1. The Hanafite school of law is the oldest and numerically the most important of the Muslim Sunni law schools. It became the dominant law school in the eastern regions of the Muslim world from the ninth century onwards and in the western regions of the Muslim world under the Ottoman Empire. I will discuss the Muslim jurists' valorization of the human body in light of the discussions of the Hanafite Transoxanian jurists of the tenth to the twelfth centuries concerning the different forms of circulation of persons and goods in the spheres of social exchange and commercial exchange. In commercial exchange, commodities are exchanged for commodities. In social exchange, goods or monetary values are considerations for non-commodities, or non-commodities are reciprocally given and taken. Whereas the Hanafite jurists call the first form of exchange *tijāra*, trade,¹ they did not develop a generic terminological classification for the second kind of exchange. I will call it the symbolic or social exchange.²

Between the two forms of exchange there are four main differences:

1. Firstly, commercial exchange is open and *accessible to everyone* whose rational capacities qualify him for the calculation of profit and loss; everybody has access to the bazaar. As the eleventh-century Transoxanian jurist Sarakhsi explains:
The Muslim and the non-Muslim under Muslim rule, the subject of a non-Muslim government and he who comes from non-Muslim territory with a guarantee of security, the free person and the slave who has been authorized to trade and also the slave who has the permission to redeem his freedom, they are all equal in the contract of tenancy because this contract belongs to the contracts of commercial exchange and in these contracts all are equal.  

By contrast, admission to social exchange is selective. It depends on the individual’s or the family’s standing in the five major social hierarchies, which are determined by religion, gender, kinship, generation and the relation of free persons to slaves.

2. Secondly, the partners to commercial exchange are equal with regard to the offer and acceptance of their respective goods, the right to the appropriation of the things exchanged and the protection of their goods and rights by the political authorities. Neither political power nor social prestige should give a privilege to any of the parties concerning these exchange relations. The contract of sale is the model for this equality in the commercial sphere. It represents a transactional justice which depends on a common value measure of the things exchanged and the idea of reciprocation in arithmetical terms.

By contrast, social exchange is open only to those who are accepted as equals by their partners. It is selective and valorizes the partners according to their standing in the five major social hierarchies. The marriage contract is the model for this kind of selective and classificatory exchange. The principles which regulate the access to the marriage contract and to the realm of social exchange remind us of Aristotle’s proportional justice in which “equality must be equal for equals” and “justice is equality...but not for all persons, only for those that are equal. Inequality also is thought to be just; and so it is, but not for all, only for the unequal. We make bad mistakes if we neglect this ‘for whom’ when we are deciding what is just.” Under Muslim law, the criteria for admission to social exchange serve to underline a principle of proportional justice that would have satisfied Aristotle: social relations, i.e. relations concerning the association of new members with the household or the establishment of
kinship relations through marriage, are conditional on the equal ranking
of the exchange partners.

3. The third difference between the commercial and social exchange
is that the first one is based on a precise calculation of the value relation
between the commodities exchanged, whereas in the second no common
measure exists between the goods or the money given as a consideration
for the social relationship acquired. The jurists, therefore, uphold the idea
that commercial exchange is based on the precise calculation of the value
relation that exists between the countervalue exchanged\(^9\) whereas social exchange is based on generosity and toleration.\(^10\) This is largely due to the
fact that the value of the social good acquired cannot be measured exactly
in commercial terms.

4. Fourthly, commercial exchange presupposes the complete and vol-
untary consent (\textit{ridā tāmīm}) of the partners to a contract.\(^11\) If one or both
of the parties act under duress, i.e. under the influence of force and fear,
or in complete or partial ignorance of the objects exchanged, the vol-
untary consent is non-existent and the contract is either not valid or has to
be authorized retroactively by the partner who acted under duress.\(^12\) The
contracts have to be interpreted in light of the parties’ intentions (\textit{nīya})\(^13\)
and purposes (\textit{maqṣūd}).\(^14\) They cannot be interpreted in a formalistic
way.\(^15\)

Things are different in the contracts concerning social exchange; contracts concerning social exchange and associations with or dissociation
from households and families are nearly always contracts which indicate
social ranking. The marriage contract, for example, is a contract of selec-
tion and classification. It classifies people into those whom one can marry
and those whom one cannot. This implies a high social risk of rupture and
conflict, because the refusal of a demand in marriage, let alone the with-
drawal of an acceptance in marriage, indicates negative ranking and class-
ification.\(^16\) Marriage presupposes, therefore, as the jurists say, a period
of negotiation and betrothal before the actual exchange of marriage decla-
ration takes place.\(^17\) This is not a legal obligation: it is a conventional
practice. But once it comes to the conclusion of the contract, the subject
matter is much too explosive and the risk of frustration and strife too
important to leave to the parties the same range of maneuvering that they
enjoy in commercial exchange. In the marriage contract the formula once
spoken is binding and produces its legal effects. According to the Hanafite doctrine, but not to that of other Muslim Sunni law schools, if the parties to a marriage contract act under duress, under the influence of force and fear, their declarations are valid and produce their legal effects. Contrary to commercial contracts, duress does not annul the binding force of the contracts of social exchange. These contracts follow the principle of a strict formalism which leaves very little place for intent, purpose, and knowledge of the parties concerned. Social exchange is a very serious business in which room for maneuvering is restricted to the utmost in order to avoid the disruptive effects of frustrated hopes and expectations and of negative classification.

II. According to the Hanafite jurists, a free person can never become the object of commercial exchange as one can never, legally, lose her or his freedom. “Man,” writes the illustrious eleventh-century Transoxanian jurist Sarakhš, “is created as an owner and not as a property.” The dignity (karāma) and the right to inviolability (ḥurma) of the free human body prevent its circulation by the means of commercial exchange or its gratuitous appropriation. The circulation of a good or a person as a commodity or as an appropriated good implies, according to the jurists, its “profanation” (ibtidāl), a term which is defined by the jurists through its opposition to protection, conservation and chastity (saun or šiyāna), and to ḥurma, inviolability and sacred status. It implies the idea of use and abuse by everybody. Profanation is a characteristic of commodities and of appropriated goods that circulate freely from one hand to another and are thus usable by everybody. It contradicts the religious status of the free human body which neither in its entirety nor in its parts may be transformed into a commodity or a freely circulated good. With regard to his body, the free person is an owner who cannot sell his property. And this has, in the twentieth century and with regard to organ transplants, given rise to long and sometimes bitter discussions, much as in the U.S.A. and in Europe.

The human body of the free person is circulated and valorized according to the norms of social exchange. But different criteria dominate different spheres of social exchange: the sphere of sexual desire, of sexual appropriation of the other person's body, follows other criteria than the sphere of violence, homicide and grievous bodily harm. Only
enslaved persons follow, in both fields, the criteria of commercial exchange.

III. Sexual desire of the other person's body leads to different legal results in the different spheres of exchange. Every adult person's body, according to Muslim law, is compartmentalized into zones of shame ('āura) which are gender specific and—in the case of women—change with slavery or freedom. They have different legal signification for members of the same or the opposite sex, for relatives or strangers, for free persons or slaves. In the man's body the shame zone covers the part between the navel and the knees\textsuperscript{23} whereas the free woman's body as a whole, face and hands (and according to others, feet and forearms) excepted, is a zone of shame.\textsuperscript{24} These shame zones must be hidden from the sight of strangers. Milder rules apply to the exchange of looks between persons of like sex\textsuperscript{25} or between persons of different sex who are forbidden to intermarry for reasons of kinship or any other marriage impediment.\textsuperscript{26} Women may licitly touch the parts of other women's bodies that they are allowed to see and so may men who are related to women through kinship or other marriage impediments (e.g. their mothers, sisters, aunts, etc.), provided that they can do so without concupiscence.\textsuperscript{27} But they are forbidden to touch adult free women to whom they are not related through kinship or other marriage impediments\textsuperscript{28} or to look at them with desire or concupiscence.

Only if a man intends to marry a woman may he look at her with avidity.\textsuperscript{29} Only through marriage do free men and women acquire the right to show each other their body with its shame zones uncovered. The illicit look at a woman's sex establishes an impediment to marriage with her mother and daughter not only for the man who commits the transgression but also for his near male relatives. It stands, as the jurists say, for illicit sexual intercourse and is considered as such.\textsuperscript{30} To allow one's body to be seen is a way to give oneself to the person who looks. In the relationship between free men and women this right can be acquired only through marriage and it is a right that both parties acquire.\textsuperscript{31} The lustful look on the other person's uncovered shame zones is conceived of as a form of appropriation of that body, and is, for that reason, allowed only between wives and their husbands or between male slave-owners and their female slaves.\textsuperscript{32}
The consensual agreement of a man and a woman to enter into a sexual relationship does not render this relationship licit. There is no personal autonomy with regard to one's sexual desires. The zones of shame are imposed upon the human body and access to them is only to be had by the prescribed legal procedure. The penal law punishes sexual intercourse between a man and a woman who are not married to each other unless the man owns the woman as his slave. There are, then, only two ways for the man to the licit appropriation of the woman's body: the marriage of the free woman or the ownership of the slave-woman.

But being admitted to marriage supposes that the bridegroom of a free woman qualifies as equal to the woman's male relatives in terms of genealogy, religious reputation and the historical depth of his family's adherence to Islam, as well as in terms of social prestige, profession, wealth and power. Through reference to genealogy a hierarchy of ethnic groups is established: the highest ranking group are the prophet's tribe, the Quraish; they are followed by the Arabs and below these follow the non-Arab Muslims. It is important to see that the equality between Quraish and the Arabs is measured in terms of collectivities, i.e. tribes and clans, whereas the non-Arab Muslims are compared as individuals.

The Hanafite doctrine on the equality of ranking (kafa'a) thus links the status of the individual man to his being included into or excluded from the systems of kinship of the dominant ethnic categories. The equality measured in these terms is a legal claim of the bride's agnatic relatives who are entitled to repeal the shame (al-'ar ash-shayn) that stems from an unworthy alliance. Therefore, the agnatic relatives of the elder generation can marry off their family's boys and girls who have not yet come of age and who have had no licit sexual experience, against their will, to partners that the agnatic relatives choose, so that de facto the married minors become objects of, not parties to, the contract. The ranking of the male lineages and individuals in these terms constitutes the framework for the bride's valorization, i.e. for the criteria through which her bride price is determined. The bride price or the nuptial payment (mahr) which the bridegroom pays as a necessary effect of the valid marriage contract and which is considered to be the payment for the "ownership of the woman's sex" is determined by a comparison of the bride's qual-
ities with those of the women of her father’s lineage—her aunts, sisters, cousins, etc.—and with the nuptial payments which they received. The qualities in question are age, beauty, wealth, reason, religious reputation and chastity. The amount of the bride’s nuptial payment is thus largely determined through the social ranking and prestige of the male lineage to which she belongs. It is before this background that her individual qualities are taken into account.40

The jurists insist that the property of the marriage bond which the husband acquires cannot become an object of commercial exchange. They teach: “What becomes property through marriage is no commodity,”41 and “the female sex is no object of trade (wa‘l-bud‘ laisa bi-māl ).”42 They define marriage as: “A reciprocal contract in which a commodity is exchanged against a non-commodity.”43 And they are categorical in stating: “Marriage does not belong to commercial exchange, because commercial exchange is an exchange of commodities and marriage is an exchange of (legitimate access to) sex for a commodity (wa‘n-nikāhu laisa minda‘ti‘jarat li‘anna‘ti‘jaratīa mu‘āwadatu‘l-māli bi‘l-māl wa‘n- nikāhu mu‘āwadatu‘l-bud‘i bi‘l-māl)”44 They explain why a non-Muslim whose wife converts to Islam has his marriage dissolved without any monetary compensation whereas the non-Muslim slave owner whose slave converts to Islam is entitled to sell his slave to a Muslim and appropriate the price as his property: “The property of marriage is not an object of trade whose value is guaranteed by the law. It can, therefore, be licitly annulled if the husband refuses to accept Islam. By contrast, the property of a slave is a protected commodity respected by the law because of the contract of protection. It is not licit to gratuitously annul this property...through the slave’s emancipation.”45

Marital relations do not follow the profit motive and, consequently, cannot form part of commercial transactions or of the protection granted by the law to the commodity value.46

The property of marriage (mil‘ an-nikāh) is a social property. Among free persons it can only be acquired through contract, not through inheritance, as would be the case with patrimonial values. The social property of marriage establishes an unequal, hierarchical relationship between the husband and his wife, whose body becomes his exclusive property as far as sexual intercourse and all lustful exchanges are concerned. But it is a
personal relationship in which the partners are not exchangeable. The husband can neither sell his wife nor marry her to somebody else. He does not have the power to profane his wife through abusing her. He enters into a social relationship with her in which both parties are to enjoy rights and duties even if 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. That this is not an equal relationship is freely admitted by the religious tradition which speaks metaphorically of marriage as a form of slavery for the wife. According to Kāsānī, the nuptial payment serves to compensate the humiliation which the woman suffers through marriage. For the same reason, the wife has to pay a price if she wants a consensual divorce from her husband. This price is considered to be the price of her liberation which annuls the husband's property rights over her body. Ideally, it should correspond to the nuptial payment made by the husband.

As regards her social distance from men, the criteria for the valorization of her body, and her sexual life in marriage, the free woman is clearly characterized by the jurists as a person whose integration into the existing hierarchies of kinship, gender, ownership and religion entitles her to participate actively in social exchange. As far as social distance is concerned, the concept of the zones of shame that determine the right to look at her and to touch her creates a large social distance between her and all men who are not related to her through kinship (including fosterage, rada' and other impediments to marriage) and marriage. This large gendered social distance is a right and a duty of the free woman. The valorization of her body as defined by the nuptial gift is clearly determined by her integration into the agnatic lineage. The relative prestige of the male ethnic group, the tribe, the clan determines the prestige of its female members. Only in comparison to the women of her agnatic clan is the bride's ranking established through her individual qualities. If, however, she resides far from her clan, the jurists look for women of the urban or tribal society in which she lives as appropriate objects of comparison and ranking. The ranking criteria of the social hierarchies among ethnic groups and lineages and of the women within these lineages are then translated into monetary values established by the jurists according to the customary practices of the various urban and regional societies.
Finally, the free woman can have a licit sexual life in marriage only. Marriage is an unequal relationship between her and her husband: he has the right to forbid her to leave the house, to punish her if she is not obedient, to marry other women besides her and to repudiate her unilaterally when he sees fit. But the relationship between husband and wife is a personal relationship which constitutes the framework of an unequal exchange between the partners. The woman is never entirely the object of the man's disposition. She keeps the right to own property to which her husband has no access. She can making her decisions with those of her...
dition. Brunschvig states that under the law "[t]he Muslim slave-woman is not under as strict an obligation to ‘hide her nakedness’ (satr al-‘aura) at the ritual prayer as the free woman."57 And according to the Hanafite school of law, men who are unrelated through marriage or kinship or ownership to female slaves may still look at their bodies as if they were free women related to them through close family ties. The jurists justify this rule through the fact that the slave women are sent out of the house in their working clothes in order to serve the needs of their masters; that they serve the guests of their masters and that, for this reason, they may be touched and looked at, except their back and their belly.58 "With regard to strangers," teaches the twelfth-century Transoxanian jurist Marghinānī, “their status outside of the house is like the status of the woman in the house for those of her male kin who cannot marry her.”59

Gendered social distance is, in the case of the slave woman, reduced to a general familiarity that puts her in everybody’s reach and touch. When the ownership of the slave’s body is circulated by commercial exchange, this familiarity is changed into the probing look of inspection. As an object of transaction the female slave’s body is profaned in many ways. Recently, Yūsuf Rāgib has described the mechanisms of the slave markets on which, in all important cities of the Middle East, slaves were offered, naked or half-naked, to buyers who carefully and shamelessly examined their bodies and who often bought them with the option of returning them if a more careful checking of their bodies, to be effected in their own homes, would result in the discovery of reprehensible bodily vices.60 Not all of these practices would have met with the approval of the jurists. But the Hanafite jurists take it for granted that a man who buys a female slave is entitled to look at her, to uncover her legs, her arms, her breast (ṣadr), and to touch her carefully “to examine the softness of her skin.”61 Whether he is allowed to look lustfully at her body is a matter of discussion. But it is clear that at the point where the female slave is turned into the object of a commercial transaction, her right to gendered social distance is reduced to the barest minimum.

Through the act of sale, slaves—male and female—are transformed into commodities while at the same time remaining human beings. This poses major problems for the jurists’ classifications. A commodity’s value (māliyya) is, as they say, defined by the commodity’s genus (jins), its
species (māhu), its quality (ṣifā) and its legal measure (qadr) if it is a fungible good.62 Whereas, in the case of slaves who are goods in specie, the species and the quality are largely identified with ethnic affiliation,63 but the question of the genus of the slaves raises many problems. Are slaves to be defined as a genus different from free persons?64 Do they form one genus or different genera? If they are a commodity genus how is their value to be established?

In Muslim law, the question of the definition of genera of commodities pervades the whole field of commercial exchange: the unequal exchange that is characteristic of usury (riḍā), which is forbidden under Muslim law, is defined in terms of an exchange of identical genera against each other in unequal quantities or at different times.65 The licit ness of contracts that include a time horizon separating payment and delivery, such as the salam, the contract of forward-buying, is constantly discussed in terms of genera relations. In general, in any conceivable commercial exchange, the question of the genera and the species of the commodities that are to be exchanged determines whether or not the transaction is licit.

By which criteria is a genus defined? The Hanafite jurists make it abundantly clear that all commodities have a commodity character and an exchange value (māliyya) and that, therefore, this common characteristic cannot define their individual genera66 and mark them off against each other. The individual genus of commodities is rather defined by the material from which they are produced,67 their ‘origin’ (aṣl) as the jurists say,68 the name (ism) that they carry,69 the form (hā’ī’ah) that they take,70 and the method by which they are produced (ṣan‘a, mīnhāţ)71 if it “imposes a change in name and use”72 are equally important criteria for the determination of commodity genera and of their delimitation against each other.

One of the most important tests of an authentic difference between commodity genera is the question whether a specific commodity can be retransformed into its original state. If it can be so retransformed then it is not an independent commodity genus, otherwise it is.73 The material origin of the commodity is, therefore, one aspect only of genus determination. Also, the formation of an independent commodity genus is not only dependent on its production and the criteria derived from it, like form, method of production, transformation and retransformation. It
depends also on the demand side and the use assigned to the particular genus of commodities by the buyers. The idea of the commodity's licit use (intifā’), as defining the range of licit 'purposes' (maqāṣid, aghrād) assigned to it by the buyer, is an essential criterion for the differentiation between commodity genera. In many cases, it is more important than the material 'origin' and the form of the commodity for the determination of the genus.

The apparatus of classificatory criteria outlined above is applied to the slaves in order to determine their value and their genus. While following their argument we should keep in mind that, due to the jurists' casuistic method of reasoning, in juridical parlance, as Schacht says, "differences between two genera are often not greater or more essential than those between several species within the same genus." The fact has not escaped the attention of the Hanafite jurists. 'Aynī, writing in the fourteenth century, underlines on several occasions that the jurists' use of genus (jins) corresponds to the use of species and Nasir ad-Din al-Mu'tarrizi in his thirteenth-century dictionary of legal terms ascribes to the jurists their own way of defining genus and species. But even if we accept this reservation, the Hanafite discussion clearly shows that for the jurists the importance of the gender criterion outweighs that of the difference between free male persons and male slaves. According to Hanafite doctrine, male slaves and free men are one genus because they may be used for the same purposes. As Sarakhsi puts it:

The free and the slave are one genus. As far as his origin is concerned, the human being is free. Slavery intervenes as an accident. The emancipation annihilates this accidental slavery. So slavery does not bring about a change in the genus, neither through a difference in the (material) origin nor the form nor the purpose, because this (difference) does not exist between free males and slave males (fa‘īnna’l-ādamiyya bi‘tibārī‘l-āsli, ḥurr. Thumma ya‘ariqu‘r-riqu‘ fih. Wāl-l-‘āqu ilī‘l-dhālikar-r-riqqā‘l-l-‘ārid. fa-la yūjibu tabdīlal-jinsi immā bi‘khtilāfī‘l-āsli awl-ha‘ati au al-maqṣūd wa-dhālikah la yūjodu bainal-‘ahrārī wa‘l-‘abīd).
Male human beings, slave and free, have the same human origin, the same form and they are used for the same purposes. There is no genus-differentiation between them. The male slave is temporarily in the accidental state of slavery, but attributes change in the course of time and their changing sequence does not bring about a change in the genus of the human being. Some jurists refer mainly to the fact that male humans, slave or free, are put to the same use by other persons; other jurists refer to the identity of form and function between free and slave males in order to justify their belonging to the same genus. Some stress their common human origin (see note 79). Many refer to the fact that slaves may be emancipated and return to their original status of free persons. According to the jurists, only Ablū Yusuf upheld the idea that the attribute of being a slave suffices to constitute slaves as a genus of their own. All in all, the Hanafite jurists quite convincingly use the apparatus of classificatory categories that they developed for the commodity exchange in order to uphold the doctrine that free and slave males belong to the same genus. As far as the constitution of the genus is concerned, the common human character is of higher importance than the difference between slaves and free persons.

The same reasoning does not hold true when it comes to female slaves. According to the Hanafite doctrine, male and female slaves are not two species of one genus but form two different genera. They ascribe to female slaves a genus that is different from that of male slaves. This genus is determined by their functions. Zufar Ablū Hudhai, one of the students of Ablū Hanifa and one of the most prominent Hanafite jurists of the eighth century, had upheld the position that “all of Adam’s children are one genus and this holds true for their males and their females.” Against this doctrine the dominant opinion of the Hanafite school of law is formulated by the eleventh-century Transoxanian jurist Sarakhsi as follows:

The male and the female of Adam’s children are legally two genera, because the purpose which is assigned to the one cannot be realized by the other. The function assigned to the female slave is concubinage (istifrāsh) and the production of children and a male slave cannot do anything of this. One
sees, then, that the difference in the functions assigned to them is bigger than the one between wheat and barley or between cloth from Marv and cloth from Herat. In this, male and female slaves differ from all living creatures.57

The same jurists who uphold the unity of the male human genus across the limits between slavery and freedom assign a different genus to the female slaves because, they say, the difference of purposes to which they are put is so enormous that, against all requirements of logic58 and against all analogies to other animals, male and female slaves cannot be conceived of as forming one genus.59 Where slavery is combined with the gender difference it destroys the unity of the human kind. With regard to human genders, the commercial and social exchange produce, in fact, different genera of human bodies.60

The female slaves' genus is constituted through reference to the fact that the appropriation of their persons does not only imply the control over their bodies, their work, their time, the right to sell them, to lease them or to make them work for the owner. All this is also part of the status of the male slave. The control over the slaves' sex life with third persons is also not peculiar to the female sex: the male slave's master can marry him to any woman he wants or he can forbid him to marry. Such an interdiction would amount to forbidding the male slave any legalized form of sex, because the slave, according to the doctrine of the Hanafite school, is not allowed to have concubines. His legalized sex life is restricted to marriage.61 What constitutes, according to the jurists, the genus of the female slaves, is the peculiar purpose assigned to them by their masters: they are to serve as concubines and as the children's mothers. The ownership of a female slave includes the right to the use of her sexual organs by her master—which the ownership of the male slave, clearly, does not. The masters of male slaves are never entitled to have sexual intercourse with them.62 The sexual appropriation of the female slave takes two forms: the commercial and the marital appropriation. The first one concerns her relationship with her master and is mediated through the commercial property titles that the owner holds over his slave; the second one concerns her marital relations with other persons. Both spheres follow their own rules; both are controlled by the slave's
owner. In both spheres the predominance of the commercial over social exchange is seen in the annihilation of the role of the woman's agnatic relatives in favor of the slave's owner, in the reduction of the rights and the role of the female slave's husband and in the mutual exclusion of rights and claims that stem from the spheres of the commercial and social exchange. The last one finds its clearest expression in the incompatibility of the commercial ownership \( (milk \text{ al-māl}) \) of a person with the ownership of the marriage \( (milk \text{ an-nikāh}) \) concerning the same woman, but it is also effective in a number of other legal norms.

The commercial appropriation follows the procedure prescribed by the sale contract. The female slave is sold as a commodity on a market. If one compares this bargain to the marriage of the free woman the following are the most striking differences: the slave's family is not represented in the sale. No agnatic relative takes the role of a guardian \( (wālī) \). Rather, it is the owner who offers her for sale. The agnatic relatives play no role in determining whether the partner is their equal. The prospective buyer just has to have enough money to pay the price. The price replaces the nuptial payment \( (mahr) \) but its amount is not determined by any reference to the status and prestige of the woman's agnatic relatives. In the sale contract, the slave's ethnic origins and affiliations play a role in determining her quality\(^93\) but her agnatic relatives do not. Individual beauty, strength, and capacities determine the price as factors secondary to ethnic affiliation.

Contrary to the marriage contract which, according to the Hanafite doctrine, does not grant the husband the right of options for the wife's redivisible vices,\(^94\) the buyer of a slave has, much as any other buyer under
The source of the cognition of redhibitory vices is the merchant’s practice...Whatever they consider to be a redhibitory vice is a redhibitory vice. A redhibitory vice is something that diminishes the exchange value (māliyya) because the function of the sale is the profit and the profit is realized through the exchange value. Whatever creates a deficiency in the purpose (assigned to the slave) diminishes the exchange value and is a redhibitory vice.99

The juridical commentaries of the period under discussion contain lengthy lists of such redhibitory vices of slaves.100 These redhibitory vices are classified into four main categories:101 those that are easily visible for everybody, those that result as symptoms of interior sicknesses and are comprehensible only to doctors, those that only women are entitled to see and, finally, those that concern the character evaluation ('āib hukmī).

Many of the criteria by which the jurists classify these defects are related to the slave’s physical appearance. They are related to the physical defects which render the slave incapable of fulfilling the purpose assigned to him by the buyer or which diminish the aesthetic pleasure of
slave it constitutes a redhibitory vice, because she is bought to have children with her master "and her adultery impairs this purpose (yukhīllu bihādha'l-maqsūd) for she sullies his bed." For the male slave, on the other hand, illicit sexual intercourse does not constitute a redhibitory vice: it does not interfere with the purpose for which he is bought, i.e. hard work outside of the house. It does not, therefore, reduce his value. Only if he becomes obsessed with sex to the degree that he does not attend his work any more, or that he will undergo repeatedly dangerous bodily punishment as a consequence of his acts, can his sexual behaviour be construed as a redhibitory vice. In the sphere of the redhibitory
sale as binding.\textsuperscript{109} They discuss in the same way the fact that he tolerates the slave woman's lustful advances on him.\textsuperscript{110} If he has sexual intercourse with the slave woman, this is a\textsuperscript{manifest} desire to buy her.\textsuperscript{111} If he allows
intercourse with her, either in order to beget children (*istifrāsh*) or in order to satisfy his desires (*lī-ghadārī sāsh-shahwā*). It goes without saying that the female slave owner is not entitled to have sexual intercourse with her male slaves because only female slaves may be sexually appropriated and only by male owners. The children stemming from the intercourse between a male owner and a female slave are slaves and may in turn be sold, pawned, rented or employed by their procreator and owner. But there is one thing that the slave-owner cannot do: he cannot marry his female slave. The jurists are very explicit about the fact that the commercial property excludes the nuptial property of the slave. The twelfth-century author Kāsim explains why owners of slaves are not allowed to marry them:

Marriage consists of a number of legal claims that both partners share in joint ownership (*šarīka*), such as the woman’s right to require sexual intercourse from her husband and the husband’s claim that his wife enables him to do so. The existence of the ownership of property rights (of the owner over the slave) excludes the joint ownership. And if there is no joint ownership in the fruits of marriage, marriage has no function (*la yūfidu‘-n-nikāh*) and is not admissible, because it is not admissible that the claims stemming from marriage are exerted against the master by his female slave or against the free woman by her (male) slave. This is so because the ownership of property rights (exerted by the master over his slave) require that the authority (*wilāya*) be that of the owner and that the owned person be submitted to this authority. The ownership of the marriage requires that the authority be given to the slave over the owner. This leads to a situation in which one and the same person is at one and the same time exerting authority and being submitted to authority concerning the same thing. This is impossible. ... When the ownership of property rights on a slave (*milk al-yamīn*) interferes with marriage, the marriage will be annulled. Such is the case when one person of the married couple acquires the ownership of his partner or of a part of his.
A husband or a wife can acquire the commercial property of their marriage partners if these are slaves, but if they do, their marriage is annulled.\textsuperscript{119} By contrast, the owner of a female slave can never marry her as long as he keeps the commercial ownership title to the property of her person. He has to abandon his commercial property rights in order to acquire what the jurists call the "nuptial property" (\textit{mil\'k an-nik\’\=ahl}). In the same line of reasoning, the slave owner cannot, according to the Hanafite jurists, establish filiation (\textit{nasab}) with his children from the union with a female slave, unless he waives his ownership rights to them. In stark contrast to other Sunni law schools, the Hanafites do not admit the establishment of filiation (\textit{nasab}) through the mere birth of the child as the fruit of such a union unless the owner explicitly acknowledges the children as his offspring.\textsuperscript{120} His acknowledgement of the filiation implies the loss of the commercial property rights concerning the slave mother and her children, and therefore, according to the Hanafite jurists, his explicit recognition of the filiation is necessary.\textsuperscript{121} It is the owner's free decision whether he wants to become the master or the father of his children. If he opts for the fatherly relationship, his children are free, they are filiated to him and carry his name, their mother becomes a "children's mother" (\textit{umm walad}), i.e. she remains a slave as long as the master lives and is set free at his death only. But she can no longer be sold. She and her children cease to be commodities, \textit{res in commercio}. Through the owner's option for the fatherly role, the female slave and her children may, therefore, be reinte-
exchange are mutually exclusive. Marriage is at the core of social exchange among free persons: a meritorious act closely related to the existing hierarchies of kinship and gender relations and, in fact, the most important basis for their reproduction. For the slaves of both sexes, marriage constitutes a redhibitory vice. They are, therefore, not entitled to marry unless their owner gives them the explicit permission to do so. Their master can impose marriage and marriage partners on both the male and the female slaves, minor or adult, against their will. According to the jurists, the master enjoys this competence as a result of his commercial ownership (milz raqaba) of the slaves in order to protect his slaves against the vice of adultery, whose punishment could result in a diminu-
case of partners in a commenda (muḍāraba) or a limited trade association ('inān) because their competences concern commercial exchange only "and the marriage does not belong to commercial exchange,"135 or, as Sarakhsi puts it, "marrying off a slave is not a feature of trade, nor is it one which the merchants customarily practice. We know of no place in any country having a market devoted to marrying off slaves."136

After the marriage contract is concluded, the master keeps control over the female slave's labour. He is not obliged to let her establish a common household with her husband, because, the jurists say, the owner's right to her service is above the husband's right.137 The husband's right to sexual intercourse with his slave wife is reduced to a hit and run formula. According to the jurists the owner tells him: "When you get hold of her, make love with her (matā ẓafarta bihā wa'ītāhā)"138 or, as Sarakhsi puts it: "She continues to serve the master in his house as she used to. When the husband finds her alone and in a moment of leisure he satisfies his (sexual) need (wa-matā wajada'z-zauju minhā khalwatun au farāghan qadā hājatahu)"139

Whether it is the slave woman or her master who decides on the licitness of the forms of sexual intercourse with her husband is a matter of debate among the Hanafite jurists. In general, they assume that coitus interruptus is used by a husband who does not want to beget children.140 A free wife is entitled to refuse her husband this form of sexual intercourse because it may conflict with her legitimate claim to beget children.141 A concubine is never entitled to refuse her master this form of sexual intercourse because she has no claims against him, neither social nor commercial.142 In the case of the married female slave, the Hanafites disagree whether it is the female slave who has to give her consent with her husband's practice or whether the permission has to come from her master, because it is his claim to the children of the couple that is put into jeopardy by the coitus interruptus.143

This argument refers to another striking difference between the female slave's marriage and the marital life of a free couple: much as in the marriage of a free couple, the children whom the female slave begets in marriage are the legitimate offspring of her husband and carry his name; their filiation (nasab) to him is established,144 but they are the property (milāk) of her master.145 The filiation (nasab) of the children can-
not be combined with an ownership title to their persons; the commercial property of the children excludes the title to their paternity; it has to be abandoned in order to create a relationship between father and children. Parental and commercial authority over the children exclude each other mutually. The two authorities belong to different spheres of the law and may, therefore, be exercised only by two different persons: the father and the owner. Only if the slave's husband is a free man who can prove through witnesses that he married the slave because he was told by her or her guardian that she was a free woman, can his children remain free. In this case, he has to pay their value to the female slave's owner, to buy off his authority over his children. In all other cases, the weak role of the husband as compared to the owner of the female slave, the mutual exclusion of filiation and ownership of the children that result from the marked difference between the commercial and social exchange cause a lack of the husband's coercive authority over his wife and his legitimate children. This lack of the husband's authority combined with the non-existent authority of the female slave's agnatic relatives is one of the factors which prevents the slave's marriage from causing the foundation of a family who would live in a common household and in which husband and wife share that “unity of marital purposes” or that “common ownership of the fruits of marriage” which, according to the jurists, characterizes the free married couple.

The husband's authority, his "ownership of the marriage," is diminished by the owner's authority, which is derived from commercial ownership. Therefore, the Hanafite jurists hold that a female slave who is married by her master may, upon emancipation (litq), dissolve the marriage. This is the "option of emancipation" (khīyār al-'itq), which is open only to female slaves. The jurists underline that, through emancipation, the husband's ownership and authority over the woman increases (izdiyād al-milk), the marriage changes its character as far as the woman is concerned and that, for this reason, she should be given an option to dissolve the marriage. The actual exemplification of the rule by the jurists is rather narrow in scope, but the logic of the explanatory figure points to the heart of the matter: through the annihilation of the owner's ownership over the female slave and her children, the husband's authority increases: he can force his wife to live in one household with him, he can forbid her
to leave the house or to see other people, he is responsible for the upbringing, the subsistence and the professional formation and activity of his children. As long as they live in his household, he can control their income. He becomes the head of the household in which the family is now organized and the balance of authority between husband, wife, children and the former owner changes. All these changes occur when the owner of the female slave sets her free and leaves the field open for her and her child's integration into the social hierarchies that determine the social ranking and authority among free persons. At that moment, she is entitled to choose whether she wants to continue the marriage under the new conditions.

IV. Social ranking and classification is established not only in the fields of marriage and sexual appropriation but also through the legal consequences of physical violence. The law of retaliation clearly classifies people into those who can use violence against other persons, as a form of retaliation, and those who cannot. Contrary to the ownership of commercial property, the ownership of the human body is not protected in the same way for and against everybody. Retaliation for grievous bodily harm is justice among equals. But the criteria of equality, in the field of retaliation, do not concern the religious and the social standing of the individual nor the social and religious merits of particular families and persons. It is not social stratification that counts but the generic classifications of people according to gender, freedom and health. Families remain important as the group of agnatic male relatives, who form the 'āqila, responsible for the compensatory payments of unintentional killing or grievous bodily harm, and as the heirs, who receive the payment for unintentional homicide.152

Thus far, the individual remains embedded in the kinship structures of social exchange. But, there is no hierarchical ranking among families. All free men have the same "legal value" (tagawwum) as far as homicide is concerned. The same holds true for all free women. The ranking takes place between free men, free women, and slaves, who do not have a legally fixed value.153 In the field of grievous bodily harm, health is introduced as an additional criterion for ranking. According to this classification, women are not the equal of men, crippled limbs are not equivalent to healthy limbs, slaves are not equivalent to free persons. Therefore, in the
field of grievous bodily harm, women have no right to retaliation against men, persons with crippled limbs not against those with healthy limbs and slaves neither against free persons nor against each other, because, in this field, they are not considered to be persons but commercial property and commercial property does not enjoy the right of retaliation against other chattel.\textsuperscript{154} If they are killed by their owners, no blood money and no tali- 
on arises from this act. The master is bound to perform an act of atone- 
m (kaffāra).\textsuperscript{155}

Conspicuously, the criterion of religious affiliation which is so prominent in the field of sexual relations is absent from the Hanafite law of retaliation. The hierarchical gender roles and the difference between the free and the slave determine the field. The contrast between the strong and healthy on the one hand, and the crippled and paralyzed person on the other hand, is an additional criterion of differentiation.

Concerning grievous bodily harm, the payment of compensation follows the same criteria: a woman’s limbs are worth half a man’s limbs, the slave’s limbs have an exchange value, not a value that is fixed by the law. His exchange value has to be estimated by experts.\textsuperscript{156} Compensation for non-intentional homicide follows similar criteria. It is supposed to re- 
establish a disrupted balance between social groups that has been caused by the loss of the life of one of the group members. The amount of the compensation depends on the generic classification of the persons con- 
cerned, i.e. on their gender roles and their status as free persons or slaves. A woman gets half of a man’s blood money. The masters of the slaves have a claim for compensation for their exchange value. Neither religious affiliation nor age nor health have any influence on the amount of the blood money that has to be paid.\textsuperscript{157} It seems, then, that as far as violence is concerned, the capacity to exert it is decisive for the choice of the cri- 
teria for valorization. Gender, health and freedom are the three criteria which determine the classification of persons and the respective prices to be paid for assaults against them.

None of these criteria plays a role in the field of capital punishment for intentional homicide. A twelfth-century jurist, Kāsānî, underlines the equality of all persons in this field:

\begin{quote}
It is not required that the killed person be equal to the killer with regard to the perfection of his person, i.e. with
regard to the integrity of his parts; it is also not required that he be his equal with regard to honor, rank and virtue. One kills the person with healthy limbs for the person whose limbs are cut or paralyzed, the scholar for the ignorant, the man of rank and honor for the commoner, the rational man for the insane, the adult for the minor, the man for the woman, the free for the slave and the Muslim for the non-Muslim.\textsuperscript{158}

All subjects of a Muslim government are equal before the Hanafite law as far as the right to retaliation for intentional homicide is concerned. The reason is that life is protected by the Muslim political community's military and political power. The protection of the human life against intentional homicide does not depend on the criteria of the commercial or social exchange, nor on religious virtue nor on the individual's affiliation to a particular family, but on the notion of belonging to the Muslim political community (\textit{dar}) and on the bond (\textit{isma}) that ties the subjects to the governments and which guarantees them the authorities' protection of their rights.\textsuperscript{159} For that reason, there is no private property of one's life. Suicide is a violation of the bond that ties the subject to the Muslim government. Much as in Greek philosophy,\textsuperscript{160} in Hanafite law suicide is an offense against the political commonwealth, against the body politic.\textsuperscript{161} Life and death are matters of the political community, not of any social hierarchy. Neither religious affiliation, nor gender, nor the authority of the elder generation or the status of slaves and masters valorizes the body in this field. Hanafite law is the only form of Muslim law that proclaims this form of equality and bases it on the adherence to the body politic. Two exceptions to this principle of equality are conspicuous: the father cannot be killed for homicide against his son, nor the master for homicide against his slave. In both cases, private authority, based on either family and generation or on commercial property, outweighs public authority.
chies. It also seems evident to me that this continuity is broken with the upsurge of the Mamluks and that from the thirteenth century onwards we can differentiate between forms of rules whose legitimation is related to the hierarchies of social exchange and those, like the Mamluks, whose legitimation is not dependent on the hierarchies of social exchange. In these latter regimes one must have been a slave, an object of commercial exchange, in order to pass into the realm of political power. One must come from a non-Muslim origin and not have a family genealogy; in short, one must be clearly separated from the social hierarchies which characterize the society to be governed. For the relationship between government and society, for the legitimacy of a political rule, for the ranking in the political sphere, this change brings about important transformations which characterize the political culture in important parts of the Arab world from the thirteenth century onwards. It seems to me that the rupture between social exchange and the reproduction of the ruling class is a development of utmost importance that makes the thirteenth century the
between the commercial and social exchange, discussed at great length by
the jurists: the non-commodity of freedom is bought by the slave for a
monetary consideration, and for him it is a clear case of social exchange,
whereas the owner sells a commodity, i.e. the slave, for another com-
modity, the payment of the slave, and so for him the exchange remains
strictly commercial. Whatever the legal interpretation of such a case, as
decidedly weakened. Of the five major social hierarchies which characterize social exchange in classical Hanafite law—religion, kinship, gender, generations, and masters versus slaves—the last one has disappeared and the fourth one has been decidedly weakened.

4. In many Muslim countries, the law of retaliation and compensatory payments, which so clearly displayed the gender influence in the field of violence and penal law, has been abolished. Gender roles have lost an important dimension through the formation of a new state, a new penal law and a new economy.

5. Something that has happened unnoticed for most of the observers is the abolition of the formalism of social exchange. Neither in marriage nor in any other field of social exchange do the law codes of Muslim countries keep the binding force of the pronounced formula independently of the intention, the knowledge, the will of the parties concerned. As far as consent and duress are concerned, modern Muslim law has decidedly abolished the formalistic dimension of social exchange and with it one of the procedural aspects that most clearly distinguished the social from commercial exchange.169

6. The privileges of access to the female body which slavery granted to the class of well-to-do males disappeared in their old form. With them disappeared, from the realm of the normative structures, a whole dimension of sexual relations in which the satisfaction of sexual desire was not tied to the marriage contract as its only means of realization. The abolition of slavery has not led to the emancipation of desires. Although in literature and in politics women have demanded, and continue to do so, a recognition of their personal autonomy concerning their desires, their love relations and their bodies, most Muslim countries do not admit the right of individual persons to autonomously shape their personal forms of love and sex relations.

7. Of the traditional forms of valorization of the human body, only the nuptial payment and—in a reduced form—the controlling role of the agnatic relatives survives. Both refer to an institution, marriage, which has become a symbol of social hierarchies and social exchange, a symbol of the non-commercial world, and a symbol of a social order of a world that has passed. This symbolical function of the institution weighs heavily on the female body and its legal and social valorization. It sets a limit
to women’s efforts to gain access to autonomy and emancipation outside the hierarchies of gender and kinship. It transforms the woman’s body itself into a symbol of the permanence of the correct social exchange.

Notes

I am grateful to the Institute for Advanced Study (Princeton, N.J.), for accepting me as a member in the year 1993-94, and to the Deutsche Forschungsgemeinschaft, which funded an extra sabbatical term from April to September 1994. Both institutions have thus granted me the time to work on the project “Commercial exchange and social order in Muslim law,” of which this article is a part.


4. That the principle of equality (musāwāt) dominates commercial exchange is underlined by all jurists. They define equality in terms of
a) access to commercial exchange (see note 3 above);

b) the relation between the price and the commodity sold (Abū Bakr b. Mas‘ud al-Kāshāni, Kitāb Bad‘āt ‘al-sanā‘i ‘fi tartīb ash-sharā‘i’ (Cairo, 1910), vol V, pp. 184, 187, 191, cf. pp. 193, 194);


For this reason, the following categories of persons are equal under com-
commercial exchange: 1. men and women (Sarakhsi, op. cit., vol. XII, p. 219; vol. XV, p. 134; vol. XIX, pp. 7, 12); 2. Muslims and non-Muslims (Sarakhsi, op. cit., vol. XIV, p. 168; vol. XII, p. 174; M. b. Hasan ash-Shaybani, Kitab al-asl, part I, Kitab al-buyut wa's-salam, ed. Shafiq Shahata (Cairo 1954), p. 221, no. 20); 3. even slaves with contracts of redemption of their freedom or the permission of their masters to engage in trade (Sarakhsi, op. cit., vol. XV, p. 134) are the equals of free persons in commercial exchange. This equality does not pertain to the dealings of a slave, even if he is permitted to trade, with his master. Everything the slave owes belongs to his master. On the casuistry belonging to this figure, see Kasauni, op. cit., vol. V, p. 193.

5. For the classical model of transactional justice see The Ethics of Aristotle: The Nicomachean Ethics, translated by J.A.K. Thomson, revised with notes and appendices by Hugh Tredennick, introduction and Bibliography by Jonathan Barnes (Harmondsworth: Penguin Books, 1976), pp. 179-182, 183-186. The emphasis that is put, in this context, on the difference between transactional and proportional justice can help one to understand the Muslim jurists’ differentiation between the commercial and social exchange.

6. This common value measure is expressed by the term maliyya, whose use by the jurists oscillates between the meanings of commodity character and exchange value: see Johansen, “Commercial Exchange and Social Order,” op. cit.


9. The argument runs as follows: 1. profit is the aim of all commercial exchange; 2. in order to calculate the profit, the maliyya or exchange value of the commodities exchanged has to be known. Therefore, the parties to commercial exchange must give precise information on the commodities exchanged in order to enable the other party to calculate the chances of profit; see Sarakhsi, op. cit., vol. XII, pp. 119, 124, 125, 128, 133, 136, 152-153; vol. XIII, pp. 38, 68, 77, 80, 99.


11. Sarakhsi, op. cit., vol. XIII, p. 157, cf. pp. 65, 69, 71, 72, 75-76; vol. XXIV, p. 237 (discarding one has to read 'an'adim); Kasauni, op. cit., vol. V,


35. Kasaani, op. cit., vol. II, pp. 319: quraish ba'dhum akfa' li-ba'din, wa'l-arabu akfa' li-ba'din hayy bi-hayy wa-qabila bi-qabila wa'l-mawali ba'dhum akfa' li-ba'din rajulun bi-raju; see also Marghinani, op. cit., vol. II, pp. 420-421; Sarakhsi, op. cit., vol. V, p. 24, explains the fact that the mawali are not the equals of the Arabs through the fact that “they lost their genealogies.”

Bellefonds, op. cit., vol. II, pp. 64, 172.

37. Kasâni, op. cit., vol. II, p. 238, adduces the guarantee of equal status (kafsa'a) as the major justification for the major agnates' right to marry their minor relatives of both sexes without their consent; see also ibid., pp. 240-241 and Linant de Bellefonds, op. cit., vol. II, pp. 64, 172. The father and the grandfather are entitled to marry their minor daughters to men who are not their equals, see Kasâni, op. cit., vol. II, pp. 245, 318. Other agnates are not entitled to do this. For marriage that is enforced upon minors (jabr) see Linant de Bellefonds, op. cit., vol. II, pp. 60-65, 69-73; vol. III, pp. 178, 182-183.


THE VALORIZATION OF THE BODY IN MUSLIM SUNNI LAW
share and Islamic banking (Cambridge: Cambridge University Press).
85. It is hard to say whether this doctrine owes some of its arguments to the influence of the cynical and stoical opposition to slavery in classical antiquity which is based on the idea that the human kind is one genus and cannot be divided into masters and slaves: see Bernard Lewis, op. cit., p. 4.
88. Ibn al-Humām, op. cit., vol. V, p. 206, underlines that logically they should be one genus only.
90. One wonders, in fact, how much of this construction is a reaction to the current practice of slave-dealers to sell young boys as girls and young girls as boys, a practice that should stir the moral fears of the jurists: see Y. Rāgıb, op. cit., pp. 759-760, nn. 270 and 271. But it seems more convincing and more fruitful to understand this as a reference to the principal gender differences among slaves as outlined below.
93. See above, note 63, for the importance of the ethnic affiliation for determining species and quality of the slave.
99. Sarakhšī, op. cit., vol. XIII, p. 106; see also ibid., pp. 51, 99, 103; Kāsānī,


108. The most striking example of this reasoning is to be met with in the case, analyzed by many jurists, of the slave who has been condemned to death but who can still licitly be sold by his master. They argue that the sale concerns the máliyya, the exchange value, whereas the death sentence concerns the life, naḍṣīyya, of the slave. Both are the result of independent claims and do not interfere with each other. Only if the death sentence is executed does the slave's exchange value disappear with his life and only in this case is the death sentence considered to be a rehibitory vice which entitles the slave buyer to a compensation: see Sarakhsi, op. cit., vol. XIII, pp. 115-116, cf. vol. XVIII, pp. 171-172; Marghinānī, op. cit., vol. V, pp. 178-181; Bābarū, op. cit., vol. V, pp. 178-181; Ibn al-Humām, op. cit., vol. V, pp. 178-182.


110. Ibid., p. 61.
114. Sarakhsi, op. cit., vol. XIII, p. 61, see also p. 96.
115. Sarakhsi, op. cit., vol. XIII, p. 64, see also pp. 46-47.
116. Sarakhsi, op. cit., vol. XVII, p. 100: the satisfaction of desire is here closely related to the coitus interruptus ("azl") which separates it from the sexual intercourse for the begetting of children.
117. Schacht, op. cit. Introduction, p. 127, "Kāfirūn are of yy' Ilāh."


147. See above, note 53.


free woman her nuptial payment (mahr)? 'Aynī, op. cit., vol. IV, p. 766, cites legal authorities who determine the criterion for the amount of the 'urūq, the money that has to be paid to the owner of a female slave by a man who had illicit sexual intercourse with her, in the following way: one states how much such a woman would have earned if, given her beauty, she would have rented herself out for prostitution. This amount is then defined as nuptial payment (mahr). See also al-Fatāwī al-'Alamīrīyya, vol. I, p. 325, for a very similar definition ascribed to the same authorities. It is evident also from Tātarkhāniyya, vol. III, pp. 150-152, that payments to women with whom a man has illicit sexual intercourse are, wherever possible, defined as nuptial payment.


