SIN AND THE SINNER: *FOLLES FEMMES* IN OTTOMAN CRETE

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Research into the most "ancient" of professions, prostitution, in the Ottoman empire does not seem to be an easy task. While the distinction in the Christian world between the pious and the "fallen" woman was more distinct, anything outside wedlock being considered forbidden,[1] in the Ottoman empire amorous relations were manifested in a variety of forms from legal marriage and the right to own concubines, who could potentially provide the owner with legal offspring, to the application of sex commerce. In some cases the availability of different forms of "carnal" satisfaction in Islamic society was viewed by contemporary European adversaries as something positive for success on the battlefield. Rossiaru, referring to Honoré Bonet in his *Apparicion Maistre Jean de Meun* written in 1398, shortly after the news of the disaster in Nicopolis, reports Bonet's warning that if the Christians did not pull themselves together, they would be overwhelmed by the Saracens who were united, lived ascetically on bread and pure water, brought up their children for a simple life, and who were from the lands in which «no law obstructs the infinite multiplication of the species; they are more prone to 'carnality' than other human beings».[2]

Despite the Westerners' views on the lax moral values of the Muslims, there were in fact distinct rules governing behaviour towards a *mahrem* and a *namahrem* woman. The term *zina*, unlawful intercourse, intercourse without ownership (*milk*) arising from marriage or ownership of a female slave,[3] is used sometimes interchangeably with the term *fuhuş* describing prostitution. In the Koran terms such as *fahşa*, *fahişe* and *fevahiş* are used to describe not only prostitution but also other crimes like fornication and

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[1] Rossiaud, Jacques, *Medieval Prostitution* (Oxford and Cambridge, Mass.: Blackwell, 1995): chapters 1-2.

[2] Rossiaud, *Medieval Prostitution*: p. 173.

[3] Schacht, Joseph, *An Introduction to Islamic law* (Oxford: The Clarendon Press, 1982): p. 178; Imber, Colin, *Ebu-s-Su'ud and the Islamic Legal Tradition* (Stanford: Standford University Press, 1997): p. 210.

sodomy.[4] The words *fahiş*, *mütefahhiş*, *fahişe*, *fevahiş*, *fahhaş* are also found in the hadiths,[5] the most significant of which is the one forbidding payment for the services of a prostitute and gains from prostitution.[6]

The confusion in the use of terms is also reflected in the *fetva*s of the Ottoman *Şeyhülislam*s. For example Ebussuud in one of his *fetva*s uses the term *zina* to refer to prostitution.

> *Question*: If a gang travels from village to village enciting their women, girls and *cariye*s to commit *zina*, what should be done legally?
>
> *Answer*: The crowd, having beaten them severely, should not release them from prison until their apparent improvement. All the women proven to have committed *zina* should be stoned.[7]

The uneasiness of Ottoman law makers and jurisconsults when dealing with sex offences is apparent and the matter is sometimes handled in an oblique manner. The *Şeyhülislam* Abdürrahim's *fetva*s attest to this.

> *Question*: What should be done to Zeyd, an inhabitant of a town, if he sometimes brings women he does not know (*namahrem*) to his house, gets into contact with them and has a conversation?
>
> *Answer*: He should be restrained and prevented with severe chastisement (*ta'zir-i şedid*).[8]

In this case the customer brings whores to his house. In the following two *fetva*s Abdürrahim deals with male and female pimps.

> *Question*: If Zeyd continuously bring strangers to his house and places his Muslim wife Hind [in their company], what should be done?
>
> *Answer*: Severe chastisement.[9]

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[4] Bozkurt, Nebi, "Fuhuş" in *İslam Ansiklopedisi* (Istanbul: Turkiye Diyanet Vakfi, 1992): p. 211.

[5] *Ibid.*

[6] F. de Jong, "Bigha'" in *EI*[2], *Supplement* IV: p. 133.

[7] Düzdağ, Ertuğrul, *Şeyhülislam Ebussuud Efendi Fetvaları Işığında 16. asir Turk hayatı* [16th-century Turkish Life in the light of the *Fetva*s of *Şeyhülislam* Ebussuud Efendi] (Istanbul: Enderun Kitabevi, 1972): p. 159.

[8] Abdürrahim, *Fetava-yı Ali Efendi* [The *Fetva*s of Ali Efendi] (Dersaadet, 1324) (hereafter *Fetava*), chapter "Fetava-yı ma Yeteallaku bi'l-Muhaladati bi'l-Ecnebiyyat ve' n-Nazari bi'l-Ecanib": p. 106.

[9] Abdürrahim *Şeyhülislam Fetvaları, Ali Efendi*, [The *Fetva*s of *Şeyhülislam* Ali Efendi] İbrahim Ural (ed.) (Istanbul: Fey Vakfı, 1995) (hereafter *Fey Vakfi*), doc. no. 873, p. 130.

> *Question*: What should be done canonically, if Hind, a resident in a neighbourhood, seduces some people's women, takes them to the houses of strangers and allows them to be hugged?
>
> *Answer*: She should be prevented by full chastisement (*ta'zir-i beliğ*) and imprisoned.[10]

Hind is more severely punished due perhaps to her efforts to lure her victims into wrongdoing.

In Ottoman criminal codes such as those of Bayezid II, Yavuz Selim and Kanuni Süleyman sexual offences like fornication are categorised together with other sexual offences like sodomy and bestiality.[11] Although prostitution is not separately mentioned, procuring appears in all entries and the punishment varies:

> If a woman practices procuring, the *kadı* shall chastise [her] with whatever number [of strokes] (*ta'zir*) he considers proper [and] a fine of one *akçe* shall be collected for each stoke.[12]

Or

> If someone habitually practices procuring, his face should be blackened and he should be ridiculed. His (or her) ears and nose should be cut. If he (or she) is not [habitually practicing procuring] he (or she) should pay five gold coins.[13]

And

> If a person practices procuring, the *kadı* shall chastise [him or her] and expose [him or her] to public scorn (*teşhir*) [in addition] , a fine of one *akçe* shall be collected for each stroke.[14]

The punishment proposed for sex offences by the jurisconsults and ordered by the sultans in their *kanunnames* varies according to the offence and the conditions under which it was committed. Thus, apart from fines, procuring could incur a *ta'zir*, *teşhir* punishment or even cutting of the noses and

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[10] Abdürrahim , *Fetava*: p. 106.

[11] Barkan, Ömer Lütfi, *XV ve XVI. Asırlarda Osmanlı İmparatorluğunda Zirai Ekonominin Hukuki ve Mali Esasları* [The Legal and Fiscal Bases of Agricultural Economy in the Ottoman Empire in the 15th and 16th Centuries] (Istanbul: Bürhaneddin Matbaası, 1943); Akgündüz, Ahmet *Osmanlı Kanunnameleri ve Hukuki Tahlilleri,* (Istanbul: Fey Vakfı, 1990): IV, pp. 366-7.

[12] Heyd, Uriel, *Studies in Old Ottoman Criminal Law* (Oxford: The Clarendon Press, 1973): p. 102.

[13] Barkan, *Zirai Ekonominin Hukuki ve Mali Esasları,* doc. no.14, p. 121.

[14] Heyd, *Ottoman Criminal Law*, doc. no. 57, p. 110.

ears and blackening of the face. If a woman does not repent, canonical punishment such as stoning is also imposed. The choice is left to the discretion of local authorities and judges who always took into account the severity of the act and public feeling.

A number of entries in the *mühimme* registers and the *sicil*s of local *kadı* courts give a picture of the activities of the culprits and the efforts of the administration to bring them to the "right path". In a *hükm* sent to the *kadı* of Istanbul and the imams and *müezzin*s dated Safer 975/August 1567, the sultan ordered the arrest of prostitutes after their guilt had been proven. The scribes of local imams and *müezzin*s were instructed to make a *defter* giving the names of the arrested prostitutes and stating whether they were local or not or whether they had relatives. He warned the local authorities that he would not tolerate any act of protection given to these women some of whom, according to information reaching him, although exiled, had returned to the areas where they had been active.[15]

Prostitution was practiced either privately in the women's own homes or in public places. A *hükm* sent to the Eyüp *kadı* on 23 Muharrem 981/25 May 1573, mentions one of the tricks used. Women entering shops selling *kaymak* on the pretext of wanting to eat sweets and were having unlawful intercourse with strangers. The shop owners were ordered not to allow practices of this sort.[16] Boats operating in Bosphorus were also used for indecent acts. Thus the boatmen were ordered not to transport together men and women who were not related.[17] The operation of laundress girls was also put under scrutiny. *Levend*s were seen to enter their shops and get into mischief with them. The sultan ordered the closure of their shops and forbade *mütevelli*s of *vakf*s to rent shops to them.[18]

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[15] *7 Numeralı Mühimme Defterleri (975-976/1567-1569) Özet-Transkripsiyon- İndeks* II (Ankara: T.C. Başbakanlık Devlet Arşivleri Genel Müdürlüğü. Osmanlı Arşivi Daire Başbakanlığı Yayın Nu. 37, 1999), doc. no. 148, p. 77. A prostitute could be allowed to operate in her base for quite some time. In Edremit a woman called Sultan was taken to court by her neighbours. In their testimony they mention the fact that the said woman was a known prostitute operating for 20 years. See Yılmaz, Fikret, "XVI. yüzyıl Osmanlı toplumunda mahremiyetin sınırlarına dair", *Toplum ve Bilim*, LXXXIII (1999/2000): p. 97.

[16] Refik, Ahmet, *Onuncu asır hicride İstanbul Hayatı* [Istanbul Life in the 10th century A.H.] (Ankara: Kültür ve Turizm Bakanlığı, 1987): p. 61.

[17] Two orders dated 23 Şevval 988/ 1 December1580 and 24 Şaban 991/12 September 1583, Refik, *İstanbul Hayatı*: pp. 61-63.

[18] 21 Zilhicce 978/17 June 1571, Refik, *İstanbul Hayatı*: p. 60. This sort of supplementing income was also common in France in the 15th and 16th centuries. In the court registers of Dijon there is an entry about women working during the day and prostituting themselves during the night. See for the case of Jeanne in Rossiaud, *Medieval Prostitution*: pp. 179-80.

Not only free women operated as whores. Slave girls, willingly or unwillingly, were also part of the trade. In an order dated Şaban 991/August 1583 different methods were employed by unlicensed *dellal*s in the slave bazaar. Such *dellal*s would come to an understanding with men who pretended to be interested in buying a slave girl. The girl would then be delivered by the *dellal* to the potential buyer who, after spending a day with her, would return the girl, explaining that he was not in fact satisfied. In other cases slave girls willingly entered the rooms of *levend*s.[19]

Caravanserais were also apparently places for sexual misconduct. In the criminal code of Kanuni Süleyman there is a clause about prostitution conducted there. Slave dealers would involve their dancing girls and slaves in drinking parties, "debaucheries and similar lawless acts". People who wanted to spend time with them would pay the dealer an amount for purchase and when they left the dealer would buy the slave girls back for a few *akçe*s.[20]

Gypsy girls was another category of females which kept the Ottoman administration busy. In a document dated 28 Rebü'l-evvel 972/3 November 1564 the sultan ordered the registration of gypsies and their prostitutes[21] who wandered from village to village with their women and musical instruments committing "sin" and even robbing and killing people whom they met en route. Orders were repeatedly issued for their arrest and punishment.[22]

The information we have about brothels is scanty.[23] It does not seem that there was any municipality involvement in their foundation or running as was the case for Europe.[24] I have come across two cases, one order dated 2 Rebi'ül-ahir 973/27 October 1565 and an entry in the Antep court from 7 Şaban 1166/9 June 1753. In the first order the inhabitants of Galata took to court Arab Fatı and Narın, Cretan Nefise and Atlu Ases, Kamer and Balatlı Aynı known prostitutes living in the same houses. Arab Fatı was

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[19] Refik, *İstanbul Hayatı*: pp. 63-64.

[20] Heyd, *Ottoman Criminal Law*: doc. no. 114, p. 126.

[21] *6 Numaralı Mühimme Defterleri (972/1564-1565) Özet-Transkripsiyon-İndeks* I (Ankara: T.C. Başbakanlık Devlet Arşivleri Genel Müdürlüğü. Osmanlı Arşivi Daire Başbakanlığı Yayın Nu. 28, 1995): doc. no. 206, p. 114.

[22] *Mühimme 6*, I, doc. no. 563, p. 308; *5 Numaralı Mühimme Defterleri (973/1565-1566) Özet ve İndeks* (Ankara: T.C. Başbakanlık Devlet Arşivleri Genel Müdürlüğü. Osmanlı Arşivi Daire Başbakanlığı Yayın Nu. 21, 1994): doc. no. 186, p. 35.

[23] Cevdet Paşa, *Tezakir* [Memoires] I-XII, Cavid Baysun (ed.) (Ankara: Turk Tarih Kurumu Basımevi, 1953): V, p. 50; Demir Aydoğan, "Zına üzerinde düşünceler" [Thoughts on Zına], *Tarih ve Toplum*, CLXIX (January, 1998): p. 7.

[24] Otis, Leah L., *Prostitution in Medieval Society : the History of an Urban Institution* (Chicago: University of Chicago Press, 1985); Roberts, Nickie, *Whores in History: Prostitution in Western Society* (London: Harper Collins, 1992).

also operating as their pimp. When the investigation committee came to investigate the complaint the accused insulted the imam, the *kadı* and the Sharia. The court ordered that their houses be forcibly sold and the accused be sent into exile. Those involved in insulting the imam and *kadı* and the Sharia were to affirm their faith and then to be imprisoned.[25] In the court case from Antep Mehmed was bringing men to his house and forcing his three wives into prostitution. He thus turned his house into a brothel. At the end of the investigation he was sentenced to death.[26]

The initiative over dealing with the prostitution was left primarily to the local community. Neighbours were usually the instigators of most complains.[27] The recipient of the compaint, whether the *kadı* or the executive authority, appointed a committee to investigate the validity of the accusation.[28] In the Cafer Subaşı neighbourhood of Istanbul there was a complaint brought in 1021/1612 against Ayşe, otherwise known Kazagancı Hatun. The committee concluded that she was guity but was unable to have her arrested and taken to court since she had fled.[29] Refusing to appear in court in itself brought severe punishment.

> *Question*: What should be done to Hind if, although seen with men, she persists in such behaviour and refuses to appear in court?
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> *Answer*: Chastisement.[30]

The rights of prostitutes during the investigation were protected, as is shown by the case of the red kaftan removed from a prostitute's house during an investigation. After the prostitute's complaint over the removal of

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[25] Refik, *İstanbul Hayatı*: p. 57.

[26] Güzelbey, Cemil, *Gaziantep Şer'i Mahkeme Sicilleri* [The *Sicil*s of the Gaziantep Sharia Court] (Gaziantep: Gaziantep Kültür Derneği Yayınları, 1966): doc. no.110/98, p. 62.

[27] A few such cases are found in Ongan, Halit, *Ankara'nın 1. Numera Şer'iye Sicili* (Ankara: Ankara Üniversitesi Dil ve Tarih Coğrafya Fakültesi, 1958): pp. 53, 70.

[28] See *sicil*s of Crete, Τουρκικόν Άρχείον Ήρακλείον [Turkish Archives of Heraklion] (hereafter T.A.H.): 15:339. There is also a *fetva* of Ebusuud related to the matter: Düzdağ, *Ebussuud Efendi fetvaları*: doc. no.775, p. 157: «*Question*: If Hind's father-in-law Zeyd says "you have committed fornication with Amr" and if it is a false accusation what should be legally done? *Answer*: If he has falsely accused Hind, he should be imprisoned and punishment on false accusation (*hadd-i kazf*) should be applied». See also Abdürrahim, *Fey vakfi*, doc. no. 856, p. 128 and Heyd, *Ottoman Criminal Law*: doc. no. 16, p. 99.

[29] 29 Cemazi'l-ahır 1021/27 August 1612. Akgündüz, Ahmet, *Şer'iye Sicilleri*, (Istanbul: Türk Dunyası Araştırmaları Vakfı, 1988): II, pp. 106-7.

[30] Abdürrahim, *Fey Vakfi*: doc. no. 862, p. 129.

the kaftan, the *subaşı* was taken to court and the prostitute's property was returned.[31]

Apart from the prostitutes, customers too were to be punished. The *kadı* of Çorum investigated the case of a *sipahi* called Mustafa who frequented prostitutes and was a drunk. We do not know of his fate but the document reveals that his mother was also a prostitute and a drunk.[32] In the case of Mehmet, a resident of Antep, accused of drinking and bringing prostitutes home, both Mehmet and his family were punished, his father, mother and brothers being sent into exile for failing to bring him to the right path.[33] Husbands too were punished, in cases where their wifes continued to "work" after getting married. Mustafa Sipahi was sent to the galleys by the *kadı* of Bilecik when his wife was caught in the act with another man in their house.[34]

Repentance was possible and encouraged by the authorities. Known prostitutes were allowed to marry provided they moved with their spouses away from the areas in which they had operated. The Istanbul *kadı*, on the 5 Receb 975/5 January 1563, allowed an imprisoned prostitute to marry on the condition that both husband and wife emigrated to a place where they were not known. Otherwise they were both to be imprisoned.[35] After a whore married she was to enjoy the same rights as the other spouses. According to a *fetva* issued by Ebusuud a prostitute who was divorced by her husband was to be paid her compensation:

> *Question*: Is it lawful for Zeyd to tell his wife "you were a prostitute before I married you", to divorce her and then to refuse to give her *mahr*?
>
> *Answer*: No.[36]

From the cases mentioned so far a sketch of the sex trade in the empire has been drawn. Due to the scarcity of information however one cannot reach firm conclusions as to the extent of public and private prostitution. The accounts of travelers such as Evliya Çelebi and D'Ohsson provide us

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31 Yılmaz, "Osmanlı toplumunda mahremiyetin sınırlarına": p. 103.

32 7 Rebiü'l-evvel 973/2 October 1565, *Mühimme 5*: doc. no. 309, p. 58.

33 22 Safer 1165/10 January 1752, Güzelbey, *Gaziantep Sicilleri*: doc. no. 109/20, p. 60.

34 7 Zi'kade 972/6 June 1565, *Mühimme 6*: II, doc. no. 1236, p. 234. For banishment to the galleys see, İpşirli, Mehmet, "XVI. aşrın ikinci yarısında kürek cezası ile ilgili hükümler" [Laws concerning the punishment of being sent to the galleys in the second half of the 16th century], *Tarih Enstitüsü Dergisi* (Istanbul), XII (1982): pp. 203-48. Husbands are also sent into exile *Mühimme 5*: doc. no. 976, p. 163, 19 Receb 973/9 February 1566.

35 *Mühimme 7*: doc.no. 623, p. 305.

36 Düzdağ, *Ebussuud Efendi fetvaları*: doc. no. 168, p. 57.

with some figures, which however should be viewed critically. D'Ohsson for example gives figures of at least 1000 prostitutes operating in Istanbul. He hastens to mention that the number of Muslim women involved did not exceed 40.[37] Evliya Çelebi, while enumerating guilds in Istanbul, mentions the *esnaf-ı gidiyan* (pimp guild) numbering up to 500 souls.[38] Punishment left in the hands of local authorities varied in severity according to the degree of "depravity" and the harm done to the public sentiment. Known prostitutes were left on occasion to pursue their trade for as long as 20 years, until a conscientious neighbour or a pious administrator decided otherwise. The level of punishment varied widely area to area. Thus in order to determine, with a degree of safety, the practices of the trade and measures taken against prostitution, studies should focus on regions or even, wherever possible, neighbourhoods within a limited period of time.

The documents on prostitution in Ottoman Crete are mainly *sicil* entries in the *kadı* court.[39] There are also petitions and three orders, two issued by Esat Paşa of Resmo (Rethymnon) in 1721 and 1722 and one by Kamil Ahmet Paşa in 1763.[40] Crete fell to the Ottomans after a continuous state of war against the Venetians lasting for 24 years (1647-1669).[41] In many cases women brought to court explained their misconduct based on the fact

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[37] de M. D'Ohsson, M., *XVIII Yüzyıl Türkiye'sinde Örf ve Adetler*, Zerman Yüksel (trans.) (Istanbul: Tercuman, 1975): III, p. 210. This number has allowed the advocates of the view that prostitution was mainly pursued by non-Muslims to put forward extreme arguments. For example Nebi Bozkurt argues that during the Ottoman empire prostitution was not widespread. Only in Istanbul, due to practices left by the Byzantines and the cosmopolitan character of the city, does one come across such cases: «Ancak İstanbul'da Bisans döneminden beri fuhuş olaylarına rastlanmaktaydı. Özellikle kozmopolit bir yapıya sahip olan Galata yakası şehrin fuşa en uygun yeridi.» "fuhuş" in *İA*, p. 213.

[38] *Evliya Çelebi Seyahatnamesi İkinci Kitab*, Zuhuri Danışman (trans. into modern Turkish) (Istanbul: Zuhuri Danışman Yayınevi, 1969): p. 215.

[39] The *sicil* collection of Kandiya is kept in the library of the Municipality of Herakleion. A selection of documents was published by Nikolaos Stavrinides and the newspaper *Vima* of Rethymnon. Nikolaos Stavrinides, *Μεταφράσεις Τουρκικών Ιστορικών Εγγράφων* 1657-1765 [Translations of Turkish Historical Documents] (Herakleion: Δημόεια Κεντρική Βιβλιοθήκη 'Ηρακλείον, 1975-1985): I-V; Papiomutoglou, Giannis (ed.), *Έγγραφα Ιεροδικείου Ρεθύμνης 17ος-18ος αι.: Οι μεταφράσεις του «Βήματος» Ρεθύμνης* [Documents from the *Kadı* Court of Rethymnon 17th –18th Centuries] (Rethymnon: Δημόεια Κεντρική Βιβλιοθήκη Ρεθύμνης, 1995) (hereafter *VIMA*).

[40] *VIMA*: doc. no. 168, p. 156; doc. no. 176, p. 162 and T.A.H., 3:366.

[41] For an overview of the situation in Crete see, Greene, Molly, *A Shared World: Christians and Muslims in the Early Modern Mediterranean* (Princeton: Princeton University Press, 2000).

that they were raped by soldiers.[42] Muslim Ağa voyvoda of Resmo in 1 Cemazi'l-evvel 1069/25 January 1659 brought Eleni Ksenou, a *zimmi* of the village of Kyrgiana to court. In his *ikram* the voyvoda argued that Eleni had been publicly associating herself with and having intercourse with men and travelers not known to her. «She destroyed her virginity and womanly purity». Thus the voyvoda brought her to court asking the *kadı* to interrogate her and register her testimony in the court records.[43] According to the entry, she was questioned repeatedly and gave the same answer. «After the fall [of Rethymnon] the army of Islam came to our village and I was raped by the soldiers. Since then I am no longer a virgin». The same voyvoda had brought to court on the same day two more women, Kali Ksenou, from the village of Agia İrene and a relative, perhaps, of the previous whore[44] and Maria Georgiou, from the village of Kyrgiana.[45] Whereas Maria gave the same story as Eleni, Kali, a maid, was raped by Emmanuel, the Christian slave of Hüseyn Ağa. Unfortunately we do not know of their fate, which was left to the discretion of the voyvoda.

The voyvoda's last act in clearing Resmo and its environs of 'fallen' women was taking to court a woman called Sofia, a resident of the village of Seli. According to the accusation, she was transferred from the province of Sfakia by a *zimmi* called Birbagis, a *hayduk*. He then settled her in the village and had intercourse with her without marrying her. He would come and visit her whenever he was down from the mountains and once took her away for some days, returning her later. The voyvoda was informed about her behaviour by the villagers. When questioned she said only that the said Birbagis had promised to marry her before taking her from Sfakia and that he had had intercourse with her. The *kadı* ordered the investigation of the accusation and questioned the villagers. From the names of the villagers

[42] In case of rape the *fetva*s and the *kanun* are lenient towards the victim. The *kanun* of Süleyman (Heyd, *Ottoman Criminal Law*: doc. no. 11, p. 98) states that «if a person abducts a woman or girl, [acting] without the consent of the woman or girl, [that] man should be castrated [but] no charge shall made against the woman or girl and no fine shall be collected. If the woman or girl is willing or runs away from her house, her vulva shall be branded». Abdürrahim gives three cases of rape: «*Question*: If Zeyd forcibly has sexual intercourse with virgin Hind and destroys her virginity, what should be done? *Answer*: Stoning» (*Fey Vakfı*: doc. no. 782, p. 119). «*Question*: If non-Muslim Zeyd forcibly has intercourse with virgin Christian Hind and destroys her virginity, what should be done? *Answer*: 100 lashes are given» (*Fey Vakfı*, doc. no. 789: p. 120). «*Question*: If non-Muslim Zeyd forcibly has intercourse with Muslim Hind what should be done? *Answer*: 100 lashes. After the punishment for *zina*, he is to be imprisoned for a long time». Punishment is more severe if the woman is Muslim and there is no case of a Muslim man raping a Christian woman.

[43] T.A.H. 1:77.

[44] T.A.H. 1:77.

[45] T.A.H. 1:77.

mentioned in the *sicil* entry only one, the *sipahi* Hüseyn Bey, was a Muslim. They all verified the story and added the information that Birbagis was engaging in banditry. Discovering that she had been arrested, Birbagis abandoned her and vanished.[46] Among the names of witnesses we find Yusuf Bey who acted as the translator. Fourteen years after the conquest of Resmo his services were still needed.

In the *sicil* entries there is also mention of a brothel operating in Kandiye (Herakleion). In 1158/1745 a derelict house in the İbrahim Paşa neighbourhood of Kandiye belonging to a deceased Muslim became a whore house. The court registered the expenses for the rebuilding and the heirs were ordered to attend to the refurbishment.[47]

The common form of punishment after arrest was expulsion. Esat Paşa of Resmo, in two orders addressed to the *kadı* of the city and the *subaşıs*, insisted that whores were to be arrested and imprisoned. Their names were to be registered, so that they could be exiled. He chastised the administration for showing sympathy to them «allowing the children of these people to stay in sin».[48] A year after the two orders were issued, on 2 Muharrem 1136/ 2 October 1723, Fatma, a prostitute and procuress from Resmo who, although expelled many times, had managed to return, was arrested once more by the *kethüda*. In court she promised not to return again.[49]

Before going into exile all financial affairs of prostitutes had to be settled. Katinaki and her daughters Kanli Hatice and Morfopoula from the whores of Kandiye were exiled. On 22 Zi'l-hicce 1175/14 July 1762 their clothes were sold at auction in the market to pay for their debts.[50]

Not all prostitutes managed to return to their bases or to make a living in exile. Saliha from Kandiye, in an undated entry, probably 1132/1720, petitioned the *paşa* saying that she had been exiled to Kissamos five months before. She had sincerely repented since and had become tired of wandering, of being hungry and of being despised. She asked to be allowed to leave Kissamos and settle in a village. The Paşa granted her petition provided she lived a quite and decent life.[51]

There is also one entry about a husband acting as a pimp and his punishment. Yahya Efendi, the imam of Vezir cami of Kandiye and a few others attested in court on 15 Cemaz'l-ahir 1103/4 March 1692, that Ali, a *dönme* Jew, although warned many times against inviting strangers to his house, continued to flout such warnings by allowing strangers to drink

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[46] T.A.H. 1:78.

[47] T.A.H. 22:41

[48] *VIMA*: doc. no.168, p. 156 [8 June 1721]; doc. no.176, p. 162 [9 February 1722].

[49] T.A.H. 16:162.

[50] T.A.H. 9:304.

[51] T.A.H. 15:336.

with his wife and indulge in indecent acts. He was sentenced to the galleys until he repented.[52]

From the cases so far it seems that the more pious the *paşa* was, the more efficient the "cleaning" operations conducted. On 15 Cemazi'l-ahir 1176/1 January 1763, Kamil Ahmed Paşa of Kandiye sent an order addressed to the *kadı*, the mufti, ulema, imams, *müezzin*s of Kandiye; the *defterdar*, the *turnacıbaşı*, the *ağa*s of the *yerli yeniceri*, the *yeniceri* of the Porte; and the inhabitants of the *vilayet* concerning another major source of immorality, the *kapatma* and *besleme* women.[53] He complained that in the city of Kandiye there were no separate neighbourhoods for Muslims. As a result, Muslims kept without legal matrimony women under the name of *kapatma* and *besleme*, chosen from the young daughters of the *zimmi*s and their wives. «Since they commit *zina* they daily leave one or two illegitimate children in front of mosques or they throw them away in less-inhabited areas, becoming thus, prey to dogs. Some [of the children] are hidden by the infidels and taken away to their churches, leaving them thus in the eternal darkness of their false faith».

Ahmet Paşa then becomes philosophical discussing the evil outcome of unlawful intercourse. He narrates the story of Moses who when referring to the queen of Belkis claimed that plague inflicted her army because of sin, resulting in the death of 70,000 people «from the time of the heathens until now». Ahmet Paşa does not restrict himself solely to Koranic examples. He narrates the immorality he witnessed during a recent trip to Salonica for the meeting of the Divan. Apparently the inhabitants of the city came to the right path while the *paşa* was there. He congratulated them, saying that now there would be divine protection for the city against plague, earthquakes, famine and fires. However, he adds, after his departure the people went back to their "foul" practices and disasters succeded one after another.

He then ordered a thorough investigation into the houses inside the city of Kandiye to discover the women kept outside wedlock.

> Of those [men] who want to marry, you should marry them [to these women] as second, third or fourth wives. [Of] those [women] left you should arrange the alimony of the ones who are pregant and they should be returned to their guardian or relatives. Those who do not wish to marry or to go away and have no relatives should be handed over to their priests who will find them husbands according to their position. The men [marrying them] should know that God is to reward them. The

[52] T.A.H. 7:74.

[53] T.A.H. 3:366. For a system similar to *besleme* see, Rossiaud, *Medieval Prostitution*: p. 179.

> city of Kandiye is externally divided into 12 districts and internally into a few neighbourhoods. The imam of each neighbourhood has knowledge of the inhabitants. They even know what bread each one eats. If one of the imams does not wish to reveal or tries to hide something then his position should be given to another and he should be exiled. None of these imams should go ahead with marriages without the *kadi*s' permission. He should be satisfied with whatever is given to him according to the financial position of the groom. He should not torture those who cannot pay.[54]

Kamil Ahmet Paşa seems to have been a deeply religious man. He took measures to eradicate sin but did not loose his toleration towards the sinner. All the "fallen" women were to be taken care of and there was no mention of punishment either for them or the men involved. Punishment was left to the discretion of the executives and mercy was what Kamil Ahmet Paşa chose.

From the cases discussed above, it is obvious that there are discrepancies related to punishment between the "letter" of the law as described in the *fetva*s of jurisconsults and the *kanun*s of the sultans, and practice reflected either in sultanic orders or *kadı* courts. Prostitution was not just a crime but also a grave sin. The local community as the instigator of complaints and the local authorities as the executor of public feeling were the main actors in the play. Thus punishment seems to vary from area to area. Local custom and public feeling assisted by a pious administrator's eagerness to clear his area of degrading deviance were to determine whether a culprit would be sentenced to canonical punishment, usually death, or simply reprimanded. Administration of law in the Ottoman empire seems once more to weigh more heavily on the side of custom.

[54] T.A.H. 3:366.

BRITISH ARCHAEOLOGICAL TRAVELLERS IN NINETEENTH CENTURY ANATOLIA: ANATOLIA 'WITHOUT' TURKS

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In 1839 Charles Fellows, an English archaeologist, wrote:

> The Turks take you round, and show all they have not built themselves, calling every ruin by the simple name of the "old walls". They know nothing of traditions, for they are only conquerors here, and extremely ignorant; but I required no guide; the stupendous ruins proclaimed their builders, and their situation told who selected it. The site of the theatre is truly Greek...[1]

This quotation encapsulates the general perception of Anatolia of a group of British travellers, and their representation of this "perceived Anatolia" through their travel accounts in the 19th century: Turks are alien to the geography of the land where they are living, and the British traveller needs no guide to understand such a remnant because it is Greek. Indeed, British archaeological travellers[2] throughout the 19th century perceived and interpreted Anatolia as a space in which the 'created' intellectual past of British culture, imagined mainly as Ancient Greece, was transferred through extant remains to the present, without taking into consideration the contemporary population of Anatolia or the region's 800 hundred years of Muslim and Turkish past.

This appropriation of the past of Anatolia was such that these archaeological travellers perceived removal of ancient remains from Anatolia to the British Museum as both acceptable and, indeed, as something that should be done. In the preface of his book, Fellows reveals his satisfaction

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[1] Fellows, Charles, *A Journal Written During An Excursion in Asia Minor* (London: John Murray, 1839): p. 34.

[2] By this term, I mean British travellers who travelled in Anatolia throughout the late 18th and 19th centuries with the explicit purpose of 'discovering' and seeing ancient remains and sometimes appropriating them. Ramsay, one of these archaeological travellers, used this term to refer to travellers who travelled with the purpose of discovering and interpreting ancient monuments, Ramsay, W.M., *Impressions of Turkey During Twelve Years' Wanderings* (London: Hodder and Stoughton, 1897): p. 14.

REVIEW ARTICLE

Haim GERBER, *State, Society and Law in Islam: Ottoman Law in Comparative Perspective* (Albany: State University of New York Press, 1994): 233 pp., ISBN 0-7914-1877-2; Colin IMBER, *Ebu's-su'ud: The Islamic Legal Tradition* (Stanford, California: Stanford University Press 1997): pp. xii+288, ISBN 0-8047-2927-1; Haim GERBER, *Islamic Law and Culture, 1600-1840* (Studies in Islamic Law and Society, 9; Leiden, Boston, Köln: E.J. Brill 1999): pp. 156, ISBN 9-0041-1319-3.

The publication in the 1990s of these three books treating issues related to Islamic jurisprudence within the realms of the Ottoman empire, from the 16th century onwards, cannot but be a welcome development. Islamic jurisprudence, after its marginalisation in the intellectual life of Islamic countries in the 19th century, re-emerged as a subject of research with the pioneering work of scholars like J. Schacht, C. Chéhata and N. J. Coulson. The last two decades have witnessed an 'explosion' in research related to Islamic law. The publication of the *Bibliography of Islamic Law, 1980-1993* by Laila Al-Zwaini and Rudolph Peters (Leiden: E.J. Brill, 1994) comprising almost 1,900 references in 220 pages for a 13-year period, compared to the mere 70 pages covering research up to 1950s, published by Schacht, attests to this explosion. Scholars such as Particia Crone, John Burton, Norman Calder, Wael Hallaq, Baber Johansen, Bernard Weiss, Muhammad K. Masud, Brinkley Messick, David S. Pawers, Aharon Layish, Maribel Fierro, to mention only a few, although conducting research thinly spread both geographically and chronologically, have provided debate at a high level.

The study of Ottoman law though remains as Colin Imber puts it (Introduction, p. xi) «at an embryonic stage». Uriel Heyd's work on Ottoman criminal law and the Ottoman *fetva*; the publication of *kanunname*s by Ö. L. Barkan and A. Akgündüz; of *fetva*s by E. Düzdağ; and of studies on the development of the office of the *şeyhülisla*m by R. C. Repp and on the controversy over cash *vakf*s by Jon Mandaville, are important contributions on Ottoman law. A number of scholars have worked on registers of the *kadı* courts from different parts of the empire thus elucidating our understanding of the function of law in practice. Ottomanists however have been more inclined to work on the economic activities of the Ottomans and touch upon issues related to social structure. Debates on the decline of Ottoman institutions after the 16th century have also made use of examples from the legal system to substantiate arguments. With few exceptions, though, axioms and preconceptions were employed rather than the results of independent research on the role of the mufti and the *kadı* in the formulation and administration of justice. All three books are somehow connected to both 'mainstream' discussions on the 'sacred' nature of Sharia; the role of the jurisconsult in Islamic and especially Ottoman society; and the use of independent thinking in formulating his arguments. For the Ottoman case, in particular, the existance and function of a secular law represented by the *kanun* and its relation to the Sharia is another interesting issue addressed by the books reviewed.

Gerber in *State, Society and Law in Islam*, despite the title of the book, provides us mainly with a study of the Ottoman legal structure in the 17th and 18th

centuries. He uses the 17th century *kadı* records of Bursa supplemented by published books largely from 18th-century Istanbul. He also explores information deriving from the *Book of Complaints* (H. G. Majer [ed.] *Das osmanische "Registerbuch der Beschwerden" (Şikayet Defteri) vom Jahre 1675* (Vienna, 1984) covering a period of nine months in 1675; fetva collections of Ottoman *Şeyhülislam*s like Abdulrahim (sic, e.g., p. 97, 219 for Abdürrahim) Efendi, Minkarizade Yahya Efendi, Feyzüllah Efendi and the printed *fetva*s of Ebussuud. In his *Introduction* Gerber encapsulates the aim of the study. «This study explores the legal structure of the core area of the Ottoman empire between the sixteenth and early nineteenth centuries, and its relationship to the sociopolitical structure of the state» (p.1). Unfortunately the author does not elucidate the term "core area". The examples used throughout the book are from Bursa, Istanbul, Aleppo, Jerusalem, the latter not quite qualifying as core areas. The author ventures then to explore «how truly despotic the Ottoman polity in this period» was (p.2) in an effort to depict the 17th and 18th centuries as not having been as "dark" as has been suggested. The theoretical tool used by Gerber comes from the orbit of anthropology. Gerber, basing himself on Faller's book (L. Faller, *Law without Precent* [Chicago, 1969]), starts off by examining the correlation between law and state structure (p.10). He then, in Chapter I, attacks, rightly so, the weberian concept of *kadı* justice, which assumes uniformity in the application of Islamic law. He also attacks ideas on the issue of law in patrimonial systems argued by neo-weberians like Lawrence Rosen (*The Anthropology of Justice* [Cambridge, 1989]). He embarks upon refuting one by one the five main features governing administration of law in Morocco, Rosen's case study, comprising the following: 1/ lack of predictability, 2/ arbitrariness on the part of the *kadı*, 3/ strong involvement of ethical considerations over strictly legal ones, 4/ proclivity of government officials to intervene, 5/ normative witnessing (p. 29). Gerber supplements his argumentation by the employment of history. He uses records where decisions could be arbitrary i.e. «family law, criminal law and civil-commercial law» (p.30). Although the cases used support his argument to some extent, he is unable to avoid statements which are too broad for the little evidence he has. For example, «no less than 75 percent of the material he [the *kadı*] was dealing with was inscribed in the sharia manual, and the rest was equally well known to the parties and to the witnesses present in each and every case» (p.37); or « ...the *kadı* records of Bursa and Istanbul contain *fetva*s in such abundance and... these *fetva*s were taken seriously by the *kadı*s – so much so, indeed, that the party with the fetva always won the case» (p. 40). For the last comment one can find other *sicil* collections where the opposite result can be demonstrated. Despite these minor shortcomings, Gerber does painstakingly and meticulously consider the material related to the role of the documents in court, the appearance of which increases significantly (p. 48); the use of oath (p.50) and judicial ignorance achieved, as he argues, by the frequent transfer of judges (p. 50); and judicial reasoning (p.55). Unfortunately yet again he runs into 'unsafe ground' when, based on a small sample of 140 cases found in Dabbağzade Numan (*Tuhfat al-Sukuk* [Istanbul, A.H. 1248]), he argues that «in no less than 71 of the 140 cases drawn from the sources both the plaintiff and the defendant were commoners» (p. 56), and concludes that since «commoners won six of eight cases against askeris»

(p.56) «...it is untrue ...to view the Ottoman ruling elite as a homogeneous body, having one common adversary, the reaya» (p. 57).

In Chapter II the relationship between *kanun* and Sharia is explored. Gerber refutes theories articulated by Johansen, Heyd, Coulson and others supporting the view that lawyers tried to narrow down the possibility of state interference in the affairs of private legal persons through the exclusion from the Sharia of issues of penal law covered by *huquq al-ibad*. He points out that the *kanun* was incorporated into the Sharia with the addition of fines covering points left unaddressed like *ehl-i fesad*, torture, interest-charging of more than 10 % and intention in cases of theft (p.63). He does not concentrate on the conflict between the two but rather «a symbiosis or compromise» (p. 72) which allowed *kanun* not to decline but transform. To support his argument he provides examples of the treatment of habitual offenders like highway robbers and prostitutes as well as cases of interest-charging from 17th- century Bursa. He is correct to note that a decline of the *kanun* would have resulted in the abolition of non-Sharia taxes. A quick look at the *fetva* collection of Abdürrahim Efendi from the 18th century where *kanun* taxes are treated chapter by chapter confirms his view. However the reconciliation between the Sharia and the *kanun*, attributed mainly to Ebussuud, although mentioned by Gerber, is not connected to the need of the dynasty for expansion of its control and the attainment of Islamic legitimisation. (We shall discuss this issue at length further on).

Chapter III examines the function of *fetva* in the legal system. It is beyond doubt that the thousands of *fetva*s produced by the *şeyhülislam*s were not only theoretical exercises but used either in court or arbitration. To support the argument that the *kanun* was accepted by jurisconsults, Gerber enumerates *fetva*s based on the *kanun* related to agrarian disputes which were taken seriously in court (p. 81). He also touches upon the diversity of *fetva*s issued by Ottoman *şeyhülislam*s and provincial Arab muftis. Once more he chooses to be provocative when arguing that Arab muftis neither culturally nor socially had any reason to admire the bureaucratic world of the Ottoman *kadı* (p. 86). His conclusion, based on the rulings on interest-charging, that law was not immutable and frozen (p.112) is by now a rather old fashioned argument, having been generally accepted by most scholars. Religious scholars, according to Gerber, accepted new solutions to legal problems without publicising them as changes.

In Chapter IV the author, basing himself on *kadı* registers mainly from Bursa, argues that Ottoman bureaucracy allowed guilds a wide measure of autonomy and accepted guild law which was neither imposed nor sanctioned by tradition (p. 113) due either to indifference, or to respect for custom or because guilds did not constitute a threat.

In chapter V Gerber goes back to some of Weber's thesis. He disagrees with the categorisation of the Ottoman state as a patrimonial one. He once more discusses the decline theories and puts the blame for such theses on those taking *nasihat* literature at face value. He proposes instead the study of the *Book of Complaints* as an excellent source on questions of decline, patrimonialism and centre-periphery issues. In his effort, though, to prove erroneous the views of those who have argued for the rapacious nature of government, he again gives unexpected comments. When discussing agricultural *iltizam* cases in the *Book of Complaints*,

for example, he characterises them as «bizarre» since the *mültezim* does not keep the revenue for himself (p.169). The *fetva*s collections of the late 17th century, however, describe legally what Gerber characterises as bizarre.

These criticisms should not, however, detract from the importance of the book. Using new tools the author has produced a thought-provoking work. A wide range of questions raised in this book are worthy of further investigation even though the author's primary concern to prove that the Ottoman empire was ultimately western might seem rather strange.

The second book by Gerber published in 1999 seems to be a continuation of the ideas expressed in the previous book. This time Islamic law is compared to western European law in an effort once more to determine the reasons for the "failure" of Islamic societies. The *fetva*s of two Arab muftis Ḫayr al-Dīn al-Ramlī (1585-1671) and Muḥammad Amīn Ibn ʿĀbidīn (1784-1836) and those of Ebussuud are used to support a strong hypothesis that law in the period from 1100-1850 was no less a work of genius than that of the earlier jurists (p.2). He again employs anthropology arguing that law shares some features with "culture" (p.3). The muftis were not abstracted from the real world but constituted an essential part of it. The Weberian and neo-Weberian ideas on the arbitrary function of the *kadı* are once more refuted before Gerber moves to yet another problem, the treatment of the Ottoman period as one of marginal importance in Islamic culture (p.15). He again elaborates on the idea of 'constructive symbiosis' in law discussed in his previous book and he identifies mechanisms such as *darura, maslaha, istihsan* and *ʿurf* which allowed, according to Gerber, the preservation of flexibility (p.9). In what appears to be dialogue with his previous book he states that «the argument of this book will be that Islamic law continued to be an aspect of the public sphere under the Ottomans, just as before them, and hence the argument that the lack of development of democratic institutions in Islam is to be attributed to the lack of civil society and public sphere, is fallacious» (p.16). All three muftis are selected for different reasons. Ebussuud is the mufti working at the centre, whereas al-Ramlī is an independent jurist, and Ibn ʿĀbidīn was employed by the bureaucracy.

The book is divided into seven chapters. In Chapter I Gerber reconstructs ideas which have already being challenged by others, such as the process of constructing Islamic law as deriving from the Prophet (p. 25). He repeats the idea that the classical period was not void of creativity. Once more the author discusses the relation between the *kanun* and the Sharia to conclude that «kanun penalties were rarely, if ever applied» (p. 29), another of Gerber's overstatements. Following his train of thought the author is at pains to explain the need for the promulgation of the kanun. The explanation he offers is that «the Ottomans enacted the kanun in good faith» (p.21). The author's approach to the whole issue of the *kanun* and its function seems to suffer greatly from the fact that he did not consult the original manuscript of the collection of the man who, it might be argued, reconciled *kanun* and Sharia, i.e. Ebussuud. The author also fails to acknowledge the only serious attempt to analyse the legal reasoning of Ebussuud written by Imber two years prior to the publication of this book.

In Chapter II the author, using *fetva*s of both Ibn ʿĀbidīn and al-Ramlī, provides convincing evidence that *fetva*s were not theoretical constructions but real

life cases. In Chapter III the relationship between state and law in the Ottoman empire is once more discussed. According to the author «early development of the distinction between the laws of God and the laws of man cannot provide a basis for any useful generalization about Islamic law» (p. 46). The ruler refrained from dictating what actually was law and was entrusted merely with implementing justice and refraining from oppression (p. 50). According to al-Ramlī the sultan was responsible for nominating judges; instructing them in the areas of law over which they did not have authority; nominating *vakf* managers and other officials and endowing state property as *vakf* as he wished (p.55). (As we are to see, these are arguments first put forward by Ebussuud). The fact that both muftis criticised the government for violating the law (p. 60) is evidence, for Gerber, that Islamic law remained as jurists' law. The promotion of the mufti of Istanbul as their superior and the dependence on the sultan for promotion does not seem to challenge this argument. Finally the author argues that the Ottomans' preference for the Hanafi *madhhab* did not in any way undermine the others (p. 70).

Chapters IV and V deal with the tools used by muftis in the process of reasoning. He accepts Hallaq's argument that the doors of *ijtihad* (individual interpretation) were not really closed. He examines the use of the term in the *fetvas* of the three muftis, to conclude that no such closure had taken place and «so may be the reasons for the decline of scientific thought in Islam must be looked for in historical developments after all» (p.91). According to Gerber *istihsan* (equity) emerged directly from the needs of the society. Gerber though is careful enough to warn us that such tools are not an open licence to violate «all moral (and legal) injunctions» (p. 104). Fornication and drinking wine were dealt with using legal fictions as was the case for interest-charging.

Chapter VI addresses the crucial question of the relation between custom and Islamic law. Gerber rightly argues that *ʿurf* became crucial as a practical fiction through which new material was accommodated (p. 110). The very interesting treatise on *ʿurf* by Ibn ʿĀbidīn attests to the idea that *ʿurf* did not function as an external force (p. 115). The final chapter is devoted to the structure of legal argument. The author, while comparing Islamic law to western law, argues that the principle of personal discretion was unavoidable exactly as it is in any modern legal system (p.123). He quotes a modern judge's idea that interpretation is personal but limited by disciplinary rules, and is conducted under «professional grammar» acquired through education (p. 143), in order to ascribe the same function to the mufti and the *kadı*. Thus their work is neither based on free-floating individual thinking (Weber, Rosen), nor on mindless imitation (the Orientalists) (p. 142). According to the author, legal tradition did not prevent the evolution of Ottoman Islamic society into a civil, capitalist and democratic, i.e. modern western society (p. 145-48). The reasons for the absence of these elements should be sought in history and particularly the exclusionist, mercantilist and protectionist West (p. 148).

Gerber following, sometimes too closely, his previous book has attempted to readdress a number of issues using once more anthropological and historical tools. His effort to defend approaches insisting on seeing Islam as the "hostile other" is admirable. However his persistence over attempting to prove that the system was as democratic and logical as the western one seems to be outmoded, especially today when societies and their law are examined on their own merit. Finally one has

to acknowledge Gerber's efforts to introduce Ottoman legal reasoning into current discussions on Islamic law and to provide an answer to those who viewed the empire as of no significance in Islamic culture in general.

The last book to be reviewed here, published in 1997 by Colin Imber on the famous *Şeyhülislam*, Ebussuud, is of a different style and approach. Imber, following the English tradition, opts for less theory and more evidence. Even when he theorises, he substantiates his argument from the sources used. As promised in the Introduction, Imber endeavours to account for both strictly legal issues and their social and historical context. The author acknowledges that Ebussuud's thought was entrenched in a particular legal tradition within Islam. While endeavouring to place him within a broad historical context, Imber also provides a valuable guide to Hanafi legal doctrine, by far the most widespread in Islamic legal tradition. Like Gerber, the author explores the interrelation between the Hanafi interpretation of Islamic jurisprudence and secular law deriving mainly from the *kanun* and imperial decrees. Gerber viewed the promulgation of the *kanun* as a 'bizarre' phenomenon, convinced that the agrarian *kanun* was in any case of limited interest and the penal *kanun* had become built-into the Sharia. Imber successfully explains how Ebussuud reconciled Sharia and the *kanun* on land holding; modified opinions on *vakf* administration and cash *vakfs*; and accepted the concept of intent in the cases of theft, a concept alien to Islamic jurisprudence. He also explains that the redesignation of the sultan as caliph had a more generalised effect. The sultan as caliph exercised his discretion in the interpretation and application of the Sharia. His enhanced authority was visible, for example, in the increased government surveillance over the administration of trusts and over contracts of marriage, «as well as in the rationalising decrees which followed Ebu's-su'ud's petitions, limiting judges' discretion in certain areas of law» (p. 271). These findings weaken Gerber's arguments on the continuing independence of the judge in the Ottoman empire. And although the result was ultimately still 'the jurists' law', one would have to argue that Ebussuud was instrumental in incorporating the ruler's enhanced authority by bringing royal decrees within the scope of Islamic law. «This equation of royal and divine justice also acquired a canonical status in the late seventeenth century with the compilation, of the Petitions (Ma'ruzat)» (p. 270). Ebussuud's rulings were the basis of the "New Kanun" promulgated after 1673 and which remained in force until 1858. His authority as a jurist to be quoted is evident when Ibn ʿĀbidīn, a 19th century mufti, utilises his legal reasoning.

Imber divides the book into three Parts. Part I discusses the historical and legal background, chapter I placing Ebussuud in the historical context of his time, and Chapter II discussing Sharia and *kanun*. Imber disagrees with Gerber on the issue of viewing the Sharia in accordance with modern concepts of law. He argues that only the non-ritual areas of the Sharia, within the category of 'claims of men', could correspond to law in its modern, secular sense. According to the author there is a dichotomy between moral and legal consequences of an act (p. 33). «In law, strict legal analogy tends to take precedence over morality» (p. 31). He recognises though that in cases where a ruling appears to be unjust, it is permissible to give judgement «according to equity rather than analogy» (p. 33). Both authors agree that the starting point of law is the rule passed from generation to generation. Their point of disagreement though lies in the process of legal reasoning. Al-

though they both agree on development, they differ over its degree. When Ebussuud defends cash *vakf*s, although he departs from the accepted opinions, he still has to use known authorities such as Shaibani and Zufar. Thus, according to Imber, we are not witnessing changes in the major outlines of the law, but modulations in juristic discussion.

Another point of disagreement is the role played by custom. For Imber «the jurists' recognition of custom ('urf) as a source of law gave it further flexibility, although only, as a rule, in accidentals and not in essentials» (p.37). «Even when the post-classical jurists did introduce new themes, such as feudal tenure, they do so within the conceptual framework which they inherited from the founders of the school» (p. 37). The kanun, though, is based on custom modified through administrative practice and Sultanic decree (p.44). As the two systems developed independently, the task of reconciliation was a difficult one.

In Part II legal sovereignty and the Caliphate are discussed. Imber agrees with Gerber on the limitations placed upon the sultan by the Sharia and to some degree by the *kanun*. The sultan could regulate the *kanun* by degree, but custom functioned as a limitation to his authority. Ebussuud, by presenting the sultan as the agent of God on earth, undermined the juristic notion that the sovereign has unmediated authority only in four areas of law (p. 95). Imber, though, is eager to modify this argument by explaining that the sultan, although caliph, had no power to change the law in essence (p. 109).

Part III deals with the law in detail. Ebussud's rulings on land tenure, *vakf*s, marriage and offences against property and person are meticulously discussed. In this part of the book Imber presents the traditional Hanafi doctrine and compares it with Ebussud's rulings. The abundance of translations of *fetva*s in itself is a very important contribution to legal argumentation. The reader is presented with 'real' cases, thus making it easier to understand how law functioned. On the laws governing land tenure, Imber expands Baber Johansen's findings related to legal fictions employed by jurists. He successfully demonstrates the way Ebussud incorporated local custom aided by well-concealed legal fictions. By declaring the Treasury to be the owner of land and by describing peasant tenure in terms such as loan or lease, he overcame the discrepancy between Hanafi doctrine and feudal reality (p.137). He also reinforced the Sultan's control by giving him greater powers of discretion over taxation rates. His rulings on *vakf*s increased the sovereign's control over their creation and administration, whereas his defence of cash *vakf*s allowed them to survive. On the rules of divorce, by making registration compulsory and by asking the community to inform the authorities when there was a problematic case, he removed marriage from the sphere of privacy to bring it under the authority of the sultan's bureaucracy. Ebussuud exemplified Hanafi rules on offences against person. Discretionary penalties to ensure punishment were introduced if Hanafi rules did not provide for this. In the case of unattributed homicide, he departs from the Hanafi tradition as he no longer links ownership with liability. According to Imber he only intervenes and modifies Hanafi law in order to render it practical and prevent injustice. He thus keeps the strange Hanafi rules on poisoning. Finally, one of the jurists' more important contributions was the categorisation of malicious damage, such as that of theft as a penal offence incurring punishment. «The investigation and punishment of theft is a matter for the administra-

tive authorities, who may use whatever method of investigation and standard of evidence is appropriate to the case» (p. 224). As for the use of fines, Ebussuud gives the answer to Gerber's remarks that fines were hardly ever levied and that Sharia punishments were preferred. In two *fetvas* he forbids the cutting of the hand of a thief and permits collection of a fine for not attending the Friday prayer (p. 225).

In this well-thought-out, well-organised and erudite book Imber has managed to convince us of his arguments and, most importantly, allowed us, through his thorough documentation, to check Ebussuud's legal reasoning. Although he might have been occasionally harsh on the jurist by depicting him as a manipulator, this epithet, as the author himself admits, is only valid when the jurist is viewed through the prism of modern times. Ebussuud remained religious and superstitious as was normal for the men of his time. It seems that when questioning his intentions, he considered himself no different from his predecessors except perhaps in being slightly more organised..

All in all, despite the different methodologies and different viewpoints employed in these three books, one cannot but admit that they constitute a starting point for discussion which will hopefully generate even more sophisticated research in this field.

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