

## Prostitution, Islamic Law and Ottoman Societies

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### Abstract

This article examines the treatment of prostitution in several genres of Ottoman legal writing—manuals and commentaries of Islamic jurisprudence, *fatwās* (legal opinions) and *ḵānūnnāmes* (Sultanic legislation)—and looks at how prostitution was dealt with in practice by the empire's sharī'a courts and by its provincial executive authorities. The article uses prostitution as a case study to investigate the relationships between the different genres of legal writing and between normative law and legal practice. It also throws light on various manifestations of prostitution in the Ottoman provinces of Egypt and Syria between the mid-sixteenth and mid-eighteenth centuries.

Cet article examine le traitement de la prostitution dans plusieurs genres juridiques ottomans – manuels de droit musulman et leurs commentaires, fatwas (avis juridiques) et *ḵānūnnāmes* (législation sultanienne) – et étudie la manière dont les tribunaux islamiques de l'empire et les autorités exécutives provinciales abordaient la prostitution dans la pratique. Cette étude de cas est aussi l'occasion d'examiner les relations qu'entretiennent divers genres de textes juridiques, ainsi que les liens unissant la théorie juridique et les pratiques judiciaires. L'article décrit enfin plusieurs formes de prostitution pratiquées dans les provinces ottomanes d'Égypte et de Syrie entre le milieu du xvi<sup>e</sup> et le milieu du xviii<sup>e</sup> siècle.

### Keywords

Prostitution, moral regulation, Islamic law, sharī'a courts, Ottoman Empire

The basic position of Islamic law towards sexual relations is straightforward: intercourse outside of marriage or concubinage (*zinā*) is illegal

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and subject to punishment by lashing or lapidation.<sup>1</sup> Although prostitution clearly violates Islamic law's tenets, the legal approach to female prostitution during the Ottoman period was rather less straightforward. In fact, there is little evidence that prostitutes or their clients were lashed or stoned to death. The issue of prostitution elicited a variety of responses from legal writers, and we find yet more variety if we look at the treatment of prostitution by shari'a courts and the authorities charged with public order. This article examines the positions of several genres of Ottoman legal writing towards prostitution and looks at how various authorities dealt with it in practice, focusing on the period from the mid-sixteenth to the mid-eighteenth century.<sup>2</sup> I use prostitution as a case study to examine the relationships between the different genres of legal writing and between normative law and legal practice. This case study provides an opportunity to describe Islamic law as a complete system, comprising state as well as juristic authority and day-to-day practice as well as normative pronouncements. This system was produced and practiced by a society that saw itself and its government as Islamic. My approach offers a contrast to the tendency to reduce Islamic law to *fiqh* (Islamic jurisprudence).

A substantial body of work on sexuality and law in the Ottoman Empire has been produced in recent decades, much of which has been based on shari'a court records.<sup>3</sup> Some of these works have examined prostitution

<sup>1</sup> The penalties of stoning or lashing for *zinā'* are among the small number of fixed penalties in Islamic law called *ḥadd* penalties (pl. *ḥudūd*). The other offences for which Islamic law prescribes fixed penalties are theft, drinking alcohol, highway robbery, false accusation of *zinā'* and, according to some jurists, apostasy. For an overview of the *ḥadd* penalties see Rudolph Peters, *Crime and punishment in Islamic law: Theory and practice from the sixteenth to the twenty-first century* (Cambridge: Cambridge University Press, 2005): 53-65.

<sup>2</sup> I do not deal with the period beyond the eighteenth century. During the nineteenth century the legal approach to prostitution in the Ottoman domains changed dramatically, as the state authorities in both Istanbul and Cairo adopted a more activist approach to the prosecution of crime, and as the issue of prostitution became associated with concerns for public health and military preparedness. I do not intend to discuss these changes here. For recent works on prostitution in nineteenth-century Egypt, see 'Imād Aḥmad Hilāl, *al-Baghāyā fī Miṣr: Dirāsa tārikhiyya ijtimā'iyya 1834-1949* (Cairo: al-'Arabī li l-nashr wa l-tawzī', 2001); Khaled Fahmy, "Prostitution in Egypt in the nineteenth century," in *Outside in: On the margins of the modern Middle East*, ed. Eugene Rogan (London: I.B. Tauris, 2002): 77-103; Liat Kozma, *Policing Egyptian women: Sex, law and medicine in Khedival Egypt* (Syracuse: Syracuse University Press, 2011): 79-98.

<sup>3</sup> For example: Abdul-Karim Rafeq, "Public morality in 18th-century Ottoman Damascus," *Revue du monde musulman et de la Méditerranée* 55-56 (1990-1): 180-196; Colin

during the period under study here. Scholars using Ottoman shari'a court records have noted that the *ḥadd* penalties (fixed penalties) of lashing and stoning were never applied to prostitutes. But they have not explained the treatment of prostitutes and their clients by Ottoman shari'a courts within the context of Islamic legal doctrine. Indeed, some have described the treatment of prostitutes as the non-application of Islamic law, and claimed that this demonstrates the flexibility of Ottoman courts.

For example, Elyse Semerdjian, in her recent book on illicit sexuality in Ottoman Aleppo, frames her discussion of prostitution around the apparent conundrum that the prostitutes in her records never received "the draconian punishments mandated in Islamic juridical writings," but instead were banished from their neighbourhoods. "How was it possible," the author asks, "for the courts to impose a punishment so different from the doctrinal positions found in the shari'a?"<sup>4</sup> Semerdjian argues that Ottoman judges were able to pass judgments based on local custom rather than Islamic law, and that this practice was sanctioned through the concepts of *istihsān* and *istiṣlāḥ* (the formation of legal doctrines on the basis of public interest).<sup>5</sup>

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Imber, "Zinā in Ottoman law," in idem, *Studies in Ottoman history and law* (Istanbul: Isis, 1996): 175-206; Judith Tucker, *In the house of the law: Gender and Islamic law in Ottoman Syria and Palestine* (Berkeley: University of California Press, 1998); Eugenia Kermeli, "Sin and the sinner: *Folles femmes* in Ottoman Crete," *Eurasian Studies* 1 (2002): 85-96; Leslie Peirce, *Morality tales: Law and gender in the Ottoman court of Aintab* (Berkeley: University of California Press, 2003); Walter Andrews and Mehmet Kalpaklı, *The age of beloveds: Love and the beloved in early modern Ottoman and European culture and society* (Durham: Duke University Press, 2005); Marco Salati, "Proscrizione, pentimento e perdono: Alcuni documenti riguardanti la prostituzione nella Aleppo ottomana del XVIII secolo," *Oriente Moderno* n.s. 24 (2005): 537-562; Yaron Ben-Naeh, "Moshko the Jew and his gay friends: Same-sex sexual relations in Ottoman Jewish society," *Journal of Early Modern History* 9 (2005): 79-108; Dror Ze'evi, *Producing desire: Changing sexual discourse in the Ottoman Middle East, 1500-1900* (Berkeley: University of California Press, 2006); Elyse Semerdjian, *Off the straight path: Illicit sex, law and community in Ottoman Aleppo* (Syracuse: Syracuse University Press, 2008); Marinos Sariyannis, "Prostitution in Ottoman Istanbul, late sixteenth-early eighteenth century," *Turcica* 40 (2008): 37-65; Başak Tuğ, "Politics of honor: The institutional and social frontiers of illicit sex in mid eighteenth-century Ottoman Anatolia," PhD diss., New York University, 2009.

<sup>4</sup> Semerdjian, *Off the straight path*: 94. Later in the same chapter, Semerdjian reviews the secondary literature on other regions of the Ottoman Empire, again framing her discussion around the absence of the fixed penalties: 129-32. See also the conclusion of the chapter, pp. 136-7, the introduction of the book, pp. xvii-xviii, and the conclusion of the book, pp. 158-60.

<sup>5</sup> *Ibid.*: 132-6. While Semerdjian gives an outline of *istihsān* and *istiṣlāḥ* in pre-Ottoman legal theory, she does not demonstrate a direct connection between these concepts and

This answer is unsatisfactory, because it suggests that Ottoman courts were able simply to ignore the prescriptions of Islamic law, harking back to the notion of an ossified *sharī'a*, irrelevant to legal practice, which the last three decades of scholarship on Islamic legal history has done much to undermine. The question of how courts were able to stray so far from Islamic jurisprudence is itself misleading. Islamic jurisprudence had a more nuanced approach to illicit sexuality than it is often credited with. Prostitutes and their clients were explicitly excluded from the fixed penalties by almost all the major *Ḥanafī* jurists of the Ottoman period; therefore the treatment of prostitutes by Ottoman courts cannot be characterized as the non-application of Islamic law.

The assumption that the fixed penalties are the relevant aspect of Islamic law also implies a narrow understanding of prostitution. The fixed penalties concern only illicit intercourse, but as a social phenomenon, prostitution encompasses much more than the sex act at its centre. Prostitution raises several legal and moral issues, including procuring, coercion, marital relations, the treatment of slaves, public decency and neighbourhood security. In addition to its discussions of the fixed penalties, Islamic law contains several other discourses that deal with all of these issues. Ottoman judges, officials and subjects were able to draw on all of these discourses when dealing with the problem of prostitution.

My intention in this article is not to expose a gulf between Islamic law as an ideal and the reality of legal practice. Instead, I will argue that the different approaches to prostitution taken by different genres of legal writing were complementary rather than contradictory. These approaches reflect the different concerns and purposes of each genre. In addition to the well-known discourse concerning the fixed penalties, which centred on evaluating the status of particular sex acts, the legal writing of the period under study contains several further discourses that were relevant to the other social and moral dimensions of prostitution. Court practice did not depart from written law, but rather drew selectively on all of these discourses. It was driven by the interests of litigants, reflecting the reactive nature of Ottoman *sharī'a* courts. Meanwhile, the government authorities periodically took the initiative and undertook active anti-prostitution

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Ottoman legal practice concerning prostitution. Eugenia Kermeli also describes the treatment of prostitutes by Ottoman judges as the application of local custom rather than Islamic law, although she does not ascribe this to *istihsān* or *istiṣlāḥ*: see Kermeli, "Sin and the sinner": 96.

campaigns, but at least in the empire's Arab provinces, such actions did not generally involve the sharī'a courts. The different genres of legal writing—*matn* (manual), *sharḥ* (commentary), *fatwā* (opinion) and *ḵānūnnāme* (codified orders of the Sultan)—together with the day-to-day practices of judges, litigants and state officials, collectively constituted Islamic law during this period.

I will look first at the treatment of illicit sexual relations and prostitution in the manuals and commentaries of Ḥanafī fiqh,<sup>6</sup> before examining fatwās on prostitution issued by Ottoman Şeyhülislāms (chief muftis). I will then look at the Ottoman criminal *ḵānūnnāme*: a code of the Sultanic law known as *ḵānūn*. Lastly, I will contrast evidence of Ottoman legal practice concerning prostitution provided by sharī'a court records with that provided by chronicles. I focus on legal writing produced during the period from the sixteenth to the eighteenth century, although I also make reference to earlier works that were still in use. These legal writings were part of academic and bureaucratic discourses that were empire-wide. In the sections on legal practice, I focus more narrowly on the Egyptian and Syrian provinces.<sup>7</sup>

## Manuals and Commentaries on Illicit Sexual Intercourse

Zinā' (fornication, i.e. sexual relations outside marriage or concubinage) is one of the offences defined in Islamic law as "claims of God": offences for which there are fixed penalties (the ḥadd penalties), and which the ruling authorities have a duty to prosecute rather than leaving the initiative to private litigants. As one of the few "claims of God," zinā' received a prominent place in all fiqh manuals and commentaries, in the chapter on the

<sup>6</sup> I focus on the Ḥanafī school, which is often described as the "official" school of the Ottoman Empire. The Ottomans allowed the other orthodox schools to coexist in the Arab provinces, adapting the pluralist court system established by the preceding Mamluk regime, but Ḥanafī doctrine was pre-eminent in matters of crime and public order. For the status of the Ḥanafī school in the Ottoman Empire, see Rudolph Peters, "What does it mean to be an official *madhhab*? Hanafism and the Ottoman Empire." In *The Islamic school of law: Evolution, devolution and progress*, ed. P. Bearman, R. Peters and F.E. Vogel (Cambridge, MA: Harvard University Press, 2005): 147-158.

<sup>7</sup> Egypt is the focus of my own research. The Syrian provinces have received significant attention from scholars, whose works show broad similarities in the treatment of prostitution with the Egyptian case. Although I focus on Egypt and Syria, I also draw some comparisons with sharī'a court practice in Anatolia, Istanbul and Crete.

fixed penalties. For this article I have examined works written or widely studied during my period, starting with Ibrāhīm al-Ḥalabī's early sixteenth-century manual *Multaqā l-abḥur*, and the commentary on it by Shaykhzādah. By the mid-seventeenth century al-Ḥalabī's manual had become the standard reference work in Ottoman schools and courts; it later became the principal source for the late nineteenth-century Ottoman *mecelle* (legal code).<sup>8</sup> I have also used the fifteenth-century Anatolian scholar Mollā Hüsrev's commentary *Durar al-ḥukkām sharḥ Ghurar al-aḥkām*, which was one of the standard works before al-Ḥalabī's rise to prominence,<sup>9</sup> and *al-Baḥr al-rā'iq sharḥ Kanz al-daqa'iq* by Ibn Nujaym, the most prolific Ḥanafī scholar active in Ottoman Egypt during the sixteenth century.<sup>10</sup> In addition, I have consulted al-Marghīnānī's *al-Hidāya*, a twelfth-century commentary that was one of the most influential works in the Ḥanafī school and widely used during the Ottoman period.<sup>11</sup> Lastly, I have consulted one fifteenth-century work that was composed outside the Ottoman Empire, in Egypt: Ibn al-Humām's commentary on Marghīnānī, *Sharḥ Faṭḥ al-qadīr*.<sup>12</sup>

Prostitution and other forms of *zinā'* were invariably discussed in the chapters of these texts on fixed penalties. The fixed penalties for *zinā'* were stoning to death if the offender was *muḥṣan* (free, Muslim and married), or 100 lashes if the offender was not *muḥṣan* (i.e. a slave, a non-Muslim, or

<sup>8</sup> Şükrü Selim Has, "The Use of *Multaqā l-abḥur* in the Ottoman madrasas and in legal scholarship," *Osmanlı Araştırmaları* 7-8 (1988): 393-418. It was also the text used by Joseph Schacht in compiling the "systematic section" of his *Introduction to Islamic law* (Oxford: Clarendon Press, 1964).

<sup>9</sup> Has, "The use of *Multaqā l-abḥur*": 399. For Mollā Hüsrev's life and work, see A. Kevin Reinhart, "Mollā Hüsrev: Ottoman jurist and *uşūlī*," in *Studies in Islamic law: a Festschrift for Colin Imber*, ed. Andreas Christmann and Robert Gleave (Oxford: Oxford University Press, 2007): 245-80.

<sup>10</sup> Ibrāhīm al-Ḥalabī, *Multaqā l-abḥur* (Beirut: Mu'assasat al-Risāla, 1989); 'Abd al-Raḥmān Shaykhzādah, *Majma' al-anḥur fī Sharḥ Multaqā l-abḥur* (Beirut: Dār Ihyā' al-turāth al-'arabī, 1980); Mollā Hüsrev, *Durar al-ḥukkām fī sharḥ Ghurar al-aḥkām* (Cairo: al-Maṭba'a al-Wahhābiyya, 1294 AH [1877-8]); Zayn al-Dīn Ibrāhīm Ibn Nujaym, *al-Baḥr al-rā'iq sharḥ Kanz al-daqa'iq* (Beirut: Dār al-kutub al-'ilmiyya, 1997).

<sup>11</sup> Burhān al-Dīn al-Marghīnānī, *al-Hidāya sharḥ Bidāyat al-mubtadī*, printed at the top of the page in Kamāl al-Dīn Ibn al-Humām, *Sharḥ Faṭḥ al-qadīr* (Cairo: Maṭba'at Muṣṭafā al-Bābī al-Ḥalabī, 1970). It is available in English translation: *The hedaya or guide: A commentary on the Mussulman laws*, trans. Charles Hamilton (Delhi: Islamic Book Trust, 1982).

<sup>12</sup> Ibn al-Ḥumām, *Sharḥ Faṭḥ al-qadīr*.

unmarried).<sup>13</sup> The primary point of debate in the sections of fiqh manuals and commentaries dealing with zinā' was whether or not particular instances of zinā' were liable for these fixed penalties.

Before turning to the jurists' discussions of prostitution in particular, we should first look at the basic procedural requirements for applying the fixed penalties to fornicators in general. These requirements were strict to the point of impossibility. No less than four male Muslim eye-witnesses of good reputation—double the number needed for most other matters—or a confession repeated four times were required to prove that zinā' had taken place. These witnesses had to have seen the actual penetration, a point emphasized by several jurists with the simile “like a pen in a kohlpot.”<sup>14</sup> Obviously, such witnesses were unlikely to exist. Even if they did, they were not legally or morally obliged to testify, unlike witnesses in most other circumstances.<sup>15</sup> In fact, jurists argued that in cases of zinā', when there was no person who would be denied a legal right, it was preferable for the community to “veil” such improprieties, in the interests of the Muslim community's reputation. Furthermore, the law provided any witnesses to zinā' with a powerful disincentive to testify: the offence of *qadhif* (sexual slander). *Qadhif* was a false accusation of zinā' and was, along with zinā' itself, one of the few offences with a fixed penalty. The fixed penalty for *qadhif* was 80 lashes. A witness who testified in an unsuccessful prosecution of zinā' was liable to this penalty.<sup>16</sup> As an added disincentive in cases where convicted defendants would be executed by stoning, the witnesses were required to throw the stones.<sup>17</sup>

Classical Islamic legal procedure, then, effectively rendered the application of the fixed penalties for zinā' impossible, and accordingly there are very few recorded instances of these punishments being carried out in states adhering to classical Islamic law.<sup>18</sup> Some historians have seen these

<sup>13</sup>) Peters, *Crime and punishment*: 59-61.

<sup>14</sup>) .. *ka-l-mayl fi-l-makhūla*...; al-Ḥalabī, *Multaqā l-abḥur*: I, 330.

<sup>15</sup>) Testimony was obligatory except in cases involving fixed penalties; see Shaykhzādah, *Majma' al-anhur*: II, 185-186.

<sup>16</sup>) Ibn Nujaym, *al-Bāḥr al-rā'iq*: V, 37-39.

<sup>17</sup>) Peters, *Crime and punishment*: 37.

<sup>18</sup>) The significant exception to this statement in the Ottoman context is an incident in 1680 in which a married Muslim woman and her Jewish lover were executed in Istanbul on the order of the chief judge of Rumelia and Sultan Mehmed IV: the woman by stoning, the man by beheading. Marc Baer explains this unusual incident in terms of the political and religious dynamics of the period: specifically, the alliance of Sultan Mehmed with the mili-

procedural hurdles as the most glaring example of the impracticality of Islamic law.<sup>19</sup> We might better understand them as representing a bias in favour of the defendant that resulted from a fundamental distrust of the ruler's power to coerce and punish. Where there was a human wronged party, this mistrust of the ruler's coercive power had to be balanced with that party's right to restitution. *Zinā'*, however, was construed by jurists as a claim of God: that is to say, the jurists understood the wronged party to be God, who was capable of obtaining his own restitution in the hereafter. Therefore, the jurists limited the ruler's power to inflict severe punishment as far as possible.

### Manuals and Commentaries on Prostitution

The main issue at stake in the jurists' discussions of *zinā'* was the applicability of the fixed penalties. The works consulted here each have a section titled "sex which necessitates the fixed penalty and sex which does not," in which the jurists went over all the possible varieties of sexual intercourse.<sup>20</sup> As with their elaboration of procedure, the jurists displayed a tendency to limit the circumstances in which the fixed penalties could be applied, using several strategies. One was to restrict the applicability of the fixed penalties to a very narrow definition of sexual intercourse: i.e. vaginal intercourse between a man and a woman. Thus, some jurists argued that homosexual

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tant pietist Kadızadeli movement. Baer notes that the sentence, in fact, contravened Islamic law both procedurally (adequate evidence was not produced) and in the punishment meted out to the Jewish man (non-Muslims guilty of *zinā'* were liable to lashing, not death). See Marc Baer, "Death in the Hippodrome: Sexual politics and legal culture in the reign of Mehmet IV," *Past and Present* 210 (2011): 61-91.

<sup>19</sup> Noel J. Coulson highlighted the rules on *zinā'* as an extreme example of the impracticality of Islamic criminal law in *A history of Islamic law* (Edinburgh: Edinburgh University Press, 1964): 126-27. Uriel Heyd and Joseph Schacht both argued more generally that the procedural requirements of Islamic law meant that its penal provisions were largely irrelevant to legal practice in historical Muslim societies: see Heyd, *Studies in old Ottoman criminal law*, ed. V.L. Ménage (Oxford: Clarendon Press, 1973): 1-3; Schacht, *An introduction to Islamic law* (Oxford: Clarendon Press, 1964): 50-1.

<sup>20</sup> *al-waḡ' alladhī yūjib al-ḥadd wa lladhī lā yūjibuhu*, or variations on that phrase. Al-Ḥalabī, *Multaqā l-abḥur*: I, 332-335; Shaykhzādah, *Majma' al-anhur*: I, 592-597; Ibn Nujaym, *al-Baḥr al-rā'iq*: V, 19-32; Mollā Hüsrev, *Durar al-ḥukkām*: II, 81-5; Ibn al-Ḥumām, *Sharḥ Faḥ al-qadīr*: V, 246-77; al-Marghinānī, *al-Hidāya*, printed at the top of the page in Ibn al-Ḥumām (see previous citation); al-Marghinānī, *The hedaya or guide*: 182-8.

encounters, and heterosexual encounters without vaginal penetration, were not punishable with the fixed penalties. Another was to appeal to the principle that only those living under a legitimate Islamic government could be subjected to fixed penalties. Some jurists excluded on this ground sexual encounters that took place in the *dār al-ḥarb* (the abode of war, i.e. the lands ruled by non-Muslims).<sup>21</sup>

The Ottoman jurists I consulted were unanimous in excluding prostitutes and their clients from the fixed penalties.<sup>22</sup> To do this they appealed to the legal concept of *shubha*, which translates as ambiguity. According to this principle, when an illegal act resembled a legal one, such that the resemblance could create an ambiguity as to its illegality, the fixed penalties could not be applied. This principle was recognized by all four orthodox schools of law, but it received its greatest elaboration among the Ḥanafīs. There were differences within the Ḥanafī school concerning the concept's flexibility of application. Abū Ḥanīfa, the school's eponymous founder, held that even if the offender knew the act to be illegal, the possibility of ambiguity in itself was sufficient to avert the fixed penalty. Abū Ḥanīfa's students al-Shaybānī and Abū Yūsuf, whose works are canonical within the school, disagreed with him on this point, and the debate continued among later jurists.<sup>23</sup>

The Ottoman jurists I studied made the following argument regarding prostitution: under Islamic law the two legal forms of sexual intercourse were intercourse between a husband and his wife, and intercourse between a master and his female slave. Both marriage and concubinage involved a payment—the dower in the former case and the purchase price in the latter—and in both cases the law conceived this payment as being in return for a form of ownership that included sexual rights. The relationship between a client and a prostitute resembled that between husband and wife or between master and slave, inasmuch as it also involved a payment in exchange for sexual intercourse. This resemblance created ambiguity as to the legality of the encounter between client and prostitute, and so the fixed penalties could not be applied.

<sup>21</sup> See al-Ḥalabī, *Mutaqā l-abḥur*, I: 333-5 for a list of varieties of heterosexual intercourse not subject to the fixed penalties. Peters summarizes the main opinions regarding male homosexuality in *Crime and punishment*: 61-2.

<sup>22</sup> The two non-Ottoman jurists I consulted differed; their positions are discussed below.

<sup>23</sup> Everett K. Rowson, "Shubha," *Encyclopaedia of Islam*, 2nd ed. (Leiden: Brill), vol. IX: 492-3.

Ibn Nujaym provided a text that justified the confusion of a fee with a dower or purchase price: “it is in favour [of this opinion] that God, may he be exalted, called the dower (*mahr*) a fee (*ujra*) when he said, ‘for what you enjoy from [your wives] give to them their fees.’”<sup>24</sup> Mollā Hüsrev and Shaykhzādah both referred to a report concerning the Caliph ‘Umar to bolster their argument:

And in favour [of this opinion] is the report that a woman asked a man for money and he refused to give it to her, until she gave herself to him. And ‘Umar, may God be pleased with him, avoided giving them the fixed penalty, saying this is her dower.<sup>25</sup>

In order for the exception for ambiguity to apply, the payment must have been exchanged specifically for sexual intercourse. Both Ibn Nujaym and Shaykhzādah insist that a man who hires a woman as a servant or to cook for him and then has sex with her is liable for the fixed penalty (as is, presumably, the woman). Shaykhzādah also argues that the fixed penalty should apply if a man gave money to a woman he had sex with, but did not specify what it was for. They give examples of statements accompanying the exchange that would meet this condition: these are, with minor variation, “I give you this dower in order to commit zinā’ with you.”<sup>26</sup>

None of these jurists explicitly addresses the question whether the offenders should genuinely have been confused about the legality of the act, or whether the possibility of confusion in itself was sufficient to avert the fixed penalties. It is significant, however, that these jurists almost exclusively use the word *zinā’* to describe sexual intercourse in their discussions of prostitution. The phrases prescribed by Ibn Nujaym and Shaykhzādah have the man saying “in order to commit *zinā’* with you.” Neither al-Ḥalabī nor Mollā Hüsrev specify an expression that should accompany the exchange, but they nevertheless specify that they are dealing with the situation in which a man hires a woman “in order to commit *zinā’* with her.” The word *zinā’* refers exclusively to illicit sexual intercourse: it is its illegality that distinguishes *zinā’* from other Arabic words for sexual intercourse such as *waḥḥ* and *jimā’*. Any man uttering the prescribed words would be admitting the illegality of his actions as he spoke. It appears, therefore, that the jurists were not concerned with what the offenders thought or knew at

<sup>24</sup> Ibn Nujaym, *al-Baḥr al-rā’iq*: V, 30.

<sup>25</sup> Mollā Hüsrev, *Durar al-ḥukkām*: II, 84; Shaykhzādah, *Majma’ al-anhur*: I, 595.

<sup>26</sup> Ibn Nujaym, *al-Baḥr al-rā’iq*: V, 30-31; Shaykhzādah, *Majma’ al-anhur*: I, 595.

the time of the offence. The fact that confusion about the legality of the act was possible averted the fixed penalties, regardless of whether the offenders had actually been confused.

While this exemption from the fixed penalties for prostitutes and their clients was asserted by all the Ottoman jurists I studied, it had not always been uncontroversial. For example, this opinion is not mentioned at all in the *Hidāya* of Marghīnānī, the most influential Ḥanafī work of the medieval period, which was widely used in the Ottoman Empire. This is not because the opinion was not in circulation when Marghīnānī wrote his work in the twelfth century. The jurists discussed above attribute the opinion to the Ḥanafī school's eponymous founder Abū Ḥanīfa, but as these are attributions rather than citations it is not clear whether these jurists allege that Abū Ḥanīfa propounded this precise position, or whether it had been inferred from a similar opinion through the process known as *takhrīj* (analogy). However, Ibn al-Humām quotes a passage justifying the opinion on prostitution from the Transoxanian jurist Ḥākim al-Shahīd's *al-Kāfi*, so we can be sure that the opinion was current at least as early as the tenth century, when Ḥākim al-Shahīd composed his text.<sup>27</sup> The section in the *Hidāya* discussing which sex acts incurred the fixed penalties employs the concept of *shubha* to exclude various categories of offence, including intercourse between a man and a slave belonging to his son, mother, father or wife, and intercourse between two people who had contracted an illegitimate marriage, but Marghīnānī does not apply the principle to the case of prostitution.<sup>28</sup>

Meanwhile, Ibn al-Humām, writing in Mamluk Cairo in the fifteenth century, rejected the opinion excluding prostitution from the fixed penalties. Ibn al-Humām points to the tension inherent in the form of words that the jurists supporting this opinion claimed the offending man had to utter for the *shubha* to take effect: *umhirtuki li-azniya biki* (I give you this dower in order to commit *zinā*' with you). If a man who both commits *zinā*' and says "I am committing *zinā*'" is not flogged, Ibn al-Humām argues, then this is a clear violation of the Koran.<sup>29</sup> Despite the fact that the

<sup>27</sup> Ibn al-Humām, *Sharḥ Faṭḥ al-qadīr*: V, 262.

<sup>28</sup> al-Marghīnānī, *al-Hidāya*, in Ibn al-Humām, *Sharḥ Faṭḥ al-qadīr*: V, 246-77 (top section of pages); al-Marghīnānī, *The ḥidāya or guide*: 182-8.

<sup>29</sup> Ibn al-Humām, *Sharḥ Faṭḥ al-qadīr*: V, 262. In Ibn al-Humām's account, it is clear that "flogging" stands for the fixed penalties, as this argument is presented as a refutation of the opinion that cases of prostitution are exempt from the fixed penalties. The fixed penalty for *zinā*' is, of course, flogging or stoning, depending on the status of the offender. The reason

opinion excluding prostitutes and their clients from the fixed penalties had both proponents and detractors, it appears to have become commonly accepted under Ottoman rule. It is striking that of the jurists active during the Ottoman period that I consulted, the only one who disagreed with this opinion was based outside the Ottoman Empire. But whether the ascendancy of this opinion was due to specifically Ottoman priorities, or rather to the internal scholarly dynamics of the Ḥanafī school, is not clear. What is clear is that for Ottoman jurists of the sixteenth to eighteenth centuries, the period under focus in this article, this opinion was authoritative, and that therefore the fixed penalties were irrelevant to the question how to deal with prostitution.

Ottoman Ḥanafī jurists thus excluded prostitution outright from the fixed penalties, but they did not consider prostitution to be legal.<sup>30</sup> The issue at stake in their discussions was the applicability of the fixed penalties to what was, regardless, considered an offence. In cases where an offence was proved but was excluded from the fixed penalty, the judge was free to apply a lesser, discretionary punishment: a concept known as *ta'zīr*.<sup>31</sup> This option was also available to judges in cases in which the evidence did not meet the strict requirements for application of the fixed penalty.<sup>32</sup> *Ta'zīr* usually consisted of lashing or caning, although according to Ibn Nujaym and Shaykhzādah it could also consist of slapping, rubbing the ears (*fark al-udhun*), a stern telling-off, disparagement short of slander, or an angry look from the judge.<sup>33</sup> The subtext of discussions of the applicability of the fixed penalties to different cases of *zinā'* was that convicted offenders who did not receive a fixed penalty would be liable to *ta'zīr*.

In fiqh manuals and commentaries, then, the jurists' discussion of prostitution was very narrow. They focused exclusively on whether or not the

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Ibn al-Humām focuses on flogging is that he wants to argue that the opinion violates the Koran, which prescribes only flogging for *zinā'*; the expansion of the fixed penalties to include stoning was based on *ḥadīth* (Traditions of the Prophet Muhammad).

<sup>30</sup> Pace Colin Imber, who argued that “by the 16th century, the majority of jurists evidently regarded [prostitution] as legal, probably on the grounds that it is pointless to legislate against the inevitable,” in “*Zinā'* in Ottoman law”: 188.

<sup>31</sup> Ibn al-Humām, describing the opinion in order to refute it, makes this explicit: he describes the opinion as *idha istā' jaraha li yazniya biha fa fa'ala la ḥadda 'alayhi wa yu'azzar* (if a man hires a woman in order to commit *zinā'* with her and then does this, the fixed penalty is not imposed but he receives *ta'zīr*). Ibn al-Humām, *Sharḥ Faṭḥ al-qadīr*: V, 262.

<sup>32</sup> Peters, *Crime and punishment*: 65-7.

<sup>33</sup> Ibn Nujaym, *al-Baḥr al-rā'iq*: V, 68; Shaykhzādah, *Majmā' al-anhur*: I, 609.

sex act merited application of the fixed penalties. As these penalties were essentially impossible to apply anyway due to procedural obstacles, these discussions can appear somewhat abstract and detached from the reality of courtrooms and lawsuits. Furthermore, prostitution comprises a range of activities and issues beyond the sex act itself. Soliciting, procuring, brothel-keeping and human trafficking are all important elements of prostitution, raising concerns about public order, the subjection of women and the temptation of men. The manuals and commentaries pay no attention to these aspects of prostitution. However, it is on these aspects that legal practice focused.

### Ottoman Fatwās on Prostitution

Ottoman jurists did address these issues in another sphere of their activity: when issuing fatwās. A fatwā is a legal opinion given in response to an individual's question regarding a particular issue. Collectively, fatwās constitute an important genre of legal writing that carried significant weight in the Ottoman legal system. During the Ottoman period, collections of the fatwās of prominent muftis—especially the Şeyhülislāms but also distinguished provincial muftis—were compiled and circulated to schools and courts for teaching and reference.<sup>34</sup> Fatwās issued by the Şeyhülislāms and other distinguished muftis were authoritative on points of law. However, they were not binding in court, because a fatwā was an opinion on a hypothetical set of facts presented by a questioner. It was the judge's role to determine whether the facts laid out in a fatwā matched those of a particular case.

Fatwās were commonly requested by litigants to use as supporting evidence in court, and by judges seeking guidance.<sup>35</sup> As a genre, therefore, they were more directly tied to court practice than either manuals or commentaries, although the circumstances of their issuance remain obscure

<sup>34</sup> On the development and particularly the bureaucratization of fatwā-giving under the Ottomans, see Uriel Heyd, "Some aspects of the Ottoman *fatwā*." *Bulletin of the School of Oriental and African Studies* 32 (1969): 35-56.

<sup>35</sup> See the following works on the use of fatwās by litigants: Haim Gerber, *State, society and law in Islam: Ottoman law in comparative perspective* (Albany: State University of New York Press, 1994): 79-112; Judith Tucker, *In the house of the law*: 17-22, 36; Boğaç Ergene, *Local court, provincial society and justice in the Ottoman Empire: Legal practice and dispute resolution in Çankırı and Kastamonu, 1652-1744* (Leiden: Brill, 2003): 138-40, 149-50; Peirce, *Morality tales*: 122-5, 239-40.

due to the removal of identifying details and the use of standardized fictitious names. Baber Johansen has argued that fatwās were the genre in which jurists were most able to respond to, and to develop the law in accordance with, contemporary circumstances. The function of manuals was teaching and the preservation of the legal school's core doctrines; they therefore tended to be conservative. Commentaries were an arena for scholarly debate and hence development of the law, but the format allowed for the presentation of several contrary opinions with no obligation on the author to favour one over another. A fatwā, however, was a direct response to a contemporary concern and demanded a positive statement of the law.<sup>36</sup>

Ottoman fatwās reveal a wider view of prostitution, and a particular concern with the threat to public order that it presented, and with the subjection of women by pimps. The following is from the fatwā collection of the eighteenth-century Şeyhülislām 'Abdürrahīm Menteşizāde:

If Zeyd, who has started a drinking club in his house and brings several strangers there to drink wine, also brings his wife Hind to the club and has her commit zinā' with the aforementioned strangers (*zevcesi Hind'i dabi ol meclise görürüb mezbürlere zinā itdirse*), can Hind be irrevocably divorced from Zeyd?

Answer: As long as the correct legal procedures are followed, she can be so divorced.<sup>37</sup>

The issue at stake in this fatwā is, of course, the woman's right to obtain a divorce without the consent of her husband: a right which is limited under Islamic law.<sup>38</sup> The mufti does not consider the criminality of the husband in this case, although he obviously believes his behaviour to be the kind of maltreatment that allows his wife a unilateral divorce. It is noteworthy that he recognizes the situation as one in which the woman was coerced.

<sup>36</sup> For a brief summary of this argument, see Baber Johansen, "Legal literature and the problem of change: The case of the land rent." In idem, *Contingency in a sacred law: Legal and ethical norms in the Muslim fiqh* (Leiden: Brill, 1999): 446-64. A fuller account can be found in his book *The Islamic law on land tax and rent: The peasants' loss of property rights as interpreted in the Hanafite legal literature of the Mamluk and Ottoman periods* (London: Croon Helm, 1988).

<sup>37</sup> 'Abdürrahīm Menteşizāde, *Fetāvā-yi 'Abdürrahīm* (Constantinople: Dārü l-ṭibā'ati l-ma'mūretü l-sultāniyye, 1243 AH [1827-1828]): I, 101.

<sup>38</sup> For an overview of divorce in Islamic law, see Judith Tucker, *Women, family and gender in Islamic law* (Cambridge: Cambridge University Press, 2008): 84-132.

The seventeenth-century Şeyhülislâm ‘Alî Efendi Çatalcalı dealt with a similar situation and did consider the husband’s criminality:

What [punishment] is necessary for the Muslim Zeyd, who brings strangers to his wife Hind who sits with them and touches their hands (*ecānibden birkaç kimesneleri zevcesi Hind’in yanına götürüb Hind dahi ol kimesnelerin ellerine yapışub mezbürler ile oturur olsa*)?

Answer: Severe corporal punishment (*ta’zîr-i şedîd*).<sup>39</sup>

Here too the mufti recognizes the coercive nature of the situation, calling for the husband’s punishment while assuming the wife’s innocence. Also noteworthy are the euphemisms employed in the question: sitting together and touching hands. The word *zinâ*’ is not mentioned, and neither is any other word for sexual intercourse. The discourse of the manuals and commentaries on illicit sex and the fixed penalties is thus avoided altogether. As the husband is the target, and procuring the concern, this discourse is irrelevant to the intentions of the questioner and the mufti.

A concern for the threat prostitution posed to public order is revealed in a fatwâ issued by the great sixteenth-century Şeyhülislâm Ebû’s-Su’ûd:<sup>40</sup>

If a group, travelling from village to village, makes a habit of inducing their wives and daughters and slave girls to commit *zinâ*’, what is necessary according to the *sharî’a*?

Answer: After they have all been beaten severely they should be imprisoned until such time as their uprightness has become apparent. Any of the wives proven to have committed *zinâ*’ should be stoned.<sup>41</sup>

Ebû’s-Su’ûd sees prostitutes and pimps (although not their clients) as a disruptive presence. Again, the principal ruling in the fatwâ—beating and imprisonment—makes no reference to the prosecution of particular acts of intercourse. Rather, soliciting and causing disruption are punishable in

<sup>39</sup> ‘Alî Efendi Çatalcalı, *Fetāvâ-yi ‘Alî Efendi*, Süleymaniye Library, Istanbul, MS Aya Sofya 1572: fos. 81b-82a.

<sup>40</sup> Ebû’s-Su’ûd, who held the position of Şeyhülislâm under Sultan Suleyman “the Law-giver” (known in the West as “the Magnificent”) was credited in Ottoman lore with harmonizing the *sharî’a* and the *kānūn* (sultanic law). For his career and writings see Colin Imber, *Ebû’s-su’ud: The Islamic legal tradition* (Stanford: Stanford University Press, 1997).

<sup>41</sup> M.E. Düzdağ (ed.), *Şeyhülislam Ebussuud Efendi fetvaları ışığında 16. asr Türk hayatı* (Istanbul: Enderun Kitabevi, 1983): 159, fatwâ no. 785. Imber discusses this fatwâ in “*Zinâ in Ottoman law*”: 201.

themselves, using the judge's power to impose *ta'zīr*. The aim of these penalties seems to be to prevent such actions occurring in the future through deterrent and rehabilitation—the imprisonment is to last until the offenders have reformed—rather than to punish an act of sexual intercourse. Although Ottoman *sharī'a* courts used imprisonment almost solely to coerce payment of debts, Ebū's-Su'ūd's choice of imprisonment here is in line with the tradition in Ḥanafī *fiqh* of using imprisonment to coerce offenders into repentance (*tawbā*).<sup>42</sup>

It is noteworthy, however, that Ebū's-Su'ūd advocates the further punishment of stoning for the wives proven to have committed *zinā'*. This seems to represent a departure from the majority position in the Ḥanafī school: that prostitutes are exempt from the fixed penalties.<sup>43</sup> However, it is important to bear in mind the limited remit of the jurist when giving a *fatwā*, which is to give an opinion on the legal implications of the facts presented to him. In this instance, the situation presented by the questioner was simply that the group was inciting their wives to commit *zinā'*. While the implication is clearly prostitution, the questioner did not specifically state that they were paid by the men with whom they committed *zinā'*. The payment in exchange for sexual intercourse was the component of the encounter between a prostitute and her client that allowed them both to escape the fixed penalty. Without this crucial detail, Ebū's-Su'ūd could not apply the principle of *shubha*, and so he ruled that the wives proven to have committed *zinā'* should be stoned.<sup>44</sup> It was not his role to enquire beyond the facts that were presented to him.

Another question about this *fatwā* is why Ebū's-Su'ūd proposes implementing the fixed penalty only for the wives proven to have committed *zinā'*. Why did he not also declare that the daughters and slave-girls proven to have committed *zinā'* should receive the fixed penalty for non-*muḥṣan* offenders of 100 lashes? Perhaps this punishment was subsumed under the

<sup>42</sup> Ibn Nujaym, *al-Baḥr al-rā'iq*: V, 71.

<sup>43</sup> It seems to me that this is the paradox of this *fatwā*. In his discussion of this *fatwā*, Imber suggested that it “contravened the *sharī'a*” by ignoring the question whether the women were *muḥṣan* or not in its prescription of stoning. However, the *fatwā* prescribes stoning only for the wives (*avretler*), and not the daughters (*kızlar*) or slave-girls (*cāriyeler*): Ebū's-Su'ūd does restrict the stoning penalty to the women who are *muḥṣan*. See Imber, “*Zinā* in Ottoman law”: 201.

<sup>44</sup> It is worth re-stating that this ruling was probably symbolic, because the chances of proving to the requisite standards that any of the wives had committed *zinā'* were minimal.

severe beating prescribed for all the offenders, but the omission might also represent Ebū's-Su'ūd's implicit recognition of the possibly coercive nature of the situation. People coerced into committing zinā' were not liable for punishment. Ebū's-Su'ūd may have regarded the wives, as mature women, as responsible for their actions, but have presumed the young, unmarried girls and the slaves to be coerced by their elders and owners. While he believed punishment for anti-social behaviour was necessary in order to secure their repentance and reform, he did not think they were guilty of zinā'.

Another of Ebū's-Su'ūd's fatwās again sees him treating prostitution as primarily a problem of public order. In this case the issue is a slave-owner who fails to control a group of his slaves, who regularly have rowdy nights out in which they drink, play music, fetch prostitutes and break windows. According to Ebū's-Su'ūd, the owner should be subjected to severe beating and lengthy imprisonment (*ḍarb-i şedīd ve ḥabs-i medīd*) in order to force him to discipline the slaves.<sup>45</sup> The interesting point for our purposes is that the slaves' use of prostitutes is classed as disorderly behaviour rather than as a sexual offence. This is another example, then, of a fatwā ignoring the ḥadd-centred discourse of fiqh manuals and commentaries, which is irrelevant to the wider social issues surrounding prostitution.

### The Criminal *Ḳānūnnāme* on Prostitution

In this section I examine the treatment of prostitution in the criminal *ḳānūnnāme* compiled under Suleyman the Magnificent.<sup>46</sup> Ottoman *ḳānūn* focused on matters of particular concern to the government, predominantly taxation and crime. Drafted partly by jurists trained in Islamic law, it was seen as complementary to rather than separate from the sharī'a, on which it drew heavily for its conceptual framework.<sup>47</sup> While each province received its own *ḳānūnnāme* dealing with taxation, the criminal *ḳānūnnāme* of the centre was in force throughout the empire. Indeed, provincial *ḳānūnnāmes*

<sup>45</sup> Düzdağ, *Şeyhülislam Ebussuud*: 120, fatwā no. 542.

<sup>46</sup> I have used the edition of this *ḳānūnnāme* prepared by Uriel Heyd and published in his *Studies*. In subsequent footnotes I will first give the page reference for the Turkish text, followed by the page reference for Heyd's English translation.

<sup>47</sup> For the relationship between the two see Heyd, *Studies*: 167-207; Peters, *Crime and punishment*: 71-75; and, for the specific context of sexual offences, Imber, "Zinā in Ottoman law."

often specified that in matters of crime, the central *ḳānūnnāme* should be followed. The *ḳānūnnāme* of Egypt states that a copy of the central *ḳānūnnāme* should be kept at the provincial governor's *Dīvān*, and that further copies should be sent to all judges and kept with their registers.<sup>48</sup>

The *ḳānūnnāme*'s approach to prostitution broadly resembles that found in the *fatwās*. Again, prostitution is seen as a social problem rather than a sexual transgression, and the concern is for public order and the possibility of exploitation. Indeed, none of the provisions on prostitution appear in the *ḳānūnnāme*'s chapter on sexual offences. Instead, they are found in the chapters entitled "mutual beating and abuse" and "drinking, theft, robbery and other offences." These provisions target procuring rather than prostitution itself, prescribing a mixture of corporal and pecuniary punishments. No punishments are mentioned for prostitutes or their clients. However, the chapter on illicit sex, in contrast to the *fiqh* texts discussed above, makes no exemption for prostitution. This chapter provides a graduated system of fines based on status and wealth for illegal sexual intercourse.<sup>49</sup> This accords with the *fiqh*, which allows offenders who do not receive the fixed penalty for *zinā'* to be punished at the discretion of the judge. Given that the standards of proof required to implement the fixed penalties were effectively impossible to meet, any imposition of the *ḳānūnnāme*'s fines would have taken place using inferior evidence, and so the fines can be seen as a variant of the discretionary punishment prescribed in the *fiqh*. The *ḳānūnnāme*'s innovation was that this discretion was centralized: taken from the individual judge and given to the senior jurists who drafted it.<sup>50</sup>

<sup>48</sup> *ḳānūnnāmes* for Aleppo, Adana, A'zāz, Bire and Çemişgezek, among others, state that the *ḳānūn* of the centre should be followed in matters of crime. The texts of all these *ḳānūnnāmes* are reproduced in Ahmed Akgündüz (ed.), *Osmanlı kanunnameleri ve hukuki tabhilleri* (Istanbul: Fey Vakfı, 1992). Aleppo: V, 647, section 8; V, 658, section 8. Adana: V, 596 section 16; V, 600, section 11. A'zāz: V, 626, section 9. Bire: V, 632, section 12; V, 637, section 10. Çemişgezek: V, 530, section 18. For the relevant section of the Egyptian *ḳānūnnāme* see Ömer Lutfi Barkan (ed.), "Mısır kanunnamesi," in idem, *XV. ve XVIinci asırlarda Osmanlı İmparatorluğunda zirai ve ekonominin hukuki ve mali esasları* (Istanbul: Bühraneddin Matbaası, 1943): 362, section 13. Many of these provincial *ḳānūnnāmes* were written one to two decades before the criminal *ḳānūnnāme* of Suleyman that I discuss here. However, the second *ḳānūnnāme* of Bire (Akgündüz, *Osmanlı kanunnameleri*: V, 636-9) was written in 1551, after the composition of Suleyman's criminal *ḳānūnnāme*, showing that at this point criminal *ḳānūn* was still being written to address the whole empire.

<sup>49</sup> Heyd, *Studies*: 56-64 / 95-103.

<sup>50</sup> Imber also argues that the *ḳānūnnāme* is broadly compatible with *fiqh* in its punishments for *zinā'*: Imber, "Zinā' in Ottoman law": 180-6. Dror Ze'evi, in *Producing desire*,

Two separate clauses of the *ḵānūnnāme* prescribe punishments for procuring. The first states that the judge should sentence a procurer to lashing or caning (*ta'zīr*), collect a fine of one *akçe* per stroke and expose the offender to public scorn by parading him or her through the streets (*teṣhīr*).<sup>51</sup> The second states that a procurer should have his or her forehead branded.<sup>52</sup>

The third clause dealing with prostitution does not specify a punishment, but throws light on a particular manifestation of prostitution with which the Ottoman state must have been especially concerned, as the

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argues that the *ḵānūnnāme* represented a fundamentally different, more egalitarian approach to sexuality than that of *fiqh*, but this argument is not convincing. The argument rests partly on the fact that punishments for sexual offences under *ḵānūn* were equal for men and women. But the punishments prescribed by *fiqh* are also equal for men and women, and Ze'evi does not adequately explain why he considers equality of punishment an innovation. He asserts that, according to *fiqh*, men convicted of *zinā'* should be punished by stoning while women should be beheaded (p. 64), but this is incorrect, and indeed it contradicts the tables of *fiqh* punishments that Ze'evi provides (pp. 56-8), which show the punishments for women convicted of *zinā'* as lashing or stoning according to status. Ze'evi also claims that under *ḵānūn*, "choice of sexual partners is not a unique privilege of mature free (Muslim) males" (p. 67). But the definition of licit sexuality, according to which a man may have sexual relations with up to four wives and an unlimited number of slaves, but a woman may have sexual relations only with a single husband, is identical in *fiqh* and *ḵānūn*. Ze'evi supports this claim by arguing that a greater degree of freedom was granted to the "lower classes" by the graduated system of fines: i.e. if they broke the law, they would receive lesser punishment. This conflates two issues: it is not poor people whose sexual choices are restricted in *fiqh*, but women (rich or poor). Also, it ignores the fact that a small fine will have a more significant impact on a poor person than on a rich person: this, presumably, is the logic behind the *ḵānūn*'s graduated fines.

<sup>51</sup> Heyd, *Studies*: clause 57, p. 71 / p. 110. *Tēshīr* could consist of shaving the offender's head, blackening his or her face with soot, parading him or her through the streets seated backwards on a donkey, and other such indignities. See Rudolph Peters, *Crime and punishment*: 34, 98. For a more detailed discussion of this punishment in Abbasid Baghdad, see Christian Lange, "Legal and cultural aspects of ignominious parading (*tashhīr*) in Islam," *Islamic Law and Society* 14 (2007): 81-108. I have not seen any examples of *teṣhīr* punishments in the *sharī'a* court records of Ottoman Cairo. However, contemporary chronicles suggest that these punishments were still in use in Cairo at the end of the seventeenth century. Aḥmad Shalabī ibn 'Abd al-Ghanī reports that in Muḥarram 1108 / July-August 1696 an official witness (*shāhid 'adl*) found guilty of forging documents had his beard shaved before being paraded through Cairo's markets on a camel, led by a crier who announced his offences to the crowds. Aḥmad Shalabī ibn 'Abd al-Ghanī, *Awḍaḥ al-ishārāt fī man tawallā Miṣr al-Qāhira min al-wuzarā' wa l-bāshāt*, ed. 'Abd al-Raḥīm 'Abd al-Raḥmān 'Abd al-Raḥīm (Cairo: Maktabat al-Khanjī, 1978): 200-1.

<sup>52</sup> Heyd, *Studies*: clause 75, p. 76 / p. 114.

clause claims that this issue had been the subject of repeated *fermāns* (edicts). Dealers in female slaves based in caravanserais were holding drinking-parties attended by the caravanserais' guests and the dealers' slaves, at which "debaucheries and similar lawless acts" were committed. The dealers maintained a façade of legality through a sham sale: a guest would buy one of the slaves and then sell her back to the dealer when he left the caravanserai, for "a few akçe less."<sup>53</sup> The fact that dealers had devised this ruse suggests that they were wary of prosecution: the state apparently not only outlawed procuring but also actively sought to suppress it.

A further clause of the *kānūnnāme*, while not dealing exclusively with prostitution, contains relevant provisions. Under the chapter "suspects and their connections," the clause allowed a community to have one of its members banished from the neighbourhood if he or she was "a criminal or a harlot" and was widely notorious as such. If that person was not accepted by a new neighbourhood, he or she could be expelled from the town altogether, after having been given a chance to repent and reform.<sup>54</sup> Judging from the evidence provided by the Ottoman sharī'a court records, banishment from a neighbourhood, rather than the corporal and pecuniary punishments mentioned elsewhere in the *kānūnnāme* and in *fatwās*, was by far the most common response to prostitution.

### The Sharī'a Courts

When Ottoman sharī'a courts dealt with prostitution, a further set of concerns was at stake. These concerns were primarily those of Ottoman subjects. Ottoman sharī'a courts were essentially reactive in nature: they did not actively prosecute but rather responded to the lawsuits brought by individuals. This was the case even with matters categorized by most modern legal systems as criminal, such as murder, theft and other offences against persons and property. This feature of Ottoman sharī'a court procedure had a significant impact on the courts' handling of prostitution.

Ottoman sharī'a courts did not pay attention to prosecuting *zinā'*, as we would expect given the near impossibility of proof. Neither did they zealously apply the punishments for procuring and soliciting prescribed by *fatwās* and the *kānūnnāme*. Prostitution most often appears in court records when residents of a neighbourhood petitioned to have a prostitute

<sup>53</sup> Ibid.: clause 114, pp. 88-89 / pp. 126-127.

<sup>54</sup> Ibid.: clause 124, p. 92 / p. 130.

or pimp neighbour expelled. These undesirable neighbours were usually running small, often family-based operations in their homes. The courts were sympathetic to such requests, and prostitutes and pimps were regularly banished. The issue at stake in these court cases, then, was not public order or the subjection of women, but the right of upstanding Ottoman subjects to live their lives untroubled by vice on their doorstep.<sup>55</sup> Ottoman subjects in fact enjoyed a broad right to enforce standards of conduct in general: as well as prostitution, residents could and did object to various types of misbehaviour, both those which were formally illegal and those which were not.

An example is a complaint brought to Cairo's main court, al-Bāb al-ʿĀlī, by the residents of the Ṣalībat Ṭūlūn neighbourhood in Shawwāl 1057 / November 1647. In a petition presented to the judge by a local *amīr*,<sup>56</sup> the residents accused a man called Aḥmad al-Maṭrabāz of a string of misdeeds including playing drums, not attending prayers, drinking wine and gathering male strangers and immoral women in his house.<sup>57</sup> Allegations of prostitution or sexual immorality were usually made using euphemisms, for reasons I will discuss below. The judge sent a representative to the neighbourhood to question the residents, who corroborated the contents of the *amīr*'s petition. The residents added that they had warned Aḥmad several times about his behaviour but he had been unrepentant. They therefore wanted him removed from the neighbourhood. Unfortunately, this document does not include a definitive judgment, noting simply that the facts of the case were recorded and a report sent to "the person with authority in such matters" (*man lahu walī al-amr*). As the court was satisfied with the residents' evidence, it seems likely that an eviction was attempted.

Court records from other regions of the empire also show that expulsion was often the remedy sought in such cases, and that the courts were usually happy to oblige. In his study of eighteenth-century Aleppo, Abraham Marcus found several similar complaints about the immoral behaviour of

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<sup>55</sup> As well as a general desire for tranquillity and propriety, residents of Ottoman cities had a further reason to want trouble-makers expelled from their neighbourhoods. The authorities could and did hold residents collectively liable for crimes and misdeeds that took place in the neighbourhood but went unreported, or when the culprits were not handed over. Abraham Marcus provides examples in *The Middle East on the eve of modernity: Aleppo in the eighteenth century* (New York: Columbia University Press, 1989): 116-7.

<sup>56</sup> A title used by senior military officials in Egypt.

<sup>57</sup> Egyptian National Archive, Cairo, Sijillāt maḥkamat al-Bāb al-ʿĀlī, register 125, entry 701, 5 Shawwāl 1057 / 3 November 1647.

a neighbour. In one case, a couple were expelled from their neighbourhood because the woman prostituted herself with the encouragement of her heavy-drinking, foul-mouthed husband.<sup>58</sup> Another woman accused of immorality, Fāṭima bint ‘Abdullāh, was banished from one area, only to be expelled again immediately upon arriving in a new neighbourhood, on the grounds of her past record.<sup>59</sup> Elyse Semerdjian found many similar examples from seventeenth- and eighteenth-century Aleppo. In Muḥarram 1071 / September 1660 a woman called Zahra was brought to court by the residents of Jāmi‘ ‘Ubays and accused of being “off the straight path” and of bringing unrelated men into her home; she was removed from the neighbourhood.<sup>60</sup> In Jumādā l-Awwal 1098 / March 1687 the residents of al-Shimālī Street complained that ‘Aqīl ibn al-Ḥājī ‘Uthmān, his sister Hannā and his mother Alif were “gathering strange women and men in their home”; the entire family was removed from the neighbourhood. In Rajab 1154 / September 1741, two brothers and an unrelated woman who were running a brothel in a private home in a village outside Aleppo were also expelled.<sup>61</sup> Marco Salati’s article on eighteenth-century Aleppo includes the texts of several court cases in which city residents successfully sought the eviction of neighbours involved in prostitution.<sup>62</sup> Haim Gerber found cases of the removal of prostitutes from their neighbourhoods in seventeenth-century Bursa.<sup>63</sup> Marinos Sariyannis notes several examples of women being expelled from neighbourhoods in seventeenth-century Istanbul for prostitution and procuring. In some cases their houses were sealed to prevent their return, although it is not clear that expulsions were always effective: Sariyannis cites one case of alleged procuring in which the defendant, a woman called Ḳarafahrī bint Muṣṭafā, had previously been banished but had returned and re-started her business.<sup>64</sup>

Although expulsion was the most common remedy, groups of offended residents sometimes pursued other options. In eighteenth-century Damascus, the inhabitants of Bāb al-Sarīja had an inn notorious for prostitution

<sup>58</sup>) Marcus, *Middle East*: 314.

<sup>59</sup>) *Ibid.*: 117-118

<sup>60</sup>) Semerdjian, *Off the straight path*: xvii-xviii.

<sup>61</sup>) *Ibid.*: 119-20; see also further similar examples *passim*.

<sup>62</sup>) Salati, “Proscrizione, pentimento e perdono”: 537-562. See especially documents 1 through 5, pp. 546-55.

<sup>63</sup>) Gerber, *State, society and law*: 39.

<sup>64</sup>) Sariyannis, “Prostitution in Ottoman Istanbul”: 54, 57.

demolished and obtained a further ruling forbidding its being rebuilt.<sup>65</sup> In 1158 / 1745 a derelict house in Candia, Crete, whose owner had died was being used as a brothel. Local residents had the court force the owner's heirs to arrange and pay for its renovation.<sup>66</sup>

The corporal punishment of prostitutes in Ottoman sharī'a courts is not entirely absent from the historical record: Haim Gerber, studying seventeenth-century Bursa, states that prostitutes were routinely punished with the bastinado, and claims that such cases were frequent in the court records he studied,<sup>67</sup> while Yvonne Seng cites a case of a women flogged for prostitution in sixteenth-century Üsküdar.<sup>68</sup> However, recent scholarship on Ottoman sharī'a courts as a whole suggests that banishment and other pragmatic solutions were far more common.

The prevalence of banishment or other solutions over corporal punishment in dealing with prostitutes and pimps is a reflection of the fact that private initiative lay behind most sharī'a court cases. It was far more common for subjects to bring cases against prostitutes and pimps than for officials to do so, and the subjects' primary concern was to clean up their neighbourhood, not to exact vengeance or to set an example through punishment. Court users' preference for banishment—they usually specified the outcome they sought—also reflected the broad and often vague grounds on which this penalty could be imposed. In seeking banishment, a right explicitly provided by *kānūn*, the plaintiffs did not have to provide evidence of particular sex acts having taken place, nor did they even have to assert, explicitly, that the offending neighbour was a prostitute or pimp. As we saw in the case of Aḥmad al-Maṭrabāz, common agreement that the neighbour engaged in vaguely-defined immorality was sufficient, and most plaintiffs preferred to employ euphemisms and generalizations rather than make specific allegations. Such nebulous phrases were useful to plaintiffs in two ways. First, they avoided the necessity of "proving" the commission of a particular act. Generalizations were not amenable to proof, which

<sup>65</sup> Rafeq, "Public morality in 18<sup>th</sup>-century Ottoman Damascus": 184.

<sup>66</sup> Kermeli, "Sin and the sinner": 94.

<sup>67</sup> Gerber, "Social and economic position of women in an Ottoman city, Bursa, 1600-1700," *International Journal of Middle East Studies* 12 (1980): 239. Gerber states that his records describe these women's offences as *zinā*, but he interprets these cases as prostitution due to their frequency and to the involvement of the police (the *şubaşı*).

<sup>68</sup> Yvonne J. Seng, "Standing at the gates of justice: Women in the law courts of early sixteenth-century Üsküdar, Istanbul," in Mindie Lazarus-Black and Susan F. Hirsch (eds.), *Contested states: Law, hegemony and resistance* (New York: Routledge, 1994): 199.

required witnesses to testify not only to a specific act, but also to when and where that act took place. The eviction petitions essentially alleged bad character, and for the purpose of establishing that an individual was of bad character the court was willing to accept a broad consensus.<sup>69</sup> Second, subjects could make generalized allegations without risking falling foul of the laws on sexual slander. As mentioned earlier, there was a fixed penalty of 80 lashes for making a false, specific allegation of illicit sex. According to the fatwā collections surveyed for this article, unspecific sexual slander—that is, the use of insults such as “whore” rather the making of a specific allegation—was punished either with the fixed penalty or with discretionary corporal punishment, depending on which word was used. The main words for prostitute in Turkish and Arabic—T. *fāḥiṣe* and *kaḥpe*, Ar. *fāḥisha* and *qahba*—entailed liability to discretionary corporal punishment; *oruspu*, another derogatory Turkish word for prostitute, incurred the fixed penalty.<sup>70</sup> When bothered by a brothel next door, it was safer for an Ottoman subject to request banishment of the offenders on the grounds of vaguely-defined immorality than it was to seek their punishment by alleging explicitly that they were prostitutes.<sup>71</sup>

The court records and the *ḳānūnnāme*, then, present different pictures of how prostitution was manifested in the Ottoman Empire and of how the authorities handled it. The *ḳānūnnāme* gives the impression that the

<sup>69</sup> In the context of Anatolia, Ergene shows that vague assertions of bad character, for example that someone was a “fomenter of corruption” (*sā’i bi l-fesād*) or was “evil” (*sū-i ḥāl*), were used to secure convictions of people accused of various sexual and non-sexual offences on a lower standard of evidence than was usual. See Ergene, *Local court*: 152-61.

<sup>70</sup> ‘Ali Efendi Çatalcalı, *Fetāvū*: fos. 80b-81a, 84a; ‘Abdürrāḥīm Menteşizāde, *Fetāvū*: I, 103.

<sup>71</sup> Rafeq claims that euphemisms were used in Damascus because prevailing notions of family and neighbourhood privacy meant that people were averse to publicizing sexual immorality, a plausible explanation that is compatible with mine. See Rafeq, “Public morality”: 181-2. Semerdjian argues that the court used euphemisms in such cases in order to avoid having to impose the fixed penalties for *zinā’*, but this is not supportable. It was not the court that used the euphemisms, it was the plaintiffs: while scribal practice may have decided the particular form of words we see in the court records, it was the plaintiffs who decided to make a charge of vaguely-defined immorality rather than a specific allegation of *zinā’*. Furthermore, in cases of prostitution the fixed penalties were not applicable anyway, as established above; in other *zinā’* cases, it was essentially impossible to produce sufficient evidence to have the fixed penalties imposed. There was no need for courts to strategize to avoid the fixed penalties: their practical irrelevance was inherent in *fiqh*. See Semerdjian, *Off the straight path*: 97-8.

state imposed harsh corporal punishments on procurers, and reveals the existence of relatively large commercial vice operations in which slave dealers exploited their human property. The court records mainly show much smaller businesses run out of homes in residential neighbourhoods. The courts appear to have shown little interest in imposing the punishments provided for by *ḵānūn*; nor do the court records show officials pursuing offenders with any great zeal. The courts respected, however, their neighbours' desire for a peaceful and proper environment and usually cooperated in evicting the offending parties.

The explanation for this discrepancy is that the principal function of the courts was to resolve disputes between private subjects: the vast majority of cases in the Ottoman court records were initiated as private lawsuits. As explained above, the issue at stake for private plaintiffs bringing cases against prostitutes and pimps was the state of their neighbourhoods. Therefore, the remedy they usually sought was expulsion, and their lawsuits only reveal prostitutes operating in residential neighbourhoods. When military officials<sup>72</sup> took unilateral action against prostitutes and procurers, they would not necessarily have done so via the courts. The Ottoman *ḵānūnnāme* contained a broad statement that any "disturber of the peace" engaged in "mischievous activities" could be punished by "the person who is entrusted with . . . the execution of the Sultan's order," without reference to a judge.<sup>73</sup> Islamic legal tradition provided for the market inspector (*muḥtasib*), whose duties included the punishment of moral infractions in public spaces.<sup>74</sup> If such officials punished prostitutes and pimps, or disrupted their activities, without recourse to the *sharī'a* courts, then their actions would have left no trace in the court records upon which many historians depend.

<sup>72</sup> I refer to officials such as governors, regimental officers and holders of such posts as *defterdār* (treasurer) and *amīr al-ḥajj* (commander of the pilgrimage) as "military officials" in order to distinguish them from judges and other members of the religious hierarchy. These officials held some kind of military rank or title, and were conceived as the military class (the *ʿaskerī*), even if not all of them had military duties.

<sup>73</sup> Heyd, *Studies*: clause 125, p. 92 / pp. 130-1.

<sup>74</sup> Peters, *Crime and punishment*: 8-11; C. Cahen et al, "Hisba," *Encyclopaedia of Islam*, 2nd edition, vol. III: 485-95. I am not aware of any studies of *muḥtasibs* in the Ottoman Empire. For a detailed study of the role of the *muḥtasib* in Mamluk Cairo, see Kristen Stilt, *Islamic law in action: Authority, discretion and everyday experiences in Mamluk Egypt* (Oxford: Oxford University Press, 2012).

### Prostitution in Contemporary Chronicles

Information about the punishment of prostitutes and pimps by military officials can be found in chronicles written in Ottoman Egypt. The information is limited and the sources are problematic: the stories I will mention here concern officials famous for their scruples and morality and have a legendary quality to them, which suggests that their recounters did not pay much attention to the legal niceties behind them. Nevertheless, they suggest that the administration of justice by military officials was a recognized, if not necessarily frequent, feature of the Ottoman legal system: it could form the basis of stories that were presumably plausible to a contemporary Ottoman audience. In this way, these stories appear to confirm that extra-judicial action was taken, perhaps irregularly, against prostitutes and procurers.

In his chronicle *al-Rawḍa al-ma'nūsa fī akhbār Miṣr al-maḥrūsa*, Muḥammad ibn Abī l-Surūr al-Bakrī reports an incident that took place during the regime of the governor Ḥusayn Pasha, who was in office from Rajab 1045 to Jumādā l-Thānī 1047 / December 1635 to November 1637. Upon discovering a brothel operating in a series of huts by the Mujāwirīn lake in Cairo, the chronicle claims that Ḥusayn Pasha hanged the pimp immediately from a nearby tree, allowing the prostitutes to flee. There is no mention of any judicial involvement or due process.<sup>75</sup>

The chronicle of al-Damurdāshī, *al-Durra al-muṣāna fī akhbār al-kināna*, recounts two relevant incidents from eighteenth-century Cairo. The first took place in Ramadan 1114 / January 1703, when currency devaluation due to coin-clipping had reached crisis levels, leading the merchants, craftsmen and 'ulamā' (religious-legal scholars) to petition the governor, who convened an assembly of the city's dignitaries to resolve the situation. The assembly decided to give jurisdiction over prices and weights to the commander of the Janissary regiment, as was the practice in Istanbul. The commander, called 'Alī Āghā, accepted the role, on condition that he have authority over all officials carrying out police functions in the city and be given permission to undertake a general campaign against corruption and vice. The assembly accepted his conditions, and 'Alī obtained a *ḥujja* (legal certificate) from the judge confirming this, which was signed by all

<sup>75</sup> Muḥammad ibn Abī l-Surūr al-Bakrī, *al-Rawḍa al-ma'nūsa fī akhbār Miṣr al-maḥrūsa*, ed. 'Abd al-Rāziq 'Abd al-Rāziq 'Īsā (Cairo: Maktabat al-thaqāfa al-dīniyya, 1997): 148.

members of the committee and approved by the governor.<sup>76</sup> This is the last mention of any judicial involvement in ‘Alī’s campaign.

‘Alī Āghā then undertook a procession through Cairo and its suburbs, which the author of the chronicle claims to have witnessed. ‘Alī was accompanied by the police officials (*ḥukkām*), the *jāwīsh* (senior officer, T. *çavuş*) of each of the seven regiments, the market inspector (*amīn al-iḥtisāb*) and the executioner, who carried the governor’s order listing the new official prices for the major commodities. ‘Alī carried a sack full of canes for administering beatings. As well as publicizing the new prices, the procession, which lasted several days, served to impose ‘Alī’s new order via the summary punishment of offenders. On the first day, al-Damurdāshī reports that two public weighers and three oil merchants were beaten to death for using fraudulent weights. Over the subsequent days ‘Alī turned his attention to moral infractions, conducting a systematic campaign against bars, cafes selling *būza* (an alcoholic drink made from barley), and brothels. The chronicle does not provide much detail about the form this campaign took: ‘Alī is said in each case to have “wrecked” or “demolished” the establishments and to have “driven out” the prostitutes.<sup>77</sup> The story does not suggest that the judicial authorities participated in ‘Alī’s procession. Interestingly, however, the chief judge of Cairo is reported to have formally sanctioned the campaign in advance with his *ḥujja*.

The second relevant incident recounted by al-Damurdāshī took place during the regime of the governor ‘Abdullāh Pasha Köprülü (1142-44 / 1729-31). In a similar fashion to the previous story, an amīr nominated as a candidate for police chief (*za’īm*)<sup>78</sup> made the right to act against prostitution and drinking a condition of his accepting the office. In this case the amīr obtained official sanction for his campaign in the form of a *fermān* issued by the governor, confirmed by another *fermān* issued by the palace in Istanbul. No involvement by the judge is mentioned. The chronicle gives no details of how the amīr carried out his campaign, but records that the brothels and *būza*-cafes in Cairo and its suburbs were closed and

<sup>76</sup> Daniel Crecelius and ‘Abd al-Wahhab Bakr (trans. and eds.), *Al-Damurdashī’s chronicle of Egypt 1688-1755: al-Durra al-musana fi akhbār al-kināna* (Leiden: Brill, 1991): 116-8; Aḥmad al-Damurdāshī, *Kitāb al-Durra al-mušāna fi akhbār al-kināna, fi akhbār ma waqā’a bi Miṣr fi dawlat al-mamālīk*, ed. ‘Abd al-Raḥīm ‘Abd al-Raḥmān ‘Abd al-Raḥīm (Cairo: Institut français d’archéologie orientale, 1989): 65-6.

<sup>77</sup> Crecelius and Bakr, *Al-Damurdashī’s chronicle*: 119-23; al-Damurdāshī, *Kitāb al-Durra al-mušāna*: 66-8.

<sup>78</sup> The chief of police was also referred to as the *ṣubaṣī*.

remained closed at the time of writing, which was over two decades later, in 1168 / 1756. The governor also sent a further fermān to the district governor (*kāshif*) in Giza, on the opposite bank of the Nile, ordering the closure of brothels and bars there.<sup>79</sup>

I do not want to suggest that the military authorities took a consistently punitive line towards prostitution at all times or in all areas of the Ottoman Empire. Both of the stories in al-Damurdāshī suggest prior periods of leniency. There is also more direct evidence that prostitution was sometimes tolerated. During the period in which al-Damurdāshī claims Cairo was free of open prostitution, the situation in Damascus was quite different, according to a barber-chronicler called Aḥmad al-Budayrī al-Ḥallāq. In Rabīʿ al-Awwal 1156 / April-May 1743, a local notable named Faṭḥī Efendi al-Daftarī held a feast to celebrate the marriage of his daughter. The festivities lasted seven days, on each of which he invited a group of people defined by status, profession or religion to be fed and to receive gifts of gold and silver. On the first day he invited the governor; on the second senior scholars (*mawālī*) and military grandees (*umarāʾ*); on the third Sufi masters and religious scholars; the fourth day saw merchants and shopkeepers honoured; the fifth was for Christians and Jews; the sixth for peasants; and lastly, on the seventh day, singers and prostitutes received their recognition.<sup>80</sup> Prostitutes sat at the bottom of the social hierarchy symbolized by the seven days. Nevertheless, that they could be publicly identified and included in the event at all suggests a certain degree of toleration.

We should be cautious about accepting this story too literally. In her study of non-elite chroniclers in eighteenth-century Syria, Dana Sajdi shows that much of al-Budayrī's chronicle is devoted to criticizing the present state of Damascus and the failure of the political elite to establish order due to their preoccupation with self-enrichment.<sup>81</sup> It appears that for al-Budayrī, the visible presence of prostitution in Damascus was one of the

<sup>79</sup> Crecelius and Bakr, *Al-Damurdashi's chronicle*: 298; al-Damurdāshī, *Kitāb al-Durra al-muṣāna*: 195-6.

<sup>80</sup> Aḥmad al-Budayrī al-Ḥallāq, *Ḥawādith Dimashq al-yawmiyya 1154-1175 / 1741-1763* (Cairo: al-Jamʿiyya al-Miṣriyya li l-dirāsāt al-tārīkhīyya, 1959): 39. For an account of this chronicle's portrayal of women, see Antonino Pellitteri, "Immagine donna in *Ḥawādith Dimashq al-yawmiyya (1741-1762)* di Aḥmad al-Budayrī al-Ḥallāq." In *Verse and the fair sex: Studies in Arabic poetry and the representation of women in Arabic literature*, ed. F. de Jong (Utrecht: M. Th. Houtsma Stichting, 1993): 153-170.

<sup>81</sup> Dana Sajdi, "Peripheral visions: The worlds and worldviews of commoner chroniclers in the 18th-century Ottoman Levant," PhD diss., Columbia University, 2002: 160-73.

chief indicators of the city's decline. It is possible, therefore, that this story was a metaphor intended to highlight the elite's failure to take action against prostitution. Even if al-Budayrī was exaggerating Fathī Efendi's familiarity with prostitutes, however, this story tells us that at least one commentator thought that tolerance of their activities had gone too far. At the same time, we should note that al-Budayrī's story is not entirely implausible. Fathī Efendi was probably involved in tax-collection, the foundation of many provincial notables' power and wealth. If prostitution was being taxed, then he may well have had an official relationship with prostitutes, albeit one mediated by lower-ranking tax-collectors. If it seems unlikely that prostitutes would appear at an official event *as prostitutes*, perhaps they were formally presented in some other capacity—as singers, dancers or entertainers—but the Damascene public, including al-Budayrī, were aware of their true profession.

While the situation in mid eighteenth-century Damascus is not clear, there is plenty of evidence that in certain places at certain times, tolerance of prostitution was institutionalized through taxation. A legal source from early in our period, the 1530 *Law Book of the Gypsies of Rumelia*, declares that gypsy communities pay a tax of 100 akçes a month “for the gypsy women of Istanbul, Edirne, Filibe and Sofia who undertake activities contrary to the shari‘a.”<sup>82</sup> The Ottoman traveller Evliyā Çelebi, visiting Cairo in the late seventeenth century, reported that some prostitutes paid taxes to the *şubaşı* (police chief) and were registered in his defter.<sup>83</sup> The British physician Alexander Russell, who resided in Aleppo around 1750, reported that prostitutes in that city were licensed by the commander of the Tüfenkçi regiment and paid him for protection.<sup>84</sup> Another story concerning eighteenth-century Cairo, from Aḥmad Shalabī ibn ‘Abd al-Ghanī's chronicle *Awḍaḥ al-ishārāt fi man tawallā Miṣr al-Qāhira min al-wuzarā' wa l-bāshāt*, refers to the taxation of prostitutes and suggests that revenues could be significant. The story takes place in Muḥarram 1144 / July 1731 during the regime of ‘Abdullāh Pasha Köprülü. It could refer to the same

<sup>82</sup> Cited by Imber in “Zinā in Ottoman law”: 188-189. Imber suggests a rationale for this policy: that the tax represented the commutation of fines (the *kānūn*'s favoured method of dealing with illicit sexual intercourse) into a regular payment.

<sup>83</sup> Evliya Çelebi, *Evliya Çelebi Seyahatnamesi 10. Kitap*, ed. Seyit Ali Kahraman, Yücel Dağlı and Robert Dankoff (Istanbul: Yapı Kredi Yayınları, 2007): 204.

<sup>84</sup> Alexander Russell, *The natural history of Aleppo*, ed. Patrick Russell (London: G.G. and J. Robinson, 1794), I: 262-63.

event recounted by al-Damurdāshī mentioned above, although in this story the initiative comes from the palace in Istanbul.

An āghā arrived from Istanbul carrying an imperial order (*khatt sharīf*) requiring the righting of wrongs (*rafʿ al-maẓālim*) and the closure of bars and brothels. The governor ʿAbdullāh Pasha called a committee attended by the ʿulamāʾ (scholars), the head of the *ashrāf* (descendants of the prophet Muḥammad), Sufi leaders, the chief judge, the senior military grandees known as beys (*ṣanājiq*) and the military officers. The officers complained that the chief of police received money from the brothels, part of which he would distribute among the officers. The officers regarded this as part of their legitimate revenues: most forms of taxation in the Ottoman Empire during this period were outsourced to local officials in return for a fixed annual payment to the treasury. ʿAbdullāh Pasha dismissed their complaint and asked rhetorically whether they thought that the Sultan was incapable of providing for his soldiers and would leave them dependent on brothels for an income. He allocated 12 *kīs* (purses, a purse being a quantity of coin) to replace the lost revenue, to be raised from the rulers of each of the seven sub-provinces in Egypt. He then proceeded to tear down the bars and brothels. The proceedings were recorded and registered both at the governor's council (*dīwān*) and at the principal shariʿa court.<sup>85</sup> Here, as in al-Damurdāshī's story of ʿAlī Āghā, the judicial authorities sanctioned proceedings against prostitution over which they did not have direct control and which do not appear to have conformed to the normative procedures of the shariʿa.

This last story reveals a tension probably inevitable wherever tax collection was farmed out to the local officials who were also responsible for supervising the local moral order. Particularly where an official had invested financial or political capital in securing his position, his incentive to maximize the return was strong. The temptation to tolerate illicit activities that could contribute to revenue must always have been present, and we should not be surprised that official resolve to tackle prostitution and bar-keeping was inconsistent. Given that evidence is scant, we cannot say whether toleration or repression was the norm, but it is clear that at least some military officials took action against prostitution outside the shariʿa courts.

<sup>85</sup> Aḥmad Shalabi ibn ʿAbd al-Ghani, *Awḍaḥ al-ishārāt*: 574-5.

## Conclusion

This article has shown that Ottoman law contained several discourses and practices dealing with various problematic aspects of prostitution. The illegality of sexual intercourse outside marriage and slavery constituted only one of these aspects. Ottoman legal practice followed Ḥanafī fiqh in not imposing the fixed penalties on prostitutes and their clients: these offenders were not liable to the fixed penalties due to the principle of *shubha* (ambiguity), although they could receive lesser punishment at the judge's discretion. However, the punishment of illegal sexual intercourse was in practice the least significant of the legal discourses on prostitution. This partly reflects the difficulty of proof: even if we disregard the stringent evidentiary requirements for the fixed penalties, which were not applicable to discretionary punishment, supplying proof of an act that almost always takes place in private will be difficult under any procedural regime. It also reflects the fact that the punishment of illegal sexual intercourse—the redress of a claim of God according to fiqh—was not of great relevance either to the litigants who used the court system or to the authorities entrusted with preserving order. God was capable of obtaining his own redress; litigants and the authorities were more concerned with the ways prostitution impinged on the rights of Ottoman subjects and disrupted Ottoman societies.

Discussions of the applicability of the fixed penalties to prostitutes and their clients were largely restricted to the genres of fiqh known as the *matn* (manual) and the *sharḥ* (commentary). As mentioned previously, the primary function of manuals was in legal education; commentaries were used for the elaboration of jurisprudential problems. *Fatwās*, on the other hand, contained normative instructions for legal practice and, being responses to questions posed by judges or Ottoman subjects, were far more geared to contemporary concerns. It is in this genre that we find concrete directions telling judges how to deal with particular situations arising from prostitution. The *ḳānūnnāme* is similar in this respect, but more systematic. The primary concerns of the writers of *fatwās* and the *ḳānūnnāme* were the protection of vulnerable women and the maintenance of public order. More attention was paid to the punishment of pimps, although there was also provision for the punishment of habitual prostitutes. While the *ḳānūnnāme*'s penalties for illicit sexual behaviour in general were pecuniary, the punishments prescribed by *fatwās* and the *ḳānūnnāme* for pimps and prostitutes were primarily corporal.

The Ottoman *sharīʿa* court records, however, reveal a striking lack of formal punishment—pecuniary or corporal—of prostitutes or pimps. When cases involving prostitution came before the courts, the action taken usually consisted of the expulsion of a prostitute or pimp from his or her neighbourhood. This did not constitute a departure from Islamic law, for two reasons: prostitutes were not, according to *fiqh*, to be punished with the fixed penalties, and in any case they were rarely explicitly accused or convicted of *zināʿ*. Expulsion reflected the concerns of the plaintiffs, as did other pragmatic solutions such as the demolition of the notorious inn and the renovation of the derelict house. The plaintiffs, who were invariably local residents unhappy living in close proximity to vice, were most concerned that the illicit activities should cease, whether by the closure of the brothel or the removal of the offenders. They were less interested in seeing the offenders punished, and had, in the sexual slander law, a disincentive to seek punishment via an explicit accusation of prostitution.

If prostitutes and pimps were rarely punished by the courts, however, this does not necessarily mean that they went unpunished. The evidence of chronicles suggests that extra-judicial action against vice undertaken by military officials was a feature, if intermittent, of the administration of Ottoman Cairo. The theatrical language of the chronicles—brothels wrecked, prostitutes driven out and pimps strung up from the nearest tree—is not much help in establishing what form this action took, although it seems likely that punishment was corporal. These actions of military officials were extra-judicial, in the sense that judges do not appear to have been directly involved in their implementation, and in the sense that they do not appear to have followed the norms of *sharīʿa* court procedure. But despite being extra-judicial, they do not seem to have been regarded as illegitimate, even by the judicial authorities. Two of the campaigns mentioned are reported to have been sanctioned by councils of the city's senior authorities, including the chief judge.

I have tried to take a holistic view of Islamic law in the Ottoman Empire, looking at several genres of legal writing and more than one institutional context in which law was practiced or enforced. My intention was to give, through the case study of prostitution, a sketch of Islamic law as a working system, rather than simply a corpus of knowledge, or a set of judicial practices, or an exertion of state power. This working system connected an esteemed jurisprudential tradition and a powerful bureaucratic apparatus to responsive forums for dispute resolution, a popular moral order and mechanisms for everyday law enforcement. This holistic approach helps to

elucidate the logic of this system, where approaches focusing only on jurisprudence or only on shari'a court practice—the two most commonly studied facets of historical Islamic law—have often found conflict between theory and practice, or between religious and secular, or between judicial and tyrannical. While there are clear differences between the various components of this legal system, in the case of prostitution, at least, we can see these as a consequence of the components' different functions and goals, rather than as evidence of unmanageable tensions between them. We can also recognize that a legal system can be moulded by its users and the demands they make of it as well as by the conscious design of jurists and rulers.

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