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Changes in legal-sexual discourses: sex crimes in the Ottoman empire*

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ABSTRACT. *Through an examination of sixteenth-century Ottoman criminal codes pertaining to sexual crimes and their punishment, the article builds on the work of others who have attempted to streamline Islamic legal discourse and new legislation, mainly in the era of Süleyman the Magnificent. An emerging governing elite, recruited through slavery and attached to the sultan's household through marriage and patronage, attempted to create a legal system that, while committed to the tenets of Islamic law, promoted the new values of a dynamic group of people, which differed in many ways from those envisaged by the* sharī a. *The new legal codes suggest a change in discourse and outlook regarding various aspects of sexuality, gender differences, and concepts of crime and punishment.*

Ottoman sultanic criminal codes of the sixteenth and seventeenth centuries refer in great detail to sexual offences. They usually restrict categories of sexual behaviour which may be defined as undermining marriage and the household structure. There are visible similarities between these codes (*kanun*, *kanunname*) and Islamic legal codes (the *sharī a*), which are the outcome of a serious effort to integrate both systems into one workable whole. Yet there are also differences. Ottoman sultanic codes challenge some of the distinctions made by the *sharī a* concerning sexual matters, and their different attitude can be clearly discerned in the legal code promulgated in the mid-sixteenth century under Kanuni Sultan Süleyman ('The Law Giver', or 'the Magnificent', as he was known in Western Europe; 1520–1566). Considered in the light of this conscious effort to

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streamline the two systems, such variations may serve as indications of shifts in legal and social emphases, of enhanced social control, and perhaps even in the way the whole amalgam of extra-marital sex was perceived.[1]

Most pre-modern Islamic states maintained two or more parallel legal systems. One implemented the sacred law (*sharī a*) and the other(s) were created to fill in what was perceived as lacunae in the legal system, or to provide legal alternatives more in tune with the social and political preferences of the ruling elite.[2] In most cases special cadres of judges and other functionaries were trained and separate court systems were established to provide these alternatives.[3]

It is often assumed that the Ottoman *kanun-sharī a* system is a simple extension of the dual-code principle described above.[4] But a close examination of the process and a careful reading of the texts demonstrate that the Ottomans chose another path. Defying established practices in surrounding medieval Islamic states, they adopted a judicial system in which kadis – officers of the sacred law – were to be trained in religious schools (*madrasa*s) under a strict study programme sanctioned by the state. Having graduated, their positions secured, they were required to comply and adjudicate in accordance with both systems of law at one and the same time.

Moreover, beginning with the reign of Mehmet 'the Conqueror' in the second half of the fifteenth century, the Ottomans kneaded the sacred law (which from now on I shall refer to as *şeriat*, using the Turkish term to differentiate the system prevalent in Ottoman times from other manifestations of the *sharī a*) and the 'secular' state law, into one compounded system. The guiding principle was *siyāsa shar īyya*. This provision in the sacred law recognized the need of states and rulers to legislate their own laws for their subjects' welfare, on condition that they did not contravene specific Islamic injunctions. In the fifteenth and sixteenth centuries, following a series of developments in Islamic jurisprudence, *siyāsa shar īyya* made room in the *şeriat* for the ruler's legislation.[5] This was not always easy. Sultanic promulgations and the *şeriat* were sometimes at odds about punishments for crimes (sexual offences are a good example for this, as we shall see later) or about laws of commerce or slavery. But conscious of their state's image as an upholder of eternal justice, heads of the judiciary in the fifteenth and sixteenth centuries did their best to resolve the differences. Most notable among them were the *nişanci*[6] Celalzade Mustafa Paşa, and Şeyhülislām Ebüssuūd, Sultan Süleyman's legal counselor and his chief jurist.[7]

Still, problems continued to crop up, indicating structural differences in basic outlook, as well as in matters of procedure such as laws of evidence

and witness testimonies.[8] Although in *kanunname*s (books of laws) sent to courts of law throughout the empire the reverse was clearly stated, whenever the sultanic law and the *şeriat* were in disagreement, the sultan's law was the overriding system. Kadis were expected to uphold this principle, sometimes against their will or their better judgement. As a result, for quite a long time a symbiosis existed between them, such that it makes it difficult to discern, when reading a verdict in the records of Ottoman courts, which parts of the judicial process were dictated by the *şeriat*, and which followed the *kanun*.

Ottoman officials upheld this symbiotic coexistence as one of the pillars of the empire, a marvel of wisdom and statecraft.[9] Perhaps at a low ebb during the seventeenth and eighteenth centuries, it never disappeared completely.[10] From the inception of the Tanzimat reforms at the beginning of the nineteenth century we find a resurgence of the *kanun-şeriat* system, which went on to influence Ottoman legislation during the formation of the late-Ottoman legal code known as the *Mecelle* in the 1870s and 1880s. And even though there is no longer consensus as to the *şeriat*'s preeminence, such conceptions of a combined legal system can be traced even to the present day. Thus one may argue that legal systems in former Ottoman Islamic provinces such as today's Egypt or Tunisia, where the *sharī a* is formally considered a major source for law promulgation, follow the same pattern.

What follows is an examination of the treatment of criminal law, and, more specifically, sexual transgression, as they figure in this ever-changing symbiosis: *şeriat* injunctions, sometimes harking back to the first centuries of Islam, sixteenth-century *kanunname*s and the more recent nineteenth-century *kanun* legislation. The purpose of the examination is to unravel the way in which the promulgation of a *kanun* changed the emphases of the *şeriat*, to suggest the reasons for these changes in emphasis, and to describe the emerging legal-sexual script.

SEXUAL TRANSGRESSION IN THE *ŞERIAT*

A comparison between the *kanun* and the *şeriat* in the field of sexual transgression should perhaps begin by examining the boundaries of sexual transgression in each code (which, as stated above, may be seen inversely as the sexual boundaries of 'the family', or of legal sex). These boundaries may be described in the form of a grid pattern or a table enumerating violations of proper sexual conduct and the punishments they entail (see Tables 1 and 2).

The *şeriat* was never fully codified, and a great deal of ambiguity remains concerning its exact rulings in many matters. There is no single

TABLE 1
Punishments for male sexual offences in the şeriat[a]

	Status of offender			
Offence	*Minor male*	*Unmarried male*	*Married male*	*Non-Muslim male*
Heterosexual *zina*	If sexually active and participated in *zina*: *ḥadd*, lashes	*Ḥadd*, lashes	*Ḥadd*, death penalty	Slave: reduced punishment (50 lashes)
Homosexual *zina*	*Aḥdath*, *murd*, usually considered unpunishable	Debated: *ḥadd* or none; even if no *ḥadd*, lashes and 'suffering' (*ta'zib*); some insist on stoning	Debated: *ḥadd* or none. If *ḥadd*: stoning or beheading. Abu Hanifa suggests imprisonment; some: no punishment	
Sodomy with legal spouse	Debated: some say forbidden, but no punishment	Debated: some say forbidden, but no punishment	Debated: some say forbidden, but no punishment	
Sex with slaves		Forbidden with father's or wife's or mother's female slave	Forbidden with father's or wife's or mother's female slave	*Dhimmis* cannot have sex with Muslims
Minors in sex	No such category			
Procuring and prostitution		Procuring of slave girls is prohibited (?)	Procuring of slave girls is prohibited (?)	
Abduction and marriage				
Abduction, no marriage/rape				

Sexual harassment		Forbidden, but no punishment unless intercourse took place	Forbidden, but no punishment unless intercourse took place
Severe harassment	No such category		
Rape	Debated: some say no *ḥadd* punishment for raped minor male, though erection is proof of lust		Husband may divorce raped wife, but should not detract from *ṣadaq*
Perjury and hearsay evidence		*Ḥadd*, same punishment as for *zina*	*Ḥadd*, same punishment as for *zina*

[a] Translations of terms; *zina* = fornication; *ḥadd* = a crime against God; *aḥdath* and *murd* = a beardless boy; *ta zib* = shaming, or causing to suffer; *dhimmis* = non-Muslim subjects (Jews or Christians) under Islamic law; *ṣadaq* = dowry. Note: in all tables, where boxes are empty, this indicates that *kanun* law did not address the relevant category.
Sources: See note 27.

TABLE 2
Punishments for female sexual offences in the şeriat[a]

	Status of offender			
Offence	*Minor female*	*Unmarried female*	*Married female*	*Non-Muslim female*
Heterosexual *zina*	*Ḥadd*, punishment – lashes	*Ḥadd*, punishment – lashes	*Ḥadd*, punishment–stoning, unless raped	Divorced and widowed wives are not considered *muḥsan*, therefore no death penalty
Homosexual *zina*		Debated: most agree on discretionary punishment. No *ḥadd* because no insertion	Debated: most agree on discretionary punishment. No *ḥadd* because no insertion	
Sodomy with legal spouse			No punishment for wife	
Sex with slaves				
Minors in sex				
Procuring and prostitution				
Abduction and marriage				
Abduction, no marriage/rape				
Sexual harassment				
Severe harassment				
Rape			Husband may divorce raped wife, but she keeps her rights	
Perjury and hearsay evidence		*Ḥadd*, same punishment as for *zina*	*Ḥadd*, same punishment as for *zina*	

[a] Translation of terms; see note to Table 1; also *muḥsan* = married.
Sources: See note 27.

code that claims to represent its rulings until the nineteenth century. However, by comparing discussions in several compilations from the thirteenth to the sixteenth centuries, we may arrive at a more or less accurate description of mainstream Sunni Islamic legal concepts regarding sexual offences. Within these there should be an emphasis on the Hanafi School of law (*madhhab*) which the ruling Ottoman elite regarded as the leading school,[11] but consideration should also be given to other schools. These other schools, the Shāfi i, the Māliki and the Ḥanbali, were known and practised in other regions of the empire, and we should see them as a pool of lawmaking from which the creators of Ottoman law could draw. The sources used here represent several major legal authorities, which were known and often used by jurisconsults in the Ottoman empire.[12] Although they differ in some ways from each other, and sometimes prescribe different punishments or different solutions, their basic outlook is very similar, and is also shared by most other legal sources.

There are several basic lines of demarcation in the *şeriat*. The first differentiates between men and women. In almost every case, even when punishments are similar, the *şeriat* makes a point of referring separately to males and females. Further important binary oppositions separate individuals between married and unmarried, adult and minor, Muslim and non-Muslim, free and slave. In the realm of judicial process the *şeriat* stresses the koranic differentiation between 'regular' crimes (*jināyāt*) and those transgressing limits specifically set by God (*ḥudūd*). These latter include such crimes and misdemeanors as fornication (*zina*),[13] false accusation of fornication, theft, and drunkenness. While *ḥudūd* crimes violating specific divine principles are to be harshly and decisively punished, *jināyāt*, including murder and assault, are left to the discretion of negotiating parties. Islamic legal thought did much to attenuate the differences, to prescribe punishments for *jināyāt* and to allow the kadi some leeway in punishing *ḥudūd* crimes when the strict demands for evidence were not met, but this basic distinction remained throughout the centuries.

These opposites – man–woman, adult–minor, married–unmarried, free–slave, as well as that between *ḥudūd* and *jināyāt* (which is of a different nature, of course, because it refers to the crime and not to the perpetrator) – can be traced in most laws and in every treatise referring to sexual transgression. They may be seen as the basic grid lines along which the *şeriat* treats any subject relating to sexual transgression. Other dynamic contrasts which we know to have existed in Islamic history and in other pre-modern societies, such as those between upper and lower class, different race or ethnicity, citizen/subject and non-citizen, or violent and non-violent crimes, are seldom referred to.[14] Neither is there serious

reference to questions of male and female positions in intercourse, which other cultures appear to have taken more seriously.[15]

Within these categories the sacred law lays emphasis on several themes. First and foremost is *zina*, which can be translated as both 'fornication' and 'adultery', although it refers to almost any act of illegal sex.[16] For women this includes any kind of sexual (or 'pre'-sexual) contact barring intercourse with the legal husband or master. For males *zina* is interpreted to mean sexual intercourse with any but the four legal wives or the person's female slaves. This basic difference between men and women, allowing men the privilege of sex with many partners, runs through all *şeriat* promulgation of household and sex laws, and distinguishes punishments for male and female.

Discussions of homoerotic sex in *şeriat* literature follow closely these grid lines. Homoerotic practices are usually referred to in Islamic texts as *liwāṭ* or *amal qawm lūṭ* (the deeds of Lot's people) referring to the biblical story of Sodom which the Koran recounts with considerably more detail. One of the first problems we encounter here is the question of whether such practices should be punished as *ḥudūd* offences, defying God's prescriptions. There is no doubt in any jurist's mind that these are serious sexual transgressions, but the Koran does not explicitly discuss homoerotic sex in the framework of the punishment for *zina*. In the formative texts of the *sharī a* a long debate ensued on crime and punishment for homosexual offences. According to some of the jurists only acts mentioned explicitly by the prophet as crimes committed against Allāh can be punished as *ḥudūd*, and the principle of *qiyās*, analogy between two comparable cases, cannot be applied here. So even though intercourse between males is an abominable crime it is not a *ḥadd* offence (crime against God). Many jurists declared that in principle perpetrators should be executed, but the question of punishment for sex between males remained moot and subject to heated debates in all schools of law.[17] The reader is always left with a sense of ambiguity concerning such crimes. They are described in the most derogatory terms, and are often accompanied by warnings of doom for those who indulge in them, but the question of punishment is in most cases left undecided.[18]

Female homoerotic practices add another complication to these deliberations. Since a basic requirement for a sexual offence to be declared as *zina* – the insertion of a male organ – is lacking, it is even more remote from the basic concept of fornication and the *ḥadd* punishment attached to it. Most jurists are in agreement that no legal punishment is required here.[19] Further questions are raised in this context about the age, freedom of choice, and religious belief of the perpetrators. Hanbali texts see no reason to differentiate between slaves and freeborn in this respect, but

other schools accept the basic premise that slaves have diminished responsibility and that free men should be punished more severely.[20] Most sources prescribe harsher punishments for married people engaging in homoerotic sex, and most concede that minors' responsibility is reduced in comparison to that of adults. There is very little discussion in Islamic legal texts of the period about the positions of both perpetrators in the sex act (penetrator/penetrated, or what is sometimes wrongly described as active/passive).[21] Finally, here and there questions are raised concerning sexual relations between people of different religions, and views on this issue also present a spectrum between the Hanafis and the Mālikis on one side, and the Hanbalis on the other.[22] The tendency is to prohibit and punish sexual intercourse between non-Muslim men and Muslim women.

SEXUAL TRANSGRESSION IN THE *KANUN*

It is sometimes claimed that the *kanun*'s origin is local custom, or older Turkish and Mongol legal systems, and therefore that it is based on principles completely different from those of the *şeriat*.[23] There may be some truth in these assumptions as regards origins, but when we compare the basic premises of both systems we can say with some certainty that where sixteenth-century criminal law is concernd, the underlying structure and the legal minds that created the *kanun* were greatly influenced by the *şeriat*. This is true also with respect to pre-Ottoman *kanun* systems, or to contemporary ones like that of Dulgadir, which Uriel Heyd translated and studied.[24]

Süleyman's famous code, known as '*Kanun-ı Osmani*' was promulgated sometime in the mid-sixteenth century, probably between 1534 and 1545. It was very similar to several other codes prepared during this period. For several centuries this *kanunname* was considered the most important one, and subsequent sultans were given new copies as they came to the throne.[25] It opens with a chapter on *zina* (*zinaya müteallik cürmi beyan eyler*). The first regulation concerns a married Muslim man who commits fornication. A rich person found guilty of *zina* would have to pay a fine of 300 akçe, a man of medium-sized property is required to pay 200, and so on down to 40 akçe for a man with no assets at all. (Other versions of the manuscript sometimes offer another socio-economic division.) The *kanunname* then goes on to detail the punishments for *zina* committed by unmarried men, married women, widows, slaves, and others, with a list of pecuniary fines attached to each.[26] Other crimes include solicitation, entering a house with intent to commit sexual intercourse, sexual harassment, and false accusations.

TABLE 3
Punishments for male sexual offences in the kanun[a]

	Status of offender			
Offence	*Minor male*	*Unmarried male*	*Married male*	*Non-Muslim male*
Heterosexual *zina*		Progressive fine (100, 50, 30)	Progressive fine (300, 200, 100, 50, 40)	Slave: half the fine of a free man in the same category
Homosexual *zina*	With other minors: punishment and fine	Progressive fine (100, 50, 30)	Progressive fine (300, 200, 100, 50, 40)	
Sodomy with legal spouse			Chastisement[b] and fine	
Sex with slaves		With father's or wife's or mother's female slave: chastisement and fine[c]	With father's or wife's or mother's female slave: chastisement and fine[c]	
Minors in sex	If child yielded to pederast, chastisement. Also fine for father	If yielded to male assailant, chastisement and fine: face blackened, nose and ears cut		
Procuring and prostitution		Procuring of slave girls is prohibited	Procuring of slave girls is prohibited	
Abduction and marriage		Divorce and punishment. Marrying kadi shaved and fined	Divorce and punishment. Marrying kadi shaved and chastised	Infidels should pay half the fine a Muslim would pay

Abduction, no marriage/rape	Even if only intent, castration	Even if only intent, castration
Sexual harassment	Entering with intent: punished as *zina*. Kissing, words (boy or girl) to be chastised = only fine	Entering with intent: punished as *zina*. Kissing, words (boy or girl) to be chastised = only fine
Severe harassment	For stripping, indignities, cutting hair – chastisement and prison	For stripping, indignities, cutting hair – chastisement and prison
Rape		
Perjury and hearsay evidence	If woman swears innocence: chastisement and fine. If man falsely accuses another: chastisement only	If woman swears innocence: chastisement and fine. If man falsely accuses another: chastisement only

[a] Translation of terms; see note to Table 1. Fines listed are in akçe.
[b] 'Chastisement' (*ta zir*) refers to a discretionary punishment left up to the kadi to decide.
[c] If with his son's female slave, or his own *mukataba* (a female slave whom the owner has pledged to manumit at a certain later date), there should be no punishment.
Sources: See note 27.

Adopting many of the *şeriat*'s binary oppositions, the *kanun* accepts its basic distinctions between men and women, adults and minors, free and slave, Muslims and non-Muslims. Just as in the *şeriat*, these fault lines run through the whole gamut of *kanun* legislation concerning sexual transgression and eclipse all others. If we try to construct a table of crimes and their punishments, the basic grid lines will be almost similar to those of the *şeriat* (see tables 3 and 4).[27] However, the *kanun* adds several other instruments to its socio-legal toolbox. These include punishments that do not exist in the *şeriat* such as fines, banishment, or forced labour; a progressive scale of pecuniary punishments; and a differentiation between violent and non-violent 'passion crimes'. On the other hand, presenting, as it were only the human aspects of the law, it dispenses with the *şeriat*'s division of *ḥudūd* and *jināyāt*.

Perhaps more important for our purposes is the legal outcomes which, based on the same legal reasoning, reflect very different concerns and values. Among these we may note the following:

1 Penalties prescribed in the *kanun* are much more lenient than those prescribed by the *şeriat*. *Kanun* regulations emphasize that punishments should 'kick in' only if and when the perpetrators are not punished by the *şeriat*. This is often perceived as mere lip service to the sacred law, but it is a necessary element in combining the two systems. What the *kanun* seems to imply is that there are 'perfect' cases, ones in which the *şeriat*'s strict demands of proof and intention could be met. In these cases the punishment sanctioned by the *şeriat* is required. In 'imperfect' cases, however, where guilt can be proved only by more flexible standards, the local customary law should be allowed to take its course.[28] This may be seen as an extension of the principle of discretionary punishment allowed by the *şeriat* in such cases.
2 As mentioned above, the punishment for most offences committed by consenting adults is a pecuniary fine, a type of punishment that is non-existent in the *şeriat*. Flogging is prescribed as punishment for a few crimes, such as recurrent procuring. In cases of rape or abduction, where the rate of violence is higher, the perpetrator is to be punished by castration. No sex crimes are punishable by death. In most cases the fines are progressive: the rich pay more than the poor for the same offences.
3 Another point is that penalties for female sexual offenders are in most cases equivalent in form, as well as in gravity, to those prescribed for men. Although the *şeriat* also preaches equal treatment, it insists on formal distinctions. For committing the same offence a man should be punished by stoning, while a woman is to be beheaded. In the

TABLE 4

Punishments for female sexual offences in the kanun[a]

Offence	*Status of offender*			
	Minor female	*Unmarried female*	*Married female*	*Non-Muslim female*
Heterosexual *zina*	Progressive fine (100, 50, 30)	Progressive fine (100, 50, 30)	Progressive fine (300, 200, 100, 50, 30)[b]	Widow: progressive fine (100, 50, 30); slave: half the fine paid by a Muslim
Homosexual *zina* Sodomy with legal spouse Sex with slaves Minors in sex				
Procuring and prostitution		Chastisement and fine	Chastisement and fine	Infidels: half the fine paid by a Muslim
Abduction and marriage		If cooperating, her vulva to be branded; fine	If cooperating, her vulva to be branded; fine	
Abduction, no marriage/rape Sexual harassment Severe harassment Rape				
Perjury and hearsay evidence		If accused man swears innocence and there is no evidence, chastisement and fine for the woman	Rumour of fornication: accused pair cannot marry even if woman is divorced. If accused man swears innocence and there is no evidence, chastisement and fine for the woman	

[a] Translation of terms; see note to Table 1. Fines listed are in akçe.
[b] If a woman's cuckolded husband accepts her back, he shall pay the fine (or a smaller one).
Sources: See note 27.

kanun this insistence on different punishments disappears. A married woman committing adultery is required to pay a fine identical to the one paid by a married man in the same economic category, while a spinster or a widow has to pay a fine similar to the one paid by a man of comparable status. It is worthwhile noting here that *kanun*s from the neighbouring state of Dulgadir, which were older and probably served as an example for Ottoman legislators, still differentiate between punishments for men and women. According to the Dulgadir code, a woman should only pay half the fine imposed on a man guilty of the same offence.[29]

4 In principle a woman who has committed adultery is required by the *şeriat* to divorce her husband (and of course, there are harsher punishments in store for her). The *kanun* states that in case the husband is willing to continue marital life with his wife he is to pay the fine, and does not have to divorce her. In practice this may have been a rare case, but nevertheless the law allows for the possibility of continued marriage after the wife's infidelity.

5 Last but not least, regulations that apply to heterosexual adultery and those that apply to homosexual offences are similar. Persons engaging in homosexual acts are required to pay exactly the same fines as men and women caught in an act of adultery. There is one case where this rule does not apply – to young men offering their sexual services to older men. The young men are punished by flogging and a fine. If the offender in this case is still a minor, his father or guardian has to pay in his place.

The Ottoman *kanun* of the sixteenth century, at least in matters of sexual morality, seems to be relatively permissive. In our anachronistic terms it may even be viewed as liberal. Fines have replaced most corporal punishments, and sexual transgression, both heterosexual and homosexual, is seen as a minor offence, as long as consenting adults commit it. But, as Heyd and Imber have shown, a closer look may reveal that this is not so. The *şeriat*, prescribing harsh punishments for sexual offences, made it almost impossible to indict and condemn people for such offences. Its strict demand for several qualified eyewitnesses, who saw the act itself, a series of mitigating circumstances suggested in the literature, and the threat of severe punishment for false accusations, made these laws all but inapplicable.[30] In the *kanun*, although punishments are less severe, a person could be convicted and punished on very flimsy circumstantial grounds. In sum, therefore, each of the two systems strikes a different balance between evidence and punishment. Evidential gaps between crimes and punishments in the *şeriat* proved to be too difficult to bridge, and in this sense the *kanun* should be seen as a corrective. Thus the

differences between the *şeriat* and the *kanun* revolve around these factors and not upon the question of leniency.

For one thing, these differences reflect the need of a government in power to impose law and order on its subjects. While the *şeriat* was mostly formed outside the ruling institutions, the *kanun* is the product of a relatively strong state machinery, with a tendency to centralize and bureaucratize. This tendency is evident first and foremost in the realm of law enactment and in the bureaucratization of the courts. Since sexual offences were always considered a source of unrest, and since the religious code left many problems unresolved, the state bureaucracy realized it had to regulate and control sexuality.

Yet it appears that the way in which post-modernist concepts and studies done in the wake of Foucault's work equate sexual legal discourse with the structures and discourses of power in society and the family encounters some difficulty here.[31] The *kanun* presents a relatively egalitarian view of sexuality. Men and women of different social positions and different sexual inclinations are treated similarly by the law. Choice of sexual partner is not a unique privilege of 'mature free males' as it supposedly was in ancient Greece. On the contrary, the system favours the socially underprivileged. The main legal differences between slaves and freeborn subjects of the same sex have to do with severity of punishment – slaves have to pay a smaller indemnity – and with inherent responsibility for criminal acts, which is diminished for slaves. It does not curtail their sexual freedom and their choice of partners any more than is required of free society. The only attribute that still makes a difference power-wise is age. Young people should, the law says, be punished more severely for transgressions, perhaps as a means of educating them and preparing them for life.

Equality between men and women in the same economic bracket where pecuniary fines are concerned exposes an underlying social system where men and women both possess property and are regarded as economically equal. This may be highlighted by a comparison with the contemporary code of Dulgadir, where women were supposed to pay half the fine demanded from men. Such a comparison would demonstrate once more that the Ottomans made conscious changes to the law, in accordance with social practice. There is also a clear distinction between violence and sexual deviance. While what we might consider deviant behaviour is, in most cases, punished lightly compared to the *şeriat*, acts of violence like rape or abduction for sexual/marital purposes are very severely punished.

One explanation for these differences has to do with the emergence and development of households. The Ottoman household was the basic building block of the state and the elite. It was the heads of such

households who influenced, perhaps more than any other social group, the promulgation of the *kanun*. They were grand viziers, ministers, governors of provinces, commanders of the army, and many served in rotation as *nişancı*s (bearers of the seal), *reisülkuttāb*s (chancellors) and high-level functionaries of the imperial palace.

Yet these people were not born into the aristocracy. Their origins were often humble and obscure. Service in the palace was based mainly on meritocratic values, and inherited economic or social status had little intrinsic value. Officials were usually recruited as slaves from lowly Christian village families and retained memories of their origins and of their childhood days. We know that many in the Ottoman slave elite reestablished contact with their original families. Although they were never reintegrated into the original families (one of the reasons being that they became part of a Muslim aristocracy) they created *vakıf*s (religious endowments) for their villages, sent their children back to their regions of origins to be trained, and in general reclaimed their own pasts. This must have influenced the way they conceived of social and economic differences.

From another perspective, a new household came into being each time one of these *kul*, the state's servants, was granted permission to form one, usually accompanied by marriage with his master's daughter (without necessarily being manumitted beforehand). The new house functioned as a surrogate family for its founder. Brought into the empire's service as slaves, members of the governing elite regarded their own soldiers, slaves, and concubines as a circle of support and familial warmth. This perpetual creation of families, in which the founder himself was partially detached from homeland and social roots, as well as often married to a woman of superior status, was not favourable to a patriarchal structure. All these factors may have led the legislating elite in the direction of a permissive outlook and somewhat less inequality, as reflected in the progressive fines.

Yet another layer of explanation, not entirely independent of the previous one, and admittedly more tentative, has to do with the first glimpses of women's power in the Ottoman court. Although the period referred to as 'the Sultanate of Women' began only a few decades after the promulgation of these codes, by the mid-sixteenth century the sultan's mothers, wives, and concubines already had a considerable influence on the court and the state. We may assume that they also had an indirect influence on the enactment of law. Their position in the royal court and in its many imitations in smaller households probably suggested a more egalitarian approach to questions of gender in legislation, especially since the sultan himself was often involved in legislation.

We may argue therefore that the Ottoman legal code reflects the emergence of a new household pattern, with different emphases and

restrictions. In other words, the new ruling elites shaped the legal makeup of the Ottoman state to such an extent that in the last analysis the *kanun* carries significant traces of their social outlook and their cultural boundaries.

To summarize, from the sixteenth century onwards the *şeriat* and the *kanun* were amalgamated or came very close to amalgamation into one legal system in the Ottoman empire. Most of those who have researched the evolution of the *kanun* discuss the effort to make the two systems compatible, but their basic assumption is that they remained too distant from each other to form one whole. Our new understanding of the dynamic nature of lawmaking in the Muslim world, coupled with a better comprehension of the *şeriat* as a set of premises rather than a legal code, have supplied us with enough evidence to doubt the veracity of the old 'dual system' view. A different concept is suggested here, according to which the sultanic law and the *şeriat* did, in fact, come to form one compatible system – compatible, that is, to the degree that any such *longue-durée* system evolved by humans may be. The *kanun* was legislated within the sphere that legal experts of the time could have accepted as Islamic, inside the boundaries of *siyāsa shar iyya*.

I believe this compatibility is an important basis for our discussion of the relationship between law and society in the realm of sexual transgression. If we can regard the *kanun* and the *şeriat* as parts of one almost integrated system, the common basis for comparison becomes much wider. Furthermore, if we accept the assumption that they are intimately related, we can discuss discrepancies between them not in terms of two competing conceptions of law, but rather as an evolution of law within the same legal and societal sphere. Thus we may assume that those loci where the *kanun* insists on maintaining a difference with the *şeriat* are not accidental, and that they reflect the cultural and political dynamics of the period. In other words, the legal minds that shaped and molded the combined system must have given much thought to the discrepancies between their legislation and previous *şeriat* laws, and were aware of their meaning. The differences thus represent a conscious attempt to provide expression to contemporary social formations.

Describing the nature of these changes and the definition of areas in which differences were maintained systematically, and those in which the *kanun* preferred not to challenge the *şeriat*'s reasoning, constitutes the second part of the argument here. *Kanun* injunctions did not change the basic notions of right and wrong suggested by the *şeriat*. There was no serious attempt to introduce new social divisions, or ethnic and racial discrimination. On the whole the Ottoman elite seems to have accepted the Islamic ideal of an *umma* (nation of Islam) that is not divided by race or

ethnicity. On the other hand the *kanun* sought to improve the legal status of slaves, to enhance a measure of equality between men and women, and to prescribe more lenient progressive punishment for non-violent sexual offences. A parallel attempt was made to punish violent sex crimes more harshly than those that did not involve violence.

BREAKING WITH TRADITION

In the following centuries *kanun* legislation in the Ottoman empire suffered many vicissitudes, which are beyond the scope of this work. Active enactment and promulgation of law was never neglected altogether, either in the *şeriat* or in the *kanun*, but their nature was more accumulative. Only in the nineteenth century was a new impetus given to the production of laws. The state's attempt to centralize and cohere, both at the centre and in some of the provinces, mainly in Egypt and Tunisia, gave rise to a surge of legislation in civil law, commercial and naval affairs, contracts, and criminal law. Unlike attempts made in former centuries, this round of legislation was characterized by a conscious separation from the *şeriat*, and measured against the highlighted backdrop of European legal systems. Although the usual mention was made of the importance of *şeriat*, and of the need to heed its laws, the new legislators chose a different path. The old tradition of *kanun* was invoked, not least by naming the new codes *kanunname*s, but the breach here seems just as wide.

The new legislation efforts began with the establishment of the new armies in Egypt and at the centre in the 1810s and 1820s, but the bulk of the new work began in the Tanzimat era, following the establishment in 1837 of the *Meclis-i Valayı Ahkam-ı Adliye*, or the Council of Justice, as it came to be known, and the famous Gülhane Rescript of 1839. A first collection of regulations, entitled *Ceza Kanunname-i Hümayun*, or Royal Criminal Code, was published in 1840, and copies of it were sent to all provincial governors and courts. This was little more than an elaboration of the principles discussed in the Gülhane Rescript, with an emphasis on questions concerning the conduct of state officials, elimination of bribery, equality in adjudication, and other laws representing a growing bureaucratic state. Discussions of principles and punishment were cursory, and questions of sexual conduct are not treated.[32]

A few years later, in 1858, another code of criminal law was promulgated under Sultan Abdülmecid, and dispatched to all provinces. This one was more detailed, and some of the principles of legislation were spelled out in the preamble. Some thought was given to the relationship with the *şeriat*, and the guiding concept offered was that the criminal code

is situated in the grey area where the *şeriat* has no say. In cases where the *şeriat* decrees that criminal matters be returned to the concerned parties for arbitration, the new code explains, the state reserves the right to punish criminals, in the form of *ta zīr* (discretionary punishment recognized by the *şeriat* as a privilege of the kadi in certain cases). In practice, though, Abdülmecid's code allows itself a much broader margin of jurisdiction, sometimes in clear contravention of the sacred law.

In a clear allusion to contemporary Western codes, the *Kanunname-i ceza* divides crimes into three categories: *cinayet* (crime), defined as deserving of exemplary punishment, including life imprisonment, hard labour on a ship, and prolonged exile; *cunha* (felony, offence), defined as one in which an educating punishment is needed, such as over one week in prison; and *kabahat* (fault, misdemeanor), which is characterized as deeds to be reprimanded, and punished by fines, or imprisonment of up to one week. There is also a stipulation that allows courts to reduce the sentence by a third of the period for good behaviour.[33]

Emerging in a tumultuous era of rapid change, this code deals with an array of new problems. Some of them may have had to do with new technologies, urbanization, and a burgeoning bureaucracy. There are punishments for tampering with telegraph lines and messages, for forging money, and for illegally printing forged documents. Other worries are the growing occurrence of urban violence and white-collar crimes. The reader gets a sense that these new laws are concerned to a great extent with the need to control, to manage the populace. More than previous administrations, the new state apparatus needs to know where all its subjects are at all times, and to be able to locate them if and when the need arises. One series of laws, for instance, threatens to punish severely those who falsify transit documents (*murur tezkeresi*), and those who fail to report the names of people who rent a room on a daily basis in inns, restaurants, or coffee shops.

Laws concerning sex and sexuality are mostly subsumed under the heading 'About crimes concerning violation of honour' ('*hetk ırz edenlerin mecazatı beyanında*'). Many of the laws under this heading involve sexual relations with a minor, by force or consent. Anyone who commits an 'indecent act' (*fi l şani*) with a minor (which, under this law, is defined as age 21 or under) for a fee, will be imprisoned for at least six months.[34] If a parent or legal guardian forces a minor to commit such an act, they are liable to be sentenced to at least five years of hard labour (*kürek*).[35] If an indecent act is committed with a girl who is not yet married, the perpetrator will be forced to pay damages in addition to a sentence of hard labour.[36] Those who commit indecent acts in public are imprisoned for three months to one year and fined.[37]

If we compare these laws to the older *kanun* legislation, we may see them as a main turning point in terms of basic principles applied to the discourse of sexuality. Sultan Süleyman's *kanunname* retained most of the *şeriat*'s basic polarities: men and women, married and unmarried, adult and minor, Muslim and non-Muslim, free and slave. It also elaborated the *shar i* principle of reduced responsibility for those who are not free adult married Muslims, especially in crimes involving women and non-Muslims. In addition, it developed the principles of progressive fines and punishments, and a hesitant distinction between violent and non-violent crimes. The new set of laws goes much further. In these laws free–slave and Muslim–non-Muslim polarities are dropped altogether. Differences between men and women are very attenuated. In fact differences occur only on the victim's side, when women or young girls are abducted, raped, or lose their virginity. In most cases the sex of the perpetrator is not mentioned, and there is never any mention of different, or even equal punishments for men and women. On the other hand, three divisions are clearly emphasized: adults and minors, violent and non-violent, and public and private.

We cannot at this stage assume a gradual linear development from older *kanun*s to this one. The process described at the beginning of this article – the streamlining of *şeriat* and *kanun* – did not repeat itself here, either with the *şeriat* or with the older *kanun*s. The new judicial elite did not, as far as we know, consciously attempt a parallel harmonization of their code with earlier ones. It is therefore much more difficult to prove that the members of the *Meclis-i Vala* were consciously making changes and carefully elaborating the differences between their outlook and that of older systems. Yet, being well versed in the Ottoman *kanun* tradition and probably in the *şeriat* as well, and being faced with a sometimes vocal opposition of the ulema (men of religion), they must have been conscious of some of the differences between their *kanunname* and previous systems.

Some of these differences can be attributed to Western European influences, which gradually increased during the 1850s and 1860s. Slavery's disappearance owes a great deal to British pressures and new British public morality, and a similar process was at work leading to the practical disappearance of the Muslim/non-Muslim divide.[38] Yet, it seems that the moving force behind many of these phenomena was internal, and had to do with the appearance of the quasi-nation state. The new elite in the second half of the nineteenth century saw its task as one of creating a modern state. In many cases, with or without their knowledge, they were in fact trying to create, or 'to imagine' a nation. Their wish to forge a monolithic populace, united in its allegiance to the sultan, providing a modern work force and a modern conscription army, with a generic basic

education in language, sciences, and heritage, became an all-embracing policy. In our case it amounted to an attempt to destroy the old social boundaries between non-Muslims and Muslims, between free and slave. All were subjects of the sublime Ottoman dynasty, all shared responsibility for its welfare, and all deserved to be treated equally. Perhaps to a lesser degree this unifying tendency may also be seen in the attenuation of differences between men and women as far as legal status and punishment are concerned.[39]

Another outcome of this process, which could also be seen as one of its main motivators, is the emergence of the family. Older generations in the elite conceived of their world in terms of households. These hierarchical independent units were very much a part of the old patrimonial state, where vertical walls between segments of the population were the norm. They were built along the same lines as tribes, guilds, or Sufi brotherhoods, with a leading figure, a hierarchy determined by proximity to the leader, and an internal division of labour and responsibility. 'Family' was an indistinct category. Even the terms used for 'family' were ambiguous as the words *usra* (Turkish *usre*) and *ā ila* (*aile*) demonstrate, with their vast semantic fields ranging from poverty to clan and to relatives. At least in the elite, to which our law-enacting protagonists belonged, the concept of family was almost meaningless in terms of social, cultural, or political function.

As a direct consequence of the centralizing and state-building efforts of the elite, however, the clan-like structures comprising Ottoman society disintegrated. And while the partitions defining people according to religion, servile status, tribe, guild, or household slowly faded, the blurred outlines of the nuclear family began to solidify. In this new structure the relations connecting guardians and minors, parents and children, and the family to the outside world became ever more prominent. Children assumed a more distinct role and a personality of their own. Responsibility for their welfare became a state affair, and a new discourse evolved around them. Familial structures also necessitated a new division between public and private, inside and outside. Hence the child as sexual victim, and the renewed emphasis in the criminal code of Sultan Abdülmecid on abuse of guardian power, on sexual abuse of minors, and on compromise of public morality.

It would be a mistake to see the discursive trends discussed here as completely substituting for each other over time. Ulema continued throughout the Ottoman period to elaborate *şeriat* law, and the works of the famous nineteenth-century jurist Ibn ʿĀbidīn (1784–1836) attest to a lively and fruitful discussion of matters pertaining to personal-status laws and to matters concerning sexual offences. Households were still very

powerful even in the second half of the nineteenth century, and in many regions and social spaces in the empire the new laws of the Tanzimat era were not well understood or wholeheartedly embraced. We could say, perhaps, that this new legislation of the nineteenth century existed side by side with a powerful and sometimes dynamic *şeriat*. This time, however, there was no symbiosis or strategic alliance between the legal systems, such as the one attempted in Süleyman's time. *Şeriat* and *kanun* were now rivals vying for authority and power.

The discursive world of nineteenth-century law on sexual conduct could therefore be seen as a disjointed one. Two – and with the emergence of mixed courts in some provinces sometimes three – legal systems, with disparate conceptions of sexuality, existed side by side, each offering its own vantage point on morality and sexual conduct. On the other hand it could be perceived as an expanding discourse. While problems of fornication, same-sex relations and sex with slaves were still part and parcel of the way people referred to sexual matters, a new set of themes was now introduced, with the emphasis on sexual violence, abuse of minors, and equality of minorities.

ENDNOTES

1 See Colin Imber, 'Zinā in Ottoman law' in his *Studies in Ottoman History* (Istanbul, 1996). This article is one of the main sources for this work and, while the thrust of my argument is different, at several points it discusses some of the issues described therein at considerable length.

2 Some of these systems were known as the *mażālim* court, the *iḥtisāb*, or the *jināyāt* court.

3 Wael Hallaq, 'The Qadi's Diwan (sijill) before the Ottomans', *Bulletin of the School of Oriental and Asian Studies* **61**, no. 3 (1998), 416–36.

4 Uriel Heyd, *Studies in Old Ottoman criminal law* (Oxford, 1973), 1–3, Heyd, 'Kanun and sharī a in Old Ottoman criminal justice', *Proceedings of the Israel Academy of Sciences and Humanities* **3**, no. 1 (1967), 1–8; and Halil Inalcik, 'Kanun', *Encyclopedia of Islam* (2nd edn), vol. 4, 556–9.

5 Frank Vogel, 'Siyāsa shar īyya', *Encyclopedia of Islam* (2nd edn), vol. 9, 694–6; Heyd, *Old Ottoman criminal law*, 198–9. Among the most prominent fuqāhā (jurisconsults) who developed the doctrine were Ibn Taymiyya, his student Ibn Qayyim al-Jawziyya (d. 1350) and the Ottoman scholar Dede Efendi (d. 1565), whose work influenced Ottoman lawmakers in the sixteenth century.

6 The *nişancı* (bearer of the seal) was a high-ranking official in the Ottoman court, entrusted with affixing the sultan's cipher to official documents.

7 See Imber, 'Zina', p. 189: 'It is, in fact, wrong to regard *kanun* and *sharī a* as mutually exclusive legal systems. The Holy Law, modified through custom and expediency, is, at least in this limited area, the basis of the secular law'.

8 See Cornell Fleischer, *Bureaucrat and intellectual in the Ottoman Empire: the historian Mustafa Ali (1541–1600)* (Princeton, 1986), 178, 282, 218–19, 291. For the image of justice see also Cemal Kafadar, *Between two worlds: the construction of the Ottoman*

state (Berkeley, 1995), 8–9, 131–2. On streamlining *kanun* and *şeriat* see Heyd, *Ottoman criminal law*, 25–7, 185–207.

9 Fleischer, *Bureaucrat and intellectual*, 291.

10 Imber, 'Zina', 184.

11 For the following description of the *şeriat*'s treatment of sexual transgression and family law I have relied on the following texts: Al-Nawawi, *Kitāb al-majmū : sharh al-muhadhdhib li'l-Tarazi* (Dar al-Turāth al- Arabi, 1990), vol. 22; Al-Wansharisi, *Al-Mi yār al-mu arrib wa'l-jāmi al-mugharrib fi fatāwa ulamā'-Ifriqya wa l-Andalus wa'l-Maghrib* (Morocco, 1981); Abi al-Hasan al-Basri, *Al-Ḥāwi al-kabīr fi fiqh madhhab al imām al-Shāfi i* (Beirut, 1994); *Mu jam al-fiqh al-hanbali : mu jam al-mughni fi al-fiqh al-hanbali, mustakhlaṣ min kitāb al-mughni li ibn Qudāma* (Beirut, 1973); *Majmū fatāwa shaykh al-islām Ahmad ibn Taymīyya* (jama a Abd al-Rahman Muhammad ibn Qasim) (n.d.); Ibrahim Al-Halabi, *Multaqa al-abḥur* (Beirut, 1989).

12 There were, of course, many other sources in use and it is difficult to say with certainty what were the most important authorities at each point in time.

13 Imber, 'Zina', p. 178, defines *zina* as 'Sexual intercourse between sane adults where there is no ownership or "quasi-ownership"'.

14 The principle of *kafā a* (marriage to one's equal) is, admittedly, an obvious exception, but this too is a recommendation, and no punishments are prescribed for those who marry above or below their social or economic bracket. See for example Halabi, *Multaqa al-abḥur*, vol. 1, 246. On violence in sexual crimes see Imber, 'Zina', 178. As Imber explains, since the *sharī a* assumes mutual complicity in the act of rape, it falls under the broad definition of *zina*.

15 The Romans saw sexual positions in which women were on top as serious moral transgressions. See Peter Brown, *The body and society* (New York, 1988), 5–11. In Renaissance Venice, to take another example, anal intercourse was seen as a very serious offence. See Guido Ruggiero, *The boundaries of Eros: sex crimes and sexuality in Renaissance Venice* (Oxford, 1985), 109–13.

16 Abdelwahab Bouhdiba, *Sexuality in Islam* (London, 1985), 30–1.

17 Nawawi, *Kitāb al-majmū*, vol. 22, 58; *Majmū Fatāwa Ahmad ibn Taymīyya*, 181–2; *Mu jam al-fiqh al-hanbali*, pt 2, XXX; Abi al-Hasan al-Basri, *Al-Ḥāwi*, 222–3; Wansharisi, *Al-Mi yār*, vol. 2, 208–10; Al-Halabi, *Multaqa al-abḥur*, vol. 1, 334.

18 Imber, 'Zina', p. 178.

19 Nawawi, *Kitāb al-majmū* 63, 48; Abi al-Hasan al-Basri, *Al-Ḥāwi*, 224.

20 *Mu jam al-fiqh al-hanbali*, pt 2, XXX.

21 *Majmu fatāwa Ibn Taymīyya*, 181–2; *Mu jam al-fiqh al-hanbali*, pt 2, XXX; Nawawi, *Kitāb al-majmu* 58, 26, 27.

22 Nawawi, *Kitāb al-majmū* 27; Halabi, *Multaqa al-abḥur*, vol. 1, 334–5.

23 Heyd, *Old Ottoman criminal law*, 167–9; Inalcik, 'Kanun', 556–9. See also Colin Imber, *Ebu's-Su ud: the Islamic legal tradition* (Edinburgh, 1997), 44. Imber argues correctly that the source for many of the *kanun*s is legal custom (*örf*). The point I would like to stress here, however, is that even custom is somehow structured. In many parts of the Ottoman Empire, after hundreds of years of Islamic rule, custom appears to have absorbed much from the *şeriat*. To a certain extent it was restructured to fit some of the basic concepts of the *şeriat*, or at least what most common people assumed would be consistent with Islamic law.

24 *Old Ottoman criminal law*, 44–53. See also Ahmed Akgündüz, *Osmanlı Kanunnameler ve Hukuki Tahlileri* (Istanbul, 1992), vol. 4, 293–6.

25 Akgündüz, *Osmanlı Kanunnameler*, vol. 4, 361. According to Akgündüz about 90 per cent of general *kanunname*s in Turkish libraries are copies of this one.

26 Akgündüz, *Osmanlı Kanunnameler*, vol. 4, 366–7.
27 Information in these tables is based on Heyd, *Old Ottoman criminal law*, and on Akgündüz, *Osmanlı Kanunnameler*, vol. 4.
28 In this respect see also Imber, *Ebu's-Su'ud*, p. 50, and Akgündüz, vol. 4, 296, 366.
29 See also Imber, 'Zina', 182–3.
30 See Halabi, *Multaqa al-abḥur*, vol. 1, 336–41. See also Imber, 'Zina', 176.
31 See for example M. Foncault, *History of Sexuality*, vol. 1: *An Introduction* (London, 1979).
32 *Ceza Kanunname-i Hümayun* (Arabic version). Süleymaniye Library, Istanbul, Hüsrev Paşa. no. 826.
33 *Kanunname-i Ceza*, Süleymaniye Library, Istanbul, *Hidiv Ismail Paşa* no. 35, no. 157 and no. 121. The last copy is an Arabic translation.
34 *Ibid.*, 45, reg. 197.
35 *Ibid.*, 45, reg. 199. *Kürek* (paddle) used to mean work on the galleys as punishment, but at this period it probably meant imprisonment with hard labour.
36 *Ibid.*, 45. reg. 200.
37 *Ibid.*, 46. reg. 202. For other examples see reg. 188, 205–6.
38 Ehud Toledano, *The Ottoman slave trade and its suppression* (Princeton, 1980).
39 Dror Ze evi, '*Kul* and getting cooler: the dissolution of an elite collective identity in the Ottoman Empire', *Mediterranean Historical Review* **11** (1996).