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THE LINE BETWEEN FORNICATION AND PROSTITUTION: THE PROSTITUTE VERSUS THE *SUBAŞI* (POLICE CHIEF)*

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This paper examines the approaches to prostitution within the frame of legal norms and social life in the Ottoman Empire via the case study of a Muslim woman who was adjudged to be a prostitute at a court in 1580. Compared with similar case reports, this case study also demonstrates the struggle of a prostitute for her rights against the unjust and arbitrary practices applied by officers and common people, which allows us to think about gender mainstreaming. One of the results of this paper establishes that there are no special regulations about prostitution in Islamic Law. Although it is viewed as 'adultery' in Hanefi Islamic Law, prostitution is understood to be punished with light sentences since most prostitutes were not married. The severe penalties in Islamic Law were designed to prevent married women's adultery. Upon marriage a woman grants or transfers her right of sexual intercourse to her husband and if she lets another person use that right, it is seen as allowing someone to steal her husband's property. In the case of unmarried women and prostitutes, the fee taken is counted as a gift or other consideration. The paper attempts to explain why the concept of prostitution did not occur in Islamic Law and why it was regulated in the Ottoman Empire as a part of private life.

Key words: prostitution, fornication, illicit law, Islamic law, gender, Ottoman history, social history, early modern history.

Between 21–26 February 1580, the *kadı* (religious judge)[1] of the Aegean coastal town of Edremit[2] examined a complicated case involving an attempted abduction of a woman named Sultan and listened to the testimony of the defendants. While the attacked woman and her attackers asserted their conflicting claims, "*prominent individuals*"

* Based on a Turkish version of this paper, see Yılmaz (2012).

[1] The Edremit Court records (*Şer'iye Sicil*s), cited herein, are from Register #1206, between Folios 46-b and 55-a (ECR 1206). For a list of the Edremit Records, see İlgürel (1974–1975).

[2] For the region under the administration of the kadı of Edremit, which was Edremit District, see Yılmaz (1995).

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from Edremit and witnesses from the Soğanyemez neighbourhood[3] testified to what they had seen and what they knew about the persons involved. As the case continued, the woman, Sultan, who was judged to have been attacked, based on the testimony of witnesses, stated that she told the Edremit *subaşı* (police chief) Mehmed: "*If I've fornicated*, *then punish me*" (ECR 1206: Fol. 52-b, document: 3, February 24, 1580) and when she uttered this profanity, the nature of the case changed instantly. The fact that these words were uttered publicly by a woman made the statement of particular interest.

At the outset, the course of the case looked positive for Sultan. However, at some stage, the fact that Sultan was a prostitute became an issue, and some of those who spoke in her favour testified that "*she is well known for being a prostitute*" (ECR 1206: Fol. 52-b, document: 3, February 24, 1580)[4] As she uttered those vulgar words in the wake of that accusation, she somehow seemed to be confirming the accusation and indeed accepted that she was in fact a prostitute. Actually, she might have been expected to talk with utmost care because of the nature of the allegation against her. It is possible that Sultan reacted this way after feeling humiliated at the court as people from her neighbourhood and prominent individuals from among the townsfolk had publicly stated that she was a prostitute. However, what is evident in the written record, to the extent it is traceable, is that Sultan had her outburst because of what she saw as the unlawful and arbitrary treatment accorded to her, rather than as a result of feeling humiliated or in anticipation of a possible punishment.

When a Woman is Tried among Men

According to the court records, Sultan was attacked by five men at her house in the late afternoon (ECR 1206: Fol. 50-b, documents: 1 and 5, February 21–22, 1580). Mehmet, the ringleader of the attackers, and his four friends, tried to drag and take her by force.[5] But people in the neighbourhood and the Edremit *Subaşı* (police chief) (ECR 1206: Fol. 50/b, document: 1), who heard the noise and Sultan's call for help, arrived at the scene almost at the same time, intervened and saved her from the attackers. The incident was recorded in the incident report with Sultan's own words, "*The subaşı, his subordinates and people from the neighbourhood saved me from Mehmet as he was trying to break into my house with a weapon and take me by force*" (ECR 1206: Fol. 50/b, document: 5). It is also understood from the case records that the attackers managed to temporarily escape while the *subaşı* and the neighbours were responding to the incident, but they were later apprehended and sent to the court (ECR 1206: Fol. 51/a, document: 5, Muharram 6, 988/February 22, 1580). Sultan filed a lawsuit against all of her attackers, specially their ringleader, Mehmet. Although Mehmet

[3] In those years, there were 12 neighbourhoods (*mahalle*s) in Edremit. According to the census of 1573, there were 31 houses in the Soğanyemez neighbourhood, see Yılmaz (1995, p. 121, Table III).

[4] About the testimony by the residents of the neighbourhood that Sultan is famous for prostitution, see ECR 1206, Fol. 51-a, document: 3 (February 22, 1580).

[5] It is cited as "…dragging". See ECR 1206: Fol. 50/b, documents: 1 and 5.

denied the accusation, Sultan managed to prove the attack thanks to the witness statements of the Edremit *Subaşı* and people in the neighbourhood (op. cit.). After all, it was not difficult to do that since the incident took place before everyone's eyes.

However, shortly thereafter, it became apparent that there were different aspects pertaining to the incident from just what everyone had seen. When the people in the neighbourhood were asked for information about the defendant and the plaintiff as required by the procedure,[6] it was found that opinions of the people on Sultan were extremely negative. According to the prevailing opinion in the neighbourhood, Sultan was a prostitute who visited the places where she was invited, and her house was visited by men called "*yaramaz*" (good-for-nothing). And what is more, she was known to have been practising prostitution for twenty years.[7]

After escaping the attack with the help of her neighbours and proving with the witness statements of people in the neighbourhood that she was mistreated and aggrieved, Sultan was now facing the charge of prostitution due to the information also provided by the neighbours, although the testimonies seemed conflicting. This case of Sultan simply embodies the complex social dynamics and multiple dimensions of neighbourhood life in the Ottoman Period.

The reason why the neighbourhood played such an active role in the judicial process was that the individual privacy and the secrets related to private life were open to the public oversight and control of the neighbourhood. In the Ottoman neighbourhood, order which was created with the combination of socialisation dynamics, legal norms and the rulership's desire to control, there was a social context where the public sphere simply crushed the right to privacy, and this caused everyone to follow each other and have opinions on one another. People in the neighbourhood and prominent individuals who were asked for information were not government officials. On the contrary, they were locals who always co-operated with the district officials whose function was to maintain social order and control and who had the right to give voice to social ethics in the name of the public. All of these "*prominent individuals*", who are called "*notables and gentry*" (Ergenç 1982) in the documents, were men for sure, and thus it is clear that they had an extremely important role in social gender besides their other functions. Therefore, the social perception supplied to the court by those who did not have official duty and function was turned into a formal and legal one. This way the highly strict and always active control function of the neighbourhood

[6] In the Ottoman districts and towns, the neighbourhood was not only an administrative unit, but also a social sphere with an oversight function. This meant that it was a physical part of the town, and it embodied the norms on how its residents would live together, so much so that people in the neighbourhood were held responsible for each other and thus they supervised each other's behaviours. Therefore, people in the neighbourhood submitted positive or negative information about someone living in that neighbourhood, when required. About this practice which was highly influential in the judicial process and the development of a judgement, and the neighbourhood, see Ergenç (1984). About characteristics of neighbourhoods communicating the privacy in terms of social control, see also Yılmaz (2000); Artan (1993).

[7] "*…and when it is asked by others, we can't say that she has had a good reputation for twenty years. A prostitute is called by her fame; this is how it is circulated. That's why she visits the sailors rooms at night*." ECR 1206: Fol. 51/a, document: 3 (Muharram 6, 988/February 22, 1580).

was in place. However, people in the neighbourhood preferred to wait rather than taking Sultan to court, a woman who according to their statements had been a prostitute for more than twenty years, and this is an important fact worth stressing. Considering that it was common in such cases to kick people out of the neighbourhood by court decision, should we interpret this as tolerance shown by people in the Soğanyemez neighbourhood toward a lonely woman who had led a life they did not approve of for twenty years? They had ample opportunity to take action much earlier based on the public opinion expressed at the court after the attack. As they did not take such action, it seems controversial to interpret that Sultan was attacked by the guardians of morals who attempted to defend the honour of the neighbourhood. If that was the reason for the attack against Sultan, she could have been the target of similar attempts in the past, too. But she had not been, and therefore possible incidents in the past might have been covered up without being conveyed to the court and Sultan was not recorded in the court. According to the case records, it is certain that Sultan had not been taken to the court before because of prostitution. If she had been, this would have been reflected in the records and used against her.

In this case, another question becomes crucial: Was there anyone protecting Sultan? If there is a connection between the lack of protection and the attack that we cannot prove, then it would be possible to understand that she maintained her life without being kicked out of the neighbourhood or brought to court for twenty years. We need to say that these possible dynamics lying behind the incident create an ambiguous but striking series of factors in terms of the relationship between social legitimacy and law.

Who is Mehmet?

Who was Mehmet, the ringleader of the attack against Sultan, and did he have a role in accounting for how Sultan had managed to live in the neighbourhood for twenty years? It appears possible that he was one of the woman's customers, or her panderer/pimp,[8] because a document (ECR 1206: Fol.46/b, document: 2) indicating that Mehmet was taken to the court on charges of being a pimp about a week prior to the incident in question shows that he had been tried in the past on the same charge, and this fact was recorded in the minutes. Although Mehmet denied this allegation despite the criminal record, the statements given by four witnesses seem very adequate to nullify his denial. The witnesses stated that Mehmet had a woman on the back of his horse and left her in somebody's room[9] in their village.[10] They also mentioned that the woman Mehmet brought to their village and left there was a prostitute. Since it is

[8] The words pimp (*pezevenk*) and panderer (*köftehor*) have the same meaning and are interchangeable in the documents.

[9] "*… Mehmet, son of Turhace, brings prostitutes to the room of Hasan and Mehmet at our village, and drinks alcohol with the sailors…*" ECR 1206: Fol. 46/b, document: 2.

[10] "*He brought a prostitute to the room of Mehmet and Hasan at our village, we saw it, witnessed it, and even testify to it...*" ECR 1206, Fol. 46/b, document: 2.

known that village rooms used to serve as a place to meet in these kinds of affairs,[11] it is very likely that these statements of the witnesses against Mehmet are true. This information allows us to put forward the reasons for the attack against Sultan with more certainty and to consider the reason for the fight between Sultan and Mehmet under the special circumstances of a relationship between a 'prostitute' and 'her pimp'. This fight between Mehmet and Sultan could be the moment when the co-operation between a disobedient woman and her pimp, who wanted to bring her into line, broke out, or a reflection of a prostitute's objection and its consequence. Unfortunately, the existing documents do not allow us to assess the situation and its influence on the incident more precisely. On the other hand, the same documents have unexpectedly rich details about the judicial process.

The Role of Officials

Without having someone powerful to protect her, it could have been a frequent problem for Sultan that a bargaining between her and her customer or pimp ends in disagreement or a brawl that may take place as a result of the attempts of those who wanted to have sexual intercourse with her without paying any money. Based on the documents, it seems possible that Sultan may have been protected thanks to the close relationships or co-operation that her procurer had established with the local officials. Such networks of relations were very common, and there were surprising examples in this respect.

To give an example, the *subaşı* of the Biga Sanjak Bey made an independent woman, Bursalı Hüma, look like an odalisque and sold her for 340 *akçe*s (small silver coins) (ECR 1205, Fol.72/b, document: 1, January 20/30, 1579). The statements given by Hüma and the men who were caught and tried with her indicate that the *subaşı* sold the woman as a prostitute.

Another example is that a woman, Aynî, who was imprisoned at the İstanbul dungeon, was taken out by officials at night, and then caught when she was having intercourse with men (Galata Court Records, 1, p. 364/1, September 2, 1552). In her statement the women said that she was taken out of the dungeon at night and brought to Beşiktaş on a boat. It is very clear that there was an organisation behind this incident, one in which officials were also involved. Although the woman stated that she did not know the person who took her out of the dungeon and brought her to Beşiktaş, she likely said this in order to protect the involved officials.

Moreover, there are examples telling us that even public servant seamen played a part in procuring prostitutes. An example of this is that of two women living in the Aksaray quarter of İstanbul who were brought to Edremit and handed over to the customers there by Hüseyin Reis, a seaman who worked on behalf of the shipyard chamberlain (ECR. 1212, Fol. 47/b, October 7/17, 1583).

[11] For entertainment and recreation habits in the countryside and for the function of village rooms in this respect, see Yılmaz (2005). This article has recently appeared in English in Faroqhi – Öztürkmen (2014, pp. 145 – 172).

Such examples also show that *subaşı*s freed prostitutes after they were caught in return for money (Refik 1988, p. 138). There are many similar examples, and therefore, something might have accounted for the fact that Sultan had managed to stay in the neighbourhood and no action was taken against her, despite people having known for twenty years that she was a prostitute. At least we should not overlook this possibility. In fact, it is understood that the Edremit *subaşı* had known that Sultan was a prostitute before the claim was made in court.

Sultan's Fight versus the *Subaşı* (Police Chief) for Justice

At this stage, it looks as if a different struggle begins among such intricate connections as the role of officials, the legal boundaries and public opinion. This time Sultan was against a block composed of the people in the neighbourhood, legal penalties and the Edremit *subaşı*. How much chance would a prostitute have in this legal struggle against an alliance including the very official who was directly responsible for the public order of the town? After that stage, Sultan's legal struggle gets very interesting as it shows that she will not accept the arbitrary treatment and bow to it just because of being a prostitute, and this is a valuable example for Ottoman social history.

We can say that Sultan exhibited a very clear attitude at the court. She did not object that her prostitution was recorded due to the testimony and opinions expressed by the people in the neighbourhood where she resided. However, from the moment when she stated that she had been subjected to arbitrary treatment by the Edremit *subaşı*, which was not the subject of the trial, we can observe that Sultan started to resist the court and the *subaşı* in a firm and determined manner.

It Is not Allowed to Search a House without a Warrant! What about a Prostitute's House?

She stated that her furry and red velour[12] caftan disappeared after the attack (ECR 1206: Fol. 52/b, document: 2, Muharram 8, 988/February 24, 1580). Sultan demanded her caftan be found and returned to her, and even went so far as to state that she suspected the *subaşı*, thereby asserting a very serious claim. She insistently requested that her caftan "*be obtained by the court and given back to her*". She claimed that it had been seized by the *subaşı* (ECR 1206: Fol. 52/b, document: 4, Muharram 8, 988/February 24, 1580). She might have thought that the reason for the *subaşı* having seized her caftan was that she was a prostitute, which she did not deny by saying "*If I've fornicated, then punish me*" (ECR 1206: Fol. 52/b, document: 2, Muharram 8,

[12] It is a kind of silky fabric, similar to velvet, kutnu and satin. It was embroidered with golden and silver threads. It is a heavy fabric used for the making of caftans. Velour fabrics of İstanbul and Bursa were famous. The velour imported from Europe was called *Frengî* (European) velour, see Özen (1980–1981), p. 321.

988/February 24, 1580) to the *subaşı*'s face in the presence of the *kadı* at the court. So she declared that what she practised did not justify her caftan being seized. It is clearly understood that she expressed these words because she believed that the seizure of her caftan was an arbitrary act, a kind of "punishment" which was not related to the legal consequences of her being a prostitute.

In response to that reaction and demand, the *subaşı* acknowledged that he had the caftan, but failed to make any explanation in his defence other than asserting that he took it to hold it as a deposit and prevent it from being lost at Sultan's request (ECR 1206: Fol. 52/b, document: 4, Muharram 8, 988/February 24, 1580).[13] Shortly afterwards, it was understood that his defence was not true. It clearly conflicted with the statements of Sultan who had testified that she was wearing the velour caftan the night the incident took place (ECR 1206: Fol. 52/b, document: 2, Muharram 8, 988/February 24, 1580). Whereas the *subaşı* claimed that he went to her home and took the caftan with Sultan's permission and at her request in order to prevent it from being stolen (ECR 1206: Fol. 52/b, document: 4, Muharram 8, 988/February 24, 1580). Not only did Sultan strongly deny the *subaşı*'s response, but also pointed out, just like a jurist who knows her rights and the practice of law very well, that he could not enter a house without a *kadı*'s permission even if the resident was guilty. "*Did the kadı give permission when you entered my house at night and took my belonging? Did he ratify*?,"[14] she asked and managed to press the *subaşı* to the wall. Moreover, since the *subaşı* himself stated that he had entered Sultan's house, she left the *subaşı* defenceless before the *kadı*, asking him "*whether he had a court order*" (ECR 1206: Fol. 55/a, document: 3, Muharram 10, 988 – February 26, 1580).

The *subaşı* had no choice but to confess in despair that he did not obtain the warrant to open and enter the house. As a result of her conscious and insistent legal struggle, her velour caftan was taken from the *subaşı* and returned to her. This result was reflected in the court records as follows: "*Sultan said at the hearing that Mehmed Subaşı took my personal red caftan and hid it. Then the said subaşı stated the caftan was there and returned it to Sultan at the court*" (ECR 1206: Fol. 55/a, document: 4, Muharram 8, 988 – February 24, 1580). This statement suggests that it was written down in such a manner as to give the impression that the *subaşı* returned the caftan voluntarily. Although it was understood that the *subaşı* entered Sultan's house without permission and seized her caftan, we do not see this clearly reflected in the written record. Instead, it was written that "*Mehmed Subaşı took my personal red caftan and hid it. Then the said subaşı stated the caftan was there and returned it to Sultan at the*

[13] "*… Subaşı responded and said: 'After I saved the said woman from the hands of Mehmet, the son of Turhace, Sultan, the said woman, told Kürklüoğlu Yusuf to open her house and take the deposit'…*"

[14] We really see that there were legal measures against searching or entering a house without the *kadı*'s permission for whatever reason. Under these measures, it was prohibited to search a house without a warrant. Although officials violated this rule in practice, a *kadı*'s permission was required to search a house. An example of a warrant to search a house: ECR 1179, Fol.18/b, document: 1 (*Sha'aban* 23, 994 – August, 9, 1586). This document was issued in line with the request to search the house upon the suspicion that Yusuf of Temaşalık village in Edremit, who was missing, might have been murdered by his wife.

court." This reminds us of the *subaşı*'s defence that he took the caftan to keep it safe, just like in his statement. We do not know whether this is a reflex to protect an official or an indication that a settlement had been reached. The fact that there is no court record of any prosecution taken against the *subaşı* for having entered a house without a court order and seizing the caftan could be cited as an indication that the statement was recorded this way to protect the *subaşı*. On the other hand, the same statement could be construed to mean that Sultan had dropped her claims against the *subaşı* in return for the mitigation of the punishment which was supposed to be imposed on her.

This ordinary woman, who speaks up from the distant past of the 16th century with her fight for justice, shows us today that she was not actually an ordinary person, she was rather an individual with a clear legal notion, and she possessed the courage and the will to defend herself. Her efforts not to give in to the alleged accusations silently and to defend herself against legal, social and moral judgements suggest how broad the limits of standing upon your individual rights could be in difficult conditions in the 16th century, contrary to what is believed today. This fight for justice of a lonely woman who cannot easily be supported by anyone due to social judgements and who is considered guilty by the legal as well as the moral norms sets a powerful example for breaking the taboos.

Sultan and the Determination of Fornication

As it is widely known today, lapidation, i.e. stoning to death, was not applied as a form of execution in the Ottoman Empire. To our knowledge, there is only one case of lapidation which was enforced in 1680.[15] As much as the difficulty in proving the fornication, reactions and open criticisms against the lapidation due to this incident had been influential on this form of punishment and it was enforced only once. It is also known that this execution was criticised by contemporary historians who wrote about the incident (Raşid 1282/1865, p. 482). Although a few other cases are also mentioned in this regard, it is very controversial whether lapidation was really enforced in these cases, and the prevailing opinion is that they were not (Mutaf 2008, pp. 573–596). On the other hand, it has long been discussed among Islamic law experts that lapidation is actually a very contradictory form of punishment in legal terms. Although it is still practised in some countries, respected Islamic law experts consider lapidation as an abolished punishment. Some even say that this form of punishment should not be practised because it stems from Jewish law. However, as is known, many Islamic jurists argue otherwise.

Nevertheless, to execute a lapidation order, it is required to establish the fornication conclusively, which is in fact almost impossible. In order to state categorically that the fornication occurred, it was required that four men should clearly see the moment and act of sexual intercourse and give identical testimonies, which shows that

[15] This case slurred over with a reference to the story covered in *Silahtar Tarihi*, Vol. 1, İstanbul, 1928, pp. 730–731, where no details were given. However, a very serious review was published a few years ago by Baer (2011, pp. 61–91).

they do not conflict or contradict one another. As might be expected, it is very difficult or almost impossible to establish proof of fornication in this way. Moreover, *kadı*s were required to examine the accuracy and reliability of the statements of the witnesses. If any of the witnesses changes his or her statement in the last minute or becomes slightly questionable in finalised cases, this was enough to invalidate a determined fornication. Also, the *kadı*s were advised by jurists to try to create suspicion by asking the confessors and witnesses of fornication questions to make them hesitate. Guiding advice can be found in the law classics, recommending an approach to bring the fornication into doubt rather than proving it. It is a deterrent practice that in case the fornication accusation turns out to be unfounded, the punishment applicable to fornication is imposed on the one who provided false testimony. It is clear that the threat of punishment for slander was used to stop people from asserting and calumniating fornication easily.

Another method to prove a fornication was by way of presumption. In other words, if a woman got pregnant when she was not married, this was considered an evidence of fornication, but the courts tended not to consider this situation as a conclusive evidence, because it was possible that women might have been forced to engage in sexual intercourse without their consent, and women had the right to state that they had been taken by force. When a woman makes such a statement, doubt arises and fornication cannot be proven even if she is unable to prove it. The existence of doubt is extremely important in this regard.

Another effective way to categorically establish fornication was confession. In our case, Sultan's words, "*If I've fornicated, then punish me*", implied a confession, but you could not consider it an exact confession, because in order to categorically determine fornication by confession, it was required that the person who is accused of fornication confesses it consciously four times at four separate court hearings. That was regarded as a consummate confession, and it was the only way for the court to take it into consideration. Based on this approach, Sultan's confession may not be regarded as complete, and the statements of the witnesses reflect a social perception and not that they actually saw her at the moment of sexual intercourse. Therefore, it is difficult to prove and rule beyond reasonable doubt that Sultan was a prostitute and committed fornication. The fact that she confirmed this with her own words does not mean that the court considered it as a confession under the law and took action accordingly.

The Result of Sultan's Case

Under the general codes and the provincial (*sancak*) laws of the Ottoman Empire, fornication was punishable by flogging/whipping that could be changed into a fine, which was a common practice (see Heyd 1973; Barkan 1943; Akgündüz 1990–1994). However, some other customary penalties were also applied, including soiling the adulterers' forehead with the purpose of exposing them, having the adulterer walk around by putting an animal rumen (animal stomach) over his or her head, destroying the adulterer's house and kicking he or she out of the neighbourhood, exiling the

adulterer by forcing him or her to sell the house, searing the genitalia, and searing the face. Ottoman chroniclers and foreign observers make reference to such customary punishments. There are also sources mentioning adulterers who were executed, thrown into the sea in a sack, and beheaded in İstanbul (Selanikî 1989, vol. II, p. 62; Heyd 1973, pp. 59, 78, 80; Wratislaw 1981, pp. 76–87; Galland 1987, vol. II, p. 16). But these kinds of punishments were not common; they were applied with the purpose of exposure and deterrence. Sometimes such punishments were ordered for political reasons, not legally. On the other hand, another aspect which must be kept in mind is that such punishments were given during the times of increasing financial problems, complaints, famine, and after disasters or military defeats. Some acts were punished more severely than fornication. Under the laws of the Dulkadir Beylik, the penalties for animal thefts were harsher than the ones for fornication (Pierce 2003, p. 73).

Considering the rules, laws and *fiqh* (law) books and under the sharia (Islamic law) and customary law, the most common penalty expected to be imposed on Sultan would have been flogging. However, it is almost certain that it could have been converted into a fine. Other than that, they could possibly exile her from the neighbourhood and Edremit. These are a part of the customary punishment, and she was sure that she would not be stoned to death, and that is why she said "*punish me*", proving once again that she had a good command of the judicial mindset and practices. On the other hand, the most severe penalties that could be imposed on Mehmet, Sultan's procurer, were flogging by rods or shovels, the duration of which was left to the *kadı*'s discretion.[16] Of course it was possible that he would not be punished at all. If he was a part of the network of social and local rulers consisting of district officials and notables with strong connections, it is possible that Mehmet slipped through the net with a fine.

Assessments of Prostitution and Fornication Based on Sultan's Case

When we look at the subject based on the *fiqh* books, it is understood that whether fornication (Imber 1996, pp. 175–206) took place for money or any other consideration, prostitution was evaluated controversially or not evaluated at all as a determining factor under Islamic and Ottoman law. Therefore, it is important in itself that prostitution was treated under fornication which required *hadd* (punishments considered as claims of God) (Heyd 1973, pp. 205–206, 209) on the one hand, and regulated without reference to the existence of money or any other consideration on the other. The primary aim of this paper is to understand the reasons for an approach towards fornication/prostitution in return for money or any other consideration, which was a fact of social life but not considered determinant under the law concerning fornication. Another aim was to point out the importance of this approach in terms of social historiography. At the same time, this paper also aims to make some assessments about prostitution in the 16th century based on what we have learnt from Sultan's story and

[16] About shovel punishment and its practices, see İpşirli (1981–1982, pp. 203–248).

to expand our limited knowledge on this subject. However, we do not intend to adopt an approach in which all aspects of fornication are discussed.[17]

Research interest in sexuality and prostitution in the Ottoman Empire is something new, and we saw its first results in recent years. The knowledge we formerly had on this subject served no purpose, it was rather used as a means of sexist conversations among some historians. In fact, the approach that this and similar subjects may or even should not be an area of research for historians still exists as a common attitude among historians, even though it is not very influential. On the other hand, it should be added that the majority of the works on this subject are about the history of Islamic law, also examined in terms of formal law. Beyond doubt, the legal framework is very important, but discussing the subject in terms of social sciences and social historiography is similarly important. Considering the boundaries of this paper with respect to the contributions it will make to the studies on prostitution, it seems more significant to focus on a legal approach which does not make a difference between prostitution and fornication, because no difference is specifically covered in the normative structure of Ottoman law, nor in its basis, namely Islamic law. Therefore, it is inevitable to discuss that the regulations covering fornication under Ottoman law embody a codification approach where buying or selling sex in exchange for payment is not taken into consideration.

Although the differences among prostitution, secret affairs and forbidden sexual intercourse were observed in social practice, it is not easy to understand that these matters are addressed by ignoring all such differences instead of covering the same with a strong statement in the theoretical design of Islamic and Ottoman law which are full of surprising details on many subjects. What are the reasons for this consistent continuity which touches only on the marital status of people (married or single) but pays no attention to whether fornication is made in return for money or other benefit (prostitution)? How could this kind of logic of the law last for centuries? The explanation that prostitution did not exist during the years when Islamic law was codified is a very weak argument, because there is no such historical finding. On the contrary, it is peremptorily clear that prostitution was known throughout the period when Islamic law was developed. Arguing that there was no conceptual difference between prostitution and fornication before modernity and this difference became clear only after the 19th century is also nothing but an insufficient and groundless explanation which contradicts both the case of Sultan described above and numerous other cases that took place in the premodern era. To find out the actual reason for this approach which ignores the difference between sexual intercourse for money and all kinds of sexual affairs between unmarried persons (fornication), we need to look into the logic of Ottoman and Islamic law.

It is known that in Islamic law the sanctions related to prostitution are considered within the scope of fornication and the penalties provided for prostitution are structured mostly as they relate to the institution of marriage (Heyd 1973, pp. 95 ff.).

[17] Note: I am presently writing a book which is an extensive study on fornication, prostitution, forbidden love and forbidden sexual intercourse in the Ottoman Empire and their various aspects in terms of offence, law, social control and gender.

Certainly, there are regulations about various forms of fornication. However, it is clear that there is a codification approach showing that judicial discourse is developed mainly based on the institution of marriage. Undoubtedly, details about the situation of singles, slaves and odalisques, children, those forbidden for each other, and members of the same gender are widely covered besides the married persons. However, almost all details of fornication discussed under the said subheadings are structured under various criteria in Islamic law, such as marriage, lineage, right of succession and the conditions that affect marriage, in other words, with reference to the institution of marriage. As a reflection of this, there is no difference between prostitution and fornication in Ottoman law. Hence, Ebussuud Efendi's opinion expressed in one of his *fatawa* (legal opinions) confirms the mentioned approach, taking prostitution into the scope of fornication. In this categorisation, he does not take into consideration the element of money paid or other benefit provided in this action: Question: "*What is required under the sharia law if people travel around the villages and have their daughters and odalisques commit fornication*?" Answer: "*After they are beaten severely before the public, they shall not be taken out of the dungeon until their righteousness becomes evident, and women who are proved guilty as charged must be stoned to death*" (Düzdağ 1983, p. 159, *Fatwa* No: 785). As is seen clearly in this example referring to those who travel around the villages and sell their wives, daughters and odalisques and have them commit fornication, the famous Shaykh al-Islām (about Ebussuud, see Imber 2004) does not take into consideration whether the act is performed in exchange for money or any other benefit and describes it under fornication without any details. However, in another *fatwa*, he uses the word prostitution in the same meaning as it is used today: "*If Zeyd divorces his wife, Hind, saying you were a prostitute before we got married, then is he entitled to not pay the mahr* (dowry)?" Answer: "*No, he is not*" (Düzdağ 1983, p. 57, *Fatwa* No: 168). This approach is the reflection of the logic of codification where the differences among forbidden love, forbidden sexual intercourse and prostitution are considered in relation to marriage. However, these differences are extremely important in respect of social historiography. Considering these examples, the difference among the above issues was taken into account in practice. Namely, it is possible to find court records as well as various document collections of the Ottoman Archives in which the word prostitute was used in many cases and the women who practised prostitution in exchange for money or any other benefit were prosecuted. Although the result was the same and penalties for fornication became a current issue back then, it can be traced that the difference between prostitution and other forms of fornication were taken into consideration in the prosecution process.

One of the highly possible factors which led to this approach is that the majority of prostitutes were single. The fact that they were subjected to relatively less severe penalties under the category of fornication of singles and adolescents compared to those married prompts us to examine the subject from that point. Accordingly, if singles commit fornication, they were sentenced to be beaten with 100 rods or lashes according to the procedure described in the books of law. However, this penalty was converted into a fine in the Ottoman laws during the 15th and 16th centuries, and the execution of the penalty was regulated as one coin for one rod. It was also possible to

make a deduction in this penalty depending on financial standing and the assets of the offender. However, there were those who practised prostitution despite being married or those who were sent to the court on charges of committing fornication for money (prostitution) even though her husband was aware of it, and this makes the situation more complicated. In the Ottoman laws, it was set forth that husbands who are aware of the prostitution of their wives are sentenced to the penalty for procuring, which was 80 or 100 rods. There were cases where some claimed that they had got divorced before the act happened, and we need to relate this to the fact that the penalty applicable to singles was less severe. Single persons are sentenced to relatively less severe punishment if they commit fornication under the sharia regulations which advise marriage and give priority to the protection of marriage. These regulations may be seen as a reflection of the fact that single persons may feel remorse and repent when getting married. The situation of those who are *muhsan* (married men) and *muhsane* (married women) is especially important with regard to our subject. In order to become *muhsan* and *muhsane*, one needs to be independent, Muslim, married, chaste, sane and not adolescent (Düzdağ 1983, pp. 157–158, *Fatwa* No: 776). The majority of the punishments applicable to single persons, adolescents, children, slaves, odalisques, the handicapped and members of the same gender (homosexuality and lesbianism) are determined with reference to the fornication of married persons. Covering the majority of the issues where all kinds of possibilities are evaluated – such as marriage, *mehram* and non-*mehram*, lineage, inheritance, fornication by accident, touching, rubbing and other matters – from the viewpoint of marriage is functional regarding the separation of prostitution from fornication. This is because the law on fornication is regulated in a way that allows defining it as a sexual intercourse without marriage. This is so apparent that the punishments applicable to married and single were different even in the cases of rape, and some wanted to kill such offenders if she was *muhsane* (Düzdağ 1983, p. 157, *Fatwa* No: 774).[18] Moreover, there is a direct and strong connection between marriage and sexual intercourse after getting married, considering the marriage contract alone is not enough for the start of marriage and the sexual intercourse must take place after the marriage contract. The sexual intercourse that takes place based on the legitimacy ensured by the marriage contract means the actual start of the marriage. In fact, *niqah* is a contract where mutual consent of the groom and bride or their witnesses is declared and the conditions for the start of the marriage are determined. Here the phrase "conditions for the start of marriage" means establishment of the consideration for sexual intercourse which gains legitimacy after the contract. Actually, the contract is drawn up in a way as to determine the compensations called "*mahr*" (dowry) (Imber 1996, pp. 263–288)[19] and include an agreement upon them. As is known, one form of *mahr* is prompt *mahr* (*muajjal*), which must be paid immediately and in cash. Another form of *mahr* is deferred *marh* (*muejjel*), which is payable in the event of divorce or the husband's death. According to one of the

[18] "*If Zeyd forcibly had sexual intercourse with Hind, what needs to be done to Zeyd? If Hind is married, Zeyd must be sentenced to death*."

[19] About all aspects of the *mahr* and its explanation with related *fatawa*, see Halebî (1968, vol. I, p. 370).

aspects of the prompt *mahr*: "*The husband acquires the wife's vulva by the payment of mahr, and it must be paid*" (Imber 2004, pp. 184–185). After paying the deferred *mahr*, the husband acquires, quite literally, the ownership (milk) of the wife's vulva, and it is this ownership that renders sexual intercourse licit (Imber 2004, p. 185). Those who complete these transactions are now considered *muhsan* and *muhsane* (Düzdağ 1983, pp. 157–158, *Fatwa* No: 776).[20] The logic of stringent opposition to having sexual intercourse without marriage contract takes its legitimacy from what has been said above, because when someone other than her husband engages in a sexual intercourse with the wife, this means 'stealing by penis' (*sirkat bi'z-zeker*). And when a married woman has sexual intercourse with someone other than her husband, it means that she let someone else steal her husband's property. On the other hand, when unmarried persons, including singles and adolescents, engage in a sexual intercourse, it is not stealing someone's property and therefore its punishment is less severe. Considering that the majority of prostitutes are single and not under a marriage contract, they may not be considered as letting someone else steal their husband's property. In fact, as a result of payment, there arises a doubtful marriage contract situation. Of course, this is considered fornication, but if such sexual intercourse ends up with pregnancy and the man accepts paternity of the child, then the lineage of that child may not be argued. Therefore, having sexual intercourse for money or any other consideration (prostitution) is not a factor that increases the offence. On the contrary, the punishment for having such intercourse with a single prostitute is less severe compared to having it with a married woman because of the payment. In other words, from the viewpoint of Islamic law, there occurs a mutual consent and temporary ownership situation where the respective consideration is paid. Thus, it is possible to explain the efforts of Ottoman courts in the details of the cases related to prostitution to find out and determine whether the sexual intercourse took place in exchange for money. The reason why the parties paid particular attention to indicating and proving the payment of money and stated without hesitation how many coins they gave was that they wanted to create a situation in their favour by way of paying money for sexual intercourse, which was a doubtful form of *mahr* (dowry). They wanted to take advantage of the controversial legitimacy they gained this way.

The Sunni schools of legal thought (I especially refer to the Hanafi *fiqh*) completely refuse temporary marriage and *mut'ah* when regulating marriage and fornication, because they do not want to make controversial the codification they established as legitimate and recommended marriage, and to contradict it. However, this thought does not suggest temporary acquisition of a vulva which is no one's property, and the punishment of those who have sexual intercourse for money in the same way as those who commit fornication when married, and thus it accepts that unmarried sexual intercourse with a prostitute is different. Accordingly, they did not hesitate to use and refer to *mut'ah* when appropriate: "*If a woman for whom no mahr is considered and determined gets divorced before the sexual intercourse*, *then mut'ah is wajib* (obligatory). *If a woman gets divorced after the sexual intercourse regardless of the mahr is*

[20] For *Muhsane*: "*…nikâh-ı sahih ile duhûl dahî şarttır*".

considered, then mut'ah is mustahabb (recommended, favoured or virtuous action) *for that woman*" (Halebî 1968, vol. 1, pp. 378–379, 389–390). Similarly, Abū Ḥanīfa, who seemed to be aware of the potential problems, thought based on a *hadith* that having sexual intercourse in exchange for money or consideration with a woman who is not under marriage contract (prostitution) does not require *hadd* punishment. He cites a decision and a practice of Omar (Molla Hüsrev, vol. II, p. 67) as evidence. Accordingly, the money paid to the woman is considered as a fee, and the prevailing opinion is that fee is acceptable as a *mahr*. In fact, one of the meanings of *mahr* is referred to as fee in the *Qur'an* (Al-Nisā, 24). Since it is a doubtful issue whether the consideration given to the women with whom one will have sexual intercourse is considered as *mahr*, this doubt prevents *hadd* punishment which is applied to the fornication of the married. The doubt arises about the paid fee which is actually not *mahr*, only similar to that. Therefore, fornication is in doubt and it is possible to handle this issue without referring to the description of prostitution. However, Abū Ḥanīfa's followers and Al-Shāfi'ī disagree with this opinion, and advise *hadd* punishment. Due to such different approaches, the partial legitimacy ensured by the consideration paid to the prostitutes and the mutual consent therein becomes controversial. But it is not absent completely. I guess it is because of this controversial situation that the jurists of Islam (*fuqahā*) slid over the subject by covering it up and took it into the scope of fornication, instead of discussing and endeavouring to mention it in every situation. The reason why the jurists of Islam made no or very limited reference to the details observed in the practice of prostitution in society could be explained by suggesting that it is a very difficult problem in terms of the logic of law, as I have tried to clarify this in the present paper.

It should also be taken into account that the jurists of Islam and the Ottoman Empire abstained from the subject due to their concern for making it licit even by mentioning it. This is because guiding people towards 'legitimate marriage' and recommending a licit sexual intercourse where the consideration is paid by a marriage contract constitute the basis of the legal ideal. This approach aimed to maintain and sustain ideal sexual order in society. The influence of moral norms should also be taken into account in maintaining and controlling such continuity. Considering that the legitimisation of sexual intercourse by marriage contract and the consummation of marriage by sexual intercourse are based on acquiring *halal* (permissible) property (vulva), the sexuality of a prostitute who is no one's property or can be bought by anyone is inevitably perceived as a threat. It is undeniable that this point of view influenced the reaction against prostitutes during the times of the Ottoman Empire.

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