International Journal of Middle East Studies (2022), **54**, 128–134
doi:10.1017/S0020743822000034

CAMBRIDGE
UNIVERSITY PRESS

ROUNDTABLE

Female Culpability for Fornication in Ottoman Law and Everyday Life

Başak Tuğ

Department of History, İstanbul Bilgi Üniversitesi, İstanbul, Turkey
Email: basak.tug@bilgi.edu.tr

Depiction of Bertrande, the wife of Martin Guerre, by Natalie Zemon Davis in her famous book *The Return of Martin Guerre* has been revolutionary in its attempt to recover the criminal agency of women in historical writing. Davis challenged the representation of women as "deceived" actors of history. Although the story of Martin Guerre has been retold many times, Bertrande has almost always been depicted as being fooled by Arnaud, the false husband; indeed the court that investigated the case decided to accept her testimony that she was "tricked" for more than three years. Despite being suspicious of adultery, the court excused her by considering "the weakness of her sex, easily deceived by the trickery and finesse of men," and thus mitigated female responsibility.[1] Yet, Davis read the same documents from a different perspective and asserted the possibility that Bertrande might have been "acquiescent" rather than "deceived" and may even have been an accomplice of Arnaud by preferring him, both sexually and socially, to Martin Guerre, her real husband who had abandoned her. In the end, the accused has not been Bertrande, but Natalie Zemon Davis, by a male historian, Robert Finlay, for creating a "proto-feminist of peasant culture" out of Bertrande.[2]

The situation with regard to the criminal culpability of women in Ottoman studies is not much different from the case of Bertrande. True, the legal agency of Ottoman women has become established in Ottoman studies since writing social and everyday-life history based on qadi (*kādı*) court records developed in the 1970s. Ronald Jennings's pioneering study on women's status in the early 17th-century Anatolian Kayseri challenged Orientalist assumptions about Muslim women by showing that Ottoman women actively sought their rights in property, inheritance, marriage, divorce, and child custody in the courts.[3] Both elite and non-elite women in the early modern period were involved in economic transactions, investments, and charitable endowments and negotiated their sexual and economic rights within marriages and after divorce.[4] Historians also observed that

[1] Natalie Zemon Davis, *The Return of Martin Guerre* (Cambridge, MA.: Harvard University Press, 1983), 110; Natalie Zemon Davis, "On the Lame," *American Historical Review* 93, no. 3 (1988): 594.

[2] Robert Finlay, "The Refashioning of Martin Guerre," *American Historical Review* 93, no. 3 (1988): 570.

[3] Ronald C. Jennings, "Women in Early 17th Century Ottoman Judicial Records: The Shari'a Court of Anatolian Kayseri," *Journal of Economic and Social History of the Orient* 18, no. 1 (1975): 53–114.

[4] For instance, see Judith E. Tucker, *Women in Nineteenth-Century Egypt* (Cambridge, UK: Cambridge University Press, 1985); Leslie Peirce, "'She is Trouble . . . and I Will Divorce Her': Orality, Honor, and Representation in the Ottoman Court of 'Aintab," in *Women in the Medieval Islamic World: Power, Patronage and Piety*, ed. Gavin R. G. Hambly (New York: St. Martin's Press, 1998), 269–300; Margaret Lee Meriwether, *The Kin Who Count: Family and Society in Ottoman Aleppo, 1770–1840* (Austin, TX: University of Texas Press, 1999); Margaret L. Meriwether and Judith E. Tucker, *Woman and Gender in the Modern Middle East* (Boulder, CO: Westview Press, 1999); Leslie Peirce, *Morality Tales: Law and Gender in the Ottoman Court of Aintab* (Berkeley, CA: University of California Press, 2003);

many Muslim and non-Muslim female subjects of the empire submitted or sent petitions to the imperial council in Istanbul to seek solutions to problems that they could not solve locally or to manipulate the decisions given by the local agents and administrators.[5]

On the other hand, when it comes to the criminal culpability of women, the authors of Ottoman legal documents as well as Ottoman scholars often shy away from that possibility. Although Islamic law attributed agency and subjectivity to women in the sexual domain by allowing them to have sexual desire, the right to refuse unwanted sexual intercourse, and birth control within marriage, it considered all sorts of sexual contact outside the marriage bond as *zinā'*, that is, unlawful sexual intercourse. Furthermore, it assigned to both sexes, but mostly to men, the responsibility to prevent such instances by prescribing strict preventive regulations such as sexual segregation and dress codes.[6] Especially in Islamic ethical literature (*akhlāq*) and somewhat in the traditional legal sources, the concupiscent faculty of one's soul (*nafs*) associated with bodily functions has been attributed to women, whereas the rational and irascible faculties have been assigned to men. Most importantly, moderating and regulating these three faculties and dispensing justice was a male responsibility according to classical Islamic ethics.[7] Therefore, it was the man's responsibility to keep woman's uncontrollable sexual desire under control through his rational faculty by moderating this desire within marriage. Such deeply rooted patriarchal inequality embedded in the understanding of the human soul in Islamic ethics might be one of the reasons Islamic law shied away from holding women responsible for sexual crimes, including adultery.

Islamic law defined *zinā'* among the *ḥadd* (pl. *ḥudūd*) crimes, that is, fixed crimes, the punishment for which is a right of God and therefore cannot be changed. Although the penalty of *zinā'* is either flogging (for unmarried offenders) or death by stoning (for the married ones), there are strict procedures of evidence for prosecuting someone for *zinā'*. According to the Hanafi school of jurisprudence, which the Ottomans officially applied, the conviction of the crime of *zinā'* required four male witnesses to the intercourse or the confession of the offender four times. Considering that false accusation (*kadhf*) of *zinā'* also was punished, it seems that Islamic jurisprudence abstained from punishing fornication and adultery, leaving it to the personal sphere, that is, the person's conscience or private prosecution outside legal borders. Even though the Ottoman sultans promulgated lawbooks (*qānūn*) that covered criminal jurisdiction, including sexual crimes, and loosened the strict evidential conditions of shari'a for the conviction of fornication, the ambiguities concerning the consensual character of the act remained. In other words, the *qānūn*s were very conscious and careful about nonconsensual sexual acts as threats to public order, and so diversified and punished rape, abduction, sexual molestation, and other sexual assaults more harshly than (consensual) fornication and adultery. Yet, fornication and adultery were not elaborated and remained as they were in Islamic jurisprudence. Thus, Ottoman political jurisdiction seems not to have wanted to exercise discretion on issues of public order in adultery and fornication in a way that overrode jurisprudential authorities.

Looking at the law in practice in the Ottoman court records, clarifying the liminal sexual or marital status of women seems to have been much more important than the adultery of a

and Judith Tucker, "'And God Knows Best': The Fatwa as a Source for the History of Gender in the Arab World," in *Beyond the Exotic: Women's Histories in Islamic Societies*, ed. Amira El Azhary Sonbol (Syracuse, NY: Syracuse University Press, 2005), 165–79.

[5] Suraiya Faroqhi, "Crime, Women, and Wealth in the Eighteenth-Century Anatolian Countryside," in *Women in the Ottoman Empire: Middle Eastern Women in the Early Modern Era*, ed. Madeline C. Zilfi (Leiden: Brill, 1997), 6–27; Fariba Zarinebaf-Shahr, "Ottoman Women and the Tradition of Seeking Justice in the Eighteenth Century," in *Women in the Ottoman Empire: Middle Eastern Women in the Early Modern Era*, ed. Madeline C. Zilfi (Leiden: Brill, 1997), 253–63; Başak Tuğ, *Politics of Honor in Ottoman Anatolia: Sexual Violence and Socio-Legal Surveillance in the Eighteenth Century* (Leiden: Brill, 2017).

[6] Judith E. Tucker, *Women, Family, and Gender in Islamic Law* (New York: Cambridge University Press, 2008), 184.

[7] Zahra Ayubi, *Gendered Morality: Classical Islamic Ethics of the Self, Family, and Society* (New York: Columbia University Press, 2019), 76–103.

https://doi.org/10.1017/S0020743822000034 Published online by Cambridge University Press

wife, according to the judicial authorities. Jurists' "overriding concern about the problems of offspring of uncertain lineage" apparently enabled them to overlook what was happening within the family since any child born to the wife within marriage was the legitimate heir of the husband, even if he denied the child.[8] Therefore, women who remained in the liminal space of marriage and divorce were more of a legal issue than the adultery cases for the Ottoman judicial authorities. Abandoned or deserted wives like the French peasant Bertrande were subject to a series of court trials. In the Ottoman Empire, constant wars, trade, and business dragged men from their homes, and some left their wives without any financial resources. In such cases, women applied to the courts for financial support, alimony, or divorce. Yet, those who applied for divorce from their absentee husbands in the Ottoman Anatolian towns of Ankara and Bursa in the 18th century often complained of "intervention and assault" by their neighbors when they wanted to marry another man. As a result, they petitioned the courts to stop neighbors' intervention in their second marriage.[9]

Even though the neighbors' intervention might be a subtext or a rhetorical strategy for getting a divorce from their absentee husbands (asking for the annulment of marriage by the qadi's initiative), these women's complaints might not have been in vain. There is a strong possibility that the community, including the family of the absentee husband, was uncomfortable with the "adulterous" status of the woman who embarked upon an intimate connection with another man while still married to her absentee husband. Whether an actual relationship, that is, the adultery, had happened or not, the community would have wanted to put an end to her liminal status by pressuring her to go to the court to ask for the annulment of her previous marriage before marrying another man. Furthermore, becoming free from the first marriage and having this registered in the court also was advantageous for the deserted wife to prevent further complications in the case of an absentee husband's return to the town after a while, as happened with the return of Martin Guerre at the end of the trial of Arnaud. There is evidence in the court records that, in the absence of a divorce document, a woman had to prove through the testimony of the others that she had obtained a "women-initiated divorce" (*khulʿ*) from her ex-husband before marrying the other.[10] Yet, although a woman's adultery was in fact a real problem for the community, family, and absentee husband, we do not encounter any petition by either the community or the ex-husband for the "punishment" of the wife for adultery. Rather, what we see in the Ottoman Anatolian courts of the 18th century is plenty of marriage annulments initiated by women themselves. In this sense, early modern Ottoman legal institutions seem to be more interested in the legal and marital status of the women than in their criminal agency due to overwhelming concern with lineage. However, the absence of regular adultery complaints or cases does not necessarily mean that adultery was not a moral problem for society. Rather, it indicates that the state promoted private methods of dealing with the issue. Ottoman court records also show that many criminal cases, including sexual disputes, were resolved outside the court, either through mutual agreement (*ṣulḥ*) or private prosecution.[11]

The enigma of the cases that find their way into the court records in the early modern period is that there are almost no references about what legal criteria the qadi gave for his decision. Even though there were procedural requirements for the adjudication process according to shariʿa, Islamic judges were not obliged to explain the reasoning behind their verdicts, for example, by referring to certain articles of the imperial law books or to the sections of the well-known Islamic jurisprudential manuals on crime and punishment.

[8] Judith E. Tucker, *In the House of the Law: Gender and Islamic Law in Ottoman Syria and Palestine* (Berkeley, CA: University of California Press, 1998), 167–68.

[9] Başak Tuğ, "Ottoman Women as Legal and Marital Subjects," in *The Ottoman World*, ed. Christine Woodhead (London: Routledge, 2012), 369–74.

[10] Ankara Court Records (hereafter ACR) 122: 90; ACR 121: 34; ACR 121: 372.

[11] Tuğ, *Politics of Honor*, 14, 187–88.

https://doi.org/10.1017/S0020743822000034 Published online by Cambridge University Press

Yet, with the introduction of legal reforms by the 1840s, in the Tanzimat period, newly introduced criminal codes aimed to standardize the procedures of adjudication and investigation as well as the penalties. Even though the shariʿa principles and courts remained intact, new provincial councils and appellate courts were established for reviewing the cases held in the local courts. Thanks to this effort at standardization, researchers are able to see how and why a particular decision was reached with reference to which criminal code the judge has given for his decision, as well as the route the documents traveled between different courts and councils.

Thus, the Tanzimat criminal codes and the archival records of the courts and the appellate councils of the 19th century reveal what had been hidden in the early modern court records. One of the most important facts exposed about sexual crimes was that adultery was generally dealt with privately within the family and community. The state intervened only when the male guardian asked for its involvement. The criminal legislation concerning "consensual" sexual intercourse has often forwarded the adulterous woman to her husband or male guardian without denoting any specific punishment. The only exception was the crime of adultery, which was added to the criminal code in 1860. The criminal code, however, only penalized an adulterous woman with imprisonment when her husband or the male guardian (in the absence of her husband) advanced litigation against her. Otherwise, the 19th-century criminal codes were mainly concerned with nonconsensual or forced sexual acts, such as abduction, rape, and sexual assault and, to a lesser extent, public outrage such as "perverting and deceiving young persons" and "behaving contrary to public decency" (Article 201).[12] Although prostitution (*fuḥşiyyāt*) is mentioned in the 1858 criminal code, perpetrators of perverting and deceiving (young people) were the ones who were penalized. Otherwise, the fact that only those who committed fornication "publicly contrary to modesty and sense of shame" (Article 202) were punishable indicates that adult prostitution (in private) was not defined as a crime in the 19th-century Ottoman criminal codes.[13] Therefore we hardly see "adulterous women" as a legal category in the 19th-century Ottoman criminal codifications.

The articles in the 1858 criminal code on abducting women and girls and deflowering a girl with seduction and pretext of marriage implicitly introduced the idea of consent to sexual intercourse by women and girls. However the codes were still silent concerning female criminal liability. First, even though abduction was penalized, the penalty was reduced if the abductor married the girl or, conversely, increased if the victim was a married woman. Therefore, what mattered for the law was not the consent but the marital status of the victim in the relationship with the abductor. Second, although the man who deceived and deflowered a girl with the promise of marriage was penalized, the girl was still treated as a victim and not penalized for fornication. Similarly, there was no mention of punishment for the runaway women who consented to the "abduction" for which men were penalized. This legal perception is confirmed by archival documentation. For example, when Ibrahim and Fatima ran away together to Kocaeli and were caught without travel licenses, only Ibrahim was imprisoned with reference to the relevant article in the criminal code concerning abduction of a girl.[14] When Fatima confessed that she was officially married to Mehmed back in Eskişehir, she was temporarily held in Kocaeli and then sent back to Eskişehir, her hometown. There was a mention of neither her crime as a runaway wife nor what would happen after she was sent back to her husband.

Even though this document is silent about Fatima's criminal liability, there is actually a very clear archival clue to what happened to girls who ran away with their lovers. In 1862, the Supreme Council of Sivas wrote to the Supreme Council in Istanbul (Meclis-i Vala) about

[12] John A. Strachey Bucknill and Haip Apisoghom S. Utidjian, *The Imperial Ottoman Penal Code: A Translation from the Turkish Text*, ed. Humphrey Milford (London: Oxford University Press, 1913), 152.

[13] Ibid., 156.

[14] Başbakanlık Osmanlı Arşivi (hereafter BOA), MVL. 1/9.

https://doi.org/10.1017/S0020743822000034 Published online by Cambridge University Press

the problem of runaway girls.[15] The document raised a concern about the lack of a clause in the criminal code relating to women who escaped with their lovers willingly. It listed all the relevant articles of the penal code of 1858 on abduction and forced illicit sex and the penalties inflicted on the abductor, stating that there was no mention of those (girls) "who dare to make such nefarious deed with their consent." Then, it explained that certain virgin girls who were "enticed" by young men confessed that they voluntarily escaped to another town, lost their virginity, and wanted to marry these men. Therefore, the report stated, the crime of (voluntary) fornication had been established. Yet, the report continued, even if the couple wanted to marry each other, these girls often had other fiancés at home, and so their families suffered from such "indecent acts." After a long warning that such elopements were already on the rise and would further increase if such deeds were not punished, the council of Sivas asked the supreme council in Istanbul to approve the execution of "not marrying these virgin girls, especially the ones who have fiancés, to their lovers, but sending them back to their male guardians." This penalty was similar to what happened to Fatima. Calling this option an "execution" shows that this was a de facto punishment for the fornicating woman even if it was not defined as a de jure penalty in the criminal code. Whereas the best scenario would be marrying the woman to her fiancé, the worst penalty would be the execution of a private punishment, such as murdering her in the name of the honor of the family.

The archival documents reveal that honor killing was not a rare phenomenon in Ottoman society. Even more striking, the 1858 criminal code codified and legitimized honor killing by excusing "a person killing his wife or one of his other mahrems [family members with whom marriage would be considered illegal] and her partner while committing fornication" (Article 188) and pardoning "murder for defense of self and honor" (Article 186).[16] According to these articles, a man—not necessarily the husband but any man in the family—who killed a woman (and her partner) for committing fornication or adultery in the name of defending honor would be pardoned or excused according to the law. In this way the criminal code paved the way for and even encouraged "private justice" in the case of the adultery of the woman. Yet, on the other hand, it did not openly acknowledge the criminal culpability of a woman before legal authorities and instead again forwarded her to the male guardian for punishment. As an example, there is a supreme court ruling that excused a father who murdered his daughter and her lover caught during fornication.[17] Even though the document is from 1856, two years prior to the 1858 criminal code that codified honor killing, it reveals that honor killing was already legitimized in the Ottoman legal practice. The supreme council legitimized its decision by getting a supporting fatwa from the şeyhülislam (the chief jurisconsult) in Istanbul.

The murder of an adulterous woman by a male member of the family other than the husband and father, by family decision, also was common in Ottoman society. For example, Emine was killed by her son after the latter caught her and her lover fornicating in Maraş in 1845.[18] Ismaʿil, Emine's son, did not kill them immediately but informed his father and uncle first. Then, the three of them went back home and Ismaʿil killed both his mother and her lover on the spot. When Ismaʿil and his father were interrogated, they confessed that "they restored their honor according to their tribal customs." After summarizing the case, the governor of Maraş asked the supreme council in Istanbul what to do with Ismaʿil, since none of the deceased Serkis' heirs made a complaint to his court. The response of the supreme council does little to clarify the case, but does reveal a great deal about the perception of honor killing by the state authorities. The supreme council asked for a court hearing to decide whether the crime of murder could be established if and when

[15] BOA, MVL. 633/67.
[16] Bucknill and Utidjian, *Imperial Ottoman Penal Code*, 140–41.
[17] BOA, A.MKT.UM. 259/88.
[18] BOA, A.MKT.MVL. 1/76.

https://doi.org/10.1017/S0020743822000034 Published online by Cambridge University Press

the heirs of Serkis had made a complaint against the perpetrators. The advice revealed that the state authorities had no reservation concerning the murder of woman since it was an honor killing. As for the murder of her partner, the council advised merely the application of the available shari'a principle of retaliation in case of complaint. The fact that this document is from 1848, ten years before the codification of honor killing in the 1858 criminal code, confirms that honor killing was already legitimized and pardoned in Ottoman legal practice by the time of codification.

The "adulterous woman" finally appears as a legal category in the Tanzimat criminal codes with an amendment made to the 1858 criminal code in 1860 (Article 201).[19] According to this article, "the right to proceed against a woman for honor belongs absolutely to her husband or to her guardian if she has not got a husband." Therefore, if her husband or her male guardian sued her, "the woman whose having committed the indecent act of adultery" would be punished with imprisonment for between three months and two years. There also was a reminder that "the husband can defeat the effect of this punishment by consenting to take his wife back."[20] As for the other articles on runaway women and honor killing in the 1858 criminal code, this clause forwarded the adulterous woman once more to the family and the male guardian. In other words, if the husband or the father did not want to accept or kill the adulterous woman, he could apply to the legal authorities for her punishment. The law excused the adultery of women if the husband or the male guardian agreed to this, yet at the same time gave him the permission to execute her punishment privately. Only after all of these options were exhausted would the state intervene, if the husband asked the legal authorities to do so.

There is in fact little legal evidence of women being imprisoned for adultery. For example, in an honor killing case in 1865, Andreo, who caught his wife Katriya and her partner Nikola during fornication and killed Nikola on the spot, was sentenced to three months of imprisonment. Sentencing Andreo for such a short period of time was legitimized by the excuse of the murder being an honor killing, with a clear reference to the relevant clause in the 1858 criminal code that reduced the punishment of the perpetrator.[21] His wife Katriya also was sentenced to six months in prison, since Nikola did not ask for her pardon. This decision was rendered with a direct reference to the adultery clause of the criminal code. In another case we see that unmarried Samatya and Ankil were sentenced to six months of imprisonment each, as a result of the litigation of the girl's father.[22] Finally, there is the case of a man in Kastamonu who litigated against his wife and his brother, who he suspected for his wife's pregnancy while he was away for military service. In this instance the supreme council in Istanbul asked the governor of Kastamonu to investigate the case to make sure that the husband would not take his wife back, despite the fact that his brother and wife confessed adultery.[23]

Apart from these direct references to the adulterous women, the language of the legal documents generally reflects a conscious intention to not hold women responsible for fornication, even if there are indications of mutual consent. Like Bertrande, most of the time women were treated as seduced, deceived or, at best, "diverted," even if there were clear indications of consent. The conscious intention of legal authorities to belittle female responsibility in fornication is obvious in the case of Asiye Hatun.[24] Miço procured Asiye Hatun for a client, Istefan, in his house in Bolu, but they were raided by the police while sharing entertainment and drinking alcohol. The local council of Bolu asked for the imprisonment of Miço with reference to the article of the 1858 criminal code on behaving contrary to public

[19] Bucknill and Utidjian, *Imperial Ottoman Penal Code*, 152–56.
[20] Ibid., 153.
[21] BOA, MVL. 805/13.
[22] BOA, A.}MKT.MVL. 125/46.
[23] BOA, A.}MKT.UM. 554/99.
[24] BOA, MVL. 699/55.

https://doi.org/10.1017/S0020743822000034 Published online by Cambridge University Press

decency by deceiving and enticing young women and men for prostitution (Article 201). Although Istefan asked to be punished for adultery, the court did not ask for any penalty for Asiye Hatun, even as her adulterer status was established when Istefan was declared to be an adulterer. When the supreme court in Istanbul received the report from the local council of Bolu, it might have realized the implicit contradiction of punishing Istefan for adultery when not asking for any punishment for Asiye Hatun for the very same act. As a result, it converted the crime of both Miço and Istefan to a "forced indecent act" and sentenced both to prison terms, three years for Miço and three months for Istefan.

Not holding women like Asiye Hatun legally responsible for a sexual crime can be seen as positive discrimination toward women. Asiye Hatun was apparently one of the women who did not have strong family ties or a male guardian such as a husband or father; she seems to have made her living from prostitution. Yet runaway girls and adulterous women were generally sent back to their male guardians without any court sentence. However, knowing that private justice such as honor killing or marrying a girl to her rapist were all tolerated by 19th-century Ottoman legislation and practice disallows one from interpreting the indifference of legal authorities toward female criminal culpability in illicit sex as a favor. On the contrary, it shows how the state relied on the "executive" power of the family on women. When one considers that illicit sex and *zinā'* of women were considered "unjust provocation" and an excuse for honor killing until 2005 under the Turkish Penal Code, and even to the current day in legal practice, it becomes obvious who the state has favored in reality and what the legal indifference toward female criminal culpability in illicit sex has meant for women.

Cite this article: Başak Tuğ (2022). "Female Culpability for Fornication in Ottoman Law and Everyday Life." *International Journal of Middle East Studies* **54**, 128–134. https://doi.org/10.1017/S0020743822000034