubine with whom he may legally exercise his sexual desire as a free man may. Consequently, in order to fulfill his sexual desire he must have possession (*milk*) of his marriage.[299] Enslavement entails an impediment to the legal capacity to act as well as a deficient condition of accountability (*nāqiṣ dhimma)*; however, the jurists find it necessary to ensure that a male slave does not also lose the capacity for lawful expression of his desire. Since male desire may lawfully be exercised through marriage and concubinage either of these might have been permitted the slave. The jurists elect, however, to permit the slave man to marry and to own *milk al-nikāḥ* i.e. to own the property entailed in marriage. In this way a male slave retains the

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to have a legal means to satisfy his desire, he can own the *milk al-nikāḥ* (tie of marriage). We should recall that only free men could purchase women for sexual relations. Slave men and free women could not purchase similarly. Much like the hierarchy in the transaction of enslavement, hierarchy stands at the core of marriage and sexuality (Ali, *Marriage and Slavery in Early Islam*, 5-6.), perhaps best illustrated in that this precludes "sexualised ownership by a female owner of her male slave" (ibid., 12.).

[298] The property of *nikāḥ* is not insignificant. It is juxtaposed with blood and the juxtaposition of nikāḥ or desire with blood (*dam*) gives to desire the gravitas of blood, rendering them equally inalienable. Such is the jurists' view of the significance of *milk-al-nikāḥ* for men that they preclude its alienation from a male slave in the same way as they preclude the alienation of his blood from his possession. Further still, the jurists never imagine this gravely significant form of ownership possible for women, free or slave.

[299] Jīwan, *Nūr Al-Anwār Ma'a Ḥāshīyat Qamar Al-Aqmār* 292.

proprietary capacities of marriage even though he may not own other forms of property.[300]

To understand why this is so we should know more about how the jurists conceptualise marriage as a form of ownership and the property it entails. Kecia Ali's explains the juristic construction of *milk al-nikāḥ*.

> Marriage (*nikāḥ*) is essentially a transaction conveying *milk* [ownership]. This *milk* is necessarily one sided. While a woman's consent may be needed at the outset, control over the fate of the marriage can only be held by one of the parties. Put differently, marriage is a bilateral transaction which establishes unilateral control.[301]

Further to this we may add that the property entailed in the bond of marriage is not a commodity,[302] even though the jurists may consider unilateral repudiation (*ṭalāq)* in

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[300] A male slave's legal capacity to act is different from a free male. By virtue of the condition of being owned, the slave cannot own property. Further limitations to a slave's legal capacity include an insufficient form of legal accountability to God (*nāqiṣ dhimma*) and restrictions on his legal capacity for obligations. This means that only some of the requirements of religion are imposed upon him. Regardless of these, a male slave continues to hold the capacity to own the property entailed in *nikāḥ*.

[301] Ali, "Money, Sex, and Power: The Contractual Nature of Marriage in Islamic Jurisprudence of the Formative Period". 475

[302] For the distinction between the property entailed in the *nikāḥ* bond from the property exchanged in any other legal transactions see Barber Johansen, "The Valorisation of the Human Body in Muslim Sunni Law," *Princeton papers in Near Eastern studies* 7-9(1996): 77. He relies on al-Sarakhsī (d. 483/1090) to show that *al-buḍ'*, the vagina, which is also the "property of the marriage bond", is not a commodity and that while "*mahr* entails an exchange, it is not for property", (Muḥammad b. Aḥmad b. Abī Saḥl al-Sarakhsī, *Kitāb Al-Mabsūt Li-Shams Al-Dīn Al-Sarakhsī*, ed. Muhammad Radi (Beirut: Dar al-Ma`rifah, 1978), 78and 68.Vol. 5.). Similarly, according to Kāsānī, marriage is "a reciprocal contract in which a commodity is exchanged against a non-commodity", (Abu Bakr ibn Mas ud al-Kasani, *Kitāb Badāi` Al-Sanāi` Fī Tartīb Al-Sharāi`* (Misr: Sharikat al-Matbu`at al-`Ilmiyah, 1909), 238.Vol. 2.).

as proprietary loss.[303] By contrast, the property entailed in owning a concubine is a commodity. The contract of slavery is an economic exchange while the marriage contract is a form of social exchange.[304] It results in *intifā'*, benefit or utility of the property under ownership without the right to lease or sell it.[305] It is also hierarchical in that women are always owned in contracts of marriage.[306] By granting a slave man the capacity to own

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[303] "In this way too *ṭalāq* and manumitting slaves and things such as that which are harmful are not legally amongst his rights", (Jīwan, *Nūr Al-Anwār Ma'a Ḥāshīyat Qamar Al-Aqmār* 288.No. 158.) Despite the fact that the jurists do not consider the vagina property (*māl*), they do consider the loss of marriage as proprietary loss. Therefore they refer to *ṭalāq* and manumission (*'itq*) as damage, frequently associating the two. On mental incompetence, for instance, Jīwan explains *talāq* and manumission constitute absolute harm, i.e. *ḍarar maḥd* , to the person who manumits his slave or divorces his wife (ibid., 288.). The juxtaposition of *ṭalāq* and manumission renders the commonality of harm to loss of property i.e. ownership of enslavement (*milk al-riqq*) and ownership of the tie of marriage (*milk al-nikāḥ*). Kecia Ali tells us that the juxtaposition of manumission and unilateral repudiation comes from the analogies jurists make between marriage and slavery and, more specifically, by applying to marriage the "conceptual vocabulary of ownership or dominion (*milk*) applied to slavery" (Ali, *Sexual Ethics and Islam: Feminist Reflections on Qur'an, Hadith, and Jurisprudence*, 43.).

[304] Johansen explains the property invoked in marriage as a social property which can only be acquired through a contract of social exchange and markedly different from commercial exchange. (Johansen, "The Valorisation of the Human Body in Muslim Sunni Law," 72-8.) Marriage is a relationship wherein a woman's "body becomes [her husband's] exclusive property as far as sexual intercourse and lustful exchanges are concerned" (ibid., 77.). Accordingly, the vagina itself is not the material that is owned but access to and usage of the vagina. The ownership of usage encompasses all the types of control that would be associated with the notion of access or of usage. Hence his rights over sexual gratification through her, over her residence and other related prerogatives that would determine his access and the exercise of his dominion.

[305] See "Milk," in *al-Mawsū'ah al-Fiqhīyah* (Kuwait: Wizārat al-Awqāf wa-al-Shu'ūn al-Islāmīyah, 1990-). Also Wael B. Hallaq, *Shari`A: Theory, Practice, Transformations* (Cambridge, UK; New York: Cambridge University Press, 2009), 300.

[306] The hierarchies of slavery and marriage function first through sex difference and then through freedom; women were always sexually owned and men always own the women with whom they have sex, (Ali, *Marriage and Slavery in Early Islam*, 12.; also see references to Ali in footnote 297 above). Johansen makes a similar observation, in marriage specifically the hierarchy ensures that "both parties are to enjoy rights and duties" but "the power of repudiation, of disciplinary measures and of the control of his wife's sexual activity is unilaterally placed in the hands of the husband" (Johansen, "The Valorisation of the Human Body in Muslim Sunni Law," 78.). Because the contract is

the tie of marriage over concubinage, the jurists express a preference for granting the slave access to social exchange over economic exchange. Further, in precluding all women from this capacity the jurists express a preference for men over women in the legal capacity for *milk al-nikāḥ*. Finally, as regards the associations of sex difference, property and *milk al-nikāḥ* we find that all free, sane men have the capacity to own property in all its dimensions. Slave men may not own most forms of property but always have the capacity to own the property entailed in the bond of marriage. Free women, by contrast, embody the capacity to own property in most, though not all, dimensions. But all women slave or otherwise, do not hold the capacity to own the tie of marriage.

The jurists produce the property of marriage as something men naturally own.[307] Accordingly they also produce the slave male's capacity to own the tie of marriage through a seemingly natural association between male sexual desire and male ownership of the bond with the women they desire. In doing so the jurists rely on an assumption that male desire must be fulfilled through male ownership of the sexual bond and that not owning this bond is not conducive to legal realisation of male desire. Further they preclude slave men from owning the sexual bond of concubinage, reserving that capacity for free men. The basic argument at play here is not that a slave must have a legal means

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built upon hierarchies, the nature of marriage is "an unequal hierarchical relationship between the husband and his wife" (ibid., 77.). Finally, Kāsānī's depiction of the *mahr* (dower) as a payment in exchange for the humiliation that a woman suffers through marriage also reflects the hierarchical aspect of the exchange (al-Kasani, *Kitāb Badāi` Al-Sanāi` Fī Tartīb Al-Sharāi`*, 275. Vol. 2).

[307] Such is the jurists' view of the significance of *milk-al-nikāḥ* for men that they preclude its alienation from a male slave in much the same way as they preclude the alienation of a slave's blood from his possession. Jīwan juxtaposes the property of *nikāḥ* or desire with that of blood (*dam*) giving to desire the gravitas of blood and rendering them equally inalienable. The jurists never imagine this gravely significant form of ownership possible for women.

for sex but that a man must own the marriage bond. A slave could easily have a legitimate means for sex through marriage to a free woman. The premise therefore is that a free women married to a slave does not own this bond. Finally, there is no similar discussion of a female slave's desire, whether for sex or for marriage. Neither is there a similar association between female desire and possession of the desired male.

I find that the text operates on the assumption that, regardless of status, the hierarchical, non-commodity property of marriage is always in the possession of a male individual. As Kecia Ali says, a woman may not be the "proprietor of marriage".[308] Reading back on Jīwan's discussion of marriage of the minor male, or the person who is ill we may also conclude that regardless of age, sanity, illness or other matters that might affect a man's legal capacity, the ownership of the bond of marriage will always rest with a male individual. As a result a free wife would find herself under the marital authority of a slave husband, as would an adult wife with a minor husband. The assumed male legal capacity for *milk al-nikāḥ* suggests a substantial difference in the jurists' understanding of male and female legal capacities. Yet, when we return to the technical aspects of legal capacity, i.e. *dhimma, 'aql* or *badan* (accountability, sufficiency of intellect and body), there are no distinctions that give rise to a concomitant difference in the legal capacity to own property. The text never accounts for the distinction between

[308] Ali, *Marriage and Slavery in Early Islam*, 9. She cites Barber Johansen, "Secular and Religious Elements in Hanafite Law: Functions and Limits of the Absolute Character of Government Authority," in *Contingency in a Sacred Law: Legal and Ethical Norma in the Muslim Fiqh* (Leiden, Netherlands: Brill, 1999 [1981]), 204. Also Judith E. Tucker, *Women, Family, and Gender in Islamic Law* (Cambridge, New York: Cambridge University Press, 2008), 222.

men and women and never explains why women cannot own the property of the marital tie. [309]

If, as Jīwan says, the capacity to own the tie of marriage remains with slaves in order to permit legal expressions of desire and, as Ali says, *milk al-nikāḥ* is about control and authority, then it becomes apparent that the juristic opinion on exclusive male possession of the tie of marriage is also an opinion on the natural association of desire, its control and authority with males. The juristic production of *milk al-nikāḥ* results in male authority over sexual desire. The jurists discourse the legal implications of desire through a male norm and maleness is the criterion for owning the tie of marriage. These norms pervade the entirety of the text and are an example of how sex difference features implicitly in the construction of the legal subject.

D. Conclusion

Assessing the juristic vision of male-female sexual desire and accompanying legal capacities of men and women allows us to 'historicize'[310] the meaning of sex difference in the text. The patterns of association between femininity, sexuality, desire, authority and control we find here tell us the meanings these concepts held for the jurists. Women become present in the text through menstruation, sexuality and marriage. Jīwan, in a discussion on menstruation, rather than affirm that being female entails a negation of legal capacity makes an unambiguous statement that female biology does not negate legal capacity. This appears to embolden the argument against derogations of women's legal

[309] Kecia Ali explains how this works; "even if women are capable of concluding marriage contracts and being party to the transfer of *milk* over themselves that results from the marriage contract, they are not considered capable by the jurists of owning the marriage tie except in a limited delegated way" (Ali, "Money, Sex, and Power: The Contractual Nature of Marriage in Islamic Jurisprudence of the Formative Period". 475.).
[310] Scott, "Gender: A Useful Category of Historical Analysis."

capacity that may arise from a woman's body. By contrast, the treatments of marriage and *ṭalāq* reveal that sex difference is relevant in determining legal capacity.

In marriage women are constructed as monogamous and men as essentially polygynous. The jurists construct women as always married in the passive sense of the word illustrated by the English notion of being "taken in marriage", and men as always marrying in the active sense of the word illustrated by the idea that men "take a wife". In sexuality legal capacity is apportioned between men and women using associations between men, sexual desire and the authority to control how and under what conditions desire is expressed. By virtue of the meanings assigned to marriage, sexual desire, malenesss and femaleness, women are not envisioned as possessors of *milk-al-nikāḥ*. Rather, they come to be the embodiment of the property that is contracted in marriage. Therefore, we may argue that the legal capacity of males and females in marriage is not the same in much the same way that the legal capacities of a slave and the master are also not the same. The hierarchical nature of the contract institutes a hierarchy of legal capacities too, namely a form of legal capacity exclusively for men, *milk-al-nikāḥ* and consequently restricted form of legal capacity for women in marriage.

Juxtaposing the discussion on *milk al-nikāḥ* with the discussion on menstruation and post partum bleeding, we find that, while female reproductive biology does not negate a woman's legal capacity, the male prerogative to manage sexual desire does curtail a woman's legal capacity in marriage. The distinction is between the capacity for sexual reproduction and the capacity for managing sexual desire. The former does not negate legal capacity. However, by virtue of how jurists envision the latter, sexual desire and sexual control does create changes in legal capacity. While female reproductive biology

does not derogate from a woman's legal capacity as a legal subject generally, the denial of control over sexual desire derogates from the legal capacity of a wife. The juristic assessment of sexual desire affects a change in a woman's capacity to act namely to her contractual capacity in marriage, in other words it affects her *ahliyyat al-adā'*. We follow through on this idea in Chapter Six.

The juristic notion of woman relies heavily upon the intersections of desire, sexuality and control. Though legal capacity depends on reason and body, (*'aql* and *badan*) and the sufficiency of the two is determined by puberty (which points to both the capacity for desire and for sexual reproduction), and the legal capacity of males and females is never explicitly differentiated in the texts, marriage is an important determinate of how the jurists see women. As a result husbands and wives have different legal sexual capacities. In spite of explicit statements that the bleeding of menstrual and post-partum bleeding (i.e., female sexual reproductivity) does not negate legal capacity, contracting for sex nevertheless relies upon a curtailed form of legal capacity for women. Being the female party to a marriage contract necessarily results in limitations upon one's legal capacities, effectively producing the distinctive legal capacity women occupy when married. These observations confirm that the substantive subject of the law refers to a person with a male body as does the grammatical subject of the law. This male norm produces a text that, while grammatically male also ostensibly applies to people with male and female bodies when. But we find otherwise. Even though the text may not cite 'femaleness' as an explicit impediment to legal capacity, being female makes the legal subject anomalous to the norm. In addition to the technical components of intellectual and physical sufficiency, women's legal capacity is determined by the meanings jurists assign

women's bodies and actions. The intersections of biology, sexual desire and authority produce proscriptions upon women

Summarily, the *ḥadīth* narrated by Abū Said Al-Khudrī appears not to hold sway in the doctrine of legal capacity as it relates to women. The reference to menstruation and post-partum bleeding acts as a textual disclaimer on the derogation of women's legal capacity. Nonetheless, the historical presentation of legal capacity refuses women the capacity to manage the marriage tie. Generally, classical legal theory offers the theoretical space not to categorise 'women' or 'femaleness' as incapacity to legal capacity. By contrast, the difference between contemporary and classical treatments of sex-difference in legal theory suggests that contemporary assessments are only somewhat linked to their historical presentations. Historically, even where sex difference is treated pejoratively, the contingency of sex difference allows for multiplicity and mobility. In contemporary analysis this dynamic of sex difference in the constitution of the legal subject is lost giving us instead distinctly bounded male and female legal capacities that occlude the inherent mobility of legal subjectivity. Further, because marriage related legal capacity is located outside the theoretical realm of legal capacity our contemporary commentators cannot detect how it derogates from women's legal capacity. The study returns to contemporary legal thought to explore the significance of these differences further in Chapter Six. For now, the next chapter takes our study of women as subjects of the law into the realm of classical positive law to examine how sex difference features in constituting the female legal subject there.

E. Post Script

I began this and the last chapter with a view of the text as a discursive field wherein the rhetorical dynamic of words and meanings interacting with each other lead the reader to make judgments in order to extract meaning out of the text as a comprehensive piece of writing that reflects the intent of the author. Emerging out of the text and drawing upon the meanings that coalesce I find that the text opens up with a tone of gender neutrality that is quickly lost as I venture further into the text and women are singled out for their low reason. I read this statement as a reflection of the writer's personal worldview, informed and affirmed by a history of *ḥadīth* and other legal studies. The writer's exceptional notion of women permeates and sensitizes my later readings of the text and it becomes particularly relevant in my reading of sex difference later in the text. When I encounter issues of difference I am informed by this earlier statement and I even look for it to be corroborated. At times my expectations are met and at others they are not. They are met in the recurring differential forms of reference to women in marriage and divorce and they are contradicted in the discussion on menstruation and bleeding after childbirth. I am further encouraged by the absence of 'femaleness' amongst the lists of legal impediments to legal capacity. In keeping with my project to resuscitate an occluded female legal subject, my unexpected reward emerges in these chapters as the complexity of the female legal subject. This is the rich material from which we theorise women as subjects of law below.

Chapter Five

Producing Women in Islamic Positive Law

A. Overview

The association of bodies to performance is, in Judith Butler's[311] view, an association that constructs both the performance and the body, so that both sex and gender are discursively constructed. In our analysis we find that legal proscription emerges out of the jurists' understanding of how female bodies should interact with other bodies. Each iteration of the law enacts a particular construct of woman and, in proscribing what legal capacities women may possess, the law constructs appropriate forms of femaleness. Thus the law shapes and is shaped by the associations made with women's bodies and ideals of female behaviour. Our analysis of *ṭalāq* and sexuality in classical legal theory has confirmed the alignment of women's bodies with legal proscriptions to the point that being female comes close to an impediment to legal capacity. But our analysis of menstruation and post partum bleeding challenged this alignment. In the resulting absence of a categorical assessment of femaleness as an impediment to legal capacity, we have yet to understand fully the role of the body in determining legal capacity.

Further to the argument for the iterative bodily performances of gender, there is also space to challenge the alignment of the physical body with social organisation. Oyeronke Oyewumi offers another avenue for understanding sex difference, namely the social facts that represent the ideological apparatus of a society.[312] Her approach minimises the role of the physical body in the organisation of society and I bring her theories to bear here because the study of the positive law similarly challenges the alignment of the body with

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[311] Butler, *Gender Trouble: Feminism and the Subversion of Identity*.
[312] Oyewùmí, *The Invention of Women: Making an African Sense of Western Gender Discourses*.

social organisation, however, not so as to entirely eliminate the place of body in the discursive construct the female legal subject. Rather, the uneven effect of sex difference on legal capacity requires we question the degree to which the body may be relied on as a determinate of legal capacity. By taking into account the social facts or the ideological apparatus of the law I offer an analysis that conditions the role of the body in determining the female legal subject. I do not intend to minimize the place of the body, as Oyewumi does, but to show that the female body may not be the primary or exclusive determinant in the law's treatment of sex difference.

The theoretical aspects of *ahliyya* (i.e. *dhimma, bulūgh, 'aql* and *badan* - individual accountability to God, puberty, reason and the body) act as a first layer of criteria to determine legal capacity. They work in conjunction with a second layer, the ideological apparatus of the text, to produce the female legal subject. I access the ideological apparatus and the social facts through what was referred to earlier as the juristic imaginary of the text. In the jurists imaginary we see how women's bodies, theoretical matters of doctrine and the ideological apparatus of the law come together to determine the female legal subject of positive law. However, as we will see, this never occurs as smoothly or systematically as may be imagined. The result is a rather inconsistent and uneven characterisation of women. Through the implicit sexing of law's subject, the occasional absence of differentiation between males and females, and the persistent coding of normative female and male behaviors I will show that the woman of Islamic law is not singular, nor is she exclusively defined by her difference in sex. The capacity to reason, marital status, age, public space, social experience, and wealth are additional considerations that determine the legal facilities available to women. We consider these

the 'social facts that determine social categories' or the ideological apparatus of a society.[313] Some indicators of that ideological apparatus emerged in our study of the theory of legal capacity, namely diminished reason, bleeding from the womb, marriage and sexual authority. In the positive law these associations are expanded through matters of marital status, age, public space, social experience and decorum and wealth. Weak intellect, while only minimally referenced in the doctrine on *ahliyya* (legal capacity), now gets numerous mentions and earns greater significance in its associations with women. Collectively these matters determine the legal capacities available to women. Finally, the analysis I offer here confirms that the law constructs and encodes the social facts associated with women's bodies even as it formulates them. The effect is to construct the woman of law simultaneously as she is obligated under proscriptions of the law. My aim in deconstructing the category woman through its identification with social fact thus, is to question the category 'woman' as a point of legal incapacity and to distribute the determinates of legal capacity beyond the physical category 'woman'.

I will present marital and non-marital legal matters here to uncover the social facts at work in producing women as subjects of in various areas of law. The seven areas of positive law to examine are inhibition or interdiction (*ḥijr*), apostasy (*ridda*), agency (*wikāla*), evidence or testimony (*shaḥāda*), enslavement (*riqq*, but mostly clientage through manumission (*walā' al-'itq*) and sex labour in slavery), marriage (*nikāḥ*) and unilateral dissolution of marriage (*ṭalāq*) in that order. I also examine the interplay of legal accountability or personality (*dhimma*) and the legal capacities for property, marriage and sexuality.

[313] Ibid.

Al-ḥijr, the legal consequence of the absence of *ahliyya*, is the positive law corollary to the legal theory discussion on legal capacity and so we begin here. Next, I examine apostasy to assess the intersections of belief and sex difference and further our analysis of women's legal accountability or legal personality (*dhimma)*. My discussions on agency and evidence will inform us of women's legal capacities in terms of property matters, and the treatment of matters related to enslavement will demonstrate how the law manages the intersection of property and sexuality. Finally, I will discuss marriage and make a brief mention of divorce. This will demonstrate the place of marriage law in maintaining norms of sexuality, modesty and virginity. It will also advance our argument for marriage as a means of legal capacity that is uniquely differentiated between men and women but not explicitly recognised in the doctrine of legal capacity.

I use a classical legal text widely cited as a source of *Ḥanafī* law and taught in a majority of traditional Islamic sciences and *madrasa* programmes. The *Hidāya*[314] of Burhān al-Dīn Abū al-Ḥasan ʻAlī b. Abī Bakr b. ʻAbd al-Jalīl Farghānī al-Marghīnānī (d.593/1197), is a self commentary of his own 13th century *Kitāb Bidāyat al-Mubtadī*,

[314] The Amal Press publication which is a translation in two volumes produced in 2006 and 2008 respectively is the primary reference for sections of the *Hidāya* up to *Kitāb al-Mafqūd,* which is approximately the first half of the *Hidāya*. Beyond that the primary reference is the Dar al-Salam publication of 2000 produced in four volumes. Due to my travels, toward the end of this study I found myself without the Dar al-Salam publication and made use of the undated Maktaba Raḥmāniya publication produced in two volumes. The Amal Press publications are al-Marghīnānī, *Al-Hidāyah -the Guidance: A Translation of Al-Hidāyah Fi Sharḥ Bidāyat Al-Mubtadī, a Classical Manual of Hanafī Law*., and ʻAlī ibn Abī Bakr al-Marghīnānī, *Al-Hidāyah -the Guidance: A Translation of Al-Hidāyah Fi Sharḥ Bidāyat Al-Mubtadī, a Classical Manual of Hanafī Law*, 2 vols., vol. 2 (Bristol, England: Amal Press, 2008). The Dar al-Salam publication of 2000 is, al-Marghīnānī, *Al-Hidāya: Sharḥ Bidāyat Al-Mubtadī*., and the undated Maktaba Raḥmāniya publication is, al-Marghīnānī, Asqalānī, and Laknawī, *Al-Hidāya: (Maʻa Al-Dirāya Maʻa Al-Ḥāshiya)*. Ibn Humam's *Sharḥ Fatḥ al-Qadīr* published in 1937 is a reference for support or clarity as required.

thought to be a combination[315] of Qudūrī's *Mukhtaṣar* (d.428/1037) and Shaybānī's *al-Jāmi' al-Ṣaghīr* (d.189/805).[316]

B. The Woman of Positive Law (*Furū' al-Fiqh)*

1. Al-Ḥijr (Interdiction or Inhibition)

The discussion of interdiction in positive law is a corollary to the discussion of legal capacity in legal theory. While *ahliyya* refers to what capacities are available to the legal subject, *ḥijr* imposes limits upon their capacity to transact. *Ḥijr* questions an individual's discernment when compromised and their capacity to continue managing their affairs. Interdiction protects property from unwise distribution and limits pronouncements on marriage and divorce. Reminiscent of the theory of *ahliyya*, the three categories of individuals who are automatically under interdiction are children, slaves and the mentally incompetent.[317]

Puberty releases a child from the interdiction that normally accompanies minority and there is no distinction between male and female children in terms of their release from interdiction. Rather there are parallels between male and female manifestations of puberty; signs of puberty for male children are ejaculation or impregnation, for female children, menstruation or pregnancy, and nocturnal emissions are signs of puberty in both

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[315] Yaakov Meron, "Marghīnānī, His Method and Legacy," *Islamic Law and Society* 9, no. 3 (2002); Susan A. Spectorsky, *Women in Classical Islamic Law: A Survey of the Sources* (Leiden; Boston, Mass.: Brill, 2010); al-Barnī, *At-Tashīl Ad-Darūrī of the Masāil of Qudūrī*.

[316] See Aḥmad ibn Muḥammad al-Qudūri and Kāmil Muḥammad Muḥammad Uwaydah, *Mukhtasar Al-Qudūri Fi Al-Fiqh Al-Ḥanafī* (Bayrut: Dar al-Kutub al-`Ilmiyah, 1997)., and Muḥammad ibn al-Ḥasan (d. 805/ 1) al-Shaybānī and Muḥammad 'Abd al-Ḥayy, *Al-Jāmi' Al-Saghīr* (Bayrūt: 'Ālam al-Kutub, 1986).

[317] The reference for the *Hidāya* in this section on *ḥijr* is the 2000, Dar al-Salam publication. al-Marghīnānī, *Al-Hidāya: Sharḥ Bidāyat Al-Mubtadī*., Kitāb al- Ḥijr.

male and female children. In the absence of the accepted signs of puberty both males and females are considered pubescent at age fifteen in the *Ḥanafī* school.[318] Where male and female children declare they have experienced the signs of puberty, their word is not to be doubted nor is proof necessary.[319]

In addition to minority, slavery and mental incompetence two further categories of people may come under interdiction, the prodigal (the financially irresponsible or *al-safīh*) and the person who has excessive debt. Given that interdiction is determined by the sufficiency of body and reason, and out encounter with reason in legal theory, we might have expected women to feature as a separate category here as do minors, the mentally incompetent and slaves, but the *Hidāya* does not give effect to femaleness as a category of inhibition. Neither does the text assume that any of these categories are specifically women.[320] In the *Ḥanafī* school, women are not a specific category of interdiction and *al-safīh* refers to someone who spends their wealth irresponsibly, for our purposes financial incompetence.

According to Abū Ḥanīfa a free, adult, sane person cannot be interdicted as *safīh* (unable to make a proper judgement), because the person is a discerning individual. Interdiction would decrease their humanity (*ādamīya*), likening them to an animal and that is more harmful than unscrupulous spending. His two students, Abū Yūsuf and Mohammad al-Shaybānī, together with Imam Al-Shāfi'ī are of the opinion that such

[318] Shāfi'ī differs and for boys it is the age of 18, though less for girls according to the *sunna* ibid., Kitāb al- Ḥijr.
[319] Ibid., Kitāb al- Ḥijr. Similarly, a woman's statement on her menstruation is considered valid without further investigation.
[320] Ibid., Kitāb al- Ḥijr

interdiction is valid.[321] Further, for Abu Ḥanīfa, a person who is found to be a *safīh* at the time of puberty must be released from interdiction at age twenty-five. His students argue to maintain the inhibition until the *safīh* proves discerning.[322] While the *Ḥanafī* school does not interdict women financially, other schools limit a woman's legal capacity to manage property. The *Mālikī* school particularly appears to have continued with the associations of prodigality with women, in some instances precluding a woman access to her property until after marriage and effectively placing women under legal interdiction until such time as they marry and prove themselves proficient in matters of property.[323]

Pre-Islamic usage set a precedent for associating women with *safah*, a feminine and negative trait[324], indicating a weak or 'castrated female intellect'.[325] Accordingly, the early exegetes of Qur'an used the "contextual meaning" of the language to understand *safah* as 'women'[326] and were unanimous in interpreting the *sufahā'* in Qur'an 4:5 as 'women'.[327] However, the association with women is said to have been rescinded by the

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[321] For an examination of the legal and moral arguments attendant to the matter of inhibition of a free, sane, adult see Arabi, "The Interdiction of the Spendthrift (Al-Safāh): Human Rights Debate in Classical Fiqh." He explores a range of legal schools concluding with Ibn Ḥazm (d.456/1064) of the extinct *Ẓāhirī* school.

[322] al-Marghīnānī, *Al-Hidāya: Sharḥ Bidāyat Al-Mubtadī*., Kitāb al- Ḥijr.

[323] Mālikī law allows women to own property but in some instances interdicts her capacity to transact it until after marriage. This process of "delayed acquisition" is ostensibly to protect a wife's property from her husband and to ensure her competence with her husband's property before permitting her exercise of her own property (Maya Shatzmiller, "Women's Property Rights in Islamic Law and the Debate over Islamic Economic Performance," in *XIV International Economic History Congress,* (Helsinki, Finland2006).). Cristina de la Puente explains this as the difference between an individual's theoretical and real juridical capacity. See De La Puente, "Juridical Sources for the Study of Women."

[324]Moosa, "The Sufahā' in Quranic Literature," 23.

[325] Ibid., 24.

[326] ibid., 25.

[327] Qur'an 4:5 "To those who are [*sufahā'*] of weak understanding, make not over your property which God made a means of support for you, but feed and clothe them therewith

end of the third/ninth century at which point the 'gender neutral legal meaning' is thought to have also become normative in *tafsīr*.[328] Al-Ṭabarī (d. 310/923), for instance, considers it an "inability to distinguish between the opportunities of profit and loss in the management of wealth"[329] and Fakhr al-Dīn al-Rāzī (d. 606/1209) settled upon the notion of 'lightness' of intellect.[330] This shift is characterized as an exegetical move from the contextual meaning of the word *sufahā'* constituted as a negative female quality to a textual meaning constituted by axioms and principles of interpretation that reduce the effect of gender in meaning and substitute a single meaning with plethora of meanings instead.[331] Nonetheless, even in this plethora of meanings the association of women with *safah* remains prominent and later jurists continued to make associations between women and *safah*. The Mālikī jurist lbn al-'Arabi even linked it with al-Khudrī's *ḥadīth* that ascribes women deficient reason; "*safah* is an attribute of derogation in women, the

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and speak to them words of kindness and justice." Ali, *The Holy Qur'ān: Translation and Commentary* , 4:5. See, Arabi, "The Interdiction of the Spendthrift (Al-Safāh): Human Rights Debate in Classical Fiqh," Note #8, 304.

[328] Arabi, "The Interdiction of the Spendthrift (Al-Safāh): Human Rights Debate in Classical Fiqh," Note #8, 304. For a discussion on how exegetical (*tafsīr)* literature addresses the *safīh* of the Qur'an, also see Moosa, "The Sufahā' in Quranic Literature." Also see Arabi, "The Interdiction of the Spendthrift (Al-Safāh): Human Rights Debate in Classical Fiqh," Note #8, 304.

[329] Abū Jaʿfar Muḥammad b. Jarīr b. Yazīd al-Ṭabarī, *Jāmi Al-Bayān ʿan Taʾwīl Al-Qurʾān* (Bayrūt: Dar al-Fikr, 1984)., cited in Moosa, "The Sufahā' in Quranic Literature," 10.

[330] Moosa, "The Sufahā' in Quranic Literature," 15. "Al-Rāzī goes to extreme apologetics to overcome the problem of women and *safah,* which seems to be embarrassing by his standards. *Safah* in women and children or even in men is not a quality of censure or derogation *(dam)* he says, nor does it imply disobedience to Allah. Such persons are called *sufahā* because of a *natural* shallowness of intellect and an inability to discern harm from injury which render them unfit to manage property. In other words the characterization is not an inherent feature of women. He goes on to argue that the Qur'an encouraged the protection of property in a variety of ways, Q. 17 :27, 29; Q. 25 : 67" ibid., Note #78, 24.

[331] Ibid., 26.

Prophet having reportedly said that "women are deficient in intellect and religion *nāqisāt fī 'l 'aql, nāqisāt fī 'l dīn*".[332] In as much as some legal scholars may have avoided a specific correlation between women and *safah*, the association of women with weak reason was not so easily dispelled and, as we will see later in discussions on women's evidence, it continues with grave affect. One explanation for why the association persists is the methodology of the scholars that requires an equal reliance on transmitted (*naqlī*) and discursive (*'aqlī*) knowledge, the former including historical and *ḥadīth* usage.[333] Even though the word may be reconfigured through time, unless a scholar relies only upon the discursive knowledge in constituting a category, the specter of historical pre-Islamic and early exegetical and *ḥadīth* associations of women with incompetence, whether of financial or general, remain.[334] So that even though the association of women and 'lightness of intellect' or 'financial incompetence' may have been reduced, the association of women with weak minds or weak reason does not dissipate.[335]

In reference to our earlier discussion on legal capacity, the historic associations of women and *safah* may explain why Jīwan is of the opinion that women have weak *'aql* (reason). It also confirms our reference to the *ḥadīth* as the origin of Jīwan's perspective. Relating this back to our analysis of the *Hidāya*, we will find that the association persists. We find a number of points where the associations between women and weak reason are recalled. We will pay attention to how the associations are formulated and how they continue to shape the legal capacity of women. On women's evidence, for instance, we

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[332] Ibid., Note #78, 24. Moosa's reference is Muhammad b. 'Abdullah ibn al-'Arabi (d. 543/1148), *Aḥkām al-Qur'an,* 'Alī Muḥammad al-Bajawī (ed.) (Cairo: Halab, 1968/1387), 1:318.
[333] Ibid.
[334] Ibid.
[335] Ibid.

will see that the female subject has distinct capacities from the male subject. However, references to weak intellect are also not the only determining factors. For example, weak intellect together with social propriety fashion women's capacities for evidence and agency. Matters of authority and control result in sex-differentiated capacities for women and men in terms of clientage, sexuality, marriage and divorce. In summary we will find that even though the treatment of legal capacity and interdiction omit the discussion of gendered forms of legal capacity, female legal subjects are distinguished from male subjects for various reasons, the associations between femaleness and a weak mind amongst them.

2. Al-Ridda (Apostasy)

There is difference among schools on the consequences of a woman's apostasy upon herself. For example, to al-Shāfi'ī apostasy is a grave crime which necessitates a grave punishment. When a woman apostatises the punishment for such a grave crime must be as grave. In this, al-Shāfi'ī explains, women are to be punished as men are. But for Abu Ḥanīfa a woman's apostasy does not have the same consequences as a man's apostasy in that she may not put to death as a man may be.[336]

The *Ḥanafī* position that a woman's apostasy is not the same as a man's rests on two arguments. Firstly, the Prophet (peace be upon him) prohibited the killing of women, apostate or infidel. Secondly, there is the principle of delaying punishment to the hereafter since expediting it would create hardship and defeat the purposes of the law. However, the *Hidāya* explains, the punishment for apostasy is not delayed for a man

[336] The reference for the *Hidāya* in this section on *ridda* is the 2000, Dar al-Salam publication. al-Marghīnānī, *Al-Hidāya: Sharḥ Bidāyat Al-Mubtadī*, vol. 2, 872.

because he is thought to be *al-ḥirāb*, one who becomes hostile to the community. Women, unlike men, upon apostatizing are not thought to be hostile as this is not part of their nature. By contrast a male apostate is assumed potentially hostile. Therefore a female apostate is treated differently; she is imprisoned until she relinquishes and returns to Islam.[337] The distinction between men and women pertains to how the jurists view women and men, their physical bodies and their emotional and mental states. The law does not imagine a woman as a physical threat to the Muslim polity. A male non-Muslim person, by contrast, is considered a threat to Muslims.

The different approaches to women's apostasy in the *Ḥanafī* and *Shāfi'ī* schools reflect the relative significance of belief and threat. Abū Ḥanīfa weighs the legal significance of apostasy through the potential for physical hostility to the Muslim polity and the punishment is related to the potential threat of a hostile unbeliever. Accordingly, women's apostasy is not punished with death. In dissociating women from physical hostility, a woman's apostasy becomes non-threatening for the Muslim polity and she may continue to live. Accordingly, men are punished with death and women are not. On the other hand, Shāfi'ī assesses the legal significance of apostasy as a matter of sin and disbelief. Because apostasy is equally sinful for both men and women, both are equally punishable through death. The *Ḥanafī* opinion prioritises the political consequences of apostasy over the consequences for belief and accountability.

In addition to the spiritual consequences of apostasy, the *Hidāya* explains its proprietary consequences. According to Abu Ḥanīfa, when a man apostatizes, any agency (*wikāla*) he granted over his dealings ends. While he is an apostate, his acts are suspended

[337] ibid., vol. 2, 872.

but if he repents and returns to Islam his acts and his commission of agency are confirmed. However, if he dies or leaves the Muslim realms his acts are considered void. Again the effect of a woman's apostasy is not the same as a man's.[338] When a woman apostatizes, the agency she granted over her dealings does not terminate with her apostasy and her apostasy has no effect on her contracts. Her constitution of agency remains until her death or until she leaves Muslim realms. The *Hidāya* does not tell us why Abū Ḥanīfa reasons this way but his two students, Abū Yūsuf and Muḥammad, do not agree with him. They find equal proprietary consequences for male and female apostasy by arguing that the apostate man's acts are valid, and therefore his commission of agency is not annulled unless he too dies or leaves Muslim realms.

To summarise, in the *Ḥanafī* view men and women do not bear the same physical consequences for leaving Islam but they may, if we used the opinion of the two students, bear the same proprietary consequences. This effects our earlier suggestions on the equality of men and women for legal accountability to God (*dhimma*) which is also the basis of the legal capacity for obligations due to and from a person (*ahliyyat al-wujūb*). Legal accountability rests upon the originary covenant between God and humanity, yet in the *Ḥanafī* school, women's withdrawal from that obligation does not incur consequences with the Divine, causing us to question the role of legal accountability for belief in the law's production of the female legal subject. Abū Ḥanīfa's analysis minimises it while Shāfi'ī's analysis centralises it as a grave sin. Further, it ties the value of belief to the potential for political or social threat rather than the individual's obligation to God.

[338] Ibid., vol. 3, 1153. Muḥammad ibn 'Abd al-Wāḥid Ibn al-Humām, *Sharḥ Fatḥ Al-Qadīr* 1-8 vols. (Cairo: Maṭba'at Muṣṭafá Muḥammad, 1937), vol. 6, 128-29.

3. Al-Wikāla (Agency or Representation)

Further, in *wikāla,* the appointment of an agent or a representative to act on one's behalf, the *Hidāya* tells us that a woman who does not normally leave her home and is not familiar with appearing in court may appoint an agent to act on her behalf in all matters regardless of the opposing party's agreement.[339] Men do not share this legal capacity and the scholars are divided on the instances where a man may appoint an agent (whether upon sickness and absence only or otherwise too) and on whether the adversary's agreement to the agency is necessary to is constitution. According to Abū Yūsuf and Muḥammad, the adversary need not agree to an agent in the event that the constituent is not sick. According to Abū Ḥanīfa, the adversary must agree. His argument addresses the competence of the agent and the constituent in their capacity to manage a legal case.[340] By contrast, no similar discussion pertains to women appointing an agent, the assumption being that women may not ordinarily leave the home or may be unaccustomed to attending court and would therefore be expected to appoint an agent. Also, no similar concession applies for men who may not be accustomed to appearing in the court. If however, a man is sick, as above, the adversary need not consent to the constituent's appointment of an agent.[341] Al-Rāzī, the *Hidāya* tells us, is of the opinion that a *mukhaddara* or secluded women is required to appoint an agent because, should

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[339] The reference for the *Hidāya* in this section on *wikāla* is the 2000, Dar al-Salam publication. A '*mukhaddara'* woman is a secluded woman who may be unaccustomed to attending the court, (al-Marghīnānī, *Al-Hidāya: Sharḥ Bidāyat Al-Mubtadī*, vol. 3, 1130-31.); Ibn al-Humām, *Sharḥ Fatḥ Al-Qadīr* vol. 3, 106-08.
[340] al-Marghīnānī, *Al-Hidāya: Sharḥ Bidāyat Al-Mubtadī*, vol. 3, 1130-31; Ibn al-Humām, *Sharḥ Fatḥ Al-Qadīr* Vol. 3, 106-08.
[341] al-Marghīnānī, *Al-Hidāya: Sharḥ Bidāyat Al-Mubtadī*, vol. 3, 1130-31.

she attend the court she would not be able to speak on her behalf due to her modesty or shyness.[342]

Further, recalling the ruling on women's apostasy above, three things terminate the agency constituted in another person, apostasy, death and mental incompetence of the constituent. Agency rests upon the capacity that originated it and when the constituent no longer possesses that capacity then the agent also no longer possesses that capacity. Except, in the case of a woman's apostasy, the agency granted by her as a constituent, to another does not terminate unless she dies or relocates to *dār al-ḥarb*, the hostile area outside of Muslim territory.[343]

The assumption in the unrestricted allowance for women to appoint agents is that it would be normal for women not to leave their homes, to remain secluded, not to have experience with the courts and to be too modest to effectively defend their cause. To accommodate this practice, all women are availed of the facility to appoint agents to act in their stead. Their appointment of an agent cannot be disputed nor can any woman's decision to appoint an agent be declined or followed by a demand that she present herself in public or in court. When the scholars allow for this they also promote these social norms as appropriate forms of female conduct. In this way the practice of some women becomes normative for other women, whether or not they seclude themselves or have experience with the court. Embedded in these laws is an affirmation and promotion of women's potentially secluded status in terms of the courts and legal management. The law acknowledges that women may be secluded, that women's public presence may be problematic, that women may have little experience in the court and it accommodates the

[342] Ibid., vol. 3, 1130-31.
[343] Ibid., vol. 3, 1153; Ibn al-Humām, *Sharḥ Fatḥ Al-Qadīr* vol. 6, 128-9.

practices that lead to this situation such that it may also promote their continuity. Finally, we note that the text does not determine a woman's ability to appoint an agent or representative by virtue of her legal capacity to act, as it does for men who are sick, neither does it reference her personal competence in the matter at hand. The criteria for appointing an agent to act on her behalf relate to a woman's assumed shyness and limited presence in public.

4. *Al-Shahada*

Women's testimony refers to the obligation to give evidence, proscriptions upon women's testimony and capacity for adjudication. Beginning with the last of these concerns, the *Hidāya* uses the principle that a person may adjudicate (as *qāḍī*) in all matters in which they may witness. Women may adjudicate upon all matters in which they may give evidence. Based on the invalidity of women's evidence in *ḥudūd* and *qiṣāṣ* (retribution), women may not adjudicate in these two areas.[344] The criteria for adjudication for men and women are seemingly standard yet a close assessment of women's evidence reveals otherwise. Women, it turns out, may only adjudicate when the law finds it suitable and the criteria for suitability vary to include reason, memory, doubt, public presence, social decorum and sexual privacy. Unlike a man whose evidence would depend on matters of reliability and competence, by virtue of being female a woman's evidence is further conditioned by these criteria.

The discussion on witnessing in the *Hidāya* opens with an injunction on the obligatory nature of witnessing. To provide evidence, once asked, is thought to be

[344] Except for footnote #355 below which refers to the undated Maktaba Raḥmāniya publication, the reference to *Hidāya* in this section on *shaḥāda* is to the 2000, Dar al-Salam publication. al-Marghīnānī, *Al-Hidāya: Sharḥ Bidāyat Al-Mubtadī*, vol. 3, 1078.

incumbent upon a witness for it is not lawful for a person to conceal testimony when asked by a plaintiff (*mudda'ī).*[345] Further, providing evidence when requested is made necessary by the Qur'an, and becomes an obligation (*farḍ*) on the witness when the plaintiff requests it. While this appears to be a general statement on witnessing applicable to all believers it is applicable to women only on condition the law permits a woman's evidence in the matter at hand, not on condition her evidence is requested, and not even on condition a woman has witnessed a matter of legal significance.

If this first principle of witnessing is maintained, when the law excludes women's witnessing it also reduces women's legal accountability and alters her legal capacity. As a result women believers who witness an event are not be held to the same standard of legal accountability for providing evidence. This limitation on women's legal capacities is not recorded in the discussion on legal capacity. Before we analyse the significance of this distinction for the textual formation of women as legal subjects, we offer here a brief summary of the various proscriptions upon women's testimony according to the *Hidāya*. For *Ḥanafī* scholars,

> ... women's evidence is initially valid, by virtue of the presence of that which the capacity for evidence (*ahliyyat al-shaḥāda*) is premised upon, which is the capacity for observation, comprehension (*ḍabṭ*) and communication. Knowledge

[345] Based on Qur'an 2:282 "And the witness should not refuse when called upon." In cases of *ḥudūd* (prescribed) crimes a person may decline to offer testimony in order to maintain the character of the accused individual, on the principles that concealing vice and preventing corporal punishment are preferable. To illustrate, if the matter involves property then the evidence ought to be expressed in a manner that will preferably not incur the *ḥadd* (prescribed punishment). The witness could, for example, use the word 'taken' rather than 'stolen', the latter being grave in legal penalties . The jurist's concern is for providing evidence when it is required but also for concealing a person's vice and avoiding corporal punishment where possible, (ibid., vol.3, 1091; Ibn al-Humām, *Sharḥ Fatḥ Al-Qadīr* vol. 6, 5.).

> of the evidence is acquired through the first [i.e. observation], retained through the second [i.e. comprehension] and through the third [i.e. communication] it is transmitted to the judge. Therefore her reporting is acceptable (as in *ḥadīth* narration), and her deficiency in memory …. is remedied by combining with another woman. Thereafter all that remains is the matter of doubt and women's evidence is not valid in matters that fall away upon legal doubt. Further, there is no validity to four female witnesses, contrary to the conclusion that may emerge by analogy, for that would cause an increase in women leaving [their homes].[346]

Where women's evidence is not considered valid, the reason jurists give is the second point in the capacity for evidence (*ahliyyat al-shaḥāda*), i.e. comprehension. In the text this amounts to imprecision in women's memory remedied by the combined evidence of two women. Thereafter, there is the matter of doubt created by the fact that the witness is a female and potentially lacking in the second requirement (even where the evidence of two women is combined). This is remedied by excluding women entirely from areas of evidence where doubt renders a claim invalid but allowing women's evidence where doubt does not invalidate a claim. These arguments occur alongside an acknowledgment that women have the three general requisites for the capacity for evidence (*ahliyyat al-shaḥāda*). The distinction between men and women is in the second matter, comprehension, which the jurists discuss in terms of weak memory remedied by combining the evidence of two women to constitute a single instance of testimony. The effect is to qualify all women's evidence, to combine the evidence of two women to permit women's evidence in some areas of law and to preclude women's evidence,

[346]al-Marghīnānī, *Al-Hidāya: Sharḥ Bidāyat Al-Mubtadī*, vol. 3, 1093.

combined or singular, in some areas of law. Further, analogical reasoning would conclude that if one woman was to be replaced by two then two women may be replaced by four and thus the evidence of four women may be considered valid in instances where women's combined evidence is permitted. Rather than deny the validity of such evidence whether on the grounds of doubt, comprehension or memory, as earlier, the jurists now use a different criteria to rule on the validity of four women as witness. In their view, to sanction the evidence of four women would condone and encourage women's public presence. Accordingly, the text explains, the evidence of four women alone in property matters is not valid because this would occasion frequent public appearances for women.

The switch from one concern to the other is instructive of juristic reasoning. The shift from the three prerequisites for the capacity for evidence (*ahliyyat al-shaḥāda*) to excessive public presence is not a logical progression but a new legal principle aimed at limiting women's public presence and[347] this principle now supersedes all other considerations of intellect, combining of evidence, necessity and the gravity of the legal matter. Accordingly, norms of social propriety trump the legal requirements for evidence and the testimony of four women is not valid.

The discussion on evidence continues and the limitation on women's public presence is followed by concern for what occurs in the privacy of women-exclusive spaces. In areas where women alone are ordinarily present, women's legal evidence is valid without accompanying male evidence as in matters of birth, virginity and personal defects in matters that do not admit men. In these instances the evidence of a single woman is valid

[347] The text is not explicit, but *sadd al-dharā'i'*, blocking the means or the prevention of harm, is a legal principle employed to limit a legal option that may lead to unwanted unlawful outcomes.

by virtue of the Prophetic saying "Women's evidence is acceptable in matters that men cannot witness".[348] *Ḥanafī* scholars, the *Hidāya* explains, accept one's women's evidence because firstly, it is preferable that women look at women and secondly, that only one and not many women look at another woman. Thus too the necessity for numerous witnesses falls, except that the second or third witness is a precaution in matters of obligation. By contrast, Shāfi'ī requires the evidence of four women.[349]

The matters of weak intellect, legal doubt and public presence do not feature in this part of the discussion. Instead, at this point in the discussion, two other concerns surface viz., maintaining the privacy of a woman's body and the decorum between sexes. The jurists allow decorum and propriety to preponderate over matters of weak mindedness or doubt to the point that a woman's evidence here is independently valid. Even the combined evidence of two women is not required in this discussion. We may suggest that this is merely a reflection of existing social custom but Abū Ḥanīfa's argument that women's evidence of a birth does not extend to where it may occasion inheritance would disprove our suggestion.

> Women's evidence of '*istiḥlāl* (the sound a child makes at birth) is not valid in terms of establishing inheritance. This is a matter that relates to men, except, a women's evidence is valid in the matter of prayer (over the deceased child) which is a matter of religion. His two students are of the view that women's evidence is valid in the matter of inheritance too because the sound occurs at birth and men

[348] al-Marghīnānī, *Al-Hidāya: Sharḥ Bidāyat Al-Mubtadī*, vol. 3, 1094; Ibn al-Humām, *Sharḥ Fatḥ Al-Qadīr*
[349] al-Marghīnānī, *Al-Hidāya: Sharḥ Bidāyat Al-Mubtadī*, vol. 3, 1094; Ibn al-Humām, *Sharḥ Fatḥ Al-Qadīr*

are not ordinarily there, thus a woman's evidence is like the evidence of two male witnesses.[350]

Following this excerpt Abu Ḥanīfa's explains that men may possibly be present at a birth and therefore he requires their evidence to establish inheritance. His two students differ because, they argue, men are not ordinarily present in these situations and therefore women's evidence is valid, to the extent that one woman's evidence also removes the need for two men. Abū Ḥanīfa's decision shows that even in matters ordinarily the domain of women, where women's privacy is maintained and where decorum between the sexes is observed, because men may potentially be present, women's testimony may revert to being invalid. His students show that, regardless of other considerations, as this juncture one woman's testimony has the value of the testimony of two men.

Contrary to the *Ḥanafī* opinion that women's evidence is initially valid and only subsequently invalid, Shāfi'ī's opinion, according to the *Hidāya*, is that women's evidence is originally considered invalid. Women are deficient in intellect (*nuqṣān al-'aql*) and lack precision in memory (*ikhtilāl al-ḍabṭ*).[351] Accordingly, the evidence of women with men is not valid even in property and related matters. The restriction is supported by limitations on women as leaders (*al-imārah*). Neither is a woman's evidence valid in *ḥudūd* (prescribed crimes). However, the *Hidāya* explains of Shāfi'ī, as a matter of necessity only a woman's evidence is acceptable in matters of property. Marriage, by contrast, is considered "a grave matter and less frequent amongst women's

[350] al-Marghīnānī, *Al-Hidāya: Sharḥ Bidāyat Al-Mubtadī*, vol. 3, 1094; Ibn al-Humām, *Sharḥ Fatḥ Al-Qadīr* , (my underlining for emphasis).The discussion here also extends to women's evidence on the virginity of a newly purchased enslaved women

[351] *Ikhtilāl* comes from the root *khalla*, *ikhtilāl* meaning deficiency, defectiveness, imperfection, to be in disorder, faulty, deficient, imperfect

experience" and therefore treated differently from property matters and women may not give evidence.[352] According to Shāfi'ī, defective understanding disqualifies women's evidence but the appeal to necessity and experience makes women acceptable witnesses. Accordingly, in spite of women being considered defective of intellect women's evidence is acceptable in property matter but not in *ḥudūd* or marriage matters. [353] Shāfi'ī's prohibition is based on the jurist's association of weak intellect with the idea of femaleness, but is conditioned by legal necessity and the nature of women's legal experience, the latter of which we may further argue is a circular proposition. Women would only be experienced in what the law allows them to experience. In the face of an existing proscription there is little chance that women would ever become experienced enough to qualify for Shāfi'ī's prescriptions.

Based on Qur'an[354] and *ḥadīth*,[355] women's evidence in the case of *zinā'*, a matter of *ḥudūd*, is only valid when accompanied by the evidence of four men. Women's

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[352] al-Marghīnānī, *Al-Hidāya: Sharḥ Bidāyat Al-Mubtadī*, vol. 3, 1092-3.

[353] Marriage matters are thought to be grave in contrast to property matters and women are also thought to be less familiar with the legalities of marriage matters. Shāfi'ī's reasoning on property and marriage tells us about how these matters were thought of historically. Contemporary thinking may assume property to be more grave than marriage and women to be more familiar with marriage law than property law but Shāfi'ī indicates otherwise.

[354] The *Hidāya* cites the highlighted sections of the Qur'an 4:15 and 24:4 in support of four witnesses. "If any of your women are guilty of lewdness, **take the evidence of four (reliable) witnesses** from amongst you against them; and if they testify, confine them to houses until death do claim them, or Allah ordain for them some (other) way." (4:15:). "And those who launch a charge against chaste women**, and produce not four witnesses** (to support their allegations),flog them with eighty stripes; and reject their evidence ever after: for such men are wicked transgressors" 24:4, (Ali, *The Holy Qur'ān: Translation and Commentary*).

[355] The *ḥadīth* of Zuhrī that the Prophet and his two immediate successors precluded women's evidence in matters of punishment (*ḥudūd*) and retaliation (*qiṣāṣ*), (al-Marghīnānī, Asqalānī, and Laknawī, *Al-Hidāya: (Ma'a Al-Dirāya Ma'a Al-Ḥāshiya)*,

testimony, it is argued, involves a degree of doubt (*shubhat al-badalīya*) and is therefore not acceptable in matters that fall away (legally) upon doubt as do *ḥudūd* matters. In other matters than *ḥudūd* and *qiṣāṣ* the evidence of two men is valid.[356] In matters related to property or otherwise a woman's evidence must be accompanied by the evidence of another woman as well as a man. This is based on Qur'an 2:282 which establishes that two male witnesses and, in their absence, one man accompanied by two men suffice in witnessing.[357] Women's evidence in this form is acceptable for marriage, divorce, manumission, the post marriage waiting period (*'idda*) , exchange (*ḥawāla*), endowment (*waqf*), settlement (*ṣulḥ*), agency (*wikāla*), bequest (*wasīya*), gift (*hiba*), judicial acknowledgement (*iqrār*), remission from debt (*ibrā')*, birth of a child (*walad)*, parturition or confinement (*wilāda*), and lineage (*nasab*) etc.[358]

To assess the implications of the rules of evidence for women as subjects of law we recall the discussion on witnessing in the *Hidāya* which opens with the obligatory nature of witnessing. It is not lawful for a person to conceal testimony when asked by a plaintiff.[359]That a woman may have evidence but be prevented, by virtue of being female, from providing evidence impacts the first principle of evidence, that the party has a right to evidence from a witness when requested. It also impacts the injunction that a witness has a duty to provide testimony once requested. Given the proscriptions on women's

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vol. 2, Kitāb al-Shahāda, 161; Ibn al-Humām, *Sharḥ Fatḥ Al-Qadīr* vol. 6, 6-7.; al-Marghīnānī, *Al-Hidāya: Sharḥ Bidāyat Al-Mubtadī*, vol. 3, 1092-3.)

[356] The *Hidāya* cites the highlighted words of Qur'an2:282 "O believers, when you contract debt, one upon another for a stated term, write it down … and **call to witness two men**, or if they be not men, then one man and two women, such witnesses as you approve of, lest one of them two (women) err, then the other will remind her", (Ali, *The Holy Qur'ān: Translation and Commentary*).

[357] See footnote #356 above.

[358] al-Marghīnānī, *Al-Hidāya: Sharḥ Bidāyat Al-Mubtadī*, vol. 3, 1092-3.

[359] See the discussion at footnotes #345 above.

witnessing, it might be more appropriate for the text to read rather that parties have a right to request and be furnished with evidence of men only but that women's evidence is not equally available. The text should also qualify that only men are obliged to make their evidence available upon request. Women are only required to make their evidence available when the law permits their evidence. Evidently women do not have the same legal and evidentiary capacities as men.

The laws on evidence are also determined by a number of social facts that qualify a woman's capacity to give evidence. They include the belief that women are weak minded, that women have experience in property but that women do not have experience in matters related to marriage, that women's public presence is not to be promoted, that men not view women's naked bodies, and that men are not ordinarily present at birth. Summarily, in the laws on evidence, matters of intellect, property, marriage, space, sex, sexuality, and gendered experience shape the law's 'evidentiary' woman. The woman thus constructed maintains decorum between the sexes, is secure in the privacy of her body as she secures the sexual privacy of other women's bodies, is only minimally present in public, often involved in property matters, less frequently involved in marriage matters (even when married), and can be an independent legal witness only in matters related exclusively to women. In all instances however, she begins as a legal individual who is compromised in terms of the second requirement of the capacity for evidence i.e. comprehension. This idea transforms into 'weak memory', 'lack of precision' or forgetting, giving support to the larger notion that women suffer weak intellect, *nuqṣān al-'aql.*

It appears there is always room to disregard women's presence, cancel women's evidence and make room to invoke a notion of weakness or lack for women. However, in the same way, a weak intellect, combined evidence of two women and legal doubt is easily overcome when women are the only witnesses and decorum between the sexes is necessary. Yet, even where those matters are addressed, women's evidence may still be curtailed by overriding concern for women's public presence. As a result of the shift between intellect, experience, public presence, privacy and decorum between the sexes, the jurists' evidentiary woman is not singularly defined, whether by body or mind. Space, experience and intellect intersect with the physicality of women's bodies and fashion a woman that is determined by the specificity of the legal situation. While the weak mind or weak memory is overwhelmingly present in discussions on women's evidence, these are not the singular determination of the validity of women's evidence.

In all the above instances sex difference intersects with a variety of other social facts. The interaction of social norms and legal needs leads to negotiations of femaleness, which illustrates the discursive nature of both the law and the individual subject governed by the law; the law produces the sorts of subjects it requires to meet its aims. When the law chooses to highlight women as 'deficient' or women's testimony as naturally doubtful, it does so easily. When it chooses to overlook these ideas and prioritize other matters pertaining to women's experiences, it does so equally. Even where all matters of doubt, experience and legal gravity have been addressed, when the law chooses to limit women's presence in public, it allows these matters to trump other legal reasons, including analogical argument, which would allow women to act as witnesses independent of men.

5. Walā' al 'Itq (Clientage through Manumission) and Sex with Slaves

As in legal theor*y,* in positive law too, the discussions on slavery point to distinctions between the legal capacities of men and women premised upon the sexual nature of their bodies. We take up the distinctions established by laws on the lineage of the children of a female slave and on the clientage established when a woman manumits a male slave. A central premise of both discussions is the association of men with sexual control and women with being controlled for, as the *Hidāya* explains, whether free or enslaved, in matters of sexuality and the lineage of children "a woman is owned and not the owner".[360]

The discussion on slavery in the *Hidāya* is extensive and various elements feature through the four volumes, the most extensive discussion being manumission. It begins with the Prophet's recommendation on the benefits of manumission and the remainder of the discussion focuses on the conditions, mechanisms and consequences of manumission. While spiritually beneficial, we will find that manumission does not establish the same material benefits for male and female manumitters, neither is ownership of a slave equally beneficial for male and female owners, nor does being a slave have similar consequences for male and female slaves. The law distinguishes the legal capacities of slave men and women as well as the legal capacities of free men and women to transact in slaves. For the most part these restrictions relate to associations the law makes with sexuality, male and female bodies, free and enslaved bodies.

The first point of distinction is that the laws on enslavement work with the premise that the sexual relationship between men and women is one of appropriation and that the

[360] References to the *Hidāya* in this section on '*itq* rely on the undated Maktaba Raḥmāniya publication and the 2000, Dar al-Salam publication. al-Marghīnānī, *Al-Hidāya: Sharḥ Bidāyat Al-Mubtadī*, vol. 3, 1331-2.

appropriator is always male. A woman may own and trade slaves, but she may never be sexual with her male slave as a man may be sexual with his female slave. A male owner may be sexual with his female slave, have a child by her and thereby release her from resale. A female slave may achieve various elevations in status through her sexual associations with the man that owns her.[361] Conversely however, a male slave may not. He cannot expect to be released from being resold or achieving any other status privileges by fathering a child since he may not be sexually associated with the woman that owns him. Only female slaves may earn their freedom through a sexual relationship with their owner and only male owners may offer female slaves release from resale by conceiving a child between them. The discussion on defects in sale explains these limitations as the purposes for which one buys a male or female slave. Where a man owns a female slave he may also own her sexually. The object in purchasing a slave woman (*al-jāriya*) is *istifrāsh* (to share a bed) and *ṭalab al-walad* (to have children*)*, accordingly where a slave woman's mouth and armpits smell unpleasant, or she is thought to commit adultery (*al-zinā*) and have children through adultery, these may be considered her defects and, as she is property, the rules pertaining to defects in property under sale apply.[362] Similar characteristics in male slaves, the *Hidāya* explains, are not considered defects as male slaves are not purchase for the 'bed' but for service.[363] Similarly, not menstruating or menstruating excessively are also considered defects in a female slave.[364] Therefore, where a woman owns a male slave her ownership does not extend to his sexual labour.

[361] al-Marghīnānī, Asqalānī, and Laknawī, *Al-Hidāya: (Ma'a Al-Dirāya Ma'a Al-Ḥāshiya)*, vol 1, Kitāb al-'Itāq, 451.
[362] Ibid., vol. 2, Kitāb al-Buyū', 43.
[363] Ibid., vol. 2, Kitāb al-Buyū', 43.
[364] Ibid., vol. 2, Kitāb al-Buyū', 43.

Even as a slave, a man is always considered a sexual appropriator. To avoid the suggestion that a male slave owns or appropriates his female owner, or to avoid the semblance of a male slave being sexually appropriated by a female, even if she is his free female owner, the sexual relationship of a male slave and a female owner is not considered.

The second significant element of legal capacity is in the lines of association that slavery and manumission establish whether through children or the clientage of manumission. *Walā' al-'itq* refers to the relationship of dependence or clientage a manumitter possesses over the slave who is manumitted. A slave-owner who is male has *walā'* over the slave he manumits and over the children of the slave thus manumitted through which, amongst other privileges, he also inherits from the former slave. By contrast, a female slave-owner has *walā'* over the slave she manumits but not over the children of the slave thus manumitted. Her *walā'* of the manumitted slave originates in her capacity to own property and, like her male counterpart, by relinquishing her property in her slave she earns *walā'* over the manumitted slave. However, as a female, her *walā'* is only partial and she does not have *walā'* over the children of the former slave. This lies with their father, the manumitted slave. According to the scholars, parentage is established through the bed (*al-firāsh*), i.e. through the person who owns the bed, in other words the person who holds the right to procreation, namely the male partner. Further, as we mentioned earlier, Marghīnānī explains that "a woman is owned and not the owner".[365] So lineage may not be established through her.[366] The distinction being made

[365] al-Marghīnānī, *Al-Hidāya: Sharḥ Bidāyat Al-Mubtadī*, vol.3, 1331-2.
[366] By this reasoning, a former slave owner has *walā'* over his former slave because the law traces the former slave's lineage to the former slave owner's 'bed'. Curiously, the

is that even as slave owners who relinquish their property in a slave, women do not possess the legal capacity to establish lineage for their former slaves. Establishing lineage is in the law's determination an exclusively male capacity; regardless of both transactions being technically the same, being female limits the clientage a woman may establish.

The law's association of female slaves with sexual labour also affects the legal capacity of slave women. It impacts their capacity for marriage, for establishing the lineage of their children and their potential to be freed. Finally, it has a profound effect on a slave woman's capacity to manage sex. Male slaves are not faced with similar incapacities. By contrast, we will recall a discussion in Chapter Four on the male slave's capacity for *milk al- nikāḥ* (the bond of marriage).[367] Jīwan found it necessary for a slave male to have a lawful avenue for his sexual desire by permitting him to own the property entailed in *nikāḥ*, even though a slave may not ordinarily own property. By contrast, the sexual desire of a female slave is not a matter the jurists concern themselves with, instead, the sexuality of a female slave is assumed to be available to her owner and it may even be shared amongst owners. When a female slave is owned in shares by more than one person her sexual labour may also be partitioned amongst the owners.[368] The law provides safeguards for establishing paternity, namely a waiting period between sex with different males,[369] but the general impact of sexual service on the legal capacities of a

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jurists do not accept a 'common bed' between a female former owner and her male former slave but they do accept a 'common bed' between a male former owner and a male former slave.

[367] See footnote #296 above and the discussion attendant to it.

[368] al-Marghīnānī, Asqalānī, and Laknawī, *Al-Hidāya: (Ma'a Al-Dirāya Ma'a Al-Ḥāshiya)*, vol. 1, Bāb al-'Istilād, 471-7.

[369] Ibid., vol. 1, Bāb al-'Istilād, 471-7.

female slave are not recorded as specific instances where the legal capacity of a female slave is radically altered. Rather the law codifies these alterations without note.

6. Al-Nikāḥ (Marriage)[370]

The law on marriage, like the law on slavery, is extensive and its associated provisions feature in further discussion throughout the text. The main discussion on marriage includes a discussion on guardianship and equality which begins by confirming that a *Ḥanafī* woman may contract her *nikāḥ* without her guardian's consent, whether she is a virgin or previously married. It continues by explaining views to the contrary from the other schools.[371] Even though, a *Ḥanafī* woman has the legal capacity to contract her own marriage, the text explains that, as a matter of modesty, she ought not to do so, for a woman who contracts her own marriage may be considered immodest.[372] The jurist's concern switches from the validity of the marriage to the character of a woman, which they associate with a modest reserve from the marriage contract. No similar reserve is expected of men even if they are previously unmarried or virgin. And in the discussion on a bride's consent to her marriage we learn as much about appropriate female behaviour as the legalities that validate marriage consent. Consent is obtained when

> **"she remains silent or laughs …** due to the words of the Prophet (God bless him and grant him peace), The permission of the virgin is to be attained about her marriage. If she remains silent she has consented.[373]

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[370] This section on *nikāḥ* relies on the Amal Press publications of the *Hidāya.*
[371] al-Marghīnānī, *Al-Hidāyah -the Guidance: A Translation of Al-Hidāyah Fi Sharḥ Bidāyat Al-Mubtadī, a Classical Manual of Hanafī Law*, vol. 1, Kitāb al-Nikāḥ, 475-6.
[372] Ibid., vol. 1, Kitāb al-Nikāḥ, 475-6.
[373] Ibid., vol. 1, Kitāb al-Nikāḥ, 492-3.

In the view of the law, a virgin female is less shy about denying consent than affirming it. Acceptance may be silent but denial requires an active response. Crying volubly and laughing sarcastically are indications of denial.[374] Further:

> …. **If this [seeking her consent] is done by a person other than the *walī*, that is, someone other than the *walī* [guardian] seeks her permission, or someone else becomes her walī at a removed level (like a brother instead of a father), consent is not given unless she expresses this in words.[375]**

The nature of consent also depends on who asks a woman's consent for her marriage. Only express consent is acceptable when the guardian is not her father or grandfather. Consent is not confirmed unless the information on the husband allows her to identify him sufficiently to show her consent.

> Seeking permission is deemed valid where the husband to be is named in a manner in which he can be identified, so that her desire to marry him can be distinguished from her desire not to marry him.[376]

Briefly, when a guardian does arrange a marriage for a virgin female, adult or child, her permission is necessary. However, for the jurists, femaleness is such that a woman is thought to be too shy to express her willingness for marriage and therefore her silence counts as consent, laughter more so, provided it is not sarcastic, and crying indicates

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[374] "The reason is that the inclination to give her consent is greater, because she is shy about expressing her willingness, but that is not so in the case of denial. Laughter has a greater implication about consent than silence as distinguished from the situation where she cries, as that is an indication of annoyance and disapproval. It is said that if she laughs in a sarcastic manner at what she hears, this is not to be taken as consent, but if she cries without making a sound, it does not amount to rejection" (ibid., vol. 1, Kitāb al-Nikāḥ, 492-3.).

[375] Ibid., vol. 1, Kitāb al-Nikāḥ, 492-3.

[376] Ibid., vol. 1, Kitāb al-Nikāḥ, 492-3.

denial. Virginity, the scholars believe, causes a woman to be shy to consent but not about denying consent, therefore silence in the absence of a sign of denial entails consent. By contrast, a woman who is not a virgin must give her consent expressly. This is because the Prophet has said

> "The deflowered woman [*thayyib,* (non virgin or) previously married woman] is to be consulted". The reason is that speaking out is not deemed a defect with respect to her, there is less shyness in her due to experience. Consequently, there is nothing to prevent an express statement in her case.[377]

The same applies whether her virginity is actual or assumed.

> **If her virginity has been lost due to jumping, menstruation, a wound or due to increase in age, then, the rule for virgins applies to her,** because she is a virgin in reality. The physical contact that she will have will be her first contact … The reason is that she is shy due to lack of experience.[378]

Thus, the shyness of a virgin is thought to dissipate with sexual experience such that a woman who is not a virgin must give express permission for her marriage. The connections between virginity and silence are elaborated further in the rule regarding a woman whose virginity is lost in fornication, (*zīna).*

> **…she takes the same rule** [as the virgin] **according to Abū Ḥanīfa** … Abū Yūsuf, Muḥammad and al-Shāfi'ī … said that her silence is not sufficient, because she is deflowered in reality and this will be a recurrence of the physical contact … According to Abū Ḥanīfa … the people know her as a virgin and they

[377] Ibid., vol. 1, Kitāb al-Nikāḥ, 493-4.
[378] Ibid., vol. 1, Kitāb al-Nikāḥ, 493-4.

will find fault with her for speaking out, therefore it is to be avoided. Accordingly, her silence is sufficient so that her interests are not lost.[379]

Even when a woman is not a virgin when she is expected to be, to protect her interests the law maintains the *façade* of virginity and allows her to use silence as consent. Abū Ḥanīfa prioritises her popular and reputational interests over legal form and allows her to feign virginity. Abū Yūsuf and Muḥammad prioritise legal form and what they believe are the natural outcomes of sexual experience, namely, a capacity to give express consent.

Alongside the legal requirements of mental competence, majority, discernment and being of those "addressed by the law" (these being the basic requirements for the legal capacity to act, i.e. *ahliyyat al-adā'*), the rules on women transacting their marriage contracts and their consent to be contracted into marriage rest on other considerations. The jurists presume that women are limited in their capacities for maintaining the objectives of marriage, understanding the complexities of marriage and their experience of marriage related matters. Further, they assume that women are naturally shy, should endeavour to appear modest and, if having fornicated, maintain a *façade* of virginity to maintain reputation. The law uses these additional concerns to manage a woman's independent contractual capacity, even as it recognises her capacity to enter into a contract independently.

Reflexively, however contrary the *Ḥanafī* opinion on a woman's independent contractual capacity in marriage is to the opinion in other schools, the text also conditions the *Ḥanafī* woman's contractual capacity with her guardian's capacity to proscribe her

[379] Ibid., vol. 1, Kitāb al-Nikāḥ, 491-2.

independent contract upon the argument that she lacks experience with men, with matters of marriage and in the interests of her modesty and reputation. These proscriptions apply more for virgin than non-virgin women but, except for the matter of active or voluble consent, the limitations on virgin women appear easily extended to women who have had sexual experience. Notably, no similar proscriptions apply to men, virgin or not. In other words men are not proscribed in matters of consent for marriage. Rather, the text works with the assumption that, unless interdicted, males have independent legal capacity for all property and marriage contracts, including divorce.

Before we conclude our discussion on marriage we make a brief note on the difference between the laws on marriage and divorce (which we will examine in the next chapter). In marriage the jurists are concerned with a woman's reputation and modesty and these frequently supersede the legal technicalities of consent and contractual autonomy. We will find a reversal of concerns in the treatment of divorce. Lost is the former concern for the social propriety of femaleness replaced instead with concern for maintaining a husband's authority over marital dissolution and the best means to validate his acquiescence.

Summarily, the discussion on marriage focuses less on matters of women's memory, comprehension, and familiarity with property and more with female propriety. It is concerned with fashioning ideas of femaleness that promote the need for modesty, achieved through a reserve from the contract of marriage. The legal text instructs its subjects upon the correct form of femaleness and, consequently too, maleness, for, in the silence that absents similar legally coded advice on modesty and reserve to male subjects, the law also constructs norms of maleness in marriage.

C. Women as Multiple and Situational Legal Subjects

While legal theory ostensible makes no distinction, suggesting women and men have undifferentiated legal capacities when in fact they don't, positive law makes obvious the distinctions between men and women and the resultant inequality. This dichotomy of equality and inequality may also more correctly reflect the multiple subject positions women occupy in the law. While in some instances women may have the same legal capacities of normative free adult male legal subjects, the legal capacities available to women are also determined by ideas of femaleness which the law uses to determine women's legal lives. These ideas determine the appropriate norms of femaleness and persist even though at times they may not prejudice women's access to the legal capacities ordinarily available to men. Even where the law appears not to distinguish male and female legal subjects, its rulings arise from ideas of femaleness that condition appropriate female and male behavior. What the law allows a woman to do in one place and not in another place is informed by the legal scholar's understanding of sex-difference. Therefore the same woman is considered a valid independent witness in the case of childbirth but not in the case of theft. Competent in one area of law and not in the other, these rulings reveal the legal understanding of femaleness more than the law's assessment of the technical legal competencies for legal capacity in women. Laws that permit men to act in ways that women are not permitted to act are founded upon the law's understanding of appropriate social behaviours for men and women. They allow a man to have sexual relations with his female slave but a woman may not have sexual relations with her male slave; the difference does not arise out a difference in the contract of slavery but a difference in the juristic understanding of male and female sexuality. Similarly, men and women have different capacities for engaging legal representatives or

agents not because they have different legal competencies, in the way that slaves, minors and mentally incompetent people have, rather because women are differentially associated with domestic and public spaces. The jurists' assessment of male and female sexuality and sociality inform the access of males and females to the same act. They moreover do not reflect a strictly theoretical juristic assessment of the requirements for legal capacity i.e. legal accountability to God (*dhimma*), sufficiency of mind (*'aql*) and body (badan).

Further to the juristic fashioning of law through normatively make and female behavior our study of legal theory and positive law indicates that an individual holds a variety of legal capacities simultaneously, so that a married woman may simultaneously own property, appoint an agent to appear on her behalf in court or not, be married and give evidence in the matter of property or childbirth, and renounce her faith in an act of apostasy. In each instance her capacity to act will be differently determined. In all instances her femaleness will feature, but not in the same way. The effect is multiple simultaneous legal subjectivities, amongst them differentiated subjectivities for property, for marriage and for spirituality.

The effects of femaleness differ in these various areas of law. In some areas femaleness entails legal facility (as in witnessing childbirth), and in others it restricts legal facility (as in divorce). Further still, in some areas of law femaleness is overlooked in favour of other considerations (such as decorum between the sexes) while in other areas of law femaleness is the paramount concern that allows other considerations of law to be overlooked (as where four female witnesses are not allowed because it promotes women leaving their homes). This makes it difficult to argue for a single, uniform notion

of femaleness that permeates the law and always prejudices or privileges women. Different aspects of femaleness, shaped by a variety of social facts and law, intersect in producing law's female subject. The law is intimately related to these social mores; they create ideas of femaleness and also reproduce existing notions of appropriate female behaviors. Criteria for these implicit distinctions reflect the social facts that organize the dynamics f masculinity and femininity in society. To be a woman in law is to have what law considers 'femaleness' differently constituted at different points in law.

D. Conclusion: The Category "Woman" in Positive Law (*Furū' al-Fiqh*)

We've concerned ourselves here with the social facts that organize laws pertaining to women. Numerous distinctions confirm that women's bodies are not the only determinate in women's legal capacity. In matters of agency the criteria of distinction do not pertain to a woman's legal capacity to act or her competence for the matter at hand but to ideas of shyness, modesty and a concern with limiting women's public profiles. In matters of evidence, women's originally valid legal evidence is conditioned by doubt which is attached to being female as though it is a natural condition of femaleness. Similarly, concern for publicity is automatically associated with women. Matters of intellect, property, marriage, space, sex, sexuality, and gendered social experience determine which woman may give evidence where. Sexual experience determines a women's control over her marriage. As a slave owner a woman's ownership rights over her property in slaves is limited to non-sexual labour and, as property, a slave woman is also expected to perform sexual labour. The laws pertaining to slavery show how the law makes heavy use of an automatic association of men with sexual control and women with

sexual submission. Finally the laws on contracting marriage give priority to matters of modesty and social decorum above the autonomy of contract.

Reviewing various aspects of positive law confirms that even though the doctrine of legal capacity is constituted without the category "femaleness" or "woman", women come to be distinguished as specific types of legal subjects in positive law. Indeed our examination has shown that the jurists do not explicitly define a singular legal category 'woman', even though they employ the concept women with such frequency that it comes to function as though it is a natural category of the law. Sex difference, attached to a variety of other social facts, becomes legally coded into differential treatment of women in the law. We found that matters of age, property, marital status, sexual experience, social experience, social decorum, proper conduct between the sexes, and public presence or visibility of women's bodies may determine a woman's legal capacities. We refer to these as social facts and note that legal capacity rests on more than sufficiency of body and intellect, legal accountability (*dhimma*) and puberty.

Comparing the location of sex difference in legal theory and positive law generally we find the latter relies more heavily on the associations of women with weak intellect. In positive law the weak mind, weak memory and inability to comprehend feature prominently in the definition of legal acts available to women in matters of evidence, property or marriage, with the effect of differentiating women as legal subjects. It is as though the incidental and commentarial aspect of weak intellect in legal theory becomes significantly prominent in positive law to render it an automatic association with women. As a result the weak intellect also functions like a social fact attached to women's bodies.

Our findings on the various formulations of women's legal capacity defy a simplistic polarisation between equal and unequal reflecting instead the points at which jurists selectively permit various social facts to determine the legal capacities available to women. These cause women's legal capacity to be multiple and situational. The multiplicity of subject states for women are determined by woman's accountability before God, woman's access to ownership in property and contract, sex-differentiated capacities to act in public and amongst men, and a specifically constrained subjectivity in matters of sexuality, whether as a slave woman concubine or as a wife. The differences in legal subjectivity emanate from differing social, sexual and legal relationships. This suggests, perhaps that women's legal subjectivity, (and potentially male legal subjectivity too), is constantly reconstituted based on the specific social and legal situation, confirming again that legal subjectivity is not only multiple but also situational. The multiply constituted legal subject is also a situational subject where the situation is differentially constituted by virtue of patriarchal social, sexual and legal norms. Different perceptions of male and female sexuality and sociality inform the access of males and females to the same act. This offers us perhaps a third avenue in the legal debates on subjectivity? The evidence supports a notion of subjectivity that is multiple and changing even if the biological female person holding the differing legal subjectivity is constant. The differences in legal subjectivity emanate from differing social, sexual and legal relationships and suggest further that the multiply constituted legal subject is also a situational subject.

We began this chapter noting that more than the female body determines women's legal capacities and our discussion here has illustrated what these additional matters are, namely, a host of social facts that emerge out of the juristic imaginary and attach to ideas

of femaleness. By recognising the place of social facts we are able to account for more than the female body in determining women's legal capacities and forward a concept of women's legal capacities as multiple and situational.

Chapter Six

Narratives of Sex and Subjectivity: Marriage as Legal Incapacity

A. Overview

The law does not explicitly acknowledge that women have a different legal capacity from men or that women are not-normative subjects of the law. In the absence of this acknowledgement the law suggests a fiction of legal in-distinction which produces a *façade* of equality. Not surprisingly, then the study of women's rights in Islamic law is tied to a narrative of tension between equality and inequality. Shaheen Sardar Ali captures the tension aptly as 'equal before Allah and unequal before man'. Yet, given our study of legal theory and positive law above, we may well argue that the notion of equality is indeed generally absent and that women's legal capacities are better understood as situational and multiple.

In this chapter we take up Sardar Ali's[380] equality based human-rights narrative along with three other approaches to women in Islamic law which offer different theories for the unequal treatment women experience in the law. We begin with a normative narrative of complementarity, which we find in traditional scholarship such as that of Abdurrahman Doi[381] and then allow Sardar Ali's equality based human rights narrative to guide us in the discussion of two further narratives that come out of a textual study of the legal subject somewhat similar to ours. Judith Tucker[382] and Kecia Ali[383] offer us valuable insights into women as subjects of law and the situational nature of legal capacity in what I respectively call a narrative of disability and narrative of marriage.

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[380] Ali, *Gender and Human Rights in Islam and International Law: Equal before Allah, Unequal before Man?*
[381] Doi, *Women in Sharī'a (Islamic Law)*.
[382] Tucker, *Women, Family, and Gender in Islamic Law*.
[383] Ali, *Marriage and Slavery in Early Islam*.

Examining these four narratives opens the way for further theorising upon the female subject of the law. Focusing on the narratives of disability and marriage, firstly we argue against the dichotomy of equality and inequality here cast as a distinction between an impeccable textual subject and a patriarchal social subject.[384] Secondly, we use the narrative of marriage to expand on our suggestion in Chapter Four that marriage incurs severe restrictions upon women as legal subjects. Finally we argue the unique legal incapacities imposed upon women through marriage cause 'marriage' or 'being a wife' to be potential impediments to women's legal capacity.

B. Narratives of Women as Subjects of law

1. General Trends in the Study of Women and the Law

By way of introduction, the default position in the normative framework of studies on women and Islamic law is that the female subject of the law is a complement to a normative male subject. Equality is not necessary and equity suffices instead.[385] By contrast, critical studies of women and Islamic law recognise that the law privileges male legal subjects, that the female subject is frequently imagined as an anomalous variant of the male subject and also unequal.[386] However, both normative and critical studies constitute the female legal subject through a narrative of tension between women and

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[384] Tucker, *Women, Family, and Gender in Islamic Law*; Ali, *Marriage and Slavery in Early Islam*.

[385] For studies that take this approach see, Doi, *Women in Sharī'a (Islamic Law)*; M. Mutahhari, *The Rights of Women in Islam*, 1st ed. (Tehran, Iran: World Organization for Islamic Services, 1981); al-Faruqi, *Women, Muslim Society, and Islam*.

[386] For studies that take this approach see, Mir-Hosseini, *Marriage on Trial: A Study of Islamic Family Law: Iran and Morocco Compared*; al-Hibri, "Muslim Women's Rights in the Global Village: Challenges and Opportunities."; Nayereh Tohidi, "Women's Rights in the Muslim World: The Universal-Particular," *Hawwa* 1, no. 2 (2003); Riffat Hassan, "Members, One of Another: Gender Equality and Justice in Islam," http://www.religiousconsultation.org/hassan.htm#contents.

men or matters of equality and inequality. Though each suggests a different approach to women as legal persons they unite in positing a female legal subject that operates in a dual and at times contradictory manner.

Summarily, in normative analysis Muslim women have a unique legal subjectivity evident in that women are spiritually equal to men but, because there are differences between the sexes, the social realization of equality is replaced by equity and the relationship between men and women is one of complementarity.[387] We cover three critical approaches here.[388] the first, the human rights approach, explains that Islamic thought has fashioned a subject who is caught between Islamically sanctioned ideals of spiritual equality and socially sanctioned realities of social inequality which fail to achieve both the ideal western norms of comprehensive gender equality and the Islamic norms of gender justice.[389] A further approach argues for female subjectivity as the tension between an impeccable textual subject and a disabled social subject who is also conditioned by sexual embodiment and desire.[390] The fourth and final approach studies marriage and suggests that as textual subjects women in marriage are fashioned on ideas

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[387] Doi, *Women in Sharī'a (Islamic Law)*.

[388] Shaheen Sardar Ali's (2000) study of gender and human rights in Islam and International law, Kecia Ali's study of marriage and slavery (2010) and a chapter on the legal subject in Judith Tuckers most recent book (2008) are the closest theoretical approximations to an analysis of gendered subjectivity. See Ali, *Gender and Human Rights in Islam and International Law: Equal before Allah, Unequal before Man?*; Ali, *Marriage and Slavery in Early Islam*. And Tucker, *Women, Family, and Gender in Islamic Law*. Also in the critical approach to the study of women and the law scholars have alluded to the discursive construction of concepts such as 'woman' and 'gender' in Islamic legal discourse. See Ali, *Sexual Ethics and Islam: Feminist Reflections on Qur'an, Hadith, and Jurisprudence*; al-Hibri, "Muslim Women's Rights in the Global Village: Challenges and Opportunities."; Mir-Hosseini, "Construction of Gender."

[389] Ali, *Gender and Human Rights in Islam and International Law: Equal before Allah, Unequal before Man?*

[390] Tucker, *Women, Family, and Gender in Islamic Law*.

of sexual dominion, akin to the dominion of an owner over a slave, in addition to which women are also propertied subjects distinct from slave subjects.[391] I name each of these respectively as narratives of complementarity, human rights, disability and marriage.

2. The Narrative of Complementarity

This approach to sex difference in the law argues for a model of complementarity between the sexes and gender equity amongst women and men. It argues in favour of the differential treatment of men and women in law. For instance, the law regarding *qiwāma* of men over women reflects the natural constitutions of men, as protectors or maintainers, and women, as individuals who must be under the protectorship of maintenance of men.[392] Alongside the legal differences that require women to be under the protection of men, men and women are also considered spiritually equal in the sight of the Creator and the law. Despite the physical differences between men and women and even though their legal obligations differentiated men and women have equal spiritual value in the sight of the law. Ideas of spiritual equality and male-female complementarity are accompanied by a narrative of Muslim exceptionalism as regards sex difference. Islam, as the narrative goes, recognizes the true nature of women and men and offers Muslim women rights and protections that non-Muslim society past and present cannot.[393]

In the complementary narrative[394] female legal subjects are legally distinct from male legal subjects and the physicality of sex difference extends to the very nature of what it is to be a person.

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[391] Ali, *Marriage and Slavery in Early Islam*.
[392] Doi, *Women in Sharī'a (Islamic Law)*.
[393] Ibid.
[394] Ibid.

3. The Rights-Based Narrative

Sardar Ali draws on a number of previous studies of women and Islamic law to show how scriptural claims of equality amongst Muslim men and women are thwarted by legal inequalities in the treatment of sex difference.

> The starting point of a journey towards equal rights later became fossilized and immutable, resulting in perpetuation of gender hierarchies in Islam.[395]

There is equality between the sexes in terms of creation, compensation in the Hereafter, accountability and responsibility[396]. Women have rights in the social and economic spheres, rights to property, inheritance and earnings, as well as the capacity to contract a marriage independently.[397]

The various points of legal discrimination against women may be divided into a hierarchy of rights and a categorisation of entitlements. Non-discriminatory rights include being a legal person, the capacity to contract, acquire, dispose and alienate property and enter into marriage without a guardian.[398] Protective and corrective categories of rights include matters that improved conditions from pre-Islamic times such as prohibiting female infanticide, inheritance (even though only half of what men inherit, consent to marry, dissolution of marriage through *khul'* (ransom) and *tafwīḍ* (delegated divorce), maintenance during marriage, financial support for children.[399] Discriminatory rights

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[395] Ali, *Gender and Human Rights in Islam and International Law: Equal before Allah, Unequal before Man?* , 38.
[396] She refers to Qur'an 33:35, 16:97 and 4:1. See also her note #118 on p. 38.
[397] Ali, *Gender and Human Rights in Islam and International Law: Equal before Allah, Unequal before Man?* , 38, 50.
[398] Ibid., 50-4.
[399] Ibid., 56-62.

include those that emanate out of Qur'an 4:34[400] which establish a gender hierarchy, male dominance in addition to which there are the limits on women's testimony, polygyny, unilateral divorce, sexual segregation, veiling and general male authority over women.[401]

A literal application of Qur'an and ḥadīth has resulted in discriminatory laws that compromise women's human rights. Preferably, interpretation ought to favour women's human rights and realise the potential for laws based on equality in the Islamic tradition.[402] There is a discourse in Islam which bears similarity in some regards to the human rights discourse that has emanated from the west.[403] In a human rights narrative of Muslim women, Islam produces an ideal of women's human rights which is not potentially reconcilable with current formulations of international human rights instruments.[404] It is possible to envision a convergence between the Muslim women's human rights framework and human rights in terms of international human rights conventions. In the resultant combination, Islam is potentially a unique system of enabling rights for women.

In spite of these facilities, the Muslim majority countries where Muslim women's human rights must be realised, Pakistan for instance, the ethical voice of Islam is silenced by patriarchy and a literalist interpretation overrides progressive interpretations of the

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[400] See footnote #213above for the verse. Qur'an 4:34 makes reference to beating a disobedient wife and is the center of extensive debate on women's rights. For more on this see the article by Laury Silvers, "In the Book We Have Left out Nothing: The Ethical Problem of the Existence of 4:34 in the Qur'an," *Comparative Islamic Studies* 2, no. 2 (2006).
[401] Ali, *Gender and Human Rights in Islam and International Law: Equal before Allah, Unequal before Man?* , 62-70.
[402] Ibid., 40.
[403] Ibid., 40.
[404] Ibid., 4.

sources of law.[405] This creates an "Operative Islamic law" which includes principles of Islamic law, secular codes of law and popular custom and usage. In this system Muslim female legal subjects are enmeshed between spiritual equality, social inequality, Islamic notions of rights, international law notions of rights and local custom. The situation may be potentially remedied by recourse to the dynamism of Islamic law and its in-built capacity to respond to changes in time and social need. The tension in the rights-based narrative is that a Muslim woman is the combined subject of a divine law that considers her spiritually equal to her male counterpart and of a human law that discriminates against her in the material world in favour of her male counterpart.

Sardar Ali's 'equal but unequal' narrative works within a human rights framework and is distinct from the normative frameworks in that Muslim woman here are negotiating between the two legal frameworks. In a rights-based narrative the Muslim female legal subject exists between her rights as a Muslim woman (whether or not these have been realised in contemporary Muslim practice) and ideas of rights and equality that originate in human rights norms. Different readings of the negotiation of the paradigms prioritise either Islamic or human rights law. Comparing this approach with the normative approach, there the historical Islamic conceptions of women and the legal facilities available to them suffice, whereas here there is constant negotiation between historical Islamic norms and the evolving needs of Muslim communities adapting to modern gender concerns.

[405] Ibid., 3.

4. A Narrative of Disability

In the third approach women are ascribed a sense of 'disability' as a result of their gender.[406] Judith Tucker's further observations confirm our own; the law speaks in the voice of male experience,[407] employs male norms and male measures, and marginalises the female experience,[408] rendering it a "secondary consideration" and "hostage to male patriarchal priorities".[409] Gendered discursive constructs form part of legal gendering practice[410] and in turn legal discourse effects gendered ways of socializing. [411]

In this narrative female subjectivity is framed as a tension between the woman of the law and the discursive woman of society. Female legal subjects are constituted through a tension between a subject with an impeccable textual pedigree and a patriarchal social subjectivity further conditioned by sexual embodiment and desire. The law confirms that women are autonomous legal subjects but real women do "not always display all the features or characteristics of the legal subject".[412] Women's legal subjectivity is overtaken by her subjectivity as a member of a family and a patriarchal society. Further to which the social setting encroaches on female autonomy, until being female carries a "whiff of disability" that hinders a woman's capacity for full participating in the law.[413]

Between the ascription of full legal capacity to women in their capacity to own and manage property and the derogations of legal capacity in witnessing, inheritance and the guardianship of women by their male relatives, the law struggles with "some obvious

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[406] Tucker, *Women, Family, and Gender in Islamic Law*, 24.
[407] Ibid., 29.
[408] Ibid., 24.
[409] Ibid., 29.
[410] Ibid., 221.
[411] Ibid., 30.
[412] Ibid., 173.
[413] Ibid., 173., and 222

contradictions".[414] Marriage law, for example, is not premised upon ideas of equality, the "marital bargain" being an exchange of "*nafaqa* (maintenance) for absence of *nushūz* (disobedience)".[415] By contrast marital status may also have no bearing on other legal capacities. This narrative confirms some of what we have already seen; property law, for example, gives women legal standing to buy, sell, will and gift property as autonomous individuals even as marriage laws may limit their physical mobility. [416] Further, women retain the freedom to contract property even where marriage laws may preclude women from independently contracting marriage.

These different subjectivities result in a tension in the discursive legal practice.

> … the construction of Woman as a subject of law, as an equal and autonomous individual with full power to act in a legal setting [is]a construct with an impeccable textual pedigree. But this Woman as legal subject ran up against the Woman of patriarchal society whose body and behaviour must be policed and restricted in ways that infringed on her ability to know and to act.[417]

Both aspects of the female subject emerge in the same context, yet are not easily reconciled. The female subject of law is produced in contrasting forms; coded textually as an impeccable subject and constructed discursively through patriarchal norms as a subject with certain disabilities.

Women's "body and behaviour must be policed and restricted"[418] especially in the intersections of space and desire. Yet space does not divide neatly between private and

[414] Ibid., 134.
[415] Ibid., 219.
[416] Ibid., 219.
[417] Ibid., 222.
[418] Ibid., 222.

public space based on gender distinct tasks. It is "a fluid site for interaction between men and women", the nature of the space being determined by "thoughts, attitudes and illicit acts".[419] Jurists create a gendered division of social space where the first zone is characterised by rampant sexual desire which may cause discord and social danger and is therefore strictly regulated and the second is a neutral desire-free zone. It is characterized by familial ties and is lightly regulated. The third is the marital zone characterized by lawful desire.[420] In the narrative of disability in female legal subjectivity, the tension lies in how the patriarchal drive to control women's sexuality repeatedly trumps the egalitarian impulses of the law.[421]

5. The Narrative of Marriage

The fourth and final narrative in our collection of four centers on marriage and it's analogies with slavery in the formative years of Islamic legal thought.[422]

> "There was a vital relationship between enslavement and femaleness as legal disabilities and between slave ownership and marriage as legal institutions. Slaves and women were overlapping categories of legally inferior persons constructed against one another and in relation to one another – sometimes identified, sometimes distinguished. Slavery was frequently analogized to marriage: both were forms of control or dominion exercised by one person over another. The contracting of marriage was parallel to the purchase of a slave and the divorce parallel to freeing a slave … To discuss marriage in the premodern period without reference to slavery

[419] Ibid., 184.
[420] Ibid., 183-4.
[421] Ibid., 222.
[422] Ali, *Marriage and Slavery in Early Islam*. (2010).

would fundamentally distort the jurists' way of thinking; the one was bound up with the other, even more so in legal thinking than in actual practice.[423]

The purchase of a slave and contracting a marriage are parallel conceptual and legal relationships and by drawing parallels between in marriage and slavery jurists also drew parallels between being female i.e. femaleness and being a slave i.e. enslavement. But this parallel is not complete since even marital legal subjectivity is conditioned by other aspects of female legal personhood. The difference between slave subjects and female subjects is evident in the 'whiff of disability' attached to a woman's marital legal capacity and the juristic defense of women's property rights, even though sex norms of gender discrimination may suggest that women occupied weaker social positions.[424] The hierarchical relationship established in marriage and divorce law is "undercut at numerous points by the recognition of female personhood"; the same texts that discuss a marriage of dominion and male prerogative to divorce include, for instance, "stubborn

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[423] Ibid., 8.

[424] Ibid., 191. While slave subjects suffered disabilities arising from the condition of enslavement, they are not similarly protected in terms of their capacity to own property. The distinction between disabilities attached to gender and the juristic defense of women's property rights is not reflective of a paradox, according to Kecia Ali. Rather, she explains, it is "part of a pervasive process of treating women and slaves similarly while also distinguishing them" (ibid., 192.). The distinction was in terms of property "in order to establish boundaries between types of legal subjects", i.e. women and slaves (ibid.). The reason, Ali tells us, is that in the hierarchical concept of marriage in early formative jurisprudence female sexuality was only permissible in the context of male dominion and male sexuality was only permissible where a man had dominion over a woman (ibid., 190.). The hierarchy manifested in two aspects of legal theory on marriage: firstly, marriage functioned, as "a relationship of control, dominion, or ownership conveying sexual lawfulness" (ibid., 189.). This was linked to the unilateral male right to divorce which also became increasingly protected (ibid., 190.). Secondly, the gender differentiated marital claims of husbands and wives worked through "strict separation of men's claims to sex and control over mobility from women's claim to support" (ibid., 189.). Here Ali's quotes Tucker (2010)"whiff of disability", for more see footnote #413above.

recognition of women's selfhood" in terms of property and spiritual accountability. Similarly, jurists insist on "respecting female rights to property, whether inherited, dowered, or earned".[425] And a father's right to compel his virgin daughter to marry coincides with the strong recommendation that she be consulted and her preferences taken into account.[426]

Ali's analysis shows that marriage related subjectivity was not the only form of legal subjectivity women could claim. Women were both marital subjects and propertied subjects. Ali calls these combinations "glimpses of a yearning for mutuality"[427] but not indicators of equality or sameness.[428] They demonstrate that gender egalitarianism and a hierarchy free society were not the guiding elements of jurists' work and certainly not part of the idealized world of the text.[429] The tension this narrative exposes is between woman's subjectivities in marriage and women's subjectivities as property owners. By extension, Kecia Ali's narrative allows us to contemplate a distinction between women's sexual and non-sexual legal subjectivities.

Further to the narratives of gender and the legal subject we have outlined here, much of the academic discussion on legal subjectivity in the study of Islamic law generally addresses the treatment of intent in positive law.[430] There is also discussion on the legal

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[425] Ibid., 191.
[426] Ibid., 191.
[427] Ibid., 190.
[428] Ibid., 190.
[429] Ibid., 191.
[430] For discussions on intent see Johansen, "The Valorisation of the Human Body in Muslim Sunni Law."; Brinkley Messick, "Indexing the Self: Intent and Expression in Islamic Legal Acts," *Islamic Law and Society* 8, no. 2 (2001); Lawrence Rosen, *The Anthropology of Justice : Law as Culture in Islamic Society* (Cambridge; New York: Cambridge University Press, 1989); Paul R. Powers, *Intent in Islamic Law : Motive and Meaning in Medieval Sunni Fiqh* (Leiden; Boston: Brill, 2006); Oussama Arabi,

person at the intersections of western and Islamic notions of the person.[431] By contrast, the studies of gender and the legal subject outlined above, combine positive law and theoretical considerations of women as individuals obligated by the law.

C. Theorising Women's Legal Subjectivity: Rights-based, Impeccable or Patriarchal

What theoretical options do these narratives provide? A rights-based narrative argues toward the possible convergence of a system of women's right in Islam and international human rights instruments on the premise that the ideal woman of Islam is not realised in the patriarchal legal norms that have subsequently come to characterise women in Islamic law.[432] Yet the premise of equality that this argument rests upon is not easy to sustain and at best tentative. It relies on ideas of equality in terms of human creation, moral and spiritual obligations of men and women and in the equality of reward for conforming with the law and punishment for violating the law.[433] However matters of equal reward and accountability do not constitute the doctrine of legal capacity in more than a rudimentary fashion. While the premise of legal accountability or legal personality (*dhimma*) is the original covenant that confirms God's lordship over humanity, the

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"Intention and Method in Sanhuri's Fiqh: Cause as Ulterior Motive," *Islamic Law and Society* 4, no. 2 (1997). For a discussion on *ismā'* also see Johansen, "The Legal Personality (Dhimma) and the Concept of Obligation in Islamic Law: How to Separate Personal Obligations from Goods and Secure Credit for the Insolvent.".

[431] We return to these briefly in our conclusion to this study. See the latter portions of Chapter Eight. See Baudouin Dupret, "The Person and the Law: Contingency, Individuation and the Subject of the Law," in *Standing Trial: Law and the Person in the Modern Middle East*, ed. Baudouin Dupret (London; New York: I.B. Tauris; Palgrave Macmillan, 2004); Mohamed Nachi, "The Articulation of 'I', 'We' and the 'Person': Elements for an Anthropological Approach within Western and Islamic Contexts," in *Standing Trial: Law and the Person in the Modern Middle East*, ed. Baudouin Dupret (London; New York: I.B. Tauris; Palgrave Macmillan, 2004).

[432] Ali, *Gender and Human Rights in Islam and International Law: Equal before Allah, Unequal before Man?* , 38.(S.S. Ali, 2000, p. 38)

[433] Ibid., 36-40, 50.

narrative of human creation presented outside the law does not offer much further support. Arguments that men and women are equally accountable before God rely upon an account of creation that suggests equality and scholars have interpreted Qur'an 4:1[434] as a point of equality in creation.[435] Yet the law itself says little on human creation, further to which *ḥadīth*, prophetic biographies and exegesis offer a narrative of Ḥawwā''s creation from Ādam's rib and as a 'comfort' to him.[436] Creation stories where women are made from the substance of men or for the purpose of giving men comfort are easily read as narratives of inequality and hierarchy in human accountability to God. If the purpose of female creation is to comfort men, and if women are characterised as necessarily 'crooked' or 'curved', as ribs generally are, then women's accountability to God might plausibly be secondary to male accountability, and women's legal capacities accordingly proscribed by the norms of a male centered society. Gaps of this sort give room to jurists to fashion normatively male subjects in opposition to female subjects proscribed by patriarchal social norms. Accordingly some ritual aspects of faith are easily rendered exclusive to men and prohibitive for women. The attendance of congregational prayer is one such matter and we will pay more attention to this in the final chapter. Equal obligation for maintaining the rule of law is another, as we saw in the previous chapter.

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[434] Qur'an 4:1. "O Mankind! Reverence your Guardian-Lord, who created you from a single person, created, of like nature his mate, and from them twain scattered (like seeds) countless men and women. Reverence God through whom you demand your mutual (rights), and (reverence) the wombs (that bore you): for God ever watches over you" (Ali, *The Holy Qur'ān: Translation and Commentary* 4:1.)

[435] For affirmative readings of Qur'an 4;1 see, A. Wadud, *Qur'an and Woman* (Kuala Lumpur: Fajar Bakti, 1992); A. Barlas, *Believing Women in Islam: Unreading Patriarchal Interpretations of the Qur'ān* (Karachi: SAMA, 2002); Riffat Hassan, *Riffat Hassan: Selected Articles* (Grabels: Women Living Under Muslim Laws, 1994).

[436] Refer to the *tafsīr* of ibn Kathir (d.774/1373) on 4:1 and 2:35 for the two narratives of Ḥawwā''s creation. Ismail ibn Umar (d.1373) Ibn Kathir, *Tafsīr Al-Qur'an Al-Azīm* (Beirut: Dar al-Fikr, 1994).

The law requires that a witness not deny a plaintiff the benefit of their testimony yet women who have witnessed a matter that requires prescribed punishment are automatically precluded from this obligation. In the matter of apostasy, an area significant in matters of in spiritual obligation for belief, women's apostasy does not carry the penalty of men's. Similarly, in the requirement to maintain moral integrity women bear the burden of seclusion and veiling making the onus for male morality a largely female obligation.

While the rights-based argument for equality in creation and obligation is not easy to sustain, in some instances the categorisation of rights allows us to characterize the types of differential treatment women receive in the law, non-discriminatory, discriminatory and protective.[437] These categories of rights are a useful tool to differentiate notions of equality and equal right from ideas of sameness, a common accusation that normative scholarship makes against reformist scholarship. The distinction between the first and third categories pertains to ideas of vulnerability and capacities of women or their surroundings. However, the latter category of protection is also a category that is easily manipulated to patriarchal norms as, for instance, in matters women's presence in congregational prayer or veiling and seclusion. In both matters the spiritual and moral accountability for social decorum becomes a primarily female responsibility.

However, we do not intend to argue categorically against a rights approach to women's legal subjectivity. To the contrary, rights approaches have produced significant advances in this regards. For the purposes of our project though, and in order to understand the treatment of sex difference in legal theory and positive law, a rights

[437] See Shaheen Sardar Ali's explanation of these approaches Ali, *Gender and Human Rights in Islam and International Law: Equal before Allah, Unequal before Man?*

approach may not allow us access to the deeper levels of negotiation that are at stake. By contrast to the dichotomy of equality and inequality which bridges the gap using a rights analysis, distinguishing between the textual and social constructs of legal subjectivity may offer a potentially more productive analysis of women as subjects of the law. The disability approach argues for a subject constituted at these two levels.[438] It draws on a notion of legal subjectivity shaped by what Beaudouin Dupret describes as 'the particular conception of a biological being'.[439] Dupret's study of the legal person makes a distinction between the legal *life* of the subject and the legal *fact* of the subject; the interiority of the individual is located in the legal life of the individual and the formal act constructs the legal fact of the individual. The question for us in this distinction pertains to what connects the legal life and the legal fact or the interior intent and exterior action, the two points at which the individual is constituted in law. Understanding the connection will allow us to see where and how social norms, namely norms of sexual difference, enter upon the constitution of the legal subject and how they lead to the differential treatment of women.

We will recall that Tucker finds that when the law isolates an ideal textual female subjectivity, the residual social subject carries a 'whiff of disability' which originates in being female. In this analysis women occupy discrete but different subjectivities; the woman of law and the woman of society, mediated by desire and space, coincide and 'rub up' against each other, and the former appears impeccable.[440] However, we argue, an impeccable subject is not necessarily so. Rather, it cannot remain impeccable in light of

[438] Tucker, *Women, Family, and Gender in Islamic Law*, 134.
[439] Dupret, "The Person and the Law: Contingency, Individuation and the Subject of the Law," 23.
[440] Tucker, *Women, Family, and Gender in Islamic Law*, 222.

what must come prior or subsequent to its constitution. Therefore the argument for an impeccable textual subject holds only when the subject is considered an entirely legal or textual creation, an artifact, with no precedence or consequence outside of law i.e. when the subject exists in the absence of a biological body conceptually constituted (contrary to Dupret). As a conceptually constituted biological body the subject is indeed a legal artifact. However the legal subject of the text does not come into being without the real life women and men of the world outside the text which precedes it. Neither does the legal subject of the text exist without the legal subjects that are intended to follow from the legal manual to the world outside the text. The subject is not hermitically sealed in the text. Rather, even the textual subject is determined by what precedes and follows it. Using the disability argument requires that an impeccable textual subject and a patriarchal social subject must also follow along the lines of a dogmatic, unencumbered or formalistic legal subject that exists outside of any social relations.[441] By contrast, we argue that even the textual subject is patriarchally determined and so the distinction between a textual subject and a socially constituted subject may perhaps be better sustained by recognizing the patriarchal nature of both subjects. While the disability argument cognizes the explicit sexing of the law's social subject it does not recognize a similar, though implicit, sexing of the textual subject. Yet the female legal subject does not reside hermitically in the text. To illustrate, even when the property rights of female legal subjects are jealously guarded in the texts a woman may not realize her property rights unencumbered by what are considered appropriate norms of female behavior,

[441] For more on the characterisation of law's subjects, see Naffine Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin, and the Legal Person* (Oxford; Portland, Or.: Hart Pub., 2009).

whether they are married or otherwise. The constitution of the propertied female legal subject is not free of the patriarchal norms that dictate how and where the legal rights to property may be exercised by a woman, more so when the women in question is also a wife (more on this below). So, rather than a dissonance between the textual and social subjects, as the disability narrative suggests, the legal subject and the social subject coincide in how the law manages women's actions to produce appropriately female and male legal subjects. The inconsistency between the social and the textual subjects only occurs when we ignore the patriarchy in the textual subject.

Tucker's attention to space and desire is valuable to demonstrate how the female legal subject is constituted in the links between women of the law and the women of society. Thoughts, attitudes and actions are differentially determined in the graded zones of desire and women's subjectivities change accordingly. Tucker's approach invites us to a previously unexplored analysis of desire and subjectivity. Studies of intent have not examined intent in terms of sexuality, yet intent relates to all forms of acts, sexual and otherwise. Tucker`s connection between sexuality and desire opens a new avenue of thought that suggests a link between intent, sexual difference and legal subjectivity. However, the idea of an impeccable textual subject would also benefit from an assessment of its complexity in that the subject is never singularly or simply constituted and is always intended to achieve wider aims, namely to maintain social norms or, put differently, to accommodate the social facts that the law attaches to the legal subject. Tucker recognises the subject of patriarchal society but in suggesting as impeccable textual subject she risks losing sight of the complexity of the textual subject. Indeed, the complexity of female legal subjectivity outlined in the chapters on positive law and legal

theory betray the simple impeccable textual subjectivity that the law may appear to suggest for women. The complexity of the textual subject occurs because, in addition to determining legal capacities and apportioning rights, the constitution of the textual subject is also intended to fashion an appropriately Islamic society, the norms of which are determined by the jurists.

Evaluating the final narrative, Kecia Ali's analogy of marriage and slavery explains two aspects of the appropriately Islamic society that the law concerns itself with viz. sexual norms and property norms. Sexual dominion and property ownership are the defining parameters of women as subjects of marriage and divorce law. The appropriately Islamic norm of marriage is that lawful sexuality occurs only when men hold dominion over women and, as much as women may own other forms of property, they do not, by default according to the law, own the bond of marriage (the *milk* of *nikāḥ).* Maleness means owning the bond of marriage and femaleness means not owning the bond of marriage. Further, being enslaved means incapacity for owning property. Yet, in a curious convergence of these two aspects of legal capacity, as Jīwan explained in Chapter Four, a male slave owns the property that forms the bond of marriage even if he is married to a free woman. Accordingly, in marriage the social norm is that the ownership established by *nikāḥ* is exclusively male whether the male person is slave or free, Muslim or not.

This suggests that a wife's legal subjectivity in marriage is different from legal capacities in other areas of laws. Dissimilar subjectivities reside simultaneously in the female legal subject. Accordingly, legal subjectivities also do not remain static or consistent in a single individual or even at a single moment. The final result of this

complexity is the constitution of the female legal subject in multiple ways and according to specific legal situations. By distinguishing between women who are wives (and we may extend this to slave women under sexual dominion i.e. concubines) and women who own property, Ali also makes evident the multiple nature of legal subjectivity. The study of the laws of marriage uncovers the unexamined assumptions that inform the laws use of sex difference, property and marriage. At the nexus of these understandings Kecia Ali allows us to contemplate more than a single legal subjectivity for women viz. marital subjectivity and propertied subjectivity. Marriage and its affects as impediments upon a woman's *ahliyya* is potentially one form of a uniquely female legal capacity. Bringing together the narratives of marriage and disability, we may consider the status of wife as a particular aspect of female disability which does not extend beyond the confines of the marital subjectivity of a wife or the sexual legal subjectivity of a woman. Juristic treatment of the female subject of marriage and divorce law renders femaleness a legal disability. But this analysis does not extend to all aspects of a woman since this subjectivity is conditioned by other aspects of female legal personhood. The legal capacities of women as wife, however, are distinct from the legal capacities of a woman as a property owner even as these two subjectivities reside in a single individual simultaneously. Indeed at times these two subjectivities may conflict. Over the next few pages we will test the idea that marriage is a unique form of *ahliyya* for women and determine if indeed we may suggest that marriage is an impediment upon a woman's legal capacity.

D. Marriage as Legal Incapacity (Impediment) for Women[442]

In addition to our conclusions here, we recall our discussion on *milk al-nikāḥ* in Chapter Five and continue further into the discussion on marriage in the *Hidāya*. We found that while female reproductive biology does not derogate from a woman's legal capacity as a legal subject generally, the denial of control over sexual desire derogates from the legal capacity of a wife. The juristic assessment of sexual desire affects a change in a woman's capacity to act namely to her contractual capacity in marriage, in other words it affects her *ahliyyat al-adā'*.

The discussion on marriage[443] in Marghīnānī's *Hidāya* includes sections on the contract and prohibited degrees of marriage, guardianship (including legal agency) and equal social status, dower, the marriage of slaves, polytheists and fair treatment of multiple spouses. Marriage takes the form of a contract consisting of formal expressions of offer and acceptance, both indicating consent, rather than the foundational inward

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[442] The reference for the *Hidāya* in this discussion on *nikāḥ* and *ṭalāq* is the Amal Press publication of 2006 and 2008.

[443] al-Marghīnānī, *Al-Hidāyah -the Guidance: A Translation of Al-Hidāyah Fi Sharḥ Bidāyat Al-Mubtadī, a Classical Manual of Hanafī Law*, vol. 1, Kitāb al-Nikāḥ, 475. The translation for *ṭalāq* here is divorce, likely because the text discusses all forms of marital dissolution under a single heading, *Kitāb al-Ṭalāq* and also because *ṭalāq* is the most popular form of dissolution. However, the legal definition of divorce in Western law pertains to the dissolution of a marriage through a court and *ṭalāq* is not generally understood as a formal, court procedure. Therefore alternate translation is required when referring to *ṭalāq*. We need to distinguish between *ṭalāq* as a unilateral repudiation that dissolves a marriage and *ṭalāq* as a general reference to marital dissolution or divorce. As a particular form of marital resolution, *ṭalāq* entails the unilateral termination of the marriage by a husband through pronouncement or, if it is delegated, by the delegated party through pronouncement. In our commentary and analysis here we use 'unilateral repudiation' or *ṭalāq* to refer to this form of dissolution and we use 'divorce' or dissolution for the general termination of marriage which includes many forms. By contrast however, the translator uses divorce as *ṭalāq* and we have maintained that form in the quoted texts.

aspects of intent.[444] As we noted in the last chapter, a woman may delegate all her legal matters to an agent and so too her marriage. The section "guardianship and equality" in the *Hidāya*, however, leads with an affirmation; an adult woman of sound mind, whether married previously or not, may contract a marriage by virtue of her own consent. [445] Much like the disclaimer on the effects of bleeding from the womb on legal capacity in classical legal theory,[446] the opening statement in the discussion on marriage dispels the suggestion that an adult woman be proscribed in her capacity to contract a marriage. The *Ḥanafī* opinion, we read further, is divided between Abū Ḥanīfa and Abū Yūsuf, his student, who requires the contract also be consented to by her guardian. The scholars reason that permissibility stems from the nature of the act which in this case pertains to something that is purely her personal right. Being sane and holding discretion, she possesses the legal capacity for contracting marriage. That this may not have actually been the case in practice, however, becomes evident when the text explains further that the guardian is asked to undertake her marriage so that she is not characterised as being immodest.[447] While *Ḥanafī* law makes no requirement for a guardian or an agent in marriage, a woman is encouraged to marry through her guardian to maintain her modesty.

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[444] Ibid., vol. 1, Kitāb al-Nikāḥ, footnote 1, 475.

[445] In this instance of references to Marghinānī the bold text indicates the *matn* and the remainder the *sharḥ*. **"[t]he *nikāḥ* of a sane [*'āqil*] and major [*bāligh*], free [*ḥurra*] woman stands concluded, when it is with her consent, even if the *walī* … did not undertake this contract. This is so according to Abū Ḥanīfah and Abū Yūsuf … recorded as the *ẓāhir al-riwāyah.* It is narrated from Abū Yūsuf … that [the contract] is not concluded, while according to Muḥammad … it is concluded but is suspended (*mawqūf*, subject to ratification by the *walī*)", (**ibid., vol. 1, Kitāb al-Nikāḥ, 491.).

[446] Jīwan, *Nūr Al-Anwār Ma'a Ḥāshīyat Qamar Al-Aqmār* 295.

[447] For the *Ḥanafī*s: "The basis for permissibility (according to the *ẓāhir al-riwāya*) is that she has undertaken an act that pertains to something that is purely her personal right, and she possesses the legal capacity to do so being sane and in possession of discretion. It

It appears, however, that Abū Ḥanīfa was amongst the unique proponents of the view that an adult woman may independently contract her marriage (as a man may). His reasoning and that of the *Ḥanafī* school in general, pertains to a woman being addressed directly by the lawgiver, and her "maturity of thought". These render her "free" with respect to marriage and to transact her property. Accordingly,

> **It is not permitted to the walī to force a virgin who is a major to marry.** Al-Shāfi'ī (God bless him) disagrees. He decides the issue on the analogy of the minor girl. The reason is that the minor is unaware of the complexities of *nikāḥ* due to lack of experience. it is also for this reason that the father takes possession of the dower (*ṣadāq*; *maḥr*) without her asking him to do so. [By contrast] We maintain that she is a freewoman, addressed directly by the communication (from the Lawgiver)[448], therefore no one has authority over her to compel her. The authority over the minor [by contrast][449] is due to the lack of maturity of thought, which becomes complete upon *bulūgh* (attaining her puberty) on the evidence that the communication (*khiṭāb*) from the Lawgiver becomes directed towards her. She is therefore, just like a young man, and her capacity for being free with respect to

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is for the same reason that she can undertake transactions in wealth and possesses the right to choose a husband, the *walī* is asked to undertake her marriage so that she is not characterised as being immodest. Thereafter, according to the *ẓāhir al-riwāya,* there is no difference between a husband who is equal in status to her and one who is not, however, the *walī* has the right to object when a husband is not equal in status. It is also recorded from Abū Ḥanīfah and Abū Yūsuf … that in the case of a husband of lesser status it is not permitted, because there are many matters (between husband and wife) that cannot be resolved by resort to the law. It is reported that Muḥammad [al-Shaybānī]… withdrew his opinion and upheld the one followed by the two jurists." al-Marghīnānī, *Al-Hidāyah -the Guidance: A Translation of Al-Hidāyah Fi Sharḥ Bidāyat Al-Mubtadī, a Classical Manual of Hanafī Law*, vol. 1, Kitāb al-Nikāḥ, 491.

[448] The Arabic does not include the word 'lawgiver', the translator adds it to explain *al-khitāb.*

[449] I have added this phrase in parenthesis for clarity.

> marriage is just like her freedom to undertake transactions in her wealth. The father takes possession of her *ṣadāq* on the basis of her implied consent for he cannot do so if she forbids it.[450]

The discussion presents the *Ḥanafī* position and its justifications alongside the contrary opinions with the effect of confirming the *Ḥanafī* position but also showing how it may in practice be proscribed in order to align more closely with the opinion of the contrary schools. Contrary to the *Ḥanafī* opinion, the *Hidāya* tells, us, the *Mālikī* and *Shāfi'ī*[451] schools do not provide for a woman to contract her marriage independent of a male guardian because the objectives of marriage are upset when assigned to women.[452] Further a woman may not contract the marriage of another woman on her behalf. Women, in the jurists' assessment, being weak of reason are prone to deceit and thereby to defeat the benefits of marriage, amongst these procreation.[453] The contrast between the *Ḥanafī,* and *Mālikī* and *Shāfi'ī* positions rests on the objection to delegating to women the objectives of marriage. The latter two do not consider women capable of this capacity and therefore consider a marriage contracted without the guardian invalid.

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[450] al-Marghīnānī, *Al-Hidāyah -the Guidance: A Translation of Al-Hidāyah Fi Sharḥ Bidāyat Al-Mubtadī, a Classical Manual of Hanafī Law*, vol. 1, Kitāb al-Nikāḥ, 491.

[451] By contrast, the view of Mālik and Shāfi'ī is that "*nikāḥ* is not concluded at all through a statement of women, because a *nikāḥ* is intended to meet certain objectives and delegating such authority to them upsets these objectives. Muḥammad … said that such upsetting of objectives is remedied after ratification of the contract by the *walī*.", (ibid., vol.1, Kitāb al-Nikāḥ, 491.).

[452] The *Hidāya* isn't clear on what these objectives are, but a commentary in the Arabic text of the undated Maktaba Raḥmāniya publication suggests that the objectives pertain to the contract and guardianship. See al-Marghīnānī, Asqalānī, and Laknawī, *Al-Hidāya: (Ma'a Al-Dirāya Ma'a Al-Ḥāshiya)*.

[453] al-Marghīnānī, *Al-Hidāyah -the Guidance: A Translation of Al-Hidāyah Fi Sharḥ Bidāyat Al-Mubtadī, a Classical Manual of Hanafī Law*, vol.1, Kitāb al-Nikāḥ, 491.

There are parallels in a woman's capacity to conduct her own marriage and manage her own property. Where the opinion of the school supports a woman's capacity to conduct her own marriage, it also supports, to varying degrees, her capacity over her property. The *Shāfi'ī* school prevents an adult woman from contracting her own marriage and also assigns her guardian her dower, by contrast in the *Ḥanafī* school an adult woman can contract her own marriage with no guardian and the law assigns her dower to her since her capacities for marriage and property are the same. The degree to which a guardian may compel a mature i.e. post-pubescent woman, virgin or otherwise, to accept a marriage appears in the *Ḥanafī* and *Shāfi'ī* schools, to parallel the extent to which she may manage her own property.[454] The *Shāfi'ī* school places an adult women under the marital guardianship of her guardian since she lacks experience with marriage and with property.[455] Consequently, the *Ḥanafī* school is unique in granting women legal capacity for marriage. The difference between the schools explains how marriage, its purposes, femaleness and the matter of women's consent was understood by the jurists. In the *Ḥanafī* school she is considered an independent individual directly addressed by God and therefore obligated to God. She is also equally capacitated in her property and in her self. Other schools, the *Hidāya* tells us, presume that femaleness entails not knowing or lack of awareness about the contract of marriage and property.

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[454] Kecia Ali makes a similar observation of *Shāfi'ī* law. See Ali, *Marriage and Slavery in Early Islam*, 58.

[455] Al-Shāfi'ī "… disagrees [and a major virgin woman may, like a minor virgin, be forced to marry], He decides the issue on the analogy of a minor girl. The reason is that the minor is unaware of the complexities of *nikāḥ* due to lack of experience. It is also for this reason that her father takes possession of her dower (*ṣadāq, mahr*) without her asking him to do so", (al-Marghīnānī, *Al-Hidāyah -the Guidance: A Translation of Al-Hidāyah Fi Sharḥ Bidāyat Al-Mubtadī, a Classical Manual of Hanafī Law*, vol.1, Kitāb al-Nikāḥ, 491.).

The contractual exchange in marriage is between sexual access and dower, through which is established the wife's confinement (*iḥtibās*) in the conjugal home so to be available to the husband. Her availability may earn her maintenance and her absence may cause her to lose maintenance[456] but his failure to pay maintenance does not result in her capacity to claim maintenance, borrow against his liability to her or to terminate the contract except through a judge. The *Hidāya* explains this is because maintenance is not a counter-value for confinement but a grant (*ṣillat*), and the demand for payment only emerges out of adjudication or a settlement (*ṣulḥ)*. Legally it is much like a gift which is also not obligatory.[457] The maintenance may be rendered a liability only through a judge's ruling and she may borrow against it. However, his failure to pay maintenance does not constitute separation because their separation would mean the cessation of the main purpose of marriage, procreation, and that is thought to be a greater harm than the loss of her wealth.[458] The juristic argument is that maintenance if a secondary matter to procreation.[459]

Other restrictions in marriage include restrict a woman's sociality. Her husband may not restrict interaction with certain degrees of her family but her confinement in the home

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[456] Absence from the conjugal home results in loss of confinement and consequently loss of maintenance, (al-Marghīnānī, *Al-Hidāyah -the Guidance: A Translation of Al-Hidāyah Fi Sharḥ Bidāyat Al-Mubtadī, a Classical Manual of Hanafī Law*, Kitāb al-Ṭalāq, 86.). The law considers other forms of absence too so that her imprisonment for debt also results in a loss of confinement and therefore maintenance, similarly for when she is abducted (ibid., 87.). The pilgrimage or *Ḥajj*, by contrast, is a valid excuse for a wife's absence and therefore does not cause her loss of the maintenance she would normally receive when she resides in the home. It does not allow her, however, to receive maintenance that meets the needs of her travel. Similarly if she is ill in her husband's home, maintenance continues, (ibid., 87.).

[457] Ibid., Kitāb al-Ṭalāq, 89.

[458] Ibid.

[459] Ibid., 89-90.

allows him the capacity to decide who she may receive in the home, terms for leaving the home, for her travel, for pilgrimage and for congregational prayer.[460] A husband is assumed to have the capacity to impose a punishment upon his wife but required to maintain the limits of safety.[461] A woman does not participate in battle without the permission of her husband[462] nor does she fast supererogatory fasts without his assent. Finally, he may continue to marry up to three more times while married to her, further to which he may be sexual with as many concubines as means allow. Her sexuality remains, by contrast exclusive to him. The effect of the various limitations on a woman's marital capacities, the proscription on her movement, the requirement for sexual availability and sexual exclusivity fashion a set of criteria that apply only to women when they are wives. The capacity for control over another independent adults' sociality, mobility, exercise of religious obligation and sexuality applies uniquely to husbands over wives.[463] This opens the possibility that marriage functions as a form of privileged legal facility for a husband i.e. *milk al-nikāḥ* and a corollary unique form of legal incapacity for women, i.e. wife.

The incapacity that results from this, namely the effect of *nikāḥ* on women's *ahliyyat al-adā'* (legal capacity to act), is apparent in the laws that determine how a woman may exit marriage. The rulings on *ṭalāq*, which form the most substantive aspect of laws on divorce or dissolution of marriage, are framed on the assumption that *ṭalāq* is exercised

[460] Ibid., 87.
[461] Ibid., vol. 2, Kitāb al-Siyar, 243.
[462] Ibid., Kitāb al-Siyar, 293.
[463] We take note of a similar arrangement between male owners and female slaves which analysis is also likely to tell us more about the dynamic of sexuality, sex difference and authority, but we do not have the space for that discussion here.

naturally by husbands and only through delegation by wives.[464] Accordingly, the text assumes that the husband has the legal capacity for *ṭalāq*.[465] The discussion on a husband's capacity for repudiation rests upon the physical and mental sufficiencies that render his words effective and we come across familiar references to legal subjects first encountered in the discussion on *ahliyya* in legal theory.

> **The divorce[466] pronounced by any husband is valid if he is sane and major. The divorce pronounced by a minor, a mentally incompetent person and one doing so in sleep is not valid,** due to the words of the Prophet (God bless him and grant him peace), "All divorce is permitted, except the divorce of a minor and a mentally incompetent person." The reason is that legal capacity depends on the rational faculty (*'aql*) with which one can discriminate, and these two lack this faculty. **The person asleep cannot exercise a choice** … **The divorce of the**

[464] al-Marghīnānī, *Al-Hidāyah -the Guidance: A Translation of Al-Hidāyah Fi Sharḥ Bidāyat Al-Mubtadī, a Classical Manual of Hanafī Law*, vol. 1, Kitāb al-Ṭalāq.Further, third parties such as fathers, brother or agents may also be similarly delegated the capacity for repudiating a wife from her husband.

[465] Summarily, the discussion on marital dissolution and begins with the forms of *ṭalāq*, the physical and mental sufficiencies that affect a husband's capacity for repudiation and continues to explain matters of form, time, utterance and intention that render *ṭalāq* effective. Thereafter it explains the forms of delegated *ṭalāq* a wife may receive, (by choice, by her hand, or at her will), other forms of *ṭalāq* (by oath or condition), other forms of marital dissolution, including *li'ān* (imprecation), *ẓihār* (injurious assimilation) and *'īlā'* (vow of continence), and general matters consequential to the dissolution of marriage. The result of *ṭalāq* is either revocable and permits the couples to resume marital relations under specified conditions or irrevocable and precludes reconciliation unless further conditions are met.

[466] The translator here uses divorce as *ṭalāq*.

person coerced takes effect …The divorce pronounced by an intoxicated person takes effect[467] … **Divorce by a dumb [mute] person takes effect.**[468]

Evidently, minors, the mentally incompetent and sleeping persons lack the rational capacities and their *ṭalāq* is not permitted, but a husband who is drunk or under coercion may pronounce a legally valid *ṭalāq*. By contrast, the text explains, a wife holds the capacity for *ṭalāq* only as it is delegated to her. Given that the law insists that divorce rests on legal capacity, which in turns rests on rational faculty or intellect, the reason for excluding women who posses both is unclear.[469] As much as the text reveals here is that *ṭalāq* is not a legal capacity we may assume for female legal subjects in a marriage. Similarly most other forms of marital dissolution listed in the *Hidāya,* amongst them *li'ān*, *ẓihār*, *'īlā'* (imprecation, injurious assimilation and a vow of continence respectively) are exclusively male prerogatives. Only *khul'* (dissolution through ransom or compensation) is a form of dissolution that women may exercise without delegation.

On *khul'* the text says …

When the spouses face constant discord and are apprehensive that they will not be able to maintain the limits imposed by Allah (*Ḥudūd Allah*) then there is no harm if she seeks to redeem herself from him through wealth on account of which he will let her go. This is based on the words of the Exalted "If ye (judges) do indeed fear that they would be unable to keep the limits ordained by Allah, there is no blame in either of them if she gives something for her

[467] Drunkenness is an illegal and therefore not legally recognised state (al-Marghīnānī, *Al-Hidāyah -the Guidance: A Translation of Al-Hidāyah Fi Sharḥ Bidāyat Al-Mubtadī, a Classical Manual of Hanafī Law*, vol.1, 565-7.).
[468] Ibid., 565-7.
[469] It is of-course clear when we consider the nature of the marriage contract as a contract of ownership (*milk*), as Kecia Ali has explained.

> freedom. These are the limits ordained by Allah so do not transgress them. If any do transgress the limits ordained by Allah, such persons wrong (themselves as well as other wrongdoers.)" [Qur'an 2:229].[470]

A woman may redeem herself (meaning to reclaim sexual autonomy) from a marriage contract by paying her husband to release her from his *milk* (ownership) in marriage. The effect is an irrevocable divorce imposing further conditions for the couple to reconcile. The next discussion, on the nature of exchange at dissolution, confirms that *milk* resides in the husband and women may only terminate the ownership by compensating the owner for the loss of his initial payment at marriage, i.e. the *mahr*. The discussion on what validates the exchange in *khul'* clarifies the limits on a wife's capacity to terminate the legal capacity her husband acquired ro sex with her when he paid the *mahr*.

> As for the ownership of (rights to) sex [*milk al-buḍ'*], they are not marketable [*ghayr mutaqawwam* by the wife] at the time of termination of the relationship, as we will mention. This is distinguished from *nikāḥ,* because rights to sex at the time of entry into the contract are marketable [*li anna al-buḍ' fī ḥāl al-dukhūl mutaqawwam* by the wife]. The legal basis (*fiqh*) in this is that it [the right to sex] is something honourable and it is not lawful to own it without paying [the wife] a counter-value [*'iwaḍ*] in recognition of its honour. As for the extinction of the rights [upon dissolution of the contract] it is in itself something honourable [for the wife to acquire], therefore there is no need to create a liability for wealth [in the husband].[471]

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[470] al-Marghīnānī, *Al-Hidāyah -the Guidance: A Translation of Al-Hidāyah Fi Sharḥ Bidāyat Al-Mubtadī, a Classical Manual of Hanafī Law*, vol. 2, 30-1.
[471] Ibid., vol. 2, 31.

In other words, a wife contracts the right to her sex upon entry into the marriage but has no similar capacity to contract termination of the right to her sex. Accordingly, a husband need not be indebted to her for the extinction of the right. Rather than the capacity to terminate the right to her sex, a wife is given the capacity to compensate the husband for the counter value he paid for the right upon marriage, i.e. the *mahr*. Accordingly she pays the counter-value for release from the tie of marriage and *khul'* entails the payment of wealth by the wife in exchange for freedom from the marriage tie. The juristic view is that the exchange is between his loss of the right to her sex and her returning the counter-value paid for the his same right at the time of marriage. At issue is that a woman does not hold the capacity to terminate her husband's right to her sex and so to terminate a marriage. However, as a person with legal capacity for property, she possesses her otherwise regular right to transact property and here she uses that capacity to compensate the husband by payment of property for the loss of his right or for his agreement to relinquish his right to her sex.[472] Should she pay the compensation, *khul'* is effective. The exchange of wealth [*al-māl*] for self [*al-nafs*], after which the husband owns one (wealth) and she the other (herself), confirms the equality of the exchange.[473]

This discussion gives insight into how jurists understood *milk al-buḍ'*, the ownership of exclusive sexual access to a wife's vagina that a husband acquires through marriage

[472] This is different from repudiation or *ṭalāq* which ordinarily does not entail compensation as it is from *khul'* which ordinarily entails a wife separating from her husband by compensating him.

[473] al-Marghīnānī, *Al-Hidāyah -the Guidance: A Translation of Al-Hidāyah Fi Sharḥ Bidāyat Al-Mubtadī, a Classical Manual of Hanafī Law*, vol.2, 30. However, in the event that the wife makes the payment in unlawful goods, such as wine, pork or carrion, she is free from the obligation to pay compensation, but the divorce stands as a revocable divorce. This is because the condition of payment at the end of a contract is not considered necessary by the jurists. Merely regaining self-ownership on the part of the wife is considered honourable enough to avoid compensation,(ibid., vol. 2, 30.).

(*nikāḥ*). Payment is thought to honour its acquisition and relinquishing it through repudiation (*ṭalāq*) or compensation provided by the wife (*khul'*), is thought to be an honourable enough return for a woman thus relinquished to preclude further payment by the husband. We will recall also that Kāsānī described the *mahr* as a payment in exchange for the humiliation that a woman suffers through marriage.[474] His description seems appropriate now that a wife does not hold the legal capacity to 'market' or in other words trade or negotiate access to sex with her once she is in a marriage contract. Only a husband may transact upon this. Perhaps the best explanation for the automatic assumption of repudiation as a capacity almost exclusively in the domain of the husband is that marriage functions contractually as a consumptive contract located in the ownership of access to the vagina. The exchange is between a commodity (dower or *maḥr*) and a non-commodity i.e., authority for exclusive rights to sexual access.[475] There are only two options to terminate this ownership and both rest on the owner's acquiescence. The first is *ṭalāq* (unilateral repudiation), where he exercises his unilateral capacity to terminate his ownership through repudiation, or delegated *ṭalāq,* where he cedes the option for repudiation to his wife or another person. The second is *khul',* where he receives compensation for relinquishing the right and for the payment he first made to acquire the right.

Kecia Ali's study of marriage explains how the restrictions of the marriage contract compromise a women's agency:

> A model of autonomous individuals with full power to negotiate contracts does not account for the ways that female agency is constrained, not only with regard

[474] See footnote #306 above. .
[475] See footnotes # 304 and 306 above.

> to giving or withholding assent to the formation of marriage but also to acting once the contract exists. Women fundamentally have lesser rights both while a marriage endures and when ending it. All spousal negotiations are affected by the imbalance of power … in the Muslim sources, the male privilege of declaring or withholding divorce constrains married women's actions. There can be no level playing field.[476]

This points to the anomalous nature of the legal capacity a woman acquires through the contract of marriage; she may enter the contract independently but is unable to equally exit the contract independently. A man may do both. These restrictions does not arise out of the theoretical matters of legal capacity, namely, sufficiency in body and sufficiency in reason, yet they constitute a significant impediment on a woman's legal capacity. Abū Ḥanīfa argues that her access into the marriage emanates from the action that pertains solely to her person and being an adult of sound reason she may not be constrained, yet the jurists do not apply a similar reasoning to her exit from the contract. At this point in the marriage the law directs itself instead to matters of authority and control over the bond of marriage which it constructs as a male prerogative. The bond of marriage is owned by a husband; it entails exclusive sexual access, control over her domicile and mobility and finally over her exit from the contract making the legal subject "wife" a particularly proscribed, if not significantly interdicted, legal subject. While she continues to have legal capacity over her property, her legal capacity over her personal sexuality and her marital state is curtailed, the impediment being in the nature of the marriage contract.

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[476] Ali, *Marriage and Slavery in Early Islam*, 195.

However these proscriptions are not acknowledged for their impact on women's legal capacity and the distinct form of legal capacity they create is unaccounted for in legal theory. They differentiate women's legal capacity into two forms, that within marriage and that outside of marriage but the curtailment through marriage is never conceptualized as a separate legal status or as a specific legal impediment that is tied to being female in the way, for example, that the law assigns a specific status to enslavement, minority or mental incompetence. By the absence of this acknowledgement, the law formulates a fiction that women's legal capacity is not differentially constructed. Yet marriage functions as a sex specific legal impediment to a woman's *ahliyya* and *milk al-nikāḥ* is a privileged form of male legal capacity.

E. Conclusion

This study of women in Islamic law is frequently framed as a duality in female legal subjectivity. This leaves us with what appears as an ostensibly impeccable female textual subject (according to Tucker), a female subject that is equal in the sight of God (according to Sardar Ali) or a female subject complementary to men (according to Doi). By contrast, Kecia Ali suggests that the dichotomy of subjectivities do not indicate tension but the absence of equality in the historic constitution of the legal subject.[477] Further to this we have also argued that the idea of equal spirituality is questionable when spiritual subjects do not have equal access to acts of spiritual value and where spirituality must be differentiated by gender. Nonetheless, the *façade* of equality is maintained because the jurists fail to acknowledge their differential treatment of women's legal capacities whether in the doctrine of *ahliyya* or the discussion on *ḥijr* (legal interdiction).

[477] Ziba Mir-Hosseini has also pointed to the historical absence of equality. See Mir-Hosseini, "Construction of Gender."

To conclude in a manner that makes way for some theorising about the female legal subject of Islamic law, and allows us to comment on the significant shift between the absence of femaleness as a category of legal incapacity in Jīwan and the contrary in Nyazee, we may begin to argue that the narrative of tension in studies of women and Islamic law may be read as evidence, instead, of firstly, the difference between legal theory and positive law on women as subjects of law. While legal theory makes no explicit distinction between women and other legal subjects, thus suggesting equality, positive law makes obvious distinctions pointing directly to inequality. Because legal theory does not acknowledge that women occupy different legal capacities from men, the study of women in law is necessarily trapped in the narrative of tension between equality and inequality. Yet, as our examination has shown, the notion of equality is only tenuous.

Secondly, the narratives of tension evidence the situationally differentiated legal subjectivities of women as property holders and wives. We find a textual subject, a social subject (both identified by Tucker), a marital legal status, and propertied legal status (both identified by Tucker and Kecia Ali), suggesting that the female legal subject of Islamic law is not a simply or singularly constituted legal subject that moves in time with the legal identity 'woman'. The evidence supports a notion of subjectivity that is multiple and changing even if the biological female person holding the differing legal subjectivity is constant.

Finally, our exploration of marriage as a particular form of legal subjectivity illustrates the laws implicit sexing of the subject; wives are significantly incapacitated by virtue of marriage and the marriage contract. While a woman may contract herself into marriage she may not with the same ease of facility terminate the same contract. In effect

the marriage contract entails an unacknowledged from of legal inhibition. Yet this inhibition is not comprehensive. It is exercised through a husband's authority over the marriage bond which includes the capacity to limit his wife' public appearances, her ability to travel, physically mobility outside home, her capacity for supererogatory acts of worship and finally her exit from the contract. We recall our earlier distinction between sexual reproduction (menstruation and post partum bleeding) and sexual authority (marriage and concubinage). Our study here confirms our earlier suggestion that the first does not derogate from legal capacity but the second does. Marriage conveys sexual authority over a woman which, the laws on divorce tell us, she is not at liberty to discard. Instead the limitations on a wife do not preclude her other capacities pertaining to property which she may also exercise to end her marriage.

This apparent contradiction reflects the multiple and situational nature of women's legal capacity, and perhaps also the reason why 'wife' or 'femaleness' do not feature as a category of legal inhibition even though being female in a marriage contract entails significant impediments upon a woman's legal capacities. Our next task is to pay closer attention to the absence of the category women or femaleness in historical legal theory and its feature in contemporary legal theory, namely the narrative that produces women with "imperfect legal capacity".

Chapter Seven

Between Classical and Contemporary Legal Theory and Positive Law

A. Introduction

In the conceptual debate on women the contending ideas are firstly, a conservative view of an historical ideal time where women adhered to 'proper' roles and which conservative thought argues women should be encouraged to return to now, and secondly, the 'liberal' view that men historically deprived women of the rights that they themselves enjoyed, which now implies that reform is necessary.[478] Yet both arguments are problematic. The androcentric nature of creation narratives and the patriarchal framework of historical legal thought preclude the historical idealism of both arguments. The male-centered foundational assumptions of the law frame disadvantageous gendered norms whose historical authority leaves little space to argue for their once egalitarian nature or for re-conceptualizing them.[479] Our reading of legal theory however tells us that while historical norms of sex difference may not be desirable for those of us who advocate equal treatment for women in the law, past legal formulations may be useful in the instance where they make sex difference less definitive of disadvantage than we find today. The historical formulation of a doctrine of legal capacity that does not formulate femaleness as point of legal incapacity accompanied by the disclaimer on bleeding from the womb as a point of legal incapacity are two of these instances. They suggest a potentially useful alternative narrative of sex difference than that suggested by the two contemporary narratives of women's 'imperfect' or 'indistinct' legal capacity.

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[478] Spectorsky, *Women in Classical Islamic Law: A Survey of the Sources*, ix-x.
[479] Ali also highlights the androcentric nature of the Qur'an, Ali, *Sexual Ethics and Islam: Feminist Reflections on Qur'an, Hadith, and Jurisprudence*, 132.

Therefore, this chapter is a comparison of classical and contemporary treatments of sex difference. It offers suggestions for the absence of a legal category specific to women in classical legal theory. We also compare the absence of a historical legal category for women with the distinctive 'imperfect legal capacity' for women in contemporary legal theory and what the effects of these approaches may be. The former I will argue is open and unpredictable but also discursive and preferable. The latter is rigid and static relying on matters of sex based identity. We will also make note of how the social, political and economic transformations over time contribute to transformations in legal thought on women's legal capacity. Finally, to return to the primary objective of our study, we offer a thick narrative of sex difference in positive law and legal theory.

B. Classical Legal Theory: The Absence of Category for Women

In a brief study of legal capacity in *Mālikī* law, Cristina De La Puente uses the differentiated legal subjectivities available to women to argue that all judicial persons who are not free adult Muslim males have limitations on the legal capacity to act dependent on the action.[480] Other legal subjects …

> … by themselves, cannot realise certain legal acts which affect them personally or even if they are able to carry these out they are not permitted to do so in all occasions and in all matters.[481]

Based on the limitations on *Mālikī* women to contract their property until after marriage, she explains, women do not have a total or "complete juridical capacity". In her correct observation, even if a wife may not need her husband's authority to manage her property, she does require his permission to leave the house, a curtailment upon her mobility. In

[480] De La Puente, "Juridical Sources for the Study of Women."
[481] Ibid., 97.

Ḥanafī law, which we will recall is our primary area of inquiry, a woman also requires her husband's permission to leave the house.[482] De La Puente says this is "equivalent to partial or complete inability to freely exercise her rights",[483] the husband's permission amounting to the husband's participation in the wife's capacity to act. De La Puente's argument is that gender is a principal cause of limitation on a person's capacity.[484] This assumes that femaleness always entails difference in legal capacity. Yet this is not always the case. To illustrate, both *Ḥanafī* and *Mālikī* law on evidence work from with a presumption against women as witnesses. However, they also specify when women's testimony is valid and Chapter Five uncovered a number of social facts that determine the validity of a woman's testimony. To account for this uneven capacity, rather than conclude that gender is a principal cause of limitation, our study of positive law in we have shown that a woman's capacity to act is invariably conditioned by the social facts the jurists attach to female bodies. Therefore where De La Puente argues that limitations on women derive from the nature of the act we would argue that limitations derive from the juristic assessment of the intersections of the act and the individual associated with the act in question. In contrast to a categorical gender-based qualification of subjects, as

[482] We should bear in mind that the schools differ in terms of women's access to property; we mentioned earlier that *Mālikī* law restricts the property rights of unmarried women and in some instances even of married women. Because of this difference De La Puente's arguments on women and property are not always transferred to *Ḥanafī* law but there are points of convergence between the two. Her analysis of incomplete capacity or partial ability *Mālikī* law may also be conditioned by attention to the nuances of how legal capacity and sex difference come together. De La Puente's observations indicate the pervasive presence of patriarchy in constituting the legal subject which we have already confirmed. Her analysis also confirms our suggestion on the multiple and situational nature of women's legal capacity; women's capacity to act is not equal for all legal acts.
[483] De La Puente, "Juridical Sources for the Study of Women," 100.
[484] Ibid., 98-100.

de la Puente suggests,[485] this study has found that sex difference determines legal capacities in uneven ways such that legal subjects are variously and situationally determined. However, De La Puente is correct when she notes that each legal situation engenders unique legal capacities to act. For both males and females legal capacity is situational. We could add to her analysis the idea that femaleness also qualifies as what may be called a further 'situation' which the txt does not explicitly announce but assumes in numerous and inconsistent ways. In this analysis we again distinguish both the nature of the act and the qualities assigned to the person performing the act. This means that I differ from De La Puente in that I do not consider sex difference the exclusive point of legal proscription upon women. By implicitly sexing the subject of the law as male and the further implication that femaleness is non-normative it is established that women's legal capacity is different from most men's legal capacity. However, the inconsistent effect of femaleness on legal capacity precludes an unqualified conclusion on sex difference or gender (which is the term De La Puente uses) as a limitation upon legal capacity.[486]

I concur, however, with de la Puente's analysis that the absence of the category does not imply the absence of the distinction.[487] Our analysis of Jīwan and Marghīnānī in the preceding chapters shows that the absence of a category of distinctive incapacity or legal

[485] This may be appropriate for some aspects of *Mālikī* law on marriage and property, but there is still room for more nuance and precision in the assessment of the female subject even in these laws.
[486] Marriage law illustrates the effect of juristic understandings of femaleness in the law and we will explore the later in this chapter.
[487] "Even though it is true that no *furū'* [positive law] text contains a chapter dedicated specifically to a woman's capacity for action, this is nevertheless the principle upon which her legal status rests"(De La Puente, "Juridical Sources for the Study of Women," 100.).

impediment (*'awāriḍ*) in legal theory and the absence of a legal interdiction (*al-ḥijr*) for women in positive law does not preclude differential treatment of women. But, in recognizing this we must also recognise and offer an analysis of the absence of a category of legal subjectivity focused on femaleness. Why, in the face of such obvious distinction in the positive law does legal theory fail to categorize women as distinct types of legal subjects and what are the effects of this absence? In *Ḥanafī* law for instance it would be appropriate to say that in the doctrine on *ahliyya* women theoretically have the same legal capacity as men because femaleness is not an automatic legal distinction for incapacity. Yet the subtext of legal theory does distinguish women's legal capacities and in the positive law women of supposedly full legal capacity are repeatedly proscribed by social facts that curtail their legal capacities.

I make a few suggestions for this absence below; the first pertains to the discussion on menstruation in the doctrine of legal capacity, the second suggestion speaks to the role of women's bodies and discursive nature of the historical category 'woman' and the final suggestion to the juristic practice of writing of legal theory.

A woman's reproductive biology might offer a point of definition for the legal category women, but, as we mentioned earlier, menstruation and post-partum bleeding do not negate legal capacity. How did this come to be? How did the legal theory on menstruation and legal capacity develop to preclude biology as a point of distinctive legal capacity for women? The development of legal theory is characterised as retrospective. The *Ḥanafī* school uses processes of induction to extract principles from positive law injunctions while the *Shāfi'ī* school is more closely associated with deducing injunctions from basic principles. A further analysis suggests that rather than these two mechanisms

legal theory follows a process of abduction in devising theory to explain existing legal facts. Abduction is the process of extracting theoretical meaning out of positive law, it does not create or posit facts but is a means through which facts "are accepted, explained and justified".[488] Therefore legal theory is not concerned with 'discovering' the principles or injunctions of the legal school, it is not the origin of rules but the justification of rules or the process of making meaning through the rules of positive law.[489] The analysis of legal capacity that follows here will make evident the processes of abduction in the doctrine on legal capacity. For the most part, the doctrine on legal capacity gathers together the broadly defined rules of legal obligation and restriction in positive law to formulate the principles of legal capacity. Therefore most impediments to legal capacity may be characterised as the collected summary or extract of positive law restrictions pertaining to an individual in that situation. As examples, the discussion on minority includes restrictions on transacting property, accountability for prayer and ritual obligations, the capacity to pronounce divorce, and other matters pertaining to legal capacity drawn from various aspects of the positive law. On sleep and mental incompetence the rules relating to the limitations of legal capacity on ritual cleanliness, prayer, pilgrimage and transacting property, and other matters found in the positive law are gathered together to give effect to the category of persons proscribed by sleep and mental incompetence. Through the processes of abduction, the rules on legal incapacity come together to give meaning to categories of legal incapacity and so to shape the doctrine of legal capacity.

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[488] Ahmed, *Narratives of Islamic Legal Theory*, 7.
[489] Sherman Jackson, "Fiction and Formalism: Toward a Functional Analysis of Uṣūl Al-Fiqh," in *Studies in Islamic Legal Theory*, ed. Bernard Weiss (Leiden, Boston, Koln: Brill, 2002).

This process of extracting meaning out of injunctions may also explain why the classical theorists do not formulate a category of legal incapacity premised upon sex difference as they do for minority, slavery and mental incompetence. My suggestion is that abduction does not apply in the constitution of menstruation and post-partum bleeding as a category of impediments to legal capacity. In contrast to the other impediments the section on menstruation and postpartum bleeding is arguably precisely the opposite of other impediments in character and development. It is not a collection of positive laws restricting women's legal capacity and it is not even a collection of a broad set of incapacities attendant to menstruation and postpartum bleeding. It reflects only a single restriction yet there are others to be found in positive law. In contrast to the other impediments which are clearly retrospectively constructed in the manner outlined above, this impediment might have evolved differently. It is, as I will show below, closely modeled on the treatment of menstruation as a matter of ritual purity in Shāfi'ī's *Risāla* where the text is concerned with matters of ritual proscription rather than matters of legal capacity.[490]

In an early *Ḥanafī* legal text, Shaybānī's (d. 189/805) narration of *Kitāb al-Āthār* of Abū Ḥanīfa[491] menstruation and post-partum bleeding also feature amidst discussions of ritual cleanliness, namely after rituals of post-coital cleanliness and before similar rituals for erotic dreams. He addresses matters of ritual cleaning as it relates to women with chronic menstrual bleeding, regular menstruation, the onset of menstruation during

[490] al-Shāfi'ī (d. 204/820), *Al-Imam Muḥammad Ibn Idrīs Al-Shāfi'Ī's Risāla Fī Uṣūl Al-Fiqh: Treatise on the Foundations of Islamic Jurisprudence*.
[491] Muḥammad ibn al-Ḥasan (d. 189/805) al-Shaybānī, *Kitāb Al-Āthār of Imām Abū Ḥanīfa*, trans. Abdassamad Clarke (London: Turath Publishing, 2006).

prayer, bleeding during pregnancy, and post partum bleeding.[492] In comparison, Shāfi'ī's *Risāla* treats menstruation in terms of a proscription on ritual performance and a valid reason or excuse for omitting ritual obligations of prayer and fasting. He explains the rules that excuse menstruating women and travelers from the normal requirements for prayer and also details the specificities of compensating these (using Qur'an 2:222).[493] The important point of distinction here is that menstruating women cannot achieve ritual cleanliness until the end of menstruation.[494] From this discussion, Al-Shāfi'ī draws analogies to other individuals, such as people who are mentally incompetent and those who are unconscious, who are similarly unable to voluntarily terminate their state of incapacity for prayer and fasting. Finally, he addresses the impediments that arise in the

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[492] Ibid., 30-35.

[493] Qur'an 2:222 "They ask thee concerning women's courses. Say: They are a hurt and a pollution: So keep away from women in their courses, and do not approach them until they are clean. But when they have purified themselves, ye may approach them in any manner, time, or place ordained for you by God. For God loves those who turn to Him constantly and He loves those who keep themselves pure and clean", (Ali, *The Holy Qur'ān: Translation and Commentary*).

[494] "So we concluded that God meant that the performance of the duty of prayer is obligatory on those who have achieved purity by ablution and [complete] washing. Since menstruant women cannot become purified by either [ablution or washing] – as menstruation is a natural occurrence beyond their free will to constitute disobedience – they are excused from prayer during menstruation and they need not make up for what they neglected after the end of their menstruation. 114. Shāfi'ī' said: By analogy with the menstruant women we hold that he who is [either] unconscious or insane, whose mind has become sick by an order of God and not by his own fault, is excused from [the duty of] prayer; for he cannot comprehend it as long as his state makes him incapable of comprehension. It is generally agreed among the scholars that the Prophet did not order menstruant [women] to perform the [duty of] prayer; but they are agreed that they should fast. We have therefore made a distinction between the two duties on the strength of the evidence I have just stated on the authority of the scholars and their agreement [on this matter]" al-Shāfi'ī (d. 204/820), *Al-Imam Muḥammad Ibn Idrīs Al-Shāfi'Ī's Risāla Fī Uṣūl Al-Fiqh: Treatise on the Foundations of Islamic Jurisprudence*, 132..

prayer and fasting of the traveler, the drunkard and the person who is mentally incompetent.[495]

Bazdāwī's *Kanz al-Wuṣūl ilā Ma'rifat al-Uṣūl*, we mentioned earlier, is thought to be the origin of Abū al-Barakāt an-Nasafī's *Manār*, the source text of our Mulla Jīwan's commentary *Nūr al-Anwār*, and it does indeed bear resemblance.[496] In Bazdāwī's list of impediments the discussion on menstruation and post-partum bleeding is placed after illness and before death. [497] It constitutes amongst the shortest sections in the list of 19 different types of impediments to legal capacity, as it does in Nasafī's text, and it also differs somewhat from Nasafī's treatment.

> Menstruation and post-partum bleeding do not deny legal capacity for obligation. Ritual cleanliness is necessary for prayer. The legal ruling is characterised by ease of performance in the situation of menstrual and post-partum bleeding and in matters that cause hardship in compensation [for non-performance]. Therefore both are proscribed. Ritual cleanliness from both are a condition for fasting as well but, contrary to analogy, compensation in fasting is not proliferate [it does not entail numerous fasts] and there is no hardship in compensation and therefore the duty [for compensation] does not fall away. The rules of menstrual and post partum bleeding are too numerous to enumerate.[498]

Like Nasafī, he confirms that menstrual and post-partum bleeding do not derogate or deny legal capacity for obligation. However, Nasafī adds that menstrual and post partum

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[495] Ibid., 132-3.
[496] See footnote #152 above.
[497] al-Bukhārī, *Kashf Al-Asrār ʿan Uṣūl Fakhr Al-Islām Al-Bazdawī*, Bāb Bayān al-Ahliyya, 393.
[498] Ibid., Bāb Bayān al-Ahliyya, 505-7.

bleeding also do not negate legal capacity for acquisition (*ahliyyat al-adā'*). Next Bazdāwī explains that ritual cleanliness is a condition for prayer, however, in terms of compensation for missed prayer the law is designed to allow for ease of performance. By way of a discussion on the duty to compensate fasts that have been missed though menstrual and post partum bleeding, he explains that prayer missed through menstrual and post partum bleeding is not similarly compensated. Contrary to analogy, both being precluded by virtue of menstrual and post partum bleeding, compensating for missed fasts which are not ordinarily as numerous does not constitute a similar constraint that compensation for missed prayer does.

For comparison, Nasafī's text on menstruation reads:

> **Menstruation and postpartum bleeding do not negate legal capacity. However ritual cleanliness (*ṭahāra*) for prayer is a condition and in the absence of the condition the obligation for prayer is absent.**[499]

And for one further comparison, Jīwan's text comprising Nasafī's source text (in bold) and his commentary reads:

> **Menstruation and postpartum bleeding** follow upon what came before. They are mentioned after illness because they are related with it since these two are an excuse (*'udhran)*. **These two do not negate legal capacity** not capacity for obligations and not capacity to act. That means that obligation for fasting and prayer have not fallen away due to these two [menstruation and postpartum

[499] Extracted from Jīwan, *Nūr Al-Anwār Ma'a Ḥāshīyat Qamar Al-Aqmār* 295.

bleeding]. **However ritual cleanliness (*ṭahāra*) for prayer is a condition and in the absence of the condition the obligation for prayer is absent.**[500]

Tracing the movement of thought from Bazdāwī to Nasafī and Jīwan, we note a few distinctions, namely that Bazdāwī says that menstruation and post-partum bleeding do not derogate from legal capacity for obligation (*ahliyyat al-wujūb*), Nasafī says that menstrual and post-partum bleeding do not derogate from legal capacity and Jīwan adds and emphasizes that it does not derogate from either of the two types of legal capacity whether legal capacity for obligation (*ahliyyat al-wujūb*) or legal capacity for acquisition (*ahliyyat al-adā'*). Jīwan's commentary also reflects much of Bukhārī's *Kashf al-Asrār* , the popular earlier commentary on Bazdāwī's *Uṣūl*, both referenced above, and is therefore also not novel.[501]

Shāfi'ī's discussion on menstruation extrapolates from a concern with a menstruating woman's obligations for prayer and fasting to similar obligations for people who are mentally incompetent, unconscious, travelling or drunk. By comparison, an earlier or contemporary positive law text, where Abū Ḥanīfa and Imām Shaybānī address ritual cleanliness for menstruant and post-partum women, does not expand the discussion here to other matters that might preclude the legal capacity for prayer. Later legal theory, namely Bazdāwī , Nasafī and Jīwan, however follows closely upon Shāfi'ī's model and expands the text to include a treatment of legal incapacity generally, not only the

[500] Ibid., 295.

[501] Bukhārī explains that menstruation and postpartum bleeding do not impede either of the two types of legal capacity and also explains in detail why the analogy of fasting and prayer does not apply to menstruation and postpartum bleeding. Jīwan's text is similarly expansive and specific about the limited degree to which menstruation and postpartum bleeding impede upon a woman's legal capacity, (al-Bukhārī, *Kashf Al-Asrār ʿan Uṣūl Fakhr Al-Islām Al-Bazdawī*, Bāb Bayān al-Ahliyya.).

incapacities for capacity for obligations for prayer and fasting but also to include many more, up to nineteen, situations that may impede legal capacity. Shāfiʿī's initial references to the obligations for prayer and fasting for people who are mentally incompetent, unconscious, traveling or drunkard later become intricate points of legal incapacity. Further, the discussion on menstruation in the later texts expands upon Shāfiʿī's concerns with menstruation and religious duties to include matters of legal capacity generally. Between Shāfiʿī and Jīwan the category expands from menstruation to include postpartum bleeding and from prayer and fasting to include legal capacity generally. Further, rather than a retrospective collection of positive law rulings, the legal theory on legal capacity and 'menstruation and postpartum bleeding' does not gather together the positive law rulings on the various aspects of menstruation and post-partum bleeding. Instead of the descriptive character of the other impediments, this impediment is better characterised as a prescriptive statement that can be traced back to the earliest stages of legal theory. It persists in this form through later legal theory with slight, though significant, expansion but without losing its basic prescriptive character. By contrast, the other impediments to legal capacity may be characterised as descriptive collections of positive law rulings.

The first suggestion for why 'woman' does not feature as a legal category of impediment to legal capacity or as a form of legal interdiction (*ḥijr*) therefore is that the doctrine on legal capacity does not gather the impediments relevant to being female into a single form of incapacity. This is because firstly because the discussion on menstruation as a matter of legal incapacity does not originate in the way the remaining impediments to legal capacity originate. Rather the original concern in recording the effects of

menstruation as Shāfi'ī' did was to confirm that women need not compensate missed prayer but must compensate missed fasts. That intent remains consistent in later legal theory, and it also expands to accommodate matters of legal capacity. Accordingly, the initial subject matter in this impediment to legal capacity is not woman or the effects of female biology on legal capacity but the effects of bleeding from the womb on ritual cleanliness. Later jurists appear to have used this discussion to expand to a general principle that bleeding from the womb does not affect legal capacity. Secondly, it is because the initial concern for an impediment to prayer and fasting transforms over time into a positive prescription that disentangles women's legal capacities from menstrual and post partum bleeding. Finally, the reason there isn't a category for femaleness is precisely because there is a category '*ḥaiḍ wa nifās*' which acts as a disclaimer for the former and also to makes femaleness impossible to formulate as incapacity.

Briefly, before we move to our second suggestion, we will recall from our earlier discussion that the two technical components of legal capacity are sufficiency in reason and body. We recall also the al-Khudrī's *ḥadīth* that uses menstruation and witnessing to assign woman imperfect faith and imperfect reason. By contrast, legal theory establishes that menstruation has no effect on legal capacity. Generally speaking we may say that the theory on legal capacity and menstruation is at odds with the *ḥadīth* that premises weak intellect and weak religion upon menstruation.

Our second suggestion for why 'woman' is not a category of legal subject in the doctrine of legal theory speaks to the role of women's bodies and the discursive nature of the associations the law makes with women. In the absence of menstruation or post-partum bleeding as a point of legal incapacity women's bodies cannot be considered

definitive of femaleness. Our study noted numerous points of distinction that the jurists use to separate the legal capacities of men and women but which do not coincide in a singular physical female. Slaves, minors an people who are mentally incompetent are more easily categorised. Slaves are distinct types of legal subjects being bodies that are owned. Minors are categorised by bodies that are pre-pubescent and mental incompetence is determined by insufficient reason. Having removed reproductive biology from the impediments to legal capacity, the jurists would be hard pressed to find a single point of biological distinction. The challenge of pinning down a singular physical aspect of woman as the legal distinction between men and women may contribute to why there is no legal category named 'woman' or 'femaleness' in the list of *'awāriḍ* (impediments) or the discussion on interdiction. However, in the absence of a physical trait there are numerous other traits that might have sufficed to define women as distinctive legal subjects. Paradoxically however, it may also be that the wide scope of matters jurists use to characterise femaleness also precludes the definition of women. The jurists use matters of reason, sexual control, public presence and other criteria related to sexual and social propriety or decorum. For instance, in matters of evidence femaleness may not preclude witnessing but proscriptions on women's public presence may. Similarly in matters of property, femaleness of the property owner does not impact her technical legal capacity to trade, yet it may impact the access of a wife to public spaces where goods are traded or to other matters related to the property or the act of trading.[502] Accordingly, the associations jurists make with femaleness are differently and selectively coded into the

[502] This includes a female slave owner's sexual access to her male slave, a female land owner's access to courts to lay claims against others and a women's capacity to witness against theft.

law making femaleness an uneven and also an unstable 'category'. Each legal matter entails a different formulation of the legal subject that reifies the category 'woman' such that it may only be singular when it is identified with a specific female body i.e. a specific person. That body however is also never consistently interpreted nor is it uniformly understood across legal categories. This renders the legal category woman in the sense of an individual with a female body sufficiently unstable to preclude the categorical legal subject 'woman' in legal theory. Chapter Five showed that the norms of femaleness in the text are neither uniform nor predictable and that the distinction of femaleness on one specific ground is clearly not as readily available as are the distinctions for slaves, children and other categories of individuals. Therefore, it may be that the random and at times even inconsistent associations made with woman make it unfeasible for the jurists to postulate a single premise upon which women may form a category of legal subject. While femaleness functions as a distinguishing characteristic of the legal subject, what characterises femaleness is inconsistent; it is a mobile concept that seldom coincides in all respects with any singular physical woman.

Unfortunately however, the absence of definition does not preclude the exercise of a category but instead allows the category woman and of femaleness to be repeatedly formulated in a variety of forms. Historically, it is formulated in terms of reason, age, experience, public presence, marriage, sexuality and property. In contemporary formulations the various juristic references to woman's incapacities may be grouped together to formulate a category of imperfect legal capacity specific to women and slaves.

Alternatively the historical absence of a definition may result in a denial of distinct legal capacity for woman in spite of the restrictions on women's legal capacities. [503]

We return to this analysis later in the chapter, for now we move to our third suggestion which pertains to the juristic practice of writing legal theory. Legal theory is concerned with extracting theoretical meaning out of positive law, and the process of writing legal theory has been characterized as a devotional or ritual practice.[504] Legal theory is a juristic formulation of what the law ought to be rather than a reflection of the existing social context. This suggests that the absence of a legal category of incapacity for femaleness reflects the jurists opinion on what ought to be the condition of women's legal capacity. Despite the numerous differential and pejorative treatments of women in various matters of law, the absence of the legal category woman tells us in the juristic imaginary femaleness is not an impediment to legal capacity. Had the jurists intended that sex-difference, either as an existential state that negates the legal capacity for obligation or for action, as slavery, minority and mental incompetence, or a transitory state that alters the rules of legal incapacity, as travel, sleep and forgetting, they would have formulated the category of femaleness amongst the impediments to legal capacity. Their failure to advance such a category tells us that they do not wish for femaleness to form a category of legal incapacity.

To summarise, our three suggestions explain that the category menstruation and post-partum bleeding is unlike the other categories in its development and formulation, the concept woman is not easily defined and finally the jurists do not intend for femaleness to constitute legal incapacity. However, this does not tell us that femaleness does not

[503] The first is Nyazee's approach and the second Zahraa's.
[504] Ahmed, *Narratives of Islamic Legal Theory*.

actually function as a form of legal incapacity. The female subject that emerges in the combination of legal theory and positive law is neither a fully capacitated legal subject nor an entirely interdicted legal subject. We should also bear in mind that failure to offer a theoretical justification for the legal incapacities women face in positive law produces a *façade* of non-distinction. It maintains the fiction that women are not differentiated in their legal capacity when in fact they are. Zahraa's narrative on women's legal capacity approach rests on this fiction. It takes the view that the female legal subject is fully capacitated with some restrictions that are not significant to a general theory of women's legal capacity. Nyazee, takes the opposite route and renders women incapacitated by virtue of being a in a category of *nāqiṣ* or imperfect legal capacity, just as a slave is. While classical legal theory avoids categorizing women as separate legal subjects, modern legal theory achieves the opposite in different ways; the difference between the two reflect the adaptation of classical law to contemporary law and legal structures and the ensuing different approaches to legal theory.

C. Modern Legal Theory: Imperfect or Indistinct Legal Capacity

Nyazee says that he follows the traditional distinction of legal capacity into three types, [505] yet he produces four types of legal capacity, complete (*kāmila*), deficient (*qāṣira*) and imperfect (*nāqiṣa*) and a fourth category, 'defective capacity' characterized by the impediments. This presentation is more appropriately an adaption of the classical approach and the argument that women have imperfect legal capacity is a transformation of the classical approach. It is an approach that attempts to draw parallels with Western

[505] As Jīwan illustrates, in traditional scholarship, each impediment characterizes a situation or a state of mind or body which may proscribe an individual's legal capacity in certain situations, (Jīwan, *Nūr Al-Anwār Ma'a Ḥāshīyat Qamar Al-Aqmār* 281-314.)

legal norms and so is naturally innovative.[506] The effects of innovating a category of legal capacity for women are born out in at least three ways.

Firstly, it shifts our understanding of the impact of sex difference on legal capacity from a matter that is situational and mobile to a matter that is essential and static. In his format legal capacity characterizes the individual and not the situation therefore women have deficient legal capacity as women not, for instance, as witnesses in penal matters. Whereas traditional scholarship characterizes legal capacity through instances of its exercise, the argument that women have imperfect legal capacity conceptualises legal capacity as state that characterizes an individual. It makes a shift from women's legal capacity as situational and mobile to women's legal capacity as essential or personal. Earlier presentations framed legal capacity as situational and therefore changeable and mobile. In this new arrangement a person has imperfect legal capacity by virtue of being a slave as though it is an existential rather than a contractual or economic state that renders a person's otherwise complete legal capacity now imperfect. Similarly too, imperfect legal capacity becomes part of being female as an existential state rather than a matter of juristic views on women's testimony, prayer during menstrual and post-partum

[506] In contrast to Jīwan, Nyazee characterizes the evolution from foetus to puberty as complete legal capacity, further distinguishes deficient capacity (of the unborn child (*janīn*), the dead person and the fictitious person. The discussion on fictitious persons rests on "the absence of *dhimma* [legal accountability] which is built on the *ahad* – the covenant between humanity and God - and which legal entities do not posses", (Nyazee, *Outlines of Islamic Jurisprudence*, 43.). He also separates the minor (*ṣabī*) and imperfect (*nāqiṣ*) capacity (of slaves and women), and then categorizes twelve of the traditional nineteen impediments as defective legal capacity. He uses ten categories that feature in Jīwan's analysis – minority (*ṣighar*), insanity (*junūn*), idiocy (*'atāh*), forgetfulness (*nisyān*), sleep (*nawm), unconsciousness (ighmā'*), slavery (*riqq*), menstruation (*ḥaiḍ*) and puerperium (*nifās*) and death (*mawt*). In addition he also discusses *shubha* (doubt), which we combines with mistake and ignorance (*khaṭa'* and *jahl*), and death illness (*maraḍ al-mawt*), (ibid., 40-53.).

bleeding and other juristic matters. The intersecting and changing forms of legal capacity that an individual will occupy through time and in various situations is less obvious in this adapted classification than it is in Jīwan's historical discussions on legal capacity.

Secondly, this classification specifies legal capacity as a function of sex-difference which classical legal theory avoids. Classical legal theory addresses women through biology and a concern for ritual purity. By contrast, this approach originates in ideas of identity, it does not address the capacity for ritual obligations and focuses instead on matters of property, transactions and marriage. As a result menstruation and post-partum bleeding (*ḥaiḍ wa nifās*) do not feature here. By contrast, the historical approach used this category to addresses the relevance of women's bodies to legal capacity. By including this category in the list of impediments (even if only to deny its effects), classical legal texts maintain the most affirmative legal discussion on the effects of a female body on legal capacity, notably none. By contrast, removing the categories menstruation and post-partum bleeding from the list of impediments to legal capacity makes it possible to conjecture that the female body is relevant to legal capacity and that female embodiment affirms a distinctive legal capacity for women. Ironically this opens the way to a specific type of legal capacity for women, the effect of which is to associate femaleness, or having a female body, with imperfect legal capacity (*nāqiṣ ahliyya*).

Finally, this classification uses the sex-based distinctions of positive law to argue for sex-based distinction in the doctrine of legal capacity thereby extending the restrictions on women in positive law into characterizations of women as legal subjects. Our earlier discussion on menstruation and post partum bleeding showed that this impediment developed differently from others, namely as an expansion on an original concern with

ritual cleanliness. When the various restrictions that positive law imposes on women are gathered together as they have been here by Nyazee, woman becomes a distinct category of legal subject with a distinctive form of legal capacity. This is not anything drastically different from how the classical approach to legal theory formulates the doctrine of legal capacity. The classical approach does just this for all the other areas of legal incapacity. However, this is the first instance we have encountered where this is done for women as categorically distinct legal subjects. None of the classical scholars we reviewed above worked in this way. The unfortunate result of this approach is further restriction upon women's legal capacities.

In addition to the narrative of imperfect legal capacity, contemporary scholarship also offers us a narrative of indistinct legal capacity for women. This second narrative uses the historical absence of a category of femaleness in the doctrine of legal capacity to deny that women have distinct legal capacities. Because of this denial, the differential treatment of women in positive law must be explained not in terms of femaleness but as measures to alleviate hardship and strengthen the family.[507] In the classical theory references to hardship pertain to compensating five missed prayers each day for the duration of a monthly menstrual period, which the jurists find excessive. The reference to menstruation as a hardship in this narrative replaces the classical scholars' concern for menstruation as an obstacles to ritual cleanliness but not to legal capacity. Further, the narrative of indistinct legal capacity cites the need to safeguard the family which does not feature in historical discussions on legal capacity but does feature in the historical positive law of marriage. Approaching the issue from this angle, rather than the classical

[507] Zahraa, "The Legal Capacity of Women in Islamic Law," 259-63.

method where legal theory justifies positive law Zahraa uses positive law to justify the theory of legal capacity. Therefore his explanation of menstruation and post-partum bleeding does not pertain to the theoretical matters that determine legal capacity, i.e. sufficiency to comprehend a command and to act upon it, but to other social facts. We saw in our discussion on positive law how social facts are attached to women's bodies as though these are natural associations. In this approach too, ideas of hardship and concern for the family are attached to matters of menstruation, post partum bleeding and a woman's capacity to contract. Through these references Zahraa comes close to Nyazee's conclusion that women are category distinguished by their biology. Yet he also recognises the historical absence of the legal distinction in the treatment of legal capacity; he reminds us that historically "not one single Islamic jurist has stated or indicated that femininity is a defect of Islamic legal capacity" and he is correct.[508] However, where this approach fails is in dismissing the differential treatment of women in positive law as immaterial to women's legal capacity. As a result firstly, it does not recognise the implicit distinctions legal theory makes between men and women which stem from explicit distinctions in positive law and preclude his categorical denial of difference between male and female legal capacity. Secondly, this approach transforms the technical aspects of legal capacity, i.e. ritual cleanliness to social concerns for women's well being.

Finally, comparing classical and contemporary legal theory on how women are conceptualised as subjects of law we conclude that they differ firstly in their intentions. The contemporary method appears to take one of two approaches; in one instance it wishes to categorise women with a distinct type of legal capacity, and so it gathers

[508] Ibid., 256.

together the various restrictions of positive law to formulate a category of imperfection. If the classical legal theorists had similar wishes they were less obvious about it. Contemporary scholarship in the second instance, by contrast, intends exactly the opposite, to show that femaleness does not result in distinct legal capacity as proof that the law does not discriminate against women. The traditional method by contrast to these two does not wish to create a theoretical category of femaleness for legal capacity.

Secondly, they concur in their position on marriage and legal capacity. Neither the historical and contemporary approach concede to marriage as a distinctive form of legal capacity. Much like the fiction of non-distinction in legal capacity, in marriage too, there is the fiction of equality and the *façade* of non-distinction. A wife and slave are similarly inhibited in their legal capacities though to different degrees, the first being the female party to the marriage contract and the second by virtue of being property. While the jurists explain very clearly that a woman in a marriage is not owned, the contract of marriage nevertheless does induce *milk al-bud' (*ownership of sexuality or more generally, milk al-*nikāḥ*) in a husband, and corresponding restrictions and limitations apply to wives as a result. The jurists acknowledge the limitations upon the slave through the category 'slave' in discussions on legal capacity and interdiction yet no similar acknowledgment features for the legal situation 'wife'. And again, silence in the legal doctrine on legal capacity maintains the fiction of equal legal capacity for wives and husbands, as it does for men and women.

And thirdly, the classical legal theory uses a discursive approach to produce a legal subject that is fluid, multiple and situationally-constituted and this is born out in the variation of laws on witnessing, property and marriage. By contrast, contemporary

formulations of female legal subjectivity impose a hard essentialist definition of women as legal subjects with imperfect legal capacity. This is not to suggest that either the classical or contemporary approaches are not patriarchal or pejorative to women, indeed both are. The difference is in the space classical legal theory leaves for different ideas of femaleness. While problematic in that it precludes certainty and consistency the discursive approach of classical legal theory is also facilitative. It is problematic in that a woman may not be certain what aspect of femaleness may preclude or promote her legal capacities until the jurists have made an evaluation. The jurists too cannot confirm that a single matter of femaleness will always result in legal incapacity or facilitate legal capacity. The undefined 'women' is open to being newly constituted along varyingly innovative lines as new and previously unstated concerns become relevant for the jurists. The law on evidence for example begins with concern for women's memory and comprehension and concludes with concern for women's pubic presence. In this way the category women is channeled by whatever contingency the idea of femaleness is required to meet at that present legal moment, leaving the legal lives of women unpredictable and unstable. However, a discursive approach is also facilitative in that it precludes a singular or static concept of femaleness. The absence of definition allows for contingency and the discursive formation of the female legal subject. In this way it avoids an essential or existential category definition of femaleness that may be generalised across all categories of legal persons. In the absence of definition femaleness remains fluid and this precludes categorical statements on women's legal capacity. Accordingly, the jurists cannot be definitive about women's legal capacity. The normative legal subject of classical and contemporary legal theory and positive law is a free, adult, male, and the female subject

is seldom explicitly or technically distinguished as a different type of subject even though she has different legal capacities to men. Contemporary legal theory also works with a normatively male legal subject but with a notion of female imperfection that is much stronger than that of classical legal theory.

D. Legal Change

Beyond an exercise in ritual or the endeavour to justify positive law, legal theory is also an interpretive experience and changes in law and legal practice reflect elements of social, cultural and other historical transformation.[509] The illusion of continuity of law over the first twelve centuries belies jurisprudence as an ongoing process of law-making that interacts with politics, economics and religious ideology.[510] Historically the law has functioned as a space where gender roles were negotiated and contested.[511] In modern times too, transformation applies not only in the practice of law but also in the way that sex difference is conceptualised in law and new means for the constitution of gender in law. Through the transformations of colonial and present times, not only are existing gendered power dynamics formalised, but new understandings of sex difference are

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[509] Scott Alan Kugle, "Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia," *Modern Asian Studies* 35, no. 2 (2001). Scott argues that Anglo-Muhammadan law "exerted persisting influence" on later Muslim conceptions of *sharī'a* , (ibid., 257-9.). Anglo-Muhammadan law was not, however, separate from the Muslim ideas of law (ibid., 259.), rather a "contradictory surface" that brings together "political, legal and cultural elements" whose effects extend to "religion, nationalist politics and the most basic Muslim self-understanding in the twentieth century"(ibid., 312.).

[510] Ibid.

[511] Khaled Abou El Fadl, "Legal and Jurisprudential Literature: 9th to 15th Centuries," in *Encyclopedia of Women & Islamic Cultures*, ed. Suad Joseph and Afsaneh Najmabadi (Leiden; Boston, Mass.: Brill, 2003), 37.

simultaneously innovated and incorporated into law.[512] In the newly defined ideas of law, traditional and modern forms of patriarchy, i.e. neo-patriarchy, co-exist.[513] New legal arrangements are accompanied by new means for determining male and female Muslim legal subjects, [514] and newly articulated ideas of sex difference.[515] The legal transformations evident in our study of historical and contemporary legal theory require vigilance over the technologies of law that determine woman as legal subjects. They reflect the law's capacity to adapt to change and the effects of transculturation in the convergence of Islamic and Western norms of sex difference .[516]

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[512] These new ways of constituting sex difference were evident in new marriage and divorce law, changes in polygamy practice, the expansion and proliferation of *bayt al-ṭā'a* (the modern formulation of a wife's confinement to her marital home), and changes in the nature of the marriage contract, (Amira 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, N.Y.: Syracuse University Press, 1996), 277.). In present times, most of these points of sex-difference are also focal points for Muslim feminist challenge to the content and practice of Islamic law viz. polygamy, consent in marriage, rights of divorce, inheritance, maintenance (*qiwāma)* and guardianship (*wilāya)*.

[513] Mir-Hosseini, *Marriage on Trial: A Study of Islamic Family Law: Iran and Morocco Compared*.

[514] Armando Salvatore, "The 'Implosion' of Sharī'a within the Emergence of Public Normativity: The Impact on Personal Responsibility and the Impersonality of Law " in *Standing Trial : Law and the Person in the Modern Middle East*, ed. Baudouin Dupret (London: I.B. Tauris, 2004); Armando Salvatore, "After the State: Islamic Reform and the 'Implosion' of Shari'A'," *Yearbook of the Sociology of Islam.* 3(2001).

[515] Legal change effected a "redefinition of the *sharī'a*" through modern state authority and new forms of subjectivity", (Mark Levine, "Book Review of Muslim Traditions and Modern Techniques of Power, Yearbook of the Sociology of Islam 3 (Münster and London: Lit Verlag, New Brunswick, N.J.: Transaction Publishers, 2001) Edited by Armando Salvatore.," *International Journal of Middle East Studies* 35, no. 2 (2003).)

[516] Ebrahim Moosa, "Colonialism and Islamic Law," in *Islam and Modernity : Key Issues and Debates*, ed. Muhammad Khalid Masud, Armando Salvatore, and Martin van Bruinessen (Edinburgh: Edinburgh University Press, 2009). Moosa argues that legal change, such as that witnessed in the development of Anglo-Mohammadan law, "affected a transculturation of law, a change in both Islamic law and British law and the emergence of a "new Muslim legal culture". As part of the broader "cultural matrix" of the state, law changed and "new Muslim legal cultures came into existence". Colonists

They also require that we study the historical legal paradigms with care to extract more than a superficial understanding of sex-difference and the legal intent of the historical jurists. The reward of such a study is in a thick narrative of sex difference and female legal subjectivity in the law. Susan Spectorsky's study of women in classical positive law offers one such narrative and our study of positive law and legal theory offer two more. Spectorsky finds that, in material terms, the jurists envision a reasonably well off women who must rely on the males around her (father, husband and jurists) to secure her legal rights. Her material privileges determine her marital capacities but considerate treatment from her husband still depends on her obedience.[517] To add to this, based on Chapter 5, our analysis of the legal characteristics of women in positive law tell us that the jurists envision a woman who is sexually appropriated, physically proscribed in marriage, potentially ill-informed in matters of marriage, better informed on property

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encountered native law, colonized peoples acquired colonial legal mechanisms, and transformation occurred in Islamic law. "The ideas of modernity", Moosa explains, "found their counterpoints" in the practice of Muslim laws, (ibid., 158.).

[517] The jurists envisioned a woman's life, according to Spectorsky's textual analysis thus: "The typical bride or wife or *divorceé* in these discussions is an upper class woman, or at least one who is prosperous enough for money and possessions to play a significant role in an appropriate marriage portion or adequate maintenance for her. She lives in an extended patriarchal family in an urban environment. She and her family have access to a *qāḍī* who is expected to be versed in the law. If a woman is lowly, or she or her husband are among the common people, these facts are noted as exceptional, If she lives in a remote area and the local *qāḍī* is not a scholar, that too is noted as exceptional. In addition to having a role as a wife and a mother, some women certainly also had roles, responsibilities or activities outside their homes … Women are subject to the oversight of a father or a guardian. But a father arranging a marriage of his daughter and a guardian arranging one for his ward are expected to do so in her best interests. Her best interests include consulting her about her future groom and then giving her in marriage to a man who is her equal in status and able to maintain her in a manner befitting her status, Once a woman is married, has received her marriage portion and has taken up residence in her husband's house, she owes him absolute obedience. In return, he owes her considerate and kind treatment" (Spectorsky, *Women in Classical Islamic Law: A Survey of the Sources*, 203-4.).

matters, preferably not present in public, and likely weak in memory. These norms of femaleness encroach upon the matters of more strictly legal concern that became evident in legal theory. Contrary to the narrative of imperfection or in-distinction contemporary legal theory formulates, the historical doctrine of *ahliyya* offers a complex narrative of femaleness including

a. accountability to God (*dhimma*) (where she is considered wholly a subject without any derogation from legal subjectivity),
b. low reason (which arises out of being female),
c. embodiment in a female body (which does not always negate legal capacity),
d. sexual reproductive capacities which do not derogate from legal capacity,
e. sexuality and sexual authority which restrict women's legal capacities
f. legal capacity that is mobile, situational and multiple
g. legal capacity that fluctuates with the fluidity of life situations
h. proscriptions of legal capacity in marriage and sex.

Further to these juristic characterisations of women, the absence of 'marriage' and 'femaleness' as categories of legal incapacity make the impact of sex difference on legal capacity invisible; it paints a *façade* of woman's legal capacity as undifferentiated from men's and the status 'wife' as legally an indistinct subjectivity.

E. Conclusion

Comparing contemporary and historical approaches to women in the law, we find that problematic gender norms in contemporary legal practice are not always historically sourced, but potentially the result of modern understandings of sex difference and novel

gender philosophies.[518] Indeed the woman of the law is no ideal contemporary incarnation of a historical Islamic legal ideal but a conglomerate of local and foreign, imperial and colonial, Islamic, historical and modern ideas of woman.[519] Further, in the discussion of women in changing legal times, 'women' potentially becomes a 'terministic screen', a concept that halts further discussion and seals a legal identity.[520] Just as modern legal frameworks render the historical law an unquestionable concept related to being authentically Muslim, so to be authentically 'woman' is to adhere to the historical norms that manage sex-difference or, in other words, to fit within a narrow distinction of what the law defines as 'woman'. Ironically, our study of legal theory tells us the historical norms are not as narrow by comparison. In the next chapter we have an opportunity to see how the historical and contemporary norms of sex difference in Islamic law apply in contemporary Muslim legal practice.

[518] Amira Sonbol, *Women of Jordan: Islam, Labor, and the Law* (Syracuse, NY: Syracuse University Press, 2003).
[519] Ibid., 10.
[520] Salvatore's analysis of *sharī'a* as a terministic screen may also be extended to the function of the concept 'woman' in moments of legal change. See Salvatore, "After the State: Islamic Reform and the 'Implosion' of Shari'A'," 136.

Chapter Eight

Women of the Law: Sex difference, Discourse and Definition

A. Milk al-Nikāḥ and Marital Legal Capacity in South Africa

This study emerges from concern for the links between legal capacity and sex difference initiated in debates on recognition of Muslim marriages in the democratic constitutional regime of post-apartheid South Africa.[521] Some seventeen years after the discussions began in 1994 the matter has yet to be settled and the debate on the theoretical and practical implications of state recognition of Muslim marriages continues. Most recently the Minister of justice released a draft Bill for public comment. The Muslim Marriages Bill (2010) confirms the premise of equality between husband and wife, regulates polygyny, expands the types of divorce and formalises these through the courts and allows women the delegated capacity for *ṭalāq*. Clause 3 addresses equality and legal capacity:

> A wife and a husband in a Muslim marriage are equal in human dignity and both have, on the basis of equality, full status, capacity and financial independence, including the capacity to own and acquire assets and to dispose of them, to enter into contracts and to litigate.[522]

Potentially, this clause removes any inequalities in the legal capacities of husbands and wives in these matters. Most women's groups and rights organisations welcome Clause 3 and the changes in marital legal practice but not all the stakeholders are content. The

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[521] For an assessment of the history of the recognition of Muslim marriages and a study of the different views that have emerged in the community see Ebrahim Moosa, "Muslim Family Law in South Africa: Paradoxes and Ironies," in *Muslim Family Law in Sub-Saharan Africa : Colonial Legacies and Post-Colonial Challenges*, ed. Shamil Jeppie, Ebrahim Moosa, and Richard L. Roberts (Amsterdam: Amsterdam University Press, 2010).

[522] *Muslim Marriages Bill 2010*.

strongest resistance to the clause and indeed to the Bill generally comes from an ultra conservative scholar who publishes the *The Majlis*, a newspaper printed in Port Elizabeth, Moulana Ahmad Sadeq Desai. Trained at a notable *Deoband madrasa*, "Miftahul Uloom" in Jalalabad, he aligns himself Moulana Ashraf 'Alī Thānvī (d.1362/1943) who's *Bahishti Zewar,* first written in Urdu in 1905, has been a popular resource for the definition of womanhood.[523] Thānvī encourages women's education even as he explains that women are intellectually deficient.[524] In effect women's intellectual deficiency requires their education in order to maintain women's faith and promote harmony in the marital home.[525] Due to deficient intellect women also do not hold the capacity to divorce and wives are always under the authority of husbands. Along similar lines, Desai argues that women and men are not equal in their capacity to contract, to marry, to own property or to personal autonomy. Clause 3 of the Muslim Marriages Bill is concerned specifically with marriage but Desai's response expands beyond these confines. Citing *ḥadīth* and

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[523] For a discussion on new ideas on women in Thānvī's '*shariatic modernity*, see Usamah Yasin Ansari, "The Pious Self Is a Jewel in Itself: Agency and Tradition in the Production of "Shariatic Modernity"," *South Asia Research* 30, no. 3 (2010).

[524] See the two concluding articles of his book "A Precautionary Note" and "Educating Women",

[525] "It is mentioned in a *ḥadīth* that *rasūlullāh sallallāhu 'alayhi wa sallam* said: "I have not left behind any test and tribulation on men more harmful than women." In other words, of all the things that are harmful for men, women are the most harmful. This is because, out of his love for a woman, a man loses all his senses, so much so that he does not even take the commands and orders of *Allah Ta'āla* into consideration. Therefore, a person must not fall in love with a woman in such a way that he has to act contrary to the *Sharī'ah*. For example, her demands for her food and clothing are more than what the husband can afford. In such circumstances, never accept any bribes in order to supplement your present income. Instead, give her from the *ḥalāl* earnings which *Allah Ta'āla* has blessed you with. You should continue teaching your womenfolk and inculcate respect and good manners in them. Do not allow them to become impudent and disrespectful. The intellect of women is deficient, it is therefore incumbent to take special measures in reforming them.", (p.188, also see pp. 23, 27, 385 and 388 of both volumes), (Ashraf Ali Thanvi, "Heavenly Ornaments: Bahishti Zewar," www.islamicbulettin.com).

Qur'an to support his argument, he summarily discounts the possibility of equal legal capacity for men and women generally.[526]Instead, he finds the clause a "flagrant violation" of the Qur'an and *sunna*.[527] Citing the *ḥadīth* of al-Khudrī on women's deficiencies, he says women are 'by nature short-sighted and lack wisdom'. It is difficult to take Desai seriously these days, having proclaimed just about every segment of South Africa's Muslim community somehow in violation of his understanding of Islam.[528] Nonetheless, his resistance to the Bill and Clause 3 is not isolated and his analysis of inequality between men and women in general and in marriage in particular is a sentiment that is shared by a large portion of the '*ulamā'* fraternity.

Clause 3 first featured in an Issue Paper published by the South African Law Commission.[529] This initiated the formal debate on recognition of Muslim marriages by the state in 2000.[530] It represents an adaptation of a similar provision in the Recognition of Customary Marriages Act of 1998 where it was used to harmonise customary law and common law .[531] It addressed the proprietary disadvantages of women in customary marriages.[532] In terms of Muslim marriages, the Law Commission argued that the clause

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[526] Ahmed Sadeq Desai, "Nnb Jamiat - Mjc Amendments: The Kufr Mmb Remains a Kufr So-Called 'Muslim' Marriages Bill," The Majlis www.themajlis.co.za. He cites the following verses of the Qur'an: "For men there is a rank over them (women)" (2;228); "Men are the rulers of women…." (4:34); "And call as witnesses two from among your men, and if there are not two men then one man and two women"(2:282) .

[527] His online discussion on the Bill, including these comments, is available on his website www.themajlis.co.za

[528] See footnote #9393 above for the *ḥadīth*.

[529] South African Law Commission SALC, "Islamic Marriages and Related Matters - Issue Paper 15 ", ed. Project 59 (2000).

[530] Ibid.

[531] *Recognition of Customary Marriages Act*.

[532] The Constitutional Court gave effect to this intention when it showed preference to the provisions for equal capacity over the proprietary conditions of customary law which

reflected Muslim Personal Law which allows women "full status and contractual capacity including the power to own and dispose of property for her own benefit".[533] Further, the Law Commission stressed the constitutional imperative for equality,[534] the need to prevent unfair discrimination and to avoid "the construction of patterns of disadvantage."[535] These sentiments, it explained further, are "entirely consistent with Islamic law."[536] To support the argument the Law Commission cited the following aspects of Qur'an and *ḥadīth*:

> 'And women shall have rights similar to the rights against them, according to what is equitable ...' (Sura2:228),
>
> 'To men is allotted what they earn and to women what they earn' (S4:32)
>
> 'The best of you are those who are best to their families and I am the best to my family.'

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precluded women owning property "Gumede V. President of the Republic of South Africa," in *CCT50/08 [2008] ZACC 23*, ed. Constitutional Court (2008).

[533] SALC, "Islamic Marriages and Related Matters - Issue Paper 15 ", 14. In the early stages of the debate positive laws on marriage and divorce were referred to as Muslim Personal Law (MPL) and the debate came to be known as the MPL debate. This is also how the Bill generally refers to the practice of positive law on marriage and divorce. More recently the debate is characterised as a debate on the Muslim Marriages Bill. The shift reflects the narrowing of scope of the Bill and awareness of the definition of terms.

[534] Clause 9(3) of the Constitution of South Africa establishes "(l) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."*Constitution of South Africa (1996)*.

[535] "Harksen V. Lane and Others," in *CCT9/97 [1997] ZACC 12* (1997).

[536] SALC, "Islamic Marriages and Related Matters - Issue Paper 15 ", 10.

'Fear Allah with respect to the treatment of your women.'[537]

Summarily, the Law Commission began with an idea of equality for which it found support in Islamic legal sources. At this stage there was only minimal debate on the issue of equality and the community appears to have been aligned with the Law Commission. The Commission itself appears not to have made much more of the idea. In 2001 it published a Discussion Paper in which it also produced the first draft of the Bill titled "Islamic Marriages Act". Clause 3 of this draft read: [538]

> A wife in an Islamic marriage is equal to her husband in human dignity and has, on the basis of equality, full status, capacity and financial independence, including the capacity to own and acquire assets and to dispose of them, to enter into contracts and to litigate.[539]

Response to this first draft of the Bill however, was not as amicable.[540] While the Community Law Center supported Clause 3 as "guaranteeing women's equality in the context of Muslim Marriages",[541] Masjid al-Quds explained that the clause limited women's dignity by comparison to a man's, whereas it has no such limits. By comparison, the *madrasa* Darul Ulum Zakariyya proposed the clause be deleted for its "negative effects on Islamic law", namely to make possible matters which 'Islam deems strictly impermissible'.[542] Islamic Forum Azaadville argued that the concept 'equality' has potential for conflict with Islamic norms which issue ideas of 'sameness' in

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[537] Ibid., 10.
[538] South African Law Commission SALC, "Islamic Marriages and Related Matters: Discussion Paper 101—Project 59," (2001).
[539] Ibid.
[540] South African Law Reform Commission SALRC, "Islamic Marriages and Related Matters: Report— Project 106 (2003)," (2003).
[541] Ibid., 31.
[542] Ibid., 30.

preference for 'equilibrium'.[543] Scholars of the Cape Town based Muslim Judicial Council suggested to amend the clause to recognize the equality of spouses in a marriage.[544] The Law Commission accepted their suggestion and amended the clause to its current formulation. When it evaluated the community response to Clause 3, the Law Commission explained that the Clause reflects

> *Qur'anic* principles of justice and equity which were established long before Western jurisprudence that followed. It should not be forgotten that more than 1400 years ago, Muslim women were free to conclude any contract on agreed terms. They participated in political and commercial life and took part in battles.[545]

In light of the findings in Chapter Five, the overstatement on 'any contract' is an obvious inaccuracy, marriage being the contract most proscribed for women. Nonetheless, the Law Commission continued its work under the premise that equality is a historical Qur'anic principle and that the Bill too would produce equality between spouses. After seven years in 2010 when the Law Commission produced its next draft of the Bill, support for the Bill quickly fractured to reveal reservations on matters of equality between spouses, integration into the South African legal systems and authority of the '*ulamā'* who have traditionally held almost exclusive authority for legal adjudication on these matters. As it stands, some '*ulamā'* organisations continue to support the legal recognition of Muslim marriages and the Muslim Marriages Bill, namely the "United Ulama Council of South Africa" (UUCSA) (a collective of *'ulamā'* groups that have been

[543] Ibid.
[544] See footnote #173 above.
[545] SALRC, "Islamic Marriages and Related Matters: Report— Project 106 (2003)," 31.

in negotiation with the state since the mid-nineties), "Jamiatul Ulama South Africa", Muslim Judicial Council, and "Sunni Jamiatul Ulama".[546]

Upon close reading Clause 3 equalises the contractual and proprietary capacities of husband and wife, yet the remainder of the Bill is premised upon a number of different legal capacities between husband and wife. For instance, a husband may freely pronounce *ṭalāq* (unilateral repudiation) while a wife may only pronounce *ṭalāq* upon delegation. *Khul'* (dissolution by compensation) is also made available but only in upon mutual agreement. Both parties have recourse to *faskh* (annulment) and this enhances the legal options for husbands but it likely to be the only option for a wife who does not have a delegated capacity for *ṭalāq* or cannot persuade her husband to agree to *khul'*. The net effect of these options is not to equalise the legal capacities of husbands and wives to contract or terminate the contract of marriage rather it clearly differentiates the capacities of husbands and wives for exiting the marriage contract. Moreover, the Bill certainly does not have the affect of equalising the capacities of husband and wife to own *milk al-nikāḥ* (the bond of marriage). The Bill defines a Muslim Marriage as a marriage "contracted in accordance with Islamic law".[547] The preamble of the Bill explains that amongst its' aims is "to regulate the proprietary consequences of Muslim marriages", yet the proprietary nature of the *nikāḥ* contract, i.e. *milk al-nikāḥ* does not feature in the Bill.

Notwithstanding the failure of the Bill to provide equality between spouses, a number of *'ulamā'* organisations have withdrawn their support for the Bill. Desai, is joined by the Durban based "Jamiatul Ulama KZN" (KZN Jamiat), a newly formed Fordsburg based "Jamiatul Ulama Gauteng", the Muslim Lawyers Association of Gauteng and a number

[546] See our earlier discussion on local '*ulamā'* groups in Chapter Three.
[547] *Muslim Marriages Bill 2010*.

of lay individuals who expressed their disapproval through a campaign launched by the KZN Jamiat to present the Ministry of Justice with hundreds of sms in opposition to the Bill. Desai's argument captures the bulk of their objections to Clause 3 namely that the Bill does not recognize Islamic distinctions between men and women and the authority men have over women.[548] Fortunately, the historical flexibility of the law is not entirely lost in that not all legal scholars have objected to the Bill or to women's presence in congregational prayer. The '*ulamā'* groups that remain in support of the Bill are represented by UUCSA and their submission on the Bill proposes Clause 3 be amended thus,

> A wife and a husband in a Muslim marriage are equal in human dignity and both have financial independence, including the capacity to own and acquire assets and to dispose of them, to enter into contracts and to litigate.

It appears the *façade* has been addressed and the realities of Muslim marriage become apparent. Equality extends only to the idea of 'dignity' and not beyond to the proprietary aspects of *nikāḥ*. Even the '*ulamā*' who support the Bill are clearly not ready to concede

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[548] Objections from legal scholars extend to provisions for equal legal capacity for men and women in property, marriage and other matters, that women may come to occupy senior juridical positions and adjudicate upon matters in the Bill and the availability of forms of marital dissolution that challenge the dominant use of *ṭalāq*. They also extend to the effect the Bill will have on the integrity of the historical Islamic law, the authority of the religious scholars to continue their oversight of the law, the changes in legal practice that the Bill invites, and the effects of a secular state legislating for a religious community. To read submissions from groups that object to the Bill go to the "MPL Danger" link on the website of SAMuslims www.samuslims.co.za . To read the Jamiat SA position, see their online newsletter, *Jamiatul Ulama,* Vol.6. No.7, 16 February 2011 and No. 8, 23 February 2011 here http://www.jamiat.co.za/newsletter/online_newsletter_0607.htm and here http://www.jamiat.co.za/newsletter/online_newsletter_0608.htm respectively. The UUCSA submission is available on their website www.uucsa.net . Search there also for their FAQ Booklet on the Bill produced February 2011.

to equality in terms of the contractual nature of *nikāḥ*. The amendment effectively disentangles the equality of a husband and wife in the contract of marriage from the financial independence of spouses and the legal capacities of men and women to own and transact in property. It also excludes the property of marriage i.e. *milk al*-nikāḥ and does away with the idea that wives and husbands are equal in their capacity to exit the marriage. In effect it aligns the Bill with the historical legal paradigm of marriage where the bond of marriage resides with a husband. Under the previous formulation of Clause 3 there remained the possibility that the courts might subject the remainder of the Bill to the equality clause, as it did with the Customary Marriages Act of 2010. In this formulation, however, there is no likelihood that might happen. The UUCSA amendment is formulated on the premise that a Muslim marriage is not premised on the idea of equality in the legal capacities of the spouses. While the spouses remain independent legal subjects for transacting in finance, contracts and property, as partners to a marriage they are not equal.

The UUCSA amendment also supports my suggestion that marriage is particular form of legal capacity exclusive to women who are wives. It conditions a woman's otherwise complete legal capacity for property (i.e. she may not own the bond of marriage), contract (she may not terminate the bond of marriage independently) and further, capacity for personal autonomy (her mobility, sociality and sexual accessibility are under the marital authority of her husband). I recall Kecia Ali's analysis of the formal parallel between the contracts of marriage and slavery where she explains that the jurists distinguish the two "in terms of property in order to establish boundaries between types of legal subjects", namely slaves as non-propertied subjects and wives as propertied subjects. I should like

to take this a step further to argue that the contract of marriage also establishes boundaries between two further types of subjects, women who are propertied subjects and women who are wives, thus distinguishing a woman's legal capacities as a marital subject from her legal capacities as a propertied subject even when she is both. This is also the distinction in the UUCSA amendment. While it acknowledges a wife's legal capacity for property, in excluding the general principle of equality in marriage it also maintains a husband's privileged marital legal capacity i.e. his *milk al-nikāḥ*. If UUCSA is to be acknowledged at all for this amendment then it must be for dispelling the *façade* that the Bill is a means toward equality in the legal paradigm of *nikāḥ* in South Africa.

The challenge for women proscribed in the ways envisioned by the UUCSA amendments to the Bill is the reformulation of disadvantageous gendered norms in contexts where legal norms are considered most authentic when fashioned in the *madrasa* and under the auspices of bodies such as UUCSA. The practice of Muslim Personal Law in a context like South Africa brings a number of legal and social paradigms together. Norms that originate in the classical legal texts such as those of Jīwan and Marghīnānī converge with contemporary understandings of women produced outside the *madrasa*, including modern adaptations of classical law to contemporary legal norms such as the analyses Nyazee and Zahraa produce. Further to these are colonial gender norms, constitutional concerns for equality and unfair discrimination, the requirements for gender justice, feminist critiques and gender based reform. The challenge for Muslim communities, scholars and lay people alike, is to manage the degree of interaction they find comfortable amongst these various paradigms, if any at all. '*Ulamā'* response to the Muslim Marriages Bill 2010, whether in support or opposition to the Bill, is consistent in

its support for the historically unequal Muslim marriage paradigm which establishes significant incapacities for women.

Legal change in terms of large scale social and technological transformations necessitate that legal scholarship adapt or render itself redundant. As Qasim Zaman has observed, contemporary '*ulamā'* respond to the challenges that legal and political change bring to their epistemic authority through new networks and technologies.[549] Internet, email, sms, and other social networking messaging systems are the new sites of religious authority which indicate "the endurance, resourcefulness and malleability" of religious authority.[550] While these technological adjustments are easily achieved, conceptual adjustments present greater challenges. In the specific South African context the challenge is to ideas of equality and sex difference and the legal understandings of both. More broadly, the challenge is to advance an approach to legal capacity that is not existentialist but discursive and more reminiscent of the fluidity that Jīwan and Nasafī illustrate in their doctrine of legal capacity, but conditions by contemporary Muslim women's quest for equality within the parameters of the historical Islamic law. The final challenge is to proffer an understanding of sex difference that allows South African Muslim women to exercise their legal capacities in keeping with both their pietistic and constitutional aspirations.

B. From Discourse to Essence

Formulations of women's legal capacity as inherently imperfect are easily grafted onto the historical notions of legal incapacity in marriage, witnessing, and other matters to allow legal scholars and lay people alike to conclude on pejorative understandings of

[549] Zaman, "The Ulama and Contestations of Religious Authority ", 206.
[550] Ibid., 206.

women as legal subjects. Even in light of the multiple legal subjectivities for property, belief, agency and other matters of equal spirituality, the final conclusion of the intersection of historical law and contemporary thought is to define 'femaleness' as a point of legal disability and women as legally imperfect individuals. The result is to lose sight of the idea that woman's biology does not negate woman's legal capacity. Rather, as we noted above, al-Khurī's *ḥadīth* on women's imperfections in reason and religion, exerts more influence on the scholarly understanding of women's legal capacities than does the legal theory on menstruation and postpartum bleeding. By contrast, Mullā Jīwan's suggestion that women have weak reason, accompanied by recourse to similar ideas in positive law act like a metaphor of "intellectual weakness" that extends through positive law and to general legal thought on women. In this metaphor, reason combines with menstruation and childbirth to produce a woman with only very limited legal capacities.

Similarly, for some '*ulamā*' groups in South Africa. The same KZN Jamiat that has withdrawn support for the Bill objected in 2002 when a small group of activists, myself amongst them, initiated the first local '*Īd* prayer that welcomed men and women equally and even encouraged women's presence. Their propaganda against women's congregational prayer rendered congregational prayer a privileged site of male spirituality. With reference to a *tafsīr* of Qur'an 4:34[551] by Moulana Idris Khandhlevi (d. 1393/1974), a respected *Deoband mufti*, men are characterised as naturally privileged in intellect, courage, valour strength, insight, opinion, in being prophets and heads of state. Accordingly, *jihād,* fighting in the way of God, announcing the call to prayer, and the

[551] See Chapter Three, footnote #213 above

Friday sermon before prayer are also male privileges.[552] With reference to Qur'an 2:282[553] women's "memory fails often and forgetfulness shrouds her", the differences between men and women include "menstruation, conception, giving birth, breast feeding, staying up nights and hard work during the day", as a result of which women develop "symptoms of depression and weakness of constitution. The man is free from all this."[554] And so female biology becomes a point of female imperfection.

Yet, in spite of the rhetoric on women's imperfections and the burden on women to maintain social morality by remaining indoors, the scholars cannot deny that women maintain the spiritual value of their ritual obligations even having left the home for prayer without their husband's permission. The capacity for legal obligation remains even in violation of the principle of seclusion. Thus, congregational prayer makes obvious the multiplicity of legal subjectivities that women hold. The combined effect of a legal prohibition against congregational prayer and continued validity of prayer performed in public illustrates the complex nature of women's legal capacity. Unfortunately, this complexity is not part of the local debate on women's congregational *'Īd* prayer. Despite the full legal capacity for prayer, for public presence and for accountability for the obligation to pray, the local *Deoband* opinion concludes, without caveat or condition, that a woman may not exercise her capacity for congregational prayer. Accordingly, sholars produce single dimensional images of women's legal capacities.

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[552] Elias, *Women Are Different*. The text is a collection of *fatāwa* (legal opinions) and treatises complied by the *Dār al-Iftā'* of the *Dār al-'Ulūm* of *Deoband* in Karachi.
[553] "And get two witnesses out of your own men. And if there are not two men then a man and two women …" See footnote #356 above.
[554] Elias, *Women Are Different*, 115.

In 2010, opposition to women's presence in congregational prayer in Durban culminated in a community wide 'Unity Eid Gah' that explicitly excluded women. The ideological effect of the event confirmed firstly the authority of the local '*ulamā*' to determine opinion on women's legal capacities. Secondly, it confirmed that women are not considered party to the unity that binds the community in congregational prayer. But, by our analysis above, resistance to women's presence in congregation appears to be more than adherence to a strict interpretation of the classical sources. It is an assessment of women as essentially or existentially problematic legal subjects possessing imperfections or deficiencies that are inherent to their nature. It is also an assessment on male authority over female sociality and women's public presence. The effect is much like the approach that characterizes women collectively with imperfect capacity. Though this is a conservative approach in contrast to Nyazee, here too the conclusion is upon women's imperfections.

Such formulations of woman as legal subjects offer little scope for points of non-distinction between men and women. They also contrast against the former classical approach as an existential or essentialist definition of women would contrast against a discursive definition.[555] The distinction between the two approaches is that the former encompasses a wide legal scope for women, at times distinguished by being female and at times not, at times in reference to body, at times to intellect and frequently to other social facts. By contrast, the current discussion is largely void of positive reference to menstruation and legal capacity instead there is now space for unsupported distinctions of

[555] "Essentialism is the theory that certain characteristics that may define "woman" f or example, necessarily pertain to women; they pertain to all women and for all time", (Victoria Barker, "Definition and the Question of "Woman"," *Hypatia* 12, no. 2 (1997): 206.).

women's legal capacity that rely entirely on having a female body. While both are patriarchal, the contemporary distinction of women as a specific category of legal capacity is, by contrast to the classical approach, restrictive. It defines women as inherently imperfect and offers little scope for points of non-distinction between men and women.

C. From Static to Fluid: Women of Full Legal Capacity (*Ahliyya Kāmila*)

The contrast in existential and discursive definitions of woman recalls some early tensions in the study of woman in feminist philosophy. The existential treatment of definition requires a metaphysical commitment to women as a category, and by contrast the discursive treatment of definition precludes essentialism or universalism.[556]

> Treating definitions as discursive entities means considering them not in terms of the determinacy of their dominion, but in terms of their relations to one another and to the discursive practices from which they derive their meaning. They must be considered as the constructs of discursive subjects in specific discursive situations.[557]

A discursive approach to definition allows for an evolving definition responsive to context and situation. The historical treatment of women in classical legal theory and positive law display what by our analysis is a combination of existential and discursive understandings of sex difference. While women are not a definitive category of legal theory, ideas of women as existentially deficient function through reference to "weak memory" and the absence of sexual authority. However, more than these matters determine women's legal facilities in positive law. There is also evidence in this approach

[556] Ibid., 185.
[557] Ibid., 198.

of a discursive construction of women as legal subjects. Matters of social authority, mobility, sexual decorum and the capacity for property feature in the legal capacities that women are permitted to exercise, however inconsistently or irregularly they may appear. In this way, femaleness is not definitive, but an evolving concept, discursively responsive to social norms. The situation of a wife historically, however, is essentialised in that a wife's sexual authority is not discursively formulated. She is always under the marital bond of her husband. The existential aspects of definition refer when women are defined in respect to men and the discursive aspects are evident when women are defined in respect to themselves. Mulla Jīwan`s discussion on reason illustrates the first approach and his discussion on menstruation the second approach.[558] Similarly, the legal approach to marriage is essentialist and the approach to property is discursive.

By contrast, the contemporary approach, is primarily essential, the definition of women is consistently in respect to men and not to women themselves. Imperfect legal capacity is definitively assigned to women <u>because</u> they are women and being a woman always implies distinction. This applies to the approach that says women have distinctive and imperfect legal capacity. The approach that argues women do not have distinctive legal capacity approach achieves the opposite. It argues from the basis that the distinctions that accrue to women emanate from natural associations of femaleness, but do not imply distinction in the pejorative sense of discrimination. The differentiations reflect the common logic of sex-difference. In both circumstance the definitions of

[558] Irigaray's explanation is a helpful explanation of the difference. Women, she says, "is defined and differentiated with reference to man and not he in reference to her",(ibid., 187.).

femaleness point to an existential notion of women that establishes narrow parameters for femaleness.

Further, historical legal theory shows that the legal subjectivities of women do not move in time with the legal identity "woman." The intersections of legal artifice and society, of simultaneous yet differential forms of legal subjectivity preclude the possibility of a singular female subject. In addition to the disability that may attend a woman's legal subjectivity, what determines the female legal subject is the legal moment at which she is constituted reflecting a confluence of intent, action, personhood and sex difference. Further to the contrast of the legal fact and the legal life of the subject, as Dupret explains,[559] or of the unencumbered legal subject of mainstream western law and the relational legal subject of existing feminist approaches to subjectivity (which we outlined in the introduction), the study of women's legal capacity here may allow us to speculate further through feminist analysis upon a situational legal subject constituted in a specific legal moment, not through legal artifice, but through social and legal norms that co-exist within that moment.

This historical approach is in my view more fluid, but we should not believe that it is not also patriarchal as illustrated by the distinct legal capacities woman owns in matters of marital and sexual authority. Accordingly, I would argue for a feminist approach to this third approach. To maintain a consistent principle of male authority over female sexuality, the positive laws on marriage allow a male slave to own the sexual bond of marriage even with a free woman. And through the facility of a guardian, even a minor and a person who is mentally incompetent still holds the sexual bond of marriage over a

[559] Dupret, "The Person and the Law: Contingency, Individuation and the Subject of the Law," 9-28.

free, adult, mentally competent woman. Potentially, the continuation of a discursive approach using contemporary understandings of women's legal capacity may allow the definitions of women to remain fluid. In a contemporary discursive approach determinates of femaleness would not be static or definitive rather we would be able to define the terms of femaleness without essentialist or universal claims.[560] Definitions of woman would emanate from local discourses on sex difference, emerge organically from local concerns and be responsive to social and legal change. Definitions would recognise the "dissymmetry of context and the heterogeneity of interests" that shape the definition of a woman at a particular time.[561] Rather than reference to "an ahistorical linguistic imperative", the definition of woman would reflect local and contextual practices.[562] Rather than atomistic definition of woman as X, isolated from context, we would work with definitions that rely upon the discursive practices from which the term derives its meanings.[563] Historical definitions were pejorative based on distinctions in woman's reason, public presence and other matters. Therefore, when we argue that the definition of women must remain discursive, we do not intend similar historical prejudices continue to define woman. While a discursive approach to the definition of women as a subject of law is certainly preferable, it must necessarily be a discursive approach that is not patriarchal and does not allow for discrimination.

[560] Barker, "Definition and the Question of "Woman"."
[561] Ibid., 198.
[562] Ibid., 199.
[563] Ibid., 198.

D. Conclusion

The study of the subject of legal theory and positive law, in the general sense, is also a study of who has the authority to define the subject,[564] in other words, who has the authority to decide meaning.

> Like other sorts of philosophical subjects -moral, rational, phenomenological, and so on-the subject of definition is not itself a concrete, historical, social being. It is a philosophical abstraction that must be founded, theoretically as closely as possible, on our finest understanding of concrete, historical, social beings. The fit will never be exact, however, for obvious reasons humans evidence differences to such an extent that no abstraction could satisfactorily accommodate such diversity, except, of course, one such as God might entertain.[565]

In Islamic law the final authority always lies in God, the Lawgiver, whose law is a manifestation of divine intent. Whereas Western law locates authority in the individual in that law is sourced from the world of human and social interactions and accountability returns there too, Islamic legal theory and positive law originate in the divine command and accountability for meeting the obligations of law returns to the Divine too. If it is indeed that only God can suggest an abstract definition that fits exactly the diversity of humans, and, as Ibn ʻArabī has explained, while God may intend all meanings that emerge from a word, it is not also the case that God approves all meanings,[566] then the task at hand lies in finding the most approved meaning as we work toward definition. The

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[564] Dupret, "The Person and the Law: Contingency, Individuation and the Subject of the Law," 22.
[565] Barker, "Definition and the Question of "Woman"," 190-1.
[566] Silvers, "In the Book We Have Left out Nothing: The Ethical Problem of the Existence of 4:34 in the Qur'an."

subject of Islamic law is constituted primarily in the covenant of duty to obey God.[567] Accordingly Islamic thought has developed a profound notion of the person in the realm of speculative theology which is a potentially productive reference point for further thought.[568] These ideas are only implicitly present as a subtext, in the belief that humanity is obligated to obeying God's law, in the idea that each individual is independently and equally accountable for their actions and in the conviction that men and women are spiritual equals.[569] But Muslim legal thought has not yet explored the debates from speculative theology to develop theories of sex difference that may be carried over to a critical analysis of sex difference in Islamic law. Perhaps this study is a suitable prompt for research in that vein.

We have reviewed the many ways in which male juristic authority defines female legal subjects and the patriarchal associations they make. If we are to apportion pious

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[567] By contrast, the person of western law is not characterized by a biological human, but by the quality of being "a subject of law and obligation". (Dupret, "The Person and the Law: Contingency, Individuation and the Subject of the Law," 22.). This legalistic approach to the person ignores the extra-legal aspects that inform law's person, Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin, and the Legal Person*, 45-6.). Western feminist jurisprudence, however, argues that this biological person is present in the legalistic person, however latent.

[568] Nachi, "The Articulation of 'I', 'We' and the 'Person': Elements for an Anthropological Approach within Western and Islamic Contexts."

[569] The limited reference to speculative thought in the discussions of women and Islamic law causes Arkoun to question the adequacy of these frames of analysis for contemporary Muslim (Mohammed Arkoun, *Islam: To Reform or to Subvert?* (London: Saqi Essentials, 2006), 268-9.). Nachi adds that to be relevant to contemporary definitions of the legal subject the person of the law must be framed in sociohistorical and anthropological perspectives, the study of the person in varying socio-historical contexts, contrasting past and present meanings of relevant terms, amongst them rights, humanity, the concept of the subject and, more broadly, the person envisioned in personal status law (*aḥwāl al-shakhṣīya*),(Nachi, "The Articulation of 'I', 'We' and the 'Person': Elements for an Anthropological Approach within Western and Islamic Contexts," 60.). Indeed much of the discussion on women rights and Islamic law which we encountered in the previous chapter does emerge from women's experiences in personal law matters relating to marriage, divorce and guardianship.

intentions to historical legal theorists, and we do, then we must recognise that, contrary to al-Khudrī's *ḥadīth* on deficiencies in women's reason and religion, the juristic vision and aspiration for what Islamic law ought to be does not allow for femaleness as a matter of categorical legal incapacity. And in the absence of femaleness as a historical category of legal incapacity, the concept of women remains potentially fluid and mobile. We acknowledge also that Islamic law does indeed distinguish women such that the suggestion that women are equal before God and unequal before man is not sustainable as a statement of legal fact. Nonetheless equal legal capacity, as a statement of the spiritual and legal aspirations of women-centered legal reformers, is potentially available to us. Accordingly I suggest future analysis of sex difference and the concept of the person maintain an approach to legal subjectivity that allows for the discursive definition of women as subjects of law. In keeping with feminist legal advocacy in Islamic legal theory and Islamic positive law I also argue for the continued discursive definition of women in contemporary legal theory this time without the pejorative bias against women, but in keeping with a framework that advocates complete legal capacity for women. With these legal facts as a starting point we may begin to map out potential avenues to advance complete legal capacity (*ahliyya kāmila*) for women in Islamic law.

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