PROTECTING HONOR IN THE NAME OF JUSTICE

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Introduction

This paper challenges the conceptualization of honor as a value system or a structure on which the Mediterranean culture has been constructed. It problematizes this ahistorical conception of honor which assumes that honor codes in modern societies are largely the legacy of "traditional" norms of the pre-modern periods. It aims to challenge these assumptions by historicizing the notion of honor in the Ottoman legal discourse and practice from the early-modern period to the so-called "reform era", the era most scholars maintain began with the Tanzimat Edict of 1839. Such a historical approach uses justice as a key to understand honor not as a value system, but as a rhetoric.

This study argues that the recurring presence of honor in the correspondence especially between the central government and the Ottoman subjects reflects the development of new parameters between the early-modern state and its subjects in moral terms. The Ottoman central government's claim to protect the honor of its subjects reflects a dialogic process in which subjects started to use new types of legal terminology and concepts in order to request the intervention of state in local matters that threatened their well-being. Yet, such a relationship or claim based on honor started to establish state-society relationship based on citizenship rights over the protection of life, honor and property well before the Tanzimat. In order to discuss the historical development of this relatively novel relationship, the paper first explores the theory of "Circle of Justice" and the idea of politico-administrative jurisdiction of the sovereign in Islamic and Ottoman political thought and practice. Secondly, it traces the utilization of the term "violation of honor" (*hetk-i* ırz) in the eighteenth-century Ottoman legal practice and discourse, and explores the pivotal role of sexuality in the perception of honor

and violence. Furthermore, it concentrates on the discourse of the "protection of honor" as a legitimizing motive behind the interventions of the political power in the sexual sphere. Finally, it concentrates on the motto of "life, honor and property" as well as the codification of "violation of honor" in the Criminal Law of the nineteenth century to investigate the continuities with as well as the ruptures from the earlier notion of honor. It argues that the novelty of the discourse of honor in the nineteenth century was its disposition towards the family as the locus of "protecting life" through reproduction.

Justice in Islamic Law and the Early-Modern Ottoman Legal Theory

In Islamic law, especially in the Hanafi doctrine of law that the Ottomans officially adopted, the principle of *siyasa shar'iyya* provided grounds for the political prerogative of the sovereign, and the government on his behalf, to preside over public order. The Hanafi jurists paid attention to guaranteeing a system of private legal relations (claims of men) to the disadvantage of the laws concerning the public interest (claims of God). As a result, penal law and fiscal law remained only roughly defined in stark opposition to the detailed definitions of the "claims of men." Thus, there was almost nothing equivalent to administrative law in Islamic jurisprudence. Since these areas remained under-developed in Islamic jurisprudence, issues concerning public order, the most prevalent of which, namely, jurisdiction over taxes and punishment for crimes (*hudud*), were delegated to the government as the trustee of public interest. While the principle of *ta'zir* (discretionary punishment) by the eight century already granted the executive authority to punish crimes which would otherwise be difficult to do according to the strict rules on evidence imposed by *shari'a*,[1] *siyasa* conceded a larger power

[1] B. Johansen, "Secular and Religious Elements in Hanafite Law. Function and Limits of the Absolute Character of Government Authority," in *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (Leiden; Boston, 1999), p. 216. Also see, M. Y. I. Dien, "Taʿzir " in *Encyclopaedia of Islam, Second Edition*, eds. P. Bearman, et al. (Brill Online, 2008), R. Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century*. (Cambridge, UK; New York, 2005). pp. 65-68.

to the sovereign than *ta'zir* did. This politico-administrative jurisdiction of the government as the judicial enforcer was thus called *siyasa shar'iyya* in Islamic jurisprudence.

The jurists, on the one hand, tried to limit the judicial interference of the political authority to restricted domains, but, on the other, often accepted the *siyasa* competence of the sovereign in taking measures in the interest of public order where this was not covered by Islamic law. As a result, even as early as the tenth century, they granted the government the right to even transgress the sphere of the "claims of God" (*hudud*) in order to protect public order.[2] It was this voluntary submission that created an inbuilt tension in the history of Islamic legal theory between the governors who transcended their sphere of competence (*siyasa shar'iyya*) in the cause of public order and the jurists who wanted to expand the sphere of private legal relations.[3] In this sense, the social and political tensions reflected in Ottoman history in the relationship between *shari'a* and *kanun* is rooted in the long history of Islam.

The Ottoman legal system constituted a good example of the Islamic legal schema described above in the form it had developed by the sixteenth century. The Ottomans adopted the Hanafi doctrine of law as the official doctrine defining fundamental procedural matters whereas for their subjects they did not totally prohibit the practice of forum shopping by applying to different courts and jurisconsults (muftis) of different schools. They created a system of Islamic learning through establishing a hierarchical system of colleges in which the

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Islamic scholars and muftis as well as the judges of Islamic courts were trained.[4] The principal legal institutions of the empire were the *shari'a* courts divided into judiciary districts headed by a judge (*kadı*) who was assisted by deputy-judges (*naib*s) in the sub-districts.[5]

Parallel to the courts system institutionalized throughout the empire, politico-administrative jurisdiction (*siyasa*) of the sovereign and the government also existed. In the patrimonial structure of the Ottoman political system, the idea of a "Circle of Justice" (*daire-yi adliyye*) conceptualized justice as being directly disseminated by the sovereign as the trustee of the prosperity of its subjects. Of course, the subjects in this picture were entrusted to the sovereign by God and the this circular justice could not be maintained without *shari'a*.[6] The exercise of power and the maintenance of peace and order for its subjects in itself was always one of the principle sources of legitimacy for the Ottoman political authority.[7] Alongside legitimacy concerns, the necessity of maintaining public order through administrative and penal regulations gave rise to Ottoman legal institutions and the practice of politico-administrative jurisdiction, as had also happened in other Muslim societies before the Ottomans. The Imperial Council (*Divan-ı Hümayun*) as a legislative and executive court

[4] C. Imber, *The Ottoman Empire, 1300-1650. The Structure of Power* (New York, 2002). p. 227.

[5] E. D. Akarlı, "Islamic Law in the Ottoman Empire," in *The Oxford International Encyclopedia of Legal History*, ed. S. N. Katz (Oxford; New York, 2009).

[6] The idea of the "circle of justice" which has its origins in Persian political tradition was conceptualized in many post-classical Ottoman political writings such as Kınalızade's *Ahlak-i 'Ala'i*, Katib Çelebi's *Düsturü'l-'amel* and Hasan Kafi's *Usulü'l-Hikem fi Nizamı'l-Alem*. For detailed analyses of these works, see respectively G. Hagen, "Legitimacy and World Order," in *Legitimizing the Order: The Ottoman Rhetoric of State Power*, ed. H. Karateke (Leiden, Boston, 2005); M. İpşirli, "Hasan Kafi el-Akhisari ve Devlet Düzenine Ait Eseri *Usulü'l-Hikem fi Nizamı'l-Alem*," *İstanbul Üniversitesi Edebiyat Fakültesi Tarih Dergisi* (1979-80); B. Tezcan, "The Definition of Sultanic Legitimacy in the Sixteenth Century Ottoman Empire: The Akhlaq-ı Ala'i of Kınalızade Ali Çelebi (1510-1572)" (M.A. Thesis, Princeton University, 1996). For analyses of the legitimizing discourses of justice through the circular view of justice in Ottoman political thinking, see B. A. Ergene, "On Ottoman Justice: Interpretations in Conflict (1600-1800)," *Islamic Law and Society* 8 (2001); Hagen, "Legitimacy and World Order." For a more general discussion on the concept of "circle of justice" in early Islamic empires and throughout the Ottoman history, including the reformation period of the nineteenth century, see L. T. Darling, "Islamic Empires, the Ottoman Empire and the Circle of Justice," in *Constitutional Politics in the Middle East: With Special Reference to Turkey, Iraq, Iran, and Afghanistan*, ed. S. A. Arjomand (Oxford; Portland, 2008).

[7] For a detailed and analytical discussion of the legitimizing mechanisms of the Ottoman sultanate, both the normative and factual ones, see H. Karateke, "Legitimizing the Ottoman Sultanate: A Framework for Historical Analysis," in *Legitimizing the Order: The Ottoman Rhetoric of State Power*, ed. H. Karateke (Leiden-Boston, 2005). He considers the establishment of "justice and order" through preventing arbitrary legal processes via courts and institutionalized mechanisms of personal redress as well as the huge corpus of legislation procedures as one of the most important pillars of "factual" legitimacy.

parallel to the *shari'a* courts administered public order through imperial statutes and decrees which were codified in sixteenth-century Ottoman legal practice in the form of "rescripts of justice" (*adaletname*s) or "law books" (*kanunname*s).

The Imperial Council was established upon the notion of *mazalim* jurisdiction. *Mazalim,* literally "injustice and wrongful deeds," was again directly related to the idea that, a Muslim sovereign, as the trustee of public order, was responsible for removing injustices. *Mazalim* courts which allowed the subjects to petition the caliph in the case of injustices perpetrated by official and semi-official powers were established in medieval Islamic Arab and Iranian states before the Ottoman Empire came into being.[8] Al-Mawardi, a Shafiʿi jurist of the eleventh century,[9] who discusses extensively the relationship between *mazalim* and *siyasa* in his *Kitab al-Ahkam as-Sultaniyyah*,[10] held the military governor (*amir*) responsible for the maintenance of public order and security whereas he gave the judge (*kadı*) the right to adjudicate to protect the rights of individuals in the litigation of private parties. He also put *hadd* punishments among the responsibilities of the governor since they were considered crimes against God and therefore against public order. This conceptualization of legal structure in a Muslim state was not, in fact, any different from that of the Hanafi jurists depicted above. Thus, the *mazalim* courts were the very institutions through which the political authority exercised its authority over public order and penal regulations granted by Islamic law.

In this sense, the *Divan-ı Hümayun* was basically the Ottoman version of the medieval *mazalim* courts. First of all, it functioned as a parallel but superior judiciary organ. It heard petitions, judged some important cases of petitioners in its own court (*divan*) or sent imperial

[8] For a detailed description of *mazalim* in the early Islamic states and under the Bahri Mamluks, see Nielsen, *Secular Justice in an Islamic State: Mazalim under the Bahri Mamluks, 662/1264-789/1387*.

[9] For biographical information on al-Mawardi, see C. Brockelmann, "Al-Māwardī Abu'l-Hasan Alī B. Muhammad B. Habīb," in *Encyclopaedia of Islam, Second Edition*, P. Bearman, et al. (Brill Online, 2009).

[10] A. I. M. Al-Mawardi, *Al-Ahkam as-Sultaniyyah. The Laws of Islamic Governance*, A. Yate trans. (London, 1996).

orders to provincial governors and judges in order to resolve issues there. From time to time, but mostly in the sixteenth century, the imperial decrees written in response to petitions complaining about some judicial and administrative injustices were formulated in the manner of a "rescript of justice" (*adaletname*) explaining certain regulations and orders on governance, administrative and judiciary principles, and were sent to provincial governors and judges all over the empire as "warnings".[11] These "rescripts of justice" were actually proto-statutes (*kanun*) in the sense that they were required to be implemented, registered in the court records and even promulgated to the public.[12]

The culmination of Ottoman power over the politico-administrative jurisdiction was the codification of all these regulations and orders concerning public order into law books which started to be codified at the end of the fifteenth century (by Mehmed II) and continued throughout the sixteenth century. The law book of Süleyman I, compiled between 1534 and 1545, is considered to be the most comprehensive version as it includes the most detailed penal codes and is therefore referred to in Ottoman studies as *the* Ottoman criminal code.[13] Since *shari'a* was deficient in criminal penalties apart from a few fixed penalties (*hudud*) defined for a very limited number of offenses, and because of the difficulty in gaining a conviction under their stringent rules on legal proof,[14] the Ottomans defined and punished most of the *hudud* and other offenses by giving a discretionary punishment (*ta'zir*) through the *kanun* statutes. Such a dual legal system based on both *kanun and shari'a* also enabled the

[11] H. İnalcık, "Adaletnameler," *Belgeler* 2 (1965); "Adaletname," in *TDV İslam Ansiklopedisi*, vol. 1 (1988).

[12] People were allowed to get a copy of the *adaletname* that was registered in the court records. İnalcık, "Adaletname," p. 346. There are examples in the court records of people using copies of *adaletname* in order to prove their case. S. Faroqhi, "Political Activity among Ottoman Taxpayers and the Problem of Sultanic Legitimation (1570-1650)," *Journal of the Economic and Social History of the Orient* 35 (1992): pp. 7-13. İnalcık states that Ottoman *adaletname*s descended from an older Islamic tradition of issuing imperial declarations against provincial rulers and putting them as inscriptions in public places such as mosques and city walls. İnalcık, "Adaletnameler," p. 51.

[13] Heyd, *Studies in Old Ottoman Criminal Law*, ed. V. L. Ménage (Oxford, 1973), pp. 26-30.

[14] For a general discussion of penal law in *shari'a*, see J. Schacht, *An Introduction to Islamic Law* (Oxford, 1964). pp. 175-187. For a more specific discussion of homicide in Islamic law, see Fahmy, "Shari'a and Siyasa." Unpublished paper, and for the discussion of unlawful intercourse (*zina*) in Ottoman law, see L. Peirce, *Morality Tales: Law and Gender in the Ottoman Court of Aintab* (Berkeley, 2003).

Ottoman central power to bind the executive authority of the ruling elite, which might otherwise have been unrestrained, to the local judge's (*kadı*) adjudicative power.

In the sixteenth century, the *kanun* continued to designate executive power to the ruling elite and thus institutionalized their "discretion" in criminal jurisdiction while putting certain boundaries so as not to disturb the balance constructed on socio-economic divisions between the ruler and the ruled. In this sense, Heyd's observation that "the chief object of the Ottoman penal codes was not the protection of society against criminals but the protection of the common people against oppressive officials and fief- holders" is to a certain extent true.[15] This idea can also be observed in the preambles to some of the law books where it is explicitly stated that people's complaints against the ruling elite were the reason behind the issuing of the *kanunname*.[16] As Hagen and Mumcu have pointed out, *zulm* (oppression) and *ta'addi* (transgression) on the part of the power holders did not originally come under the penal law of *shari'a*.[17] In this sense, the transgressions and abuses of the ruling elite were also regulated and brought under control by the *kanun*.

In the eighteenth century the *kanun* was still a prevalent legal force, contrary to the mainstream argument about its decline. It was now diffused into politico-legal culture rather than being fixed and codified into a uniform law book. This fluidity of *kanun* was in accordance with the economic and administrative reconfiguration of Ottoman power towards the oligarchic rule of the nobility. The juridical competence that the political power acquired through *kanun* (alongside other apparatus), and by which it deployed its administrative, economic and punitive means, was not stable. Its configuration and, consequently, the *kanun*'s content changed according to social, economic and political conjunctures. In this

[15] Heyd, p. 176.

[16] The *kanunname* for the Christians of the island of Cephalonia in the late fifteenth century was issued by request of its inhabitants who sent a representative to Istanbul to complain about oppressive tax-collectors and other officials and requested a *kanunname*. See, Ibid., p. 14.

[17] Hagen, "Legitimacy and World Order," p. 72; A. Mumcu, *Osmanlı Hukukunda Zulüm Kavramı (Deneme)* (Ankara, 1972). p. 7.

sense, the conformation of *kanun* altered in the eighteenth century parallel to changes in the configuration of political and economic power. While standardization through codification was a desirable and manageable objective in the sixteenth century, it became neither desirable nor manageable for the Ottoman power as the eighteenth century approached. Promulgation of *kanunname*s was critical in terms of the legitimation of imperial power while the political and economic interests of the central administration and ruling elite often overlapped in the empire-consolidation process of the sixteenth century.

Kanun and *shari'a,* however, operated in a different political atmosphere in the eighteenth century. The reconfiguration of the economic and administrative organization, mostly concentrated in the second half of the seventeenth and the first half of the eighteenth century, changed not only the structure of the central government, but also its relationship with the provincial ruling elite. With the new redistributive economy based on life-time tax-farming contracts, while the grandee elite accumulated power and constructed an oligarchic rule in central administration, local notables and dynastic households started to dominate in provincial government. The central religious elite and its dynastic extensions in the provinces were also added to the politics of these multi-dimensional elite. Thus, it was to the advantage of everyone in this multi-faceted power equilibrium to keep *kanun* and *shari'a* on flexible grounds in order to manipulate them more skillfully.

Thus, in order to leave a space for deployment of both *kanun* and *shari'a* when necessary, the grandee government at the imperial center did not, on the one hand, want to fix the rules of "public order" by codifying law books. But, on the other hand, within such a political atmosphere where there were different centers of power, the central government was also wary of threatening both provincial and religious dynasties by freezing economic, social and administrative terms through codified regulations. Rather, the *kanun,* operationalized through highly bureaucratized institutions and sophisticated archiving practices in the

eighteenth century, compelled the central elite to constantly redefine and reformulate its relationship with the provincial powers. The most important sources which present us with a clear picture of the application of *kanun* in eighteenth-century legal practice are petitions and imperial decrees written in response to these petitions in the Imperial Council. These petitions and the imperial rescripts written on them constantly refer to both *kanun* and *shari'a* as active sources of legal solutions according to which a particular grievance will be handled.

Thus, *shari'a* and *kanun* were part of the same legal domain in which the main beneficiaries of the economic and political system did not necessarily consider them as a dichotomy. Rather, as Khoury intelligently demonstrates, up to the nineteenth century, within the parameters of a shared vocabulary, the *shari'a* was "often a discursive means used by local jurists to challenge the legitimacy of particular points of state law, not its existence".[18] In this sense, resorting to *shari'a* was not a sign of the "upsurge of Muslim orthodoxy" as Heyd has argued, but rather the deployment of a legitimate legal force by the ruling elite to expand its economic and political power that had actually been granted to them through *kanun* and *siyasa* in an earlier period. Hence, to leave the sphere of *kanun* on flexible ground based on "ad hoc regulations" without ossifying it under quasi-universal codifications was in fact to the advantage of the oligarchic rule of the nobility in a period where economic and social power relations were constantly being reconfigured.[19] Thus, the relationship of *shari'a* and *kanun* should be analyzed in their varied forms within their political conjuncture according to the social and economic distribution of power. Yet, the idea of "Circle of Justice", in its meaning that the sultan is the distributer of justice and that justice is the "fulcrum of sultanic

[18] D. R. Khoury, "Administrative Practice between Religious Law (Shari'a) and State Law (Kanun) on the Eastern Frontiers of the Ottoman Empire," *Journal of Early Modern History* 5 (2001): pp. 324-6. She argues that the elastic margins of *shari'a* and *kanun* were seriously challenged in the nineteenth century when the state law homogenized local court practices in favor of *kanun* with its 1858 Land Code and therefore polarized the *shari'a* advocates into making stricter interpretations of classic definitions of ownership with reference to scripture. Ibid.: pp. 324-6.

[19] R. Abou-El-Haj, "Power and Social Order: The Uses of the Kanun," in *The Ottoman City and Its Parts: Urban Structure and Social Order*, ed. D. Preziosi and R.A. Abou-El-Haj (New Roschelle, New York, 1991), pp. 79-86.

legitimacy"–sometimes in reference to both *shari'a* and *kanun* and sometimes to only one of them—persisted throughout the entire early modern Ottoman governance.

Legitimacy, Honor and Sexual Violence:

One of the legitimizing strategies of early-modern Ottoman state in the eighteenth century was its claim to protect the "honor" of its subjects. The protection of honor was closely connected with the maintenance of law and order in society, especially in the provinces where local power brokers were threatening the "honor" of the state, too. In this changing relationship between the Ottoman central government and its subjects, the petitioning process must have played an important role in the intermingling of different genres and in traveling of moral values and legal categories reflecting these values. Just like the mutual rhetorical usage of "banditry" by the Ottoman state and its subjects, so the notion of honor and the legal term *hetk-i ırz* (violation of honor) have been established in this dialogic process.

Why was this "politics of honor", most of the time associated with sexual honor, a legitimizing strategy for the Ottoman state? Scott Taylor explains this in relation to the notion of justice:

> "Honor creates the polite fiction of autonomy for those who are, in truth, subordinate, and allows both the dominant and subordinate to accept that this state of affairs is just. In this way, honor and sexual could be touchstones for the legitimacy of power. If everyone feels honored, then the hierarchical distribution of power can seem fair; but if the subjects of empire feel humiliated, the power that acts on them becomes illegitimate. The subjects then have justification for rebellion or any other violent act that can reclaim their autonomy and honor"[20]

[20] S. Taylor, "Honor in the Early Modern Eastern Mediterranean – An Introduction," *The Journal of Early Modern History*,15 (4) (2011): pp. 306-7.

This is in fact exactly what rests behind the idea of "Circle of Justice": There must be a "consent" given by the subordinate to the hegemonic power, and the power should in return provide a sense of justice by *honor*ing the subjects through protection. In such a formulation, protecting the honor of its subjects through establishing a moral order also means protecting political power's own legitimacy and honor on the eyes of its subjects.

In this sense, the politics of honor in early-modern Ottoman polity was dialogic process as the notion of honor was rhetorical rather than being structural code of the society. It was not "structure, provoking a predictable response to any given predicament", but as "a resource that both states and their subjects could invoke in crisis, and something that both groups needed to safeguard in order to sanction their own behavior and status.[21] As we will see in more detail in the following pages, the legal terms associating sexuality with honor were generally used in the petitions in which the early-modern central government and the subjects were in dialogue with each other, albeit in an indirect manner. Petitioners were well aware of the power of rhetoric. They knew that their petitions must attract the attention of the Imperial Council personnel to be considered worthy of a hearing in the Imperial Council. The crafting of a plausible narrative—albeit within the limits of the official language—was at the center of the petitioning activity. However, as Natalie Zemon Davis brilliantly shows in her study of letters of remission in sixteenth-century France, looking at the "fictional" aspects of these documents is not inevitably a "quest for fraud" or "forgery".[22] Rather, looking at how the narratives were formulated through this collaborative endeavor and seeing what kind of rhetorical strategies were employed gives us important clues about the moral and social sensibilities of Ottoman subjects.

[21] Ibid., p. 309.

[22] N. Z. Davis, *Fiction in the Archives: Pardon Tales and Their Tellers in Sixteenth-Century France* (Stanford, Calif., 1987), pp. 3-4.

Let's see a petition submitted to the Imperial Council in Istanbul by a man who was an inhabitant of Ankara, a provincial city in Central Anatolia, in 1744. In this petition, Hasan Beşe, the husband of Fatime, seeks justice against those who committed sexual assault against his wife:

> May you, most excellent and merciful master, be well and strong!
> I, your humble slave, am an inhabitant of the village of Yıldırım el-viran of the district of Şorba in Ankara. While my wife Fatime was taking care of her land with no harm or offense to anyone, Hacıoğlu Kadri, an inhabitant of the same village, being one among the harmful bandits, "broke into my house" at night and committed an "indecent act" (*fi'l-i şeni'*) with my wife and "violated (her/our)honor" (*hetk-i ırz*) and committed "mischief" (*fesad*). Since the aforementioned Kadri has run away, I kindly request an imperial order of yours addressing the judges of Ankara and Şorba and the governor of Ankara for resolving the case when he is captured and establishing justice according to the *fetva* of the chief mufti that I present here.
>
> Your humble servant, Karabaşoğlu Hasan Beşe[23]

Although the couple's experience of the event and their sorrow were of course singular, the description of case in the petition was not unique at all. There is a host of legal documents, including petitions, imperial decrees and court records describing other events in mid-eighteenth-century Anatolia in almost exactly the same way the above petition describes the sexual assault on Fatime. Certain legal terms like "indecent act" (*fi'l-i şeni'*), "violation of honor" (*hetk-i ırz*) or expressions like "breaking into the house" were repeated to describe situations of sexual assault. Furthermore, those who committed sexual assault were generally identified as bandits or brigands with the use of a certain terminology such as "*mütegallibeden*" (being considered/from among the usurpers) "*şaki*" (robber) and "*eşkıya taifesinden*" (being a member of the gang of bandits).

[23] Prime Ministry Archive, A.DVN.ŞKT, folder 67, petition 134 (1157/1744).

My research on sexual offense cases in eighteenth-century Ottoman Imperial Council registers revealed two interesting phenomena: First, there were many more petitions and imperial decrees concerning sexual offenses than I had expected to find since I was basically assuming that the central government would not bother itself with the ordinary sexual involvements of Ottoman subjects. Second, there was an abundance of complaints by Ottoman subjects against the violence of certain "bandits" in their local towns in Anatolia. These petitions and the imperial decrees mention not only the regular harassments of bandits, such as plundering crops, attacking houses and killing innocent people, but also, and with almost no exception, incidents concerning their sexual violence. The juxtaposition of these two issues, that is, the central government's unexpected interest in sexual crime and petitions specifically mentioning the sexual violence of bandits alongside the other crimes, looks important to understand symbolic meaning of sexual violence for understanding violence of that age in general.

The case brilliantly reveals the central role of sexual violence as one of the most important indicators of the accused being habituated to "violence", namely being bandit. At this point, it gets important to understand why sexual violence was one of the important symbols of excessive "violence", tantamount to transgressing both the gender order as well as the order and rules of the state. Here, the notion of "honor" and the question of whose honor was destroyed with sexual assault come into the scene.

Islamic literature favors the expressions related to privacy whereas the definition of the public sphere in pre-modern Islam starts with the negative of this private. The terms such as *haram/mahzur* (forbidden), *sir/maktum* (secret), *sitr* (veiling), *hurma* (inviolability), *awra* (anything that man conceals by reason of shame or prudency) occupy a larger space than antonymic concepts such as *alaniyya* (open, manifest), or *tashhir* (making well-known,

notorious).[24] So, the public sphere in pre-modern Islam is defined as the negative of the private, that is, the sphere of life which is not protected from unwanted intrusions of power. Definitions of privacy in the Islamic context do imply not only territorial and spatial privacy, but also two other inviolabilities; the privacy and dignity of the human body and the inviolability of reputation and honor of a person. Violence in this context is the act of unveiling others and "tearing apart the veil of integrity" (*hetk-i ırz*).[25] In fact, one of the most frequently encountered terms in the eighteenth-century legal documents in which the central government and the petitioners used in their correspondences is *hetk-i ırz*. The term was often coupled with "bandits" and used to describe certain people's cruelty and assaults on others' honor, i.e., assaulting their family, wives and children, slandering them, and in certain cases physically attacking them, as we have seen in our example.[1] The offenses of breaking into others' houses and assaulting women and girls, and specifically committing sexual assault (*fi'l-i şeni'*) against a certain woman, girl or boy were generally described by the term *hetk-i ırz* in these documents.

Sexuality is in the intersection and the very inner core of three components of the definitions of privacy, that is, the inviolability of space, body and honor, and thus an attack to sexual sphere represents violation of the space, body and honor, all together, in Islamic and early-modern Ottoman world.

In our exemplary case, the violation of all three dimensions of privacy is apparent: The accused violates the territorial immunity by "breaking into house", then violates the right of inviolability of human body by sexually assaulting Fatime, and as a result, violates the honor

[24] C. Lange and M. Fierro, "Introduction: Spatial, Ritual and Representational Aspects of Public Violence in Islamic Societies (7th-19th Centuries ce)," in *Public Violence in Islamic Societies. Power, Discipline and the Construction of the Public Sphere, 7th-19th Centuries Ce*, ed. C. Lange and M. Fierro (Edínburg, 2009), p.4..

[25] The expression literally means "tearing (one's) honor" and "disgracing someone".[25] See H. Wehr and J. M. Cowan, *A Dictionary of Modern Written Arabic* (Wiesbaden, 1980). p. 1018. Interestingly enough, *hetk* itself acquires a meaning in Arabic which implicitly accommodates "honor," despite the fact that *ırz* normally means honor. Moreover, the term *hatīka* which stems from the same root means "dishonour".[25] See, B. Farès, "'Ird," in *Encyclopaedia of Islam, Second Edition*, P. Bearman, et al. (Brill Online, 2008).

of the couple, but most importantly the honor of Hasan Beşe, as the one responsible of protecting his wife's body and reputation in such a patriarchal society. All of these acts were defined by the term *hetk-i* ırz in the petition. Yet, the violation of the privacy of an Ottoman woman or man was not only a private violence, but also a public violence, meaning, the violation of the honor of the Ottoman state too. So, violation of the private was also a violation of the state's monopoly over violence as the sole authority to interfere and destroy the privacy of its subjects' bodies. Thus, these outlaws by interfering in the privacy of the Ottoman subjects, of which the most innate format was sexual violence, challenged the monopoly of state over violence and thus violated the state honor as well.

I argue that this intensive association of honor and sexuality through the usage of the term *hetk-i ırz* highlighted in the communications between the Imperial Council and Ottoman subjects in the petitionary documents points to the seeds of a change in moral attitude and the regulation of morals in the eighteenth century. While, by the nineteenth century, such a regulation was accentuated more in governmental thinking and the technologies of the modern state, as will be discussed in the following section, its roots were based in the relationship of the Ottoman imperial power and its subjects in the eighteenth century. Through the claim of "protecting (the) honor" and eager discourse against the ones who threatened the honor of its subjects, the imperial power usurped both the existing powers such as that of community and newly emerging provincial powers that the central state preferred to define as "bandits" or "outlaws", and wanted to assert its control over moral order in the society.

Tanzimat Reforms –"Life, Honor and Property"

The increasing emphasis on honor in the legal discourse utilized especially in the conversation between the central government and the Ottoman subjects that can be observed

in legal practice of petitioning in the eighteenth century actually enabled the imperial power to categorize and punish sexual offences more effectively on the principle of *ta'zir* (discretionary punishment) through the politico-administrative jurisdiction of the government. By creating its own terminology such as "violation of honor" (*hetk-i ırz*) and "indecent act" (*fi'l-i şeni'*), politico-legal praxis created a way to avoid the stringest *shari'a* rules on fornication and adultery, and regulate the public order on moral terms on its own discretion. This was not in fact alien to the idea of the "Circle of Justice" that legitimized the relationship between the government and its subjects in the classical Ottoman politico-legal theory: the sovereign was responsible of the well-being of his subjects by preventing oppression and injustice in return of the latter's consent and support (in the form of taxation) for the government. The circle has been preserved by the political and material support of the subjects to the government who provided honor and prosperity to them in return. In this circular notion of justice, honor was the touchstone for the legitimacy of power.

As we come to the legislative codifications of the nineteenth century, we see first of all, that the Tanzimat Edict of 1839 codified this new relationship between the government and the subjects on the basis of the protection of "life, honor and property". Furthermore, we frequently come across the terms "violation of honor" (*hetk-i ırz*) and "indecent act" (*fi'l-i şeni'*) utilized as regular and mainstream terminology. Although the Criminal Code of 1851 (*Kanun-ı Cedid*) contained few criminal offenses and used the term *hetk-i namus* only once,[26] *fi'l-i şeni'* and *hetk-i ırz* became the usual and most-frequently used terms, replacing *zina* and diversifying sexual crimes in the Criminal Code of 1858. The usage of these two terms in this Code gives us more clues about their meanings in the previous centuries as well; *hetk-i ırz* was used as an umbrella heading under which different types of *fi'l-i şeni'* offenses such as

[26] A. Akgündüz, *Mukayeseli İslam ve Osmanlı Hukuku Külliyatı* (Diyarbakır 1986). p. 825.

adultery, defloration, rape, sodomy and molestation were put together.[27] The emphasis on honor in conceptualizing sexual offenses and sexuality becomes more apparent when such clustering was codified. However, the usage of the term in the eighteenth century was no different; it referred to the violation of one's honor through various assaults on a person among which sexual assault was the most disgraceful.

Interestingly enough, the French Penal Code of 1810, from which the Ottoman Criminal Code of 1858 was adopted, used the French version of *hetk-i ırz* in the heading: "Attacks upon morals" ("Attentats aux moeurs").[28] Moreover, the same terminology seems to have been used in the Egyptian legal code as early as 1830.[29] Yet, it appears that the idea of "violation of honor" and "attacks upon morality" in Ottoman legal language precedes the era of legal reform both in the Ottoman Empire and in France.[30] Therefore, just as the old *kanunname*s were codifications of an amalgam of customary law and *shari'a*, the criminal codes of the nineteenth century can be read as a codification and institutionalization of Ottoman legal custom and terminology which was already in use during the eighteenth century and even before—albeit influenced in the nineteenth century by foreign practices, too.

Furthermore, the use of a language which was not directly borrowed from Islamic jurisprudence and the appearance of this terminology in nineteenth century codes can also be read as a continuation of a *kanun* tradition that created its own language and legal culture, though not necessarily contradictory to that of the *shari'a*. Concentrating on a well-preserved

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[27] Ibid. pp. 864-866.

[28] "Attentants aux Moeurs" in Livre III, Titre II, Section IV in *Code Pénal de 1810 (Texte intégral - État lors de sa promulgation en 1810)*, http://ledroitcriminel.free.fr/la_legislation_criminelle/anciens_textes/code_penal_de_1810.htm. For its English version, see *The Penal Code of France. Translated into English with Preliminary Dissertation and Notes.*, M. Evans trans. (London, 1819).

[29] Illegal defloration (*izalat bakarat bint*) was considered among the offenses against a person's honor (*hatk 'ird*). See, L. Kozma, "Musta'amala Minmudda. Stories of Defloration and Virginity," in *16th Middle East History and Theory Conference* (University of Chicago, 2001), p. 2; R. Peters, "Islamic and Secular Criminal Law in Nineteenth Century Egypt: The Role and Function of the Qadi," *Islamic Law and Society* 4 (1997): pp. 81-82.

[30] Despite the fact that it is beyond the limits of my dissertation, it would be interesting to explore whether there was any interaction between the early-modern legal cultures of the Ottomans and French which would have created such a common terminology as reflected in their codified penal codes of the nineteenth century.

notion of justice revolved around the idea of "Circle of Justice", instead of creating a binary between the *shari'a* and *kanun*, or *shari'a* and Tanzimat reforms, would enable us to understand the prevalence of honor as one of the most important legitimizing parameters of justice.

Tanzimat Edict of 1839 which initiated the bureaucratic and institutional reforms of the following decades was actually established upon the traditional concept of "just ruler", at least in the discursive level. It legitimized the changes and reforms through the idea of "Circle of Justice", by connecting justice, popular prosperity and the strength of the state. (Darling, p. 23):

> "Indeed there is nothing more precious in this world than life and honor. What man, however much his character may be against violence, can prevent himself from having recourse to it, and thereby injure the government and the country, if his life and honor are endangered? If, on the contrary, he enjoys perfect security, it is clear that he will not depart from ways of loyalty and all his actions will contribute to the welfare of the government and of the people.
> If there is an absence of security for property, everyone remains indifferent to his state and his community; no one interests himself in the prosperity of the country, absorbed as he is in his own troubles and worries. If, on the contrary, the individual feels complete security about his possessions then he will become preoccupied with his own affairs, which he will seek to expand, and his devotion and love for his state and his community will steadily grow and will undoubtedly spur him into becoming a useful member of society".

The circular relationship between justice, security, prosperity and loyalty was well-rooted in Gazali's treatise *Nasihat al-Muluk* (Counsel of Princes). The guaranteeing "perfect security for life, honor and property" in the Tanzimat Edict was also parallel to Gazali's formulation

of "the conservation of religion, life, reason, off-spring and property" as the ultimate concern of the *shari'a*.[31]

Yet, the new Tanzimat reforms were to be justified by shifting the ideological stress away from the preservation of the social order toward the prosperity that would result from good administration (Darling, p. 25). Tanzimat Edict stated that the new period would be only the beginning of "further beneficial and advantageous measures to make certain the execution of orders insuring the wellbeing of the people, rich and poor, whose happy state is a necessary precondition for the reinvigoration of religion and state and the prosperity of country and nation".[32]

Since the idea of "Circle of Justice" has promoted the politico-administrative jurisdiction of the government (*siyasa*) as the judicial enforcer, Tanzimat reforms were in conformity with this idea not only in the discursive field, but also in practice as well. The intensification and proliferation of state control over finances with an attempt to abolish tax farming, "exerting control directly over its subjects as individuals rather than dealing with groups through intermediaries" and the "reconsolidation of lawmaking and administration in official hands" by the Tanzimat reforms can be read as continuation of the efforts of the central government to exert control over public order in the 18th century. The strengthening of bureaucracy over *ulama* or the "triump of the 'men of pen' over magistrates" as Şerif Mardin formulated[33] and the establishment of new councils and courts for legislative and executive purposes were in fact the crystallization of the appellate system that has already derogated the independent power of the *kadı* with the rise of the authority of the governors' and the imperial councils in the 18th century. Even the transformation of the private and public law "into two

[31] B. Abu-Manneh, "The Islamic Roots of the Gülhane Rescript", *Die Welt des Islam* 34 (1994); p. 196.

[32] H. İnalcık, "Application of the Tanzimat and Its Social Effects", *Archivum Ottomanicum* 97 (5) (1973): p. 4, rpt in H. İnalcık, *The Ottoman Empire: Conquest, Organization and Economy* (London, 1978), p. XVI, 4.

[33] Ş. Mardin, "Heaven and the Administration of Things, Some Remarks on Law in the Tanzimat Era", in *Shared Histories of Modernity. China, India and the Ottoman Empire,* ed. H. İslamoğlu and P. Purdue (London; New York, 2009), p. 260.

increasingly distinct spheres"[34] was a gradual process which has already started before the Tanzimat and continued well until the establishment of the Turkish Republic.[35]

Yet, the predisposition of the Ottoman political power towards scrutinizing social order in the eighteenth century was not then comparable with the endeavors and means of the Ottoman state during the nineteenth century. The early-modern power of the eighteenth century was not only deprived of the "disciplines and technologies of power" over a "deployment of sexuality", but also of the desire to create "docile bodies" through a panoptical surveillance of the subjects in a Foucauldian sense.[36] For example, in this period punishments were not yet standardized, uniformed or quantified but rather left to the "discretion" of the law-enforcers. A correlation of the length of imprisonment with the severity of the crime, or the universalization of penalties in relation to the crimes, was established only by legal reforms of the nineteenth century. Whereas regulations concerning judicial and administrative authorities issued in 1838 still determined the punishment for "bribery" according to status (of the administrator), just as the principle of discretionary punishment did in the period here studied, the penal codes of 1840 and 1858 were constructed more in accordance with a discourse on "equality" and attempted to establish a universal principle of punishment based on the crime committed.[37] Furthermore, various councils, both at the imperial center and in the provinces, that were established throughout the nineteenth century worked within a more hierarchized and institutionalized appellate structure, compared to the loosely hierarchized appellate triangle of the *kadı* court, governor's council and the

[34] Ibid., p. 262.

[35] Khaled Fahmy makes a brilliant anaylsis of the simultaneous and blurred use of both kanun and sharia in these reformed courts and councils in Mehmed Ali's Egypt. See, K. Fahmy, "Shari'a and Siyasa", Unpublished paper.

[36] M. Foucault, *The History of Sexuality, Volume 1: An Introduction* (New York, 1978); *Discipline and Punish: The Birth of the Prison* (New York, 1995).

[37] A recent study by Cengiz Kırlı on the "invention" of corruption in the penal code of 1840 vividly demonstrates how a new legal discourse on "equality" was constructed on universalizing punishment based on the crime. Cengiz Kırlı, "Yolsuzluğun İcadı: 1840 Ceza Kanunu, İktidar ve Bürokrasi," *Tarih ve Toplum Yeni Yaklaşımlar* 4 (2006). For the penal codes of 1840 and 1858, see Akgündüz, *Mukayeseli İslam ve Osmanlı Hukuku Külliyatı*. pp. 808-876.

Imperial Council in the eighteenth century.[38] Within this highly hierarchized judicial system, the scope of the legal jurisdiction of the local judges and their courts became narrower in the nineteenth century than in the eighteenth century.[39]

However, one can still recognize a path in governmental mentality which proceeds from the eighteenth towards the nineteenth century even though it is neither an easy nor a linear one. One observes continuity especially in the development of new parameters between the government and its subjects on moral terms through a mutual claim on honor. Ruth Miller accurately defines the Tanzimat period as an "explicit intent of constructing a modern—understood in the early nineteenth century as liberal—imperial state". The 1839 Edict promised "a legally homogeneous Ottoman citizenry the right to life, honor, and property".[40] In this sense, Tanzimat Edict was a proto-constitution defining the relationship between the state and its subjects on the basis of "rights and duties" driving from abstract legal norms such as honor. In this political schema in which citizenship has been established upon the abstraction of "equality" and "rights", Miller argues, the rights were granted or acquired mostly through defining reproduction as one of the most basic attributes of citizenship and political duty of the citizens. In other words, the modern state puts sexuality and reproduction at the center of citizenship thanks to its biopolitical concerns of "protecting life" from a Foucauldian point of view. In this sense, coupling of "life, honor and property"—property as a prerequisite of being a liberal citizen—in the Tanzimat Edict, and emphasis put on the notion of "honor" as an umbrella unifying sexual violence and adultery under one heading in

[38] For these various councils established throughout the nineteenth century, see Sedat Bingöl, *Tanzimat Devrinde Osmanlı'da Yargı Reformu: (Nizamiye Mahkemelerinin Kuruluşu ve İşleyişi 1840-1876)* (Eskişehir, 2004), Musa Çadırcı, "Osmanlı İmparatorluğunda Eyalet ve Sancaklarda Meclislerin Oluşturulması," in *Yusuf Hikmet Bayur'a Armağan* (Ankara 1985), Ekrem Buğra Ekinci, *Osmanlı Mahkemeleri, Tanzimat ve Sonrası* (İstanbul, 2004).

[39] I. Agmon, *Family & Court: Legal Culture and Modernity in Late Ottoman Palestine* (Syracuse, NY, 2006), pp. 68-73, 235-38.

[40] R. Miller, "Rights, Reproduction, Sexuality, and Citizenship in the Ottoman Empire and Turkey," *Signs: Journal of Women in Culture and Society* 32 (2) (2007): pp. 355-6.

the Tanzimat legal codifications in the following decades, are not surprising according to this new biopolitical model of rights and citizenship.

One observes concrete outcomes of the abstraction of "honor" of the Tanzimat Edict in the Criminal Code of 1858. In the criminal code, "honor" acquires a gendered character as opposed to its universal liberal abstraction in the Tanzimat Edict. First of all, it is sexualized by its association with all sorts of sexual crimes ranging from sexual molestation to adultery under the heading of *hetk-i ırz* (violation of honor). Secondly, it is gendered through the differentiation of crime and punishment of the sexual assault and rape according to the victim's gender and age—against the adult men and women, "virgin girls" and boys—definition of the penalty for the procurement of "young" men and women, and finally the definition of the crime and punishment of adultery for husband and wife differently.[41]

In this construction, women were mostly defined as victims, that is to say, "passive" subjects whose rights to "honor" should be protected by the state.[42] Yet, they were also constituted as active subjects, albeit only under one circumstance; as adulterous wives. The new criminal code—different from its antecedents such as the old criminal code, *kanunname* of Süleyman in the 16th century— confined fornication within the boundaries of the "family" by giving the right of litigation (against the adulterous wife and her lover) only to the male guardian – either the husband or the father of the woman in the absence of a husband. In this sense, women became active subject-citizens through their sexuality only when they were defined as reproductive members of the family, albeit from a negative angle, as the ones their sexuality should be controlled by the collaboration of the two patriarchs – the state and the patriarch of the family. In other words, the honor of both the state and the family was to be protected through the regulation and control of women's sexuality. In this constitutional

[41] See Miller for a detailed analysis of the articles concerning adultery in both the Ottoman and French Code. Ibid., pp. 366-8.

[42] Miller defines this citizenship right as "negative" right, that is, the right not to be coerced. Ibid., p. 363, fn. 15.

agreement, the man negotiated his rights with and promised loyalty to the political sovereign in return for the guarantee of the sovereign protecting his honor in controlling the wife's sexuality. The woman also obtained her eir "rights" while being protected from sexual assault but at the same time allowing the duplication of the control over her sexuality through the state's hands.

In Lieu of Conclusion

Thinking about honor as a tool legitimizing inequality through the rhetoric of justice has enabled us to find cohesion in the governmental mentality of the Ottoman imperial power in its emphasis on protection of honor as the new parameter determining the relationship between the state and its subjects from the eighteenth century onwards. While the idea of justice disseminating from the sovereign to its subjects as a guarantee of prosperity and government was on the one hand present in the theory of "Circle of Justice" and *siyasa shar'iyya* as well as their application in the Ottoman legal practice in the early-modern period, one should also admit that technologies of the modern state and its disposition towards the population and family for protecting life and honor starting from the nineteenth century onwards were novel on the other hand.

This may give us clues about why the Ottomans adopted the French Penal Code of 1810 for a much later criminal legislation of 1858 while there was already an available theoretical and legislative framework for legitimizing state's intervention on sexuality on the basis of honor. Although the historical role of the notion of honor in the construction of subjection/subjectivity in French history has not been explored in this paper, the French code locating the family—with implicit reference to the nuclear family—instead of the community at the center of the definition of the illicit sex was novel for the Ottomans. It apparently fitted well into the liberal attempts of the Ottoman imperial power which aimed to create "Ottoman

subjects" on the basis of universal-yet-gendered definition of citizenship around the idea of protection of life, honor and property through the institution of family. While it remained outside the scope of the current paper, the fundamental question of how such an increasing emphasis on family and reproduction in the discourse of honor that legitimized more scrutiny and control over sexuality through codified legislations and the disciplinary institutions has actually affected people's daily experience of sexuality and gender dynamics in the society, should be investigated further.