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Marriage to Minor Girls: Intercourse, desire, and the female body in Islamic law

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My discussion so far has explored the two juristic considerations in making consummation of marriage with minor brides permissible: her desirability (an ambiguous cultural marker) and her ability to bear penetration without physical harm. What I am most interested in, however, is how such an act is conceptualized by the jurists? What are the assumptions regarding men and women as subjects of law? How are male and female bodies conceptualized in making such an ethically conceivable? Intercourse between adult men and minor girls is thus an important case study to understanding the broader gendered assumptions that underlie the juridical tradition.

With regards to marriage to minors, there is a significance difference in the juristic determination regarding the desirability of the minor boy vs. the minor girl. This difference is important for understanding how juridical conceptions of masculinity and femininity produce significant variations in the experiences of minor boys and minor girls in marriage, despite the fact that both are entered into marriage without regard to their consent. While the minor boy's desirability is marked by his ability to achieve an erection, the desirability of the minor girl is established by determining whether she is found desirable to men and can bear penetration: the boy's desirability is marked by his ability to penetrate and the girl's desirability is marked by her ability to be penetrated. This conception of male as active



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and female as passive is critical to understanding how the law conceives of and deems ethical sexual intercourse with minor brides. Let me provide an example to explain/illustrate ...

In a discussion on the legal definition of illicit sexual intercourse (*zinā*), al-Sarakhsī returns to the issue of sexual intercourse with minor girls. In Islamic law, the status of individuals and the legal relationship between them determines whether sex is licit. The punishment for illicit sexual intercourse is fixed, whipping or stoning, depending on the marital and sexual status of the individuals. If a man and a woman willfully engage in sexual intercourse outside of the bonds of marriage or slavery, both of them are to be punished. It is important to recognize that while these punishments were upheld theoretically they were practiced with great restraint. As the punishments were severe, the standards for evidence were stringent, requiring four male witnesses to attest to the actual act of penetration. Furthermore, any level of doubt about the action typically resulted in penalties being dropped altogether or reduced to discretionary punishments.

In attempting to tease out the nuances of what constitutes illicit sexual intercourse, al-Sarakhsī lays out for us three scenarios: rape of an adult woman by an adult man, intercourse between an adult man and a minor girl, and intercourse between a minor boy and an adult woman. The primary question and issue at stake here is what criteria should be used in determining whether the act legally classifies as *zinā* and, consequently, whether the punishment should be enacted? Through a complex weaving of different arguments we begin to see how the law constructs men as desiring subjects and women as desired objects that are the locus for the sex act. This subject/object relation forms the framework for reading the role of male and female bodies in the act of intercourse and is further confirmed and articulated through language.

al-Sarakhsī begins with the case of rape. This case raises crucial issues regarding who is legally culpable in *zinā*. Whereas consensual illicit sex between two adults is punishable, in a case of rape, he argues, the man would be punished as he engaged in sex voluntarily but the woman would not because of coercion. While this may seem intuitive, his legal reasoning in determining whether *zinā* has occurred is not concerned with the woman's coercion but her legal designation as a desired object, the place where the sex act is performed (the exact term he uses is *maḥal al-fi'l*, meaning the locus or place of the act). al-Sarakhsī goes on to explain that coercion is of no legal significance in ascertaining *zinā* as it does not diminish the fact that the act occurred. The woman is a proper locus as she is able to endure penetration, thus the

man's action (i.e. penetration) constitutes illicit sexual intercourse. He is to be punished. The woman, however, is not punished as she did not make herself as the locus available willingly but was instead coerced.ⁱ

“In Islamic law, the status of individuals and the legal relationship between them determines whether sex is licit.”

To further elaborate upon this legal nuance, he analogizes rape to sexual intercourse with a minor girl. Similar to the previous situation, he argues, the man would be liable for *zinā* regardless of the fact that the minor girl is not legally culpable due to legal minority.ⁱⁱ In each one of these cases, the main consideration is the legal culpability of the man. As far as the minor girl is concerned, the desirability of the locus, characterized by its

suppleness and warmth, is not reduced or diminished by factors such as coercion or even legal minority. In both these cases (i.e. the case of rape and illicit sexual intercourse with the minor girl) there is no doubt that illicit sex occurred as the acting party was an adult male and the locus of penetration (i.e. the woman) was a desirable one.

Given al-Sarakhsī's view of the male as acting agent (*al-fā'il*) in the act of intercourse, what are the legal implications if the situation is reversed and the woman is legally obligated while the man is not. al-Sarakhsī provides us such a scenario in which an adult woman invites an insane man or male child to herself to which he responds by committing adultery with her.ⁱⁱⁱ In such a situation, he argues, the woman would not incur punishment. Contrary to the previous scenario in which the adult man was punished for engaging in sexual intercourse with an insane woman or female child, the situation in reverse does not acquire the same judgment. The crucial distinction in these two cases has to do with Ḥanafī law's determination that men are both the addressees of revelation and the acting subjects in sexual intercourse.

In explicating the position of the Ḥanafī school regarding this case, al-Sarakhsī argues that in such a case the legal injunction for illicit sexual intercourse does not go into effect because the acting subject in the sex act (i.e. the man) is not legally accountable under the law due to his impaired legal subjecthood (i.e. due to insanity and legal minority). Interestingly, the acting subject in this situation is not the woman who initiated the sex act, but the man. For al-Sarakhsī, the woman acted only in enabling the act, making herself available (*makkanat nafsaḥā*)^{iv} for sexual intercourse, inviting the insane man or minor boy to act upon her. However, as the insane man and male child are not legally obligated, the punishment for *zinā* does not go into effect in cases where they are the acting subject. The main conceptual framework for understanding sexual intercourse for Ḥanafī jurists is the interplay of activity and passivity and that is assigned to men and women respectively, men desire/women are desired, men penetrate/women are penetrated).^v

Constructing the woman as the locus in sex acts, her action being entirely dependent on the man's, leads to a legal and moral conundrum in that it would allow women to engage willfully in *zinā* without fear of punishment. Since the illicitness of sexual intercourse is defined by the legal subjecthood of the man then the obvious question that arises is: what is the legal culpability of the woman? As the Ḥanafī position upheld by al-Sarakhsī holds both men and women accountable but only considers the man's action of legal consequence, why would women then be punished?

al-Sarakhsī attends to this dilemma by differentiating between the precise nature of what creates legal accountability for men and women. He argues that man is the direct acting agent (*al-mubāshir lil fi'l*) in the sex act while the woman is subsidiary (*al-tābi'ah*), following the action of the man. al-Sarakhsī confirms this reading of intercourse by asserting that if a man were to penetrate a sleeping woman, the law would still consider his act to constitute *zinā* and he would be punished for his action. As woman is the locus where sex is performed, her lack of consciousness does not hinder her availability. In this conceptual framing, the very definition of sexual intercourse is dependent on the action of the man. He is not only the acting subject (*al-fā'il*) but his participation in fact constitutes the very source of the act itself (*aṣl al-fi'l*). The women's culpability, on the other hand, is established through making herself (i.e. the penetrative place) available. While recognizing women's sexual agency in providing sexual access, the woman's intent and participation remain irrelevant in both the definition of

intercourse as well as the determination of *zinā*. Her activity is read passively and she does not enter into juridical consideration until after the man's act comes into effect.^{vi}

In al-Sarakhsī's legal imagination, man is the acting subject, the penetrator, whose intent and legal obligation are the primary concerns in what constitutes *zinā*. As the object of male desire the woman is viewed as the locus where the act is performed, her agency is read passively; she is penetrated. This passivity is constructed by reading the female body as a passive receptacle which is confirmed linguistically through the use of passive grammatical constructions in speaking of women's agency, she makes herself available, invites a man for intercourse, has *zinā* done to her. There is a seeming disconnect between the desire and consent of the woman on the one hand, and sexual access to her on the other. While the woman's desire for sex is not negated in the legal discourse, the juridical construction of the female as locus is separate from her desire and consent to the act. Women seem always available for penetration regardless of their desire for sexual fulfillment. The minor girl can continue to play her part in this conception of penetrator/penetrated despite the lack of consent or desire on her part.

al-Sarakhsī's reading of woman as locus is particularly telling of the law's assumptions regarding gender. In reading the sex act as the subject/object performance of penetration, al-Sarakhsī not only conceptualizes the woman as the object figuratively but also equates the female body to the vagina. The *maḥal* (locus), desirable because of its suppleness and warmth, is simultaneously the woman and the vagina. The line between the desirability of the woman and the desirability of the vagina is blurred. In an interesting juridical move woman is identified with, located, and fixed within her body. Place, object, vagina, the penetrated all become a metonymy for woman. The categories of subject/object and the juridical reading of the act of intercourse interplay in a self-affirming juridical construction. Man as subject is always the penetrator and woman as object, the penetrated. Ontological assumptions about gender inform the hermeneutical horizons for the sex act and become synchronized with the material body, simultaneously interpreting and confirming embodied sexual practices for the juridical discourse. The minor girl can adequately serve as the locus where the marriage is consummated provided she as the locus is desirable to the groom and her vagina as the locus can adequately bear penetration without physical harm. The objectification of the minor bride here is further amplified in her objectification in the marriage contract itself. She is married off by her father or paternal grandfather and as a minor her consent is not only unnecessary but Ḥanafī law does not allow for the marriage to be annulled once the minor girl enters puberty and decides that she no longer wishes to remain in the marriage.

ⁱ Muḥammad ibn Aḥmad al-Sarakhsī, *Kitāb al-Mabsūṭ* (Bayrūt, Lubnān: Dār al-Kutub al-‘Ilmīyah, 2001), 9:55.

ⁱⁱ In this second scenario, in which the male is legally obligated and the female is not, al-Sarakhsī gives the example of the minor girl and a woman who is insane or sleeping. For the minor girl and the insane woman, legal obligation (*taklīf*) is absent due to age and insanity. The sleeping woman is not liable due to the lack of intent and voluntariness. Thus, in each of these cases, the woman would not be held liable for adultery.

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ⁱⁱⁱ The precise phrasing that al-Sarakhsī uses here is important to understand the passivity of the woman's agency. He begins laying out the scenario by stating: if an adult woman (laying out the legal definition, one who is sane (*al-‘āqilah*) and legally mature (*al-bālighah*) invites an insane man or minor boy to herself and he commits adultery with her, then there is no punishment for her (*fa idhā da‘at al-‘āqilah al-bālighah majnūnan aw ṣabiyyan ilā nafsihā fa zanā bihā*). It is crucial to note here that al-Sarakhsī does not state that they both committed adultery. The active

verb is used for the man, in that he commits adultery while the active verb used for the woman relates to her invitation to him to act upon her. Ibid., 9:54.

^{iv} Ibid.

^v It is important to note that Ḥanafī law differs from other Sunni legal schools in the determination of *zinā*. The Shāfi‘ī legal school, for example, still maintains activity and passivity as the conceptual framework for understanding gender and yet holds women accountable for their sexual activity regardless of the active partner. The Ḥanafī school is unique in the way it employs this gendered framework in matters of sexual intimacy.

^{vi} It’s important to note a nuance to al-Sarakhsī’s argument here. He argues that while the act of the young boy or the insane man is considered adultery linguistically, it is not considered so juristically. Adultery, he argues, is legally defined as an act that is prohibited by revelation and is not disconnected from moral accountability. Thus, as the actions of the minor boy and insane man are not accountable, their participation in intercourse does not meet the legal definition of adultery. As the act is not constituted thus, the woman (the passive partner) cannot be considered an adulteress.