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DEPARTMENT OF HUMANITIES AND SOCIAL SCIENCES
MA PROGRAM IN HUMANITIES AND SOCIAL SCIENCES

MASTER'S THESIS

THE RAPE CASES IN THE *MECLIS-I VALA* (1858-1868): LEGAL IDENTIFICATION AND TRIAL PROCESS

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ÖZ

MECLİS-İ VALA'DA TECAVÜZ DAVALARI (1858-1868): HUKUKİ TANIMLAMA VE YARGILAMA SÜRECİ

Bir cinsel suç türü olarak tecavüz, genellikle kamu düzeni ve ahlakına karşı bir tehdit olarak görülmüştür. Her toplum, tecavüzün önlenmesi ve cezalandırılması için kendi kanunlarını yapmış ve uygulamıştır. Osmanlı otoriteleri de tecavüzü sadece bireye karşı işlenen bir suç olarak değil aynı zamanda İmparatorluğa karşı işlenen bir suç olarak değerlendirmiş ve gerekli hukuki çalışmaları yürütmüştür. Ancak, Osmanlı hukuk literatüründe tecavüzün ne olduğunu doğru bir şekilde anlamak için; öncelikle, İslam hukukunun tecavüzü nasıl tanımlandığı ve İslam hukukunun Osmanlı hukuk geleneğine etkisi dikkatlice analiz edilmelidir. Bu analiz, Tanzimat Fermanı (1839) sonrasında Osmanlı hukuk kaynaklarında tecavüzün tanımlanması hususundaki devamlılığı ya da farklılığı tespit etme imkânı sağlamaktadır. Özellikle; Tanzimat sonrası, Osmanlı hukuk anlayışı, kanunlaşma hareketi sonucunda, daha nesnel ve standart bir hal almış ve hukuk sistemindeki yenilikler, tecavüzün tanımlanmasına ve cezasının belirlenmesine ciddi bir şekilde etki etmiştir. Nitekim, 1838-1876 yılları arasında en yetkili hukuk kurumu olarak hizmet etmiş olan Meclis-i Vala'ya yansıyan tecavüz vakalarına dair, tecavüz suçunun mahkeme sürecini aydınlatmak ve mahkemenin tecavüz suçunu nasıl ele aldığını analiz etmek için, önemli veriler içermektedir. Ayrıca, 1858 Ceza Kanunu'ndan sonra, cinsel suçlar tek bir başlık altında toplamış ve tecavüz için verilecek olan cezalar, teşhir, kürek, hapis ve tazminat olarak belirlenmiştir. Şöyle ki; Meclis-i Vala'daki tecavüz dava kayıtları, 1858 Ceza Kanunu'nda homoseksüel ve heteroseksüel tecavüz suçları ile ilgili maddeleri nasıl ele aldığını ve yargılama sürecinin nasıl yansıtıldığını analiz etmek için büyük bir fırsat sağlamaktadır. Nitekim, bu araştırmanın amacı, öncelikle; Osmanlı ceza kanunlarında ve mahkeme kayıtlarında tecavüzü tanımlamak için kullanılan terimleri analiz ederek terminolojik değişimi göstermektir. Daha sonra, 19.yy'da, Meclis-i Vala'da görülen tecavüz davalarının yargılanma sürecini 1858 Ceza Kanunu ve 1858-1868 yılları arasındaki Meclis-i Vala kayıtlarını kullanarak hukuki devamlılığı veya değişikliği ortaya çıkarmaktır.

Anahtar kelimeler: Osmanlı hukuku, Meclis-i Vala, zina, tecavüz (fi'l-i şenî'), eşcinsellik (fi'l-i livata), cebir, kasıt, mahremiyet, kürek cezası, pranga cezası, teşhir

ABSTRACT

THE RAPE CASES IN THE *MECLIS-I VALA* (1858-1868): LEGAL IDENTIFICATION AND TRIAL PROCESS

YASEMİN ÇELİK

June, 2020

Rape, as a kind of sex crime, is generally seen as a threat against public order and morality. Each society has made its laws to prevent and punish the crime and has implied them. Ottomans also evaluated rape as a crime that was committed against not only an individual but also the Empire and thus executed necessary legal works. However, to understand what rape is truly in the Ottoman legal literature, primarily how Islamic law identifies rape and the influence of Islamic law on the Ottoman legal tradition must be analyzed. This analysis provides an opportunity to detect the continuity and difference in the Ottoman legal sources after the *Tanzimat* Edict (1839). Particularly, the Ottoman legal understanding became more objective and standard as a result of the codification movement after the *Tanzimat* and these innovations in the legal system seriously affected the identification of rape and determination of punishment for rape offense. Indeed, the *Meclis-i Vala*, which served as the most authorized legal institution between 1838-1876, includes significant data about the rape cases transmitted to the *Meclis-i Vala* to enlighten the trial process of rape offense and to analyze how the court dealt with rape offense. Besides, after the enactment of the 1858 Penal Law, sex crimes were collected under only one title and the punishments for rape were determined as exposure (*teşhir*), hard labor (*kürek*), imprisonment, and fine. Thus, the rape case records in the *Meclis-i Vala* provide a great chance to analyze how the court dealt with the articles of the penal law related to heterosexual and homosexual rape offenses, and the trial process was reflected. The purpose of this study is initially to show the terminological change by analyzing the terms to identify rape in the Ottoman penal laws. Then, it aims to bring out the legal continuity or change in the rape cases held in the *Meclis-i Vala* in the 19th century by using the 1858 Penal Law and the registrations of the *Meclis-i Vala* between 1858-1868.

Keywords: Ottoman law, the *Meclis-i Vala* (the Supreme Court), adultery (*zina*), rape (*fi'l-i şenî'*), sodomy (*fi'l-i livata*), violation of honor (*hetk-i ırz*), force (*cebr*), intendment (*qasd*), privacy (*mahremiyet*), hard labor (*kürek*), shackle (*pranga*), exposure (*teşhir*)

ACKNOWLEDGMENT

This thesis has significantly evolved in consequence of my affection for the study of Leslie P. PEIRCE, Morality Tales. Therefore, I firstly would like to thank Leslie P. PEIRCE for her inspirational study. This thesis is my dream work; therefore, it means a lot to me. It was a long and hard period to complete this thesis properly. This was also an opportunity to ruin biases. For the first time, when I came up with this subject, which I was pretty enthusiastic to conduct such a momentous issue about women historiography in the Ottoman Empire, I faced some problems which were mostly about my sex and belief. They were considered obstacles in fear that I could not produce an objective and righteous study. Therefore, I own great appreciation to all the people contributing to my academic and private life in any way.

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İstanbul; June, 2020 Yasemin ÇELİK

LIST OF ABBREVIATIONS

BOA	: Türkiye Cumhuriyeti Cumhurbaşkanlığı Devlet Arşivleri Başkanlığı Osmanlı Arşivi
MVL	: Meclis-i Vala
A.} MKT.MVL	: Sadaret Meclis-i Vala Evrakı
A.} MKT.UM	: Sadaret Umum Vilayat Evrakı
T. V.	: Takvim-i Vekayi
AE.SMHMD.III	: Ali Emiri Mehmed III
A. {DVN.ŞKT	: Bab-ı Asafi Şikayet Kalemi
Ed.	: Edited
Trans.	: Translated
Abb.	: Abbreviated
Prep.	: Prepared
()	: Symbolized the words that cannot be read in the primary sources

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1. INTRODUCTION

1.1. The Importance and Limitation of the Subject

This thesis focuses on the identification and trial process of rape in the Ottoman legal sources which are the 1858 Penal Law and the *Meclis-i Vala* registrations between 1858-1868. I also study legal terms that defined sex crimes in Ottoman legal language during the 19th century. The study aims to shed light on the legal continuity or change in the identification and trial process of rape through the homosexual and heterosexual rape cases heard in the *Meclis-i Vala* between 1858 and 1868.

Rape has always been a public problem for societies and hence states throughout history. Islamic legal tradition approaches any sexual intercourse without having a marriage contract and concubinage as *zina* (adultery). Any type of sex crime is considered under this categorization; therefore, rape is evaluated as a variant of *zina* according to this approach. The Ottoman Empire also internalized the same tradition until the *kanunname* (lawbook) of Selim I but it was not a clear separation legally. Even if rape was tried to be separated from *zina* in terms of punishment and crime scope, *zina* was still a legal phenomenon to identify rape. In other words, rape has generally been perceived as a kind of sex crime that threatens personal rights, public order, and morality. Rape offense has been one of the main concerns of codification movements to preserve public order and morality and to provide justice. In addition to this, sexuality and crimes about sexuality can be seen as a chance to determine gender through law. Roscoe Pound defined law as ‘‘social control through the systematic application of the force of politically organized society.’’[1] For Pound, whilst the law can be produced via the function of the court in the legal system, Alfred Radcliffe-Brown points out the role of sanction during the process of producing law.[2]

[1] For further information about what law is according to Pound’s argument. Roscoe Pound, **Social Control Through Law**, (New Brunswick: Transaction Publishers, 1997).

[2] Alfred R. Radcliffe-Brown, **The Andaman Islanders**, (Cambridge: Cambridge University Press,1933), 202; Alfred.R. Radcliffe-Brown, **Structure and Function in Primitive Society**, (New York: The Free Press, 1965), 212.

Sex crimes like rape have always been in the radar of state power to determine and preserve social identity and public morality via legal sanctions. It might not be wrong to state that the female body has been an outstanding object for particularly, legal and political discussions. Gülhan Balsoy argued the perception of the female body in terms of demographic and political developments in the Ottoman Empire. According to Balsoy, woman and her body became the major focus-point of the Empire's population policy during the 19th century. She got this conclusion by analyzing the abortion, miscarriage, and fertility policies, and legal sanctions to prevent the expansion of these.[3] Rape issue is also a good potentiality to understand how the Ottoman legal tradition approached and treated sex crimes during the 19th century. Undoubtedly, the Edict significantly affected the process of rape identification throughout the codification movements within the legal system. Thence, this situation provides a discussable environment to illustrate the differences or similarities of the identification of rape in the legal sources before and after the *Tanzimat* Edict. It also ensures concrete evidence to analyze how the theoretical information was evaluated in the court registrations.

In this condition, there is a question that must be asked: How the *Tanzimat* Edict affected the process of rape identification and trial process? Ottoman modernization began in the last years of Sultan Mahmud II (1808-1839) and the range of modernization movement expanded both in the reigns of Sultan Abdülmecit (1839-1861) and Sultan Abdülaziz (1861-1876). Those reformations were held not only in the central government but also in the local government to fix the dissolution and corruption within the Empire. Besides, some of the reformations were made to redeem the demands of the European powers such as England, France, and Russia. All these reformative movements within the Empire got this process to be called the *Tanzimat* Era (1839-1876).[4] According to Caroline Finkel, each reformation movement in the Ottoman Empire drew great attention from opposite sides in the Empire. Even if the content of the Edict seemed completely internal matters, the Edict brought domestic

[3] Gülhan Erkaya Balsoy, **Kahraman Doktor İhtiyar Acuzeye Karşı: Geç Osmanlı Doğum Politikaları**, (İstanbul: Can Yayınları, 2000), 145-170.
[4] Stanford Shaw, Ezel Kural, **History of the Ottoman Empire and Modern Turkey**, vol. 2, (Cambridge: Cambridge University Press, 1977), 55-75.

issues onto the international scope. [5] For this reason, the Edict does not only aim to meet the external demands but also fulfill the internal demands. It will probably be wrong when we label the Edict as an outcome of the Great Power's pressure.

In a general context, the *Tanzimat* Edict aimed to promise new laws ensuring the rights of life and property regardless of nation, religion, and sex of its subjects, to prohibit bribery and nepotism, and also to regulate taxation and conscription in the Empire.[6] In other words, The *Tanzimat* Edict primarily promised the protection of life, honor, and chastity; secondly, the welfare and security of the subjects; lastly, the principle of equality before the law.[7] Further, according to Başak Tuğ, the Edict primarily guaranteed the inviolability of honor and chastity without exception because life, honor, and chastity were considered as judicial apparatus to perform justice within the society.[8] These promises could be provided through the codifications; therefore, the Edict primarily emphasized the importance and requirement of the codification. Furthermore, Dror Ze'evi argued that sex is one of the most indispensable facts expected to be controlled by both societies and states through laws. Laws are irresistible apparatus of the states all over the world to shape and to regulate sexual life.[9] The argument of Ze'evi supports the views of both Tuğ and Balsoy about the role of the female body in producing policy and law.

The codification movement in the Ottoman Empire highly gained speed with the *Tanzimat* Edict (1839) and then the *Islahat* Edict (1856). The Ottomans mostly followed the *Tanzimat* principles to increase standardization and feasibility in the legal system. However, there was a common argument about the codification movement

[5] Caroline Finkel, **Osman's Dream: The Story of The Ottoman Empire 1300-1923**, (London: John Murray, 2005), 449.
[6] Şükrü Hanioğlu, **A Brief History of the Late Ottoman Empire,** (New Jersey: Princeton University Press, 2008), 72-90. For further information about the requirements of the Edict and the reaction to the Edict from the society, the article of Halil İnalcık; *''Tanzimat'ın Uygulanması ve Sosyal Tepkiler'',* is an important source to understand the internal reasons of the Edict. The internal reasons for the proclamation of the Edict can be evaluated under three categories such as finance, administration, and judiciary. Therefore, codification is an attempt to understand the innovations made in the legal literature in terms of sex crimes.
[7] Halil İnalcık, **Devlet-i Aliyye: Osmanlı İmparatorluğu Üzerine Araştırmalar**, vol. 4, (İstanbul: Türkiye İş Bankası Kültür Yayınları, 2019), 143.
[8] Başak Tuğ, ''Protecting Honor in the Name of Justice'', 16, https://cems.ceu.edu/sites/cems.ceu.edu/files/basic_page/field_attachment/bt-paper-1.pdf [18.02.2020].
[9] Dror Ze'evi, **Producing Desire: Changing Sexual Discourse in the Ottoman Middle East (1500-1900)**, (London: University of California Press, 2006), 48-49.

among scholars. Later, I will explain those legal discussions in detail in Chapter 1. Khaled Abou el-Fadl, a Muslim scholar, claims that the pluralistic tradition of the past has drastically been replaced by the current authoritarian understanding to create a uniformity in the current codification. When this approach is taken as a reference point to interpret the codification movement in the Ottoman Empire, it seems quite useful to understand the reaction against it and the purpose of it. Therefore, the reforms made in the Ottoman legal system aimed to strengthen centralization through the codification attempts of the *Shari'a*.[10] According to Abou el-Fadl, the codification in the *Shari'a* is against the nature of classical Islamic law and the uniformity attempts through codification seem a threat to its interpretative structure.[11] However, the Ottoman sultans had the authority to enact codes and regulations separately the *Shari'a* to meet the needs of the Empire. These codes and regulations did not bind to the *shari'a* clauses and method; therefore, they could be enacted as *fermans* (edicts) under the will of the Sultan to fulfill the socio-political, economic, and judicial needs of the Empire.[12] The codes and regulations enacted by the Sultan could not contradict with the principles of the *Shari'a*. Having conformity with the *Shari'a* was essential for the sake and interest of the Islamic community to prevent the legitimacy discussion among the scholars.[13] The *Tanzimat* Edict was a result of this tradition to maintain public order and interest. The first article of the Edict addressed; particularly, the inviolability of life, honor, and property

> ''The enactment of new codes is necessary for the sake of the Empire and the motherland. The essence of these codes required the security of life, honor, and chastity, the protection of property, the determination of tax rate, conscription, and tenure. Thusly, there is nothing more sacred than life and honor and chastity in the world. If a person considers that they are in danger; even if the person is not prone to infidelity, the person attempts to perpetrate defensive acts to protect them. It is quite detrimental to the Empire and the motherland. In return, it is real that if a person is sure about his or her life and chastity, the person does not swerve from the truthfulness. The person naturally becomes beneficial for the Empire and the motherland by dealing with his or her errands.''[14]

Frankly, that could be the logic behind why the articles, which were about the inviolability of chastity, honor, and life, in both *kanunnames* (lawbooks) and the penal

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[10] Khaled Abou el Fadl, **Speaking God's Name: Islamic Law, Authority, and Women**, (Oxford: Oneworld Publications, 2001), 46-48.
[11] **ibid**., 173.
[12] Halil İnalcık, ''Osmanlı Hukukuna Giriş: Örfi-Sultani Hukuk ve Fatih'in Kanunları'', **Ankara Üniversitesi Sosyal Bilimler Fakültesi Dergisi**, vol. 13, no. 2 (1958):102-126.
[13] **ibid**., 104.
[14] Halil İnalcık, **Devlet-i Aliyye: Osmanlı İmparatorluğu Üzerine Araştırmalar**, vol. 4 (İstanbul: Türkiye İş Bankası Kültür Yayınları, 2019), 136.

codes after the *Tanzimat* took place in primary chapters, and why constantly emphasized lawfulness and generality principles of new laws. Furthermore, the third article of the Edict emphasized the generality of the laws: ‘‘Both Muslim subjects and other religious communities, *millet* system, are allowed to benefit from the articles of life, honor, and chastity without any exception in pursuance of the *Shari'a* and that is guaranteed to the whole subject.’’[15] Since the Edict promised the protection of life, honor, and chastity of the whole subject within the Empire, the penal laws had to have the characteristics of generality and lawfulness.

Initially, the Ottoman authorities focused on the enactment of penal laws to preserve and maintain justice in society. That approach aimed to emphasize the lawfulness of punishment and sentence which was based on the judgment of a judge.[16] The first legislative production of the *Tanzimat* was the Penal Law (1256/1840) which was labeled as local penal law. The 1840 Penal Law comprised both the *Shari'a* and the customary laws' principles. Since the 1840 Penal Law was prepared with a rush, there were some systematic deficiencies in the penal law. Therefore, the penal code could not meet the expectancies and it was replaced by the 1851 Penal Law. The Penal Law (1267/1851) which was called *Kanun-u Cedid*, the New Code, was also a local penal law like the previous code. However, the penal law was more comprehensive in terms of crime and punishment.[17] Despite the legislative improvements, the penal law did not answer the needs of the legal system, it was nulled in 1274/1858. The last penal law enacted during the *Tanzimat* era (1839-1876) was *Ceza Kanunname-i Hümayun*, the Imperial Penal Law, (1274/1858). The 1858 Penal Law was prepared with the leadership of Ahmed Cevdet Paşa and was structurally the combination of the Ottoman law and the 1810 French Penal Law. However, there are some arguments about the adaptation of the 1810 French Penal Law during the enactment process of the 1858 Penal Law. One argument is that the 1858 Penal law was a literal translation of the 1810 French Law, which was a bad adaptation. The other one is that even if the essence of the penal law was taken from the 1810 French Penal Law, various addendums and

[15] **ibid**., 136.
[16] Musa Gümüş, ‘‘Osmanlı Devlet'inde Kanunlaştırma Hareketler, İdeolojisi ve Kurumları’’, **Tarih Okulu**, vol.19, İlkbahar-Yaz, (2013): 168.
[17] **ibid**., 171.

rectifications indicated the Ottoman legal tradition.[18] In addition to these arguments, Ahmed Cevdet Pasha did not openly mention the 1810 French Penal Law during the preparation process of the penal law. However, he only treated it as ''European laws'' to end up the discussion about adaptation matters during the preparatory works.[19] Apart from these discussions, secularity is another popular argument among researchers. As the 1858 Penal Law secluded *hadd*[20] punishments and mostly followed *ta'zir*[21] punishment which is highly open to state intervention, the penal law is relatively considered as more secular than any other penal laws among Ottoman legal sources. However, this cannot mean that the penal law was against the *Shari'a*.[22] The 1858 Penal Law had a wide crime category and a unified structure. The Penal Law got several addendums; hence the content and scope of the law were extended. The code was valid until the new penal code was enacted in 1926. It must be known that the Imperial Penal Law is one of the primary sources of this study because it provides a trailable and affirmable research circle to draw a schema about the identification and punishment of sex crimes between 1858-1868.

In consequence of these codification attempts after the *Tanzimat*, rape as a kind of sex crime gained a partially independent legal identity from *zina* (adultery). While *zina* was a legal term to point out the main category of sex crimes such as adultery, sodomy, and prostitution, *hetk-i ırz* (the violation of honor); especially with the enactment of the 1858 Penal Law, became the major legal term to define sex crimes in Ottoman legal language. The terminological shifting from *zina* to *hetk-i ırz* or *zina* to *fi'l-i şenî'* (an indecent act: adultery and rape) could be concretely observed in both legal sources and court registrations. Further, the consequences of judicial reforms held in the Ottoman legal tradition can be followed in the official court records to bring out the legal transformation.

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[18] Mehmet Gayretli, ''1858 Osmanlı Ceza Kanununun Kaynağı Üzerindeki Tartışmalar ve Bu Kanuna Ait Bir Taslak Metninin Bir Kısmıyla İlgili Değerlendirme'', 1-2, http://earsiv.ebyu.edu.tr/xmlui/bitstream/handle/20.500.12432/1763/mgayretli-2.pdf?sequence=1&isAllowed=y [13.02.2020].

[19] Ahmed Cevdet Paşa, **Tezakir**, vol. 2, prep. by Cavid Baysun, (Ankara: TTK Yayınları, 1967), 83.

[20] *Hadd*, or *Hudud* is the punishments for definite offences; except for qısas and blood money, which are prescribed in the Quran or the Hadith. Ali Bardakoğlu, ''Had'', https://islamansiklopedisi.org.tr/had--fkih, (2016-2020), [20.04.2020].

[21] *Ta'zir* is a punishment which is under the jurisdiction of a ruler except for *hadd* and *qısas* penalties. Tuncay Başoğlu, ''Tazir'', https://islamansiklopedisi.org.tr/tazir, (2016-2020), [20.02.2020].

[22] Tahir Taner, ''Tanzimat Devrinde Ceza Hukuku'', **Tanzimat**, vol. 1, (İstanbul: Milli Eğitim Basımevi, 1999), 230.

The reformative regulations after the *Tanzimat* were arranged and controlled by the *Meclis-i Vala* (the Supreme Court) with the consent of the Sultan. The *Meclis-i Vala* (1838-1876) was one of the most significant state organs after the *Tanzimat* and it served accordingly the principles of the *Tanzimat*. To understand its place in the Ottoman central government, we need to figure out its origin. Firstly, the *Divan-ı Hümayun*, the Imperial Council, was generally considered as a representation of Turk-Islam tradition but we cannot give a definite process of its transformation about how it became a counselor council for state affairs and then a judicial authority.[23] İnalcık stated that the Imperial Council generally served as a kind of cabinet which discussed on all state affairs, appointments and also decision making organ in the Empire.[24] In addition to this, Ahmet Mumcu classified the main roles of the *Divan-ı Hümayun* in the central administration under three categories such as political, judicial, and financial functions. Those divisions and implementations of the *Divan-ı Hümayun* can have precisely been presented through the chronicles.[25]

The important function of the *Divan-ı Hümayun* is the judiciary for this study. Since the study has focused on the judicial function of the *Meclis-i Vala*, it seems enough to know the judicial function of the *Divan-ı Hümayun* to present similarities and differences within their own legal responsibilities. The *Divan-ı Hümayun* served as a high court but also it worked as an appeal court. However, Islamic law does not have the concept of appeal within its presence because the judgments made by the *qadı*, Muslim judge, are accepted as a final sentence. Nonetheless, if new evidence got found or judicial mistakes proved after the final sentence having been announced, the plaintiff could ask for dismissal of charges or demand to be heard again.[26] Since the *Divan-ı Hümayun* conducted an appeal authority in the Ottomans, it reconsidered the judgment of *qadı* and sent it back to the court in the same region or different one to reevaluate his recall. Thus, justice could be provided and checked through state

[23] Ahmet Mumcu, ‘‘Divan-ı Hümayun’’, https://islamansiklopedisi.org.tr/divan-i-humayun, (2016-2020), [10.02.2020].
[24] Halil İnalcık, **The Ottoman Empire: The Classical Age 1300-1600**, (London: Phoenix,1973), 93.
[25] Ahmet Mumcu, **Divan-ı Hümayun**, (Ankara: Birey ve Toplum Yayınları, 1986), 71-117.
[26] Ekrem B. Ekici, **Osmanlı Hukuku**, (İstanbul: Arı Sanat Yayınevi, 2014), 388-89.

intervention.[27] Abstractively, the *Divan-ı Hümayun* persuaded its existence as a ceremonial and vanity tool without having any political and legal competences.[28]

Secondly, another predecessor of the *Meclis-i Vala* is the *Meşveret Meclisi* or *Meclis-i Meşveret*, the Consultant Council. It served as a council to negotiate on a significant and extraordinary situation such as making peace or declaring war between the late 17th century and the middle of the 18th century until the *Meclis-i Vala* gained its full function in the central government.[29] However, the *Meclis-i Meşveret* did not have any authority to evaluate legal issues, which was a significant difference between the *Divan-ı Hümayun* and the *Meclis-i Meşveret*.[30] It is a fact that the *Meclis-i Meşveret* was not sufficient enough for the central administration. Therefore, Mahmud II decided to establish a new ordered council to rule both the process of the *Tanzimat* Edict and its requirements and to run political, financial, and legal matters properly with his edict below.

> ''In the whole time, for the sake of the Ottoman Empire, as a result of the negotiation and discussion among deputies and officers, an ordered and permanent council was a necessity to consult and negotiate state affairs. For this, may namely *Meclis-i Ahkam-ı Adliyye* -the Supreme Council of Judicial Ordinances- establish in the imperial palace''[31]

The *Meclis-i Vala* (the Supreme Council) undoubtfully had been not only a court but also a significant state organ during its period of office in the 19th century. In 1838, the *Meclis-i Vala* was established with the name of the *Meclis-i Vala-yı Ahkam-ı Adliyye* (the Supreme Council of Judicial Ordinances) so that Mahmud II and central government could have been discussed administrative issues and also inspected reformations. Until the proclamation of the First Constitution in 1876, the *Meclis-i Vala* had been performed the roles of legislation, and judiciary; of course, with the consent of the Sultan of that period. Throughout the time, the *Meclis-i Vala* had been

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[27] Ahmet Mumcu, ''Divan-ı Hümayun'', https://islamansiklopedisi.org.tr/divan-i-humayun, (2016-2020), [10.02.2020].
[28] **ibid**.
[29] Ali Akyıldız, ''Meclis-i Meşveret'', https://islamansiklopedisi.org.tr/meclis-i-meşveret, (2016-2020), [20.02.2020].
[30] Ahmet Mumcu, **Divan-ı Hümayun**, 157-162); Ali Akyıldız, ''Meclis-i Meşveret'', https://islamansiklopedisi.org.tr/meclis-i-meşveret, (2016-2020), [20.02.2020].
[31] ''Cemi' zamanda Devlet-i Aliyye'nin mehasın-şümulunden olduğu vecihle bazı mesalih-i biha beyne'l-vükela müşavere ve müzakere ile tanzim ve tesviye olunagelmekde ise de vükela ve me'murin meşagil-i kesireleri cihetiyle da'imen akd-i encümen-i meşveret etmekliğe dest-rest olmadıklarından… mültezem-i mülukaneye-i hayriyyesi kemaliyle karın-i hüsn-i husul ve suret olunması içün Meclis-i Ahkam-ı Adliyye ism-i samisiyle saray-ı hümayun-ı şahanede…'' T. V. 163, (11 Muharrem 1254/ 7 April 1838)

separated into departments and then reunited to increase the quality of its working conditions and to provide a better service. Also, its name had been changed several times after its departments divided or reunited.[32]

Firstly, the *Meclis-i Vala-yı Ahkam-ı Adliyye* divided into two sections in 1854 such as the *Meclis-i Ali Tanzimat* (the High Council of the *Tanzimat*), which was responsible for arranging reformations and even inspecting them from 1854 to 1861, and the *Meclis-i Vala-yı Ahkam-ı Adliye*, which was simply focusing on judicial and legislative matters between 1854 and 1861. Secondly, in 1861, these separated departments reunited again; this attempt not only aimed to decrease the caseload of the council but to increase the service quality as well, under the name of *Meclis-i Vala-yı Ahkam-ı Adliyye* because of organizational and administrative problems. Later it was divided into three departments; namely, *Kanun and Nizamat Dairesi* (the Law and Regulations Agency), which simply assumed legislation function of the formers councils, *Umur-ı İdare-i Mülkiye Dairesi* (the Administration and Finance Agency), performing administrative responsibilities and disquisition of the *Meclis-i Vala* and lastly *Muhakemat Dairesi* (the Judgements Agency), which assumed as an appeal court for cases decided by the provincial councils of justice, and as a court of the first instance in cases involving officials of the central government, and served from 1861-1868. Finally, the *Meclis-i Vala* had been reorganized as *Divan-ı Ahkam-ı Adliyye* (the Council for Judicial Regulations) and *Şura-yı Devlet* (the State Council) in 1868.[33] Thus, the legislative and judicial organs of the Empire were separated. The thesis only deals with the registrations between 1858-1868. It has two reasons; firstly, the 1858 Penal was in force onwards 1858, and secondly, *Muhakemat Dairesi* (the Agency of Judgments) of the *Meclis-i Vala* began to serve as both an appeal authority and a first instance court between 1861-1868.

The *Meclis-i Vala* was at the top of the Ottoman legal system and associated with the principles of the *Tanzimat* Edict to create a united and neutral legal system. The Ottoman Penal Codes which was enacted in 1840, 1851, and 1858 became the main source of the judges to make verdicts. Yet, we cannot dogmatize that the *Meclis-i Vala* merely used the Penal Codes. Because we have plenty of instances that showed us the

[32] Ali Akyıldız, ‘‘Meclis-i Vala-yı Ahkam-ı Adliyye’’, https://islamansiklopedisi.org.tr/meclis-i-vala-yi-ahkam-i-adliyye, (2016-2020), 20.05.2020].
[33] Mehmet Seyitdanlıoğlu, **Tanzimat Devrinde Meclis-i Vala**, (Ankara: TTK Basımevi, 1999), 33-64.

Meclis-i Vala occasionally headed to the *Shari'a* law to conclude the suits. To do that, the *Meclis-i Vala* appointed a *müfti* who was one of its members to take care of religious matters because the *Meclis-i Vala* did not just serve as an appellate court but also a high court.[34] The cases held in the province (*vilayet*) and sanjak (*sancak*); especially, about murder, wounding, theft, and the crimes requiring shackle (*pranga*) punishment, were transferred to the *Meclis-i Vala*. After the case was examined in the *Meclis-i Vala*, the decision was sent to the *Meclis-i Ali Umumi* or *Meclis-i Umumi* to get it approved. Finally, if the *Meclis-i Umumi* found the decision appropriate, the decision was presented to the Sultan. After the decision was approved by the Sultan, that decision would become final. The final sentence was executed by either governorship (*valilik*) or sub-governorship (*mutasarrıflık*).[35]

The explanation above proved that there was a dual system in the Ottoman judiciary as a result of Ottoman legal tradition. On the one side, the representatives of the semi-secular and single court understanding of the Ottomans, the *Meclis-i Vala,* and on the other side, the existence of the *Shari'a* Courts. To become clear, the duality in the legal system was neither the first time nor a strange condition for the Ottoman government. Because of its classical judicial structure, the cases related to the *Shari'a* law and, even sometimes the cases based on the customary law could be held in the Sharia courts. The *qadıs* concluded such cases as murder, heritage, etc. in the *Shari'a* courts; on the other hand, some issues which could not be concluded by *qadı* himself like infidelity sent directly to the *Divanı-ı Hümayun* to resolve through *kanunname* (lawbook).[36] That duality was likely to create a cooperative working environment rather than contradictive. The dual structure generally penetrated to the process of trial in the *Meclis-i Vala*. The collaborative relationship between the *Meclis-i Vala* and the *Shari'a* courts can be seen in the documents with the phrases of ''… *i'lam-i şer'i Meclis-i Vala-yı Ahkam-ı Adliyye'ye havale ile..*'', religious or *shari'a* notification referring to the *Meclis-i Vala* and also ''… *icra kılınan muhakeme-yi şer'iye* …'', conducted *shari'a* judgment.[37]

[34] **Ibid**., 119-120.
[35] **Ibid**., 119.
[36] Hanioğlu, **ibid**., 18-19.
[37] BOA, MVL 662-78, (2 Şevval 1280/ 11 March 1864); BOA, MVL (?); BOA, MVL 741-62; (28 Rebi'ül-ahir 1282/ 20 September 1865); BOA, A.} MKT. MVL 110-36, (27 Safer 1276/ 25 September 1859)

As seen in the documents analyzed, the *Meclis-i Vala* was a high court; therefore, complicated cases could get solved or after the judgments in the local courts, they were transferred to the *Meclis-i Vala* for a final judgment. As the *Meclis-i Vala* was accepted as an appeal authority for both the *Nizamiye* and *Shari'a* courts, they had to work correspondingly. The legitimization of the decisions made in the *Meclis-i Vala* was gained through the *Shari'a* so it could not contradict the verdicts of the *Shari'a* law.[38] In addition to this, the Ottoman society had a heterogeneous structure; thence, how non-Muslim subjects could apply for the *Meclis-i Vala* is another issue. Every single subject in the Empire was able to appeal to the *Meclis-i Vala* directly or via representative regardless of their religion, sex, language, and nation. Their disagreements, which could be religious or legal, can have been concluded because there had been the representative of their patriarch or religious leader so that judges justified the suit within a fair and democratic atmosphere.[39]

To present a clear picture of the *Meclis-i Vala*, the working conditions, the correspondence style, and genre, and also the institutions in the records are important to show hierarchical structure in the Ottoman bureaucracy. The courts serving in the province (*liva* or s*anjak*) and district had to send the verdicts about the cases which were respectively about murder, injury, robbery, hard labor, and shackle crimes to the *Meclis-i Vala* to make them approve.[40] Therefore, the form of correspondence between institutions gains a great deal of significance to observe the bureaucratical structure and process in the *Meclis-i Vala*. The registrations kept in the *Meclis-i Vala* ensure a great deal of evidence about the mainframe of correspondence and relationship between the institutions in the Ottoman local administration such as *zaptiye* (zaptiah)[41],

[38] Seyitdanlıoğlu, **ibid**., 85; Ekinci, **ibid**., 183-186.
[39] Seyitdanlıoğlu, **ibid**., 120.
[40] **Ibid**., 119.
[41] *Zaptiye* (Zaptiah) was an adaptation of the *şurta* (Shurta)which was a public organization to preserve and provide security and order in the Islamic state organization. Metin Yılmaz, ''Şurta'', https://islamansiklopedisi.org.tr/surta, (2016-2020), [19.03.2020]. In the Ottoman Empire, it was *subaşı* and its duties were to secure and to provide public order and military affairs. It was also responsible for examining the crime scene and speaking with witnesses and also catching and questioning criminals. This description connotates us the post-modern period police organizations. Abdülkadir Özcan, ''Zaptiye'', https://islamansiklopedisi.org.tr/zaptiye, (2016-2020), [10.02.2020].

mutasarrıflık (sub-governorship)[42], *valilik* (governorship) and *vilayet* (province)[43]. Both *mutasarrıflık* and *vilaye*t or *valilik* (sub-governorship and province or governorship) were a point to reach out to the central government so the subjects in the *liva* and the province could appeal to the courts to seek justice. Also, the orders and verdicts decided in the *Meclis-i Vala* were announced to the public and executed by them. Moreover, *Daire-i Muhakemat* (the Agency of Judgements) which was a department of the *Meclis-i Vala* designed as not only a kind of appeal authority for criminal courts but also a trial court for criminal cases.[44] The cases heard and examined in the Agency of Judgements were evaluated accordingly the principles of code of laws and the verdicts were based on the code of laws. The investigations held on the Judgements Agency showed that the *Meclis-i Vala* was one of the judicial authorities of that period. Therefore, the rape cases which were referred to the *Meclis-i Vala* were heard in the Agency of Judgements, and after inquisitions and investigations, a legal document called *şukka* or *mazbata*, (document or record), was arranged. The document which involved the judicial instructions or the verdict about the case sent to the lieutenant governor or governorship to announce or to execute.

The bureaucratic improvements within state organizations; as a result of centralization, affected the style and language of correspondence to enhance quality and speed. The statesmen of the *Tanzimat* era decided to head for standardization and to use unsophisticated and clear language in the correspondences. To the regulation of the *Meclis-i Vala* in 1847, the official correspondence between the departments must have been a summary or written in the shape of clauses. The parts of the title, nickname, and compliment must have been shortened. Also, there must have been a date in all the official correspondences and the sender must have signed the documents or affixed

[42] *Mutasarrıflık* (sub-governorship) was a title used for an administrative chef of the Ottoman provincial administration after the *Vilayet Nizamnamesi* (Province Regulation) in 1864. It was regarded as the representative of governor in *liva*. Its basic responsibility was both to imply and to proclaim the orders and regulations coming from the governorship. A. Fuat Örenç, ‘‘Mutasarrıflık’’, https://islamansiklopedisi.org.tr/mutasarrif, (2016-2020), [10.03.2020].

[43] *Vilayet* or *Valilik* (province or governorship) was an instance of the Ottoman local administration. The most important thing was that it was straightforwardly bounded to the central government to get the central government strengthened. Iasha Bekadze, ‘‘Osmanlı’da Kullanılan Vilayet Tabiri Üzerine’’, **Karadeniz Uluslararası Bilimsel Dergisi**, vol. 36, no. 36 (2017): 259-60. The governorship was merely responsible for implying the verdicts decided in the court. Mustafa Gençoğlu, ‘‘1864 ve 1871 Vilayet Nizamnamelerine Göre Osmanlı Taşra İdaresinde Yeniden Yapılanma’’, **Çankırı Karatekin Üniversitesi Sosyal Bilimler Enstitüsü Dergisi**, vol. 2, no. 1 (2011): 34-37.

[44] Akyıldız, ‘‘Meclis-i Vala-yı Ahkam-ı Adliyye’’, https://islamansiklopedisi.org.tr/meclis-i-vala-yi-ahkam-i-adliyye, (2016-2020), [20.05.2020].

with his seal.[45] Thus the Ottoman diplomacy and bureaucracy gained a standard structure and began to use an unsophisticated and a clear language in the correspondences. Thanks to this implementation, the comprehensibility and practicability of the decisions were aimed to increase. The level of activity in the Ottoman bureaucratic affairs was also wanted to decrease. Additionally, the official documents in the *Meclis-i Vala* are named *şukka*[46] or *mazbata* (record or document). Its primary function was to inform the addressed institution or person about the latest growth and issues. These documents have a certain structure. Firstly, they begin by pointing out the institution which was written for and the compliment part follows it, though. While clerks were addressing the institutions, they generally used these phrases such as ''*Makam-ı Ali Cenab-ı Sadaretpenahiye''*[47] and also ''*Makam-ı Vala-yı Hazret Vekaletpenahilerine Mazbata*''[48], or sometimes wrote the numbers of the documents such as *Mazbata* 971 and directly the names of the institutions. In the compliment part, ''*Devletlü, Atufetlü Efendim Hazretleri*''[49], ''*Devletlü, İzzetlü …*''[50], which were the most common type of compliment in the Ottoman correspondences, and ''*Maruz Çakerkeminelerindir ki*''[51] were used in the *Meclis-i Vala* records. After addressing a certain institution and praising addressee, the clerks mentioned about the date and the case number of legal issues and also what department of the *Meclis-i Vala* they had been sent and investigated in. If there was any attachment related to a case, the attachments were also indicated with a clear language. Afterward, the place where a legal case happened, and the parties of the case were introduced in a detailed way and the stories of both parties were recorded, too. Besides, if there was any statement or report of the law enforcement agency, it was added to the document. The most important part is that we can find detailed information about how the investigation took place and what the officers did to build their cases or how suspects were accused or vindicated through the investigation process. Furthermore, the punishments of the

[45] Seyitdanlıoğlu, **ibid**., 109-10.
[46] *Şukka* is a kind of official documents which is written from high degree institution to low degree institution. On contrary to this, *tahrirat*, writings, is known as a correspondence between central and local administration or two local authorities. Mübahat S. Kütükoğlu, Elkab, https://islamansiklopedisi.org.tr/elkab, (2016-2020), [.05.20].
[47] ''To the authority of the high and honorable majesty''
[48] ''The document to the great and excellency majesty''
[49] ''To the great and wealthy and grant excellency''
[50] ''To the great and wealthy and dignified excellency''
[51] ''Submmitted by your trustworthy servant''

criminals were clearly expressed in the records by marking their reference points in the Ottoman Penal Laws. The punishments were precisely defined in terms of the place, the duration, and the amount. The determination of punishment and the presentation of its reference point in the documents prove to us the legal character of these documents. Finally, the documents generally ended with a closure part which had certain phrases such as ''*ol babda emr-ü ferman*''[52], ''*ol babda ve herhalde emr-ü ferman hazret menlehü'l-emrindir*''[53] or, *''... dair mazbata*''[54], ''*siyakında şukka''*[55]

1.2. The Methodology and Structure of the Thesis

After having explained the major theme of the study, I will firstly discuss the contribution of my primary sources to this study and the Ottoman historiography and then the studies about sex crimes will bring out the workableness of rape. Since rape is considered as one of the most serious crimes that each society encounters, there are various studies to find out a solution to prevent and punish the crime. Indeed, there are a lot of serious studies to analyze the place of rape offenses in both Islamic and Ottoman laws. Therefore, the issue of rape has been discussed to evaluate its identification and punishment legally and socially.

The thesis approaches the issue of rape as a kind of sex crime. It aims to explain the legal identification of rape in Ottoman law and its trial process in the *Meclis-i Vala*. The study does not only include heterosexual rape but also homosexual rape offenses to stress the generality and objectivity of the legal verdicts about rape offense. To conduct such a comprehensive study, Ottoman law shall initially be studied to detect legal terms identifying rape offense and to draw attention to the current legal tradition. Resulting from Ottoman law including two components such as the *shari'a* (religious) and customary (*örfi*), rape has been analyzed through both of these two components. Firstly, I will study rape accordingly Islamic law through Qur'anic verses, *hadith*, *sunnah*, and *fatwas* (a legal opinion) and then through Ottoman *kanunnames* (lawbooks) which are Mehmed II (1444-1446, 1451-1481), Bayezid II (1481-1512), Selim I (1512-1520), and Süleyman I (1520-1566). The Ottoman Penal Laws in 1840,

[52] ''The imperial order related to the subject''
[53] ''All the subjects and all the edicts are the orders of the excellency''
[54] ''… the document regarding the issue''
[55] ''… the official certificate about the issue''Also, a typical *Meclis-i Vala* registration shall be given in the appendix part.

1851, and 1858 also will be analyzed to determine legal change or continuity in the Ottomanlegal language. In consequence of the comparative study, the terms *zina* (adultery), *cebren zina* (adultery by force), *fi'l-i şenî'*, etc. will be examined in terms of how they were mentioned in the legal sources and courts actually dealt with. Secondly, to get a better analytical evaluation about rape and its trial process, 52 registrations of the *Meclis-i Vala* between 1858-1868, which were transferred by different regions, and the *Shari'a* registrations before the *Tanzimat*, which were taken from İslam Araştırmaları Merkezi (İSAM), will be studied mutually to illustrate the change and continuity about the identification and trial process of rape in the *Meclis-i Vala*.

Just like the *shari'a* records, the *Meclis-i Vala* registrations have rich content in terms of socio-political, economic, cultural, and judicial issues. Especially, the records about judicial issues have more detailed and comprehensive information about the parties, sentences, and punishments of certain cases. The records can also provide concrete information about where and how the event occurred, who the parties were, and when the case was sent to the *Meclis-i Vala*, what department investigated and what the final judgment was. For this reason, the records of the *Meclis-i Vala* ensure a more traceable and original working atmosphere to study the trial process of criminal cases comprehensively. In addition to this, the records provide an opportunity to observe how the court dealt with the *Tanzimat* reformations held in the criminal area and how the reforms reflected on the judicial records. Furthermore, through case analysis in the *Meclis-i Vala*, the components of rape such as *cebr*, intrusion, and *qasd* (intendment) and additionally substantial factors of rape such as abduction, retention, clamor, and attempt have determined to make the blurry definition of rape enlighten. Lastly, the scope and degree of the punishments for rape offenses are saliently recorded by referring the 1858 Penal Law and this situation creates a chance to confirm legal judgments and to trace judicial steps. Thanks to the clear and instructive essence of both the *Meclis-i Vala* records and the 1858 Penal Law, the principal punishment which was inflicted under concrete evidence and additional punishment which was given under circumstantial evidence can be categorized and confirmed judicially.

On the other side, the studies having been done in this area before are important to see the place of my study and to draw attention to sexuality and woman studies in Ottoman

historiography. Başak Tuğ, who is a historian studying on sexuality, studied on sexual crimes in eighteenth-century Ottoman society by emphasizing ‘‘the circle of justice’’ and the role of honor discussion over producing justice in the Ottoman legal tradition in her book, *‘‘Politics of Honor in Ottoman Anatolia: Sexual Violence and Socio-legal Surveillance in the Eighteenth Century’’* (2017). Also, the author analyzed the historical and judicial transformation of the terms to define sexual crimes in the Ottoman legal language during the 18th century. This study is significant to see the data about sex crimes during the 18th century because my study aims to create a concept map which includes terms defining sex crimes on Ottoman legal terminology during the 19th century by following its footsteps. Further, the article of Tuğ, *‘‘Gendered Subjects in Ottoman Constitutional Agreements, ca. 1740-1860’’* (2014), mentions about the continuities and changes over the moral understanding and order from the mid of the 18th century to the early years of the *Tanzimat* Edict. The author also aimed to analyze the legal culture of the *Tanzimat* era through the legal sources, including imperial decrees and laws, and their implementations, court records. Sexual violence was explained by emphasizing the issue of honor and the terms identifying sexual crimes during that period. Belkis Konan also studied rape in Ottoman law by stating the related articles in both various legal sources and Ottoman legal sources; particularly the 1858 Penal Law in her article namely ‘‘*Osmanlı Hukukunda Tecavüz Suçu*’’ (2011). The study is significant to conceptualize the historical process of the definition and punishment of rape through legal sources. The author has benefited from the registrations of the *Shari‘a* courts, *Mühimme*[56], and the *Meclis-i Vala* to explain rape by referring the term *hetk-i ırz* (violation of honor). Also, the author primarily has focused on the term ‘‘*ırza geçme*’’, which means an attack to honor in Turkish, by associating it with the term *hetk-i ırz* to identify rape in Ottoman legal tradition even though one of the primary sources, the 1858 Penal Law, identified rape with the term *fi‘l-i şenî‘*. Besides, particularly with the enactment of the 1858 Penal Law, the term *hetk-i ırz* was turned into a general legal term to define sex crimes. Also, many studies have been targeting the definition of rape and how rape was judged in the *Meclis-i Vala*. For instance, Fehminaz Çabuk studied rape cases which were transferred to the

[56] *Mühimme defteri*, *mühimme* registration, is the whole of the official reports kept in the İmperial Council, Divan-ı Hümayun. Mübahat S. Kütükoğlu, ‘‘Mühimme Defteri’’, https://islamansiklopedisi.org.tr/muhimme-defteri, (2016-2020), [19.05.2020].

Meclis-i Vala to conceptualize how justice was produced and sustained within the society in her article ‘‘*Osmanlı'da Meclis-i Vâlâ'ya İntikal Eden Irza Geçme Davaları ve Uygulanan Cezalar* (1850 1862)’’ (2017). While doing this study, the author has analyzed the rape issue through the term *ırz* (honor or chastity) by appealing to the term *hetk-i ırz* and the interpretation of rape accordingly Islamic law. Çabuk has clearly conceptualized the definition and punishment of rape by giving concrete case examples from the *Meclis-i Vala* registrations and the 1858 Penal Law. Whilst the main component of rape *cebr* (force) is analyzed, the other components are merely mentioned throughout the case examples. Abstractively, the author has presented us with the cooperative relationship between the *Shari'a* courts and the *Meclis-i Vala* to observe the duality in the legal system. Further, the article of ‘‘*Irzımı İsterim: 19. Yüzyılda Cinsel Saldırı Davaları Üzerine Bir Vaka İncelemesi*’’ by Melike Karabacak (2019) presents a comparative analysis of rape by referring the Ottoman legal sources both before and after the *Tanzimat* Edict to present how these reforms affected the attitude of the women in Ottoman society towards the courts. The arguments were aimed to be strengthened through the case example from the *Meclis-i Vala* by pointing out the related article from the 1858 Penal Law and after. However, the most vital point of this study is that the author carefully and comprehensively analyzed the legal terminology to define rape in the Ottoman legal sources such as *fi'l-i şenî'* (an indecent act) and *ırz* (honor or chastity). Also, the study of Leslie Peirce, Morality Tales is an important source to understand Ottoman legal tradition and the place of Ottoman women in this life. The study shapes different legal stories of different women who were seeking justice to illustrate the influence of socio-political factors on the judiciary and performing justice. The story of a rape victim in the book have made me ask these questions: Why does a woman need four eye-witnesses to substantiate her allegation? If she had such eye-witness, she would probably get rid of having been raped. But then, another question has come to my mind; Could it be related to prevent malicious prosecution in the society or to prevent to conceal *zina* (adultery) crime? And this situation has continued by asking other questions for a while. For instance, what is the truth behind this practice? and how did the Ottoman evaluate rape? Therefore, this study is a significant opportunity to research and observe women in Ottoman legal history. On the other side, rape in Islamic law is a blurry area; thereby many scholars have studied rape to perceive it correctly. Amira El-Azhary Sonbol analyzed the

differences between what the theoretical output in consequence of the sectarian interpretation is on rape and how courts actually solved it in her article ‘‘Rape and Law in the Ottoman and Modern Egypt (1997). Further, Hina Azam presented us with the Maliki interpretation of sexual violation, especially rape and its identification and definition in ‘‘Sexual Violation in Islamic Law’’ (2015). Another study on sexuality was conducted by Elyse Semerdijan namely ‘‘Off the Straight Path: Illicit Sex, Law and Community in Ottoman Aleppo’’ (2008) to illustrate sex crimes such as adultery, sodomy, and rape according to the *shari'a* registrations in Aleppo. These three studies are significant to see a different interpretation of rape in Islamic sects and to observe the influence of the Ottoman legal understanding over their own legal structure during the Ottoman sovereignty. Furthermore, Dror Ze'evi studied sexuality and the place of sexuality in legal and political arenas in the Ottoman Middle East between 1500-1900 in his book, ‘‘Producing Desire’’ (2006). Finally, my study will explain the legal terms defining homosexual and heterosexual rape in the Ottoman legal language and the trial process of rape offenses in the Ottoman legal tradition during the 19th century by analyzing the 1858 Penal Law and the rape cases in the *Meclis-i Vala* between 1858-1868. It also will shed light on the legal continuity or change in the identification and trial process of the rape offenses by conducting a comparative study.

This study, namely ‘‘The Rape Cases in the *Meclis-i Vala* (1858-1868): Legal Identification and Trial Process’’, has two main purposes. The first one is to analyze the theoretical identification of rape through Ottoman law by considering its components such as Islamic (*Şer'i*) and Customary (*Örfi*) Laws. While conducting such comprehensive research, the *Tanzimat* Edict (1839) is the threshold of this study to signify the changes or continuity in the identification process of rape in the legal documents. The comparative study between the legal documents before and after the *Tanzimat* shall naturally illustrate the continuity or change in the Ottoman legal literature. The second is to enlighten the trial process of rape cases through legal procedures, sentence, and punishment, and to present how the courts used these theoretical consequences of rape issues. Especially, the influence of the *Tanzimat* over the legal procedures shall be analyzed through the innovations in the trial process of rape. The study is formed into three chapters.

The first chapter, namely ‘‘Rape in the Ottoman Law’’, is about the identification of rape in the *kanunnames* of Mehmed II (1444-1446, 1451-1481), Bayezid II (1481-1512), Selim I (1512-1520), and Süleyman I (1520-1566) before the *Tanzimat* and the Ottoman Penal Laws in 1840, 1851, and 1858. To define rape correctly in the Ottoman legal sources, the concept of *zina* was primarily examined through its components such as consent and willingness. *Zina* is one of the *hadd* crimes in Islamic law and defines as illicit sexual intercourse based on consent and willingness between a man and woman who are not married to each other. While *zina* is a well-defined legal term in the Islamic context, rape is a blurry term. To understand how the Ottomans distinguished these terms and defined rape, the terminological study will be conducted throughout the Ottoman legal sources before and after the *Tanzimat*. In the Ottoman legal sources, the issue of identification of rape is analyzed through the terms *hetk-i ırz* (violation of honor), *fi'l-i şenî'* (an indecent act: adultery or rape), *fi'l-i livata* (sodomy or forced sodomy), and *bikr-i izale* (defloration) by referring certain articles.

The second chapter, namely ‘‘The Definition of Rape in the *Meclis-i Vala* Registrations’’, aims to explain the terms which were used to define rape in Ottoman legal literature by examining rape cases heard in both the *Shari'a* Court and the *Meclis-i Vala*. The context of the identification of rape does not only focus on heterosexual but also includes homosexual relationships. The selection of the *shari'a* registrations intentionally was made from the time before the *Tanzimat* to observe the change in Ottoman legal language and system. Through the *Meclis-i Vala* registrations (52 registrations), the usage of the terms in both the records and the Penal Laws after the *Tanzimat* is analyzed to detect the change and continuity. Also, through the analysis of rape cases, the components of rape offense are tried to be detected such as force, intrusion, and intendment and also their variants in the rape cases. While doing this terminological study, the examples of rape cases in both the *Shari'a* courts and the *Meclis-i Vala* will help us to conceptualize rape by making references to the legal sources in force and *fatwas*.

The third chapter, namely ‘‘The Trial Process of Rape in the *Meclis-i Vala*’’, explains respectively the legal procedures in the criminal cases, sentence and punishment as a result of a trial in the *Meclis-i Vala*. To enlighten the process of investigation, the way of applying to the *Meclis-i Vala* and the notions of confession (*ikrar*), witnessing,

evidence, and testimony and will be examined by stressing the similarity and difference in the *Shari'a* courts. And then, the sentence will be explained through its structure, lawfulness, and the document which it was written on according to the cases from both the *Shari'a* courts and the *Meclis-i Vala*. Lastly, punishments for rape offense will be verified through the articles of the Imperial Penal Law in 1858 by indicating some rape cases from the *Meclis-i Vala*. The punishments for rape such as exposure (*teşhir*), hard labor (*kürek*), shackle (*pranga*), imprisonment (*habs*), and fine (*tazminat*) will be analyzed in terms of lawfulness, the amount and heaviness of the punishment by pointing out the differences in the *Shari'a* courts.

2. RAPE IN THE OTTOMAN LAW

The main concern of this chapter is to enlighten the identification process of rape in the Ottoman law by considering its distinguishing essence. Then, I argue the categorization of sex crimes in Islamic law to conceptualize the legal transformation process in the Ottoman legal language before the *Tanzimat* Edict. Before explaining rape in the Ottoman law, the origin and components of the Ottoman law will be briefly mentioned to build a bridge between Ottoman and Islamic legal tradition during the identification process of rape crime. Lastly, the notion of rape will primarily be analyzed through the *kanunnames* before the *Tanzimat* such as Mehmed II (1451-1481), Bayezid II (1481-1512), Selim I (1512-1520) and Süleyman I (1520-1566) and the Imperial Penal Laws in 1840, 1851, 1858 after the *Tanzimat* to detect the change or continuity in Ottoman legal language.

2.1. The Islamic Law as a Component of Ottoman Law

Towards the end of the 9th century, Islamic scholars claimed that Islamic law got into its last form, and *ijtihad* (jurisprudence) which was a method to enact a law in Islamic legal tradition was ended. In respect to this statement, there was no reason to enact new codes in an Islamic society.[57] Islamism, which organizes both public life and the relationships between individuals and recognizes only one code that is based on holy orders, ensures public, and judicial orders through the existence of *Shari'a*.[58] To this assumption, Islamic law seems enough to run a state and regulate public and private lives in a society. On contrary to this assumption, there were two different kinds of law in the Ottoman legal structure such as the customary (*örfi*) and Islamic (*Shari'a*)

[57] Joseph Schacht, ''The Schools of Law and Later Developments of Jurisprudence'', **Law in the Middle East**, vol. 1, ed.by Majid Khadduri, Herbert J. Liebesney, (Washington: The Middle East Institute, 1955), 73.
[58] Halil İnalcık, **Devlet-i Aliyye: Osmanlı İmparatorluğu Üzerine Araştırmalar**, vol. 1, (Türkiye İş Bankası Kültür Yayınları: İstanbul, 2009), 227.

laws. Each of these laws had its unique structure, a field of law, and the enactment process.[59]

According to Mehmet A. Aydın, the Islamic law is called holly law which is independent of state intervention; on the other side, the customary law is only enacted by the sultan, including the whole imperial orders and edicts, to fill up the area which Islamic law cannot truly offer an option.[60] Furthermore, why the Ottomans needed an extra law can be explained through the relationship between law and society. Both Clifford Greetz and Lawrence Rosen argued the influence of culture over the law. Greetz argued that there is a hidden object in the legal sources of society. In addition to this, Rosen implied that law and society are the outcomes of the same cultural assumptions.[61] There seems to be a reasonable answer for why the Ottoman required customary law that law is not something solid, it can transform and shape according to socio-political, economic, and cultural conditions of society.

In the Ottoman Empire, the main clauses of making laws were being defined under four principles. Firstly, the legal issues must have been out of *shari'a* jurisdiction. Secondly, it must have been based on a legal situation which could be associated with the existence of custom (*töre*) or ritual (*âdet*). Thirdly, it must have been arranged under the will of the Sultan. Lastly, it pointed out that the general condition of the society must have needed that enactment.[62] Whilst the Ottoman customary law was fundamentally shaped in regard to the intervention and will of the Sultan to preserve and maintain the interest of the empire and the public order. The legal materials and institutions arranged after the *Tanzimat* were the consequence of this perspective.

On the other side, Islamic or *Shari'a* law is based on two main sources namely primary and secondary sources. These are Quran (the Holy Book of Islam) and also *sunnah* (the acting of Prophet Muhammed) and *hadith* (the words of the Prophet Muhammed) which are primary sources; on the other hand, *ijma* (the consensus of Islamic scholars), and finally *qıyas* (analogical deduction to provide detailed information related to legal prescription by using their reasoning) are considered as secondary sources to make

[59] **ibid**., 227.
[60] Mehmet Akif Aydın, ''Osmanlıda Hukuk'', **Osmanlı Devleti ve Medeniyeti**, vol. 1, ed. by Ekmeleddin İhsanoğlu, (İstanbul: 1994), 375-76.
[61] Haim Gerber, **State, Society and Law in Islam: Ottoman Law in Comparative Perspective**, (Albany: State Uninversity of New York, 1994), 5.
[62] Mehmet Akif Aydın, **ibid**., 228.

Islamic law.[63] Even though the Quran is the main source of Islamic law, the Quran does not have enough and comprehensive explanations about some critical issues such as rape. Apart from the rape issue, the Quran contains full and detailed information about marriage, divorce, and heritage, etc.[64] The second one is the *hadith* and the *sunnah*, these are the practices and words of the Prophet Muhammed, which have a crucial effect on the process of the development of the law. Since the Quran cannot all the time enlighten on the blind spot of the issues, *hadith*, and *sunnah* ensure legal guidance on judicial prescriptions to give a clear sight on the interpretation of the Quranic verses.[65] Especially, the *hadiths* provide an opportunity to see how the Prophet dealt with certain legal issues such as rape and adultery. While Islamic law openly elucidates some judicial issues, some legal issues are indistinct. Therefore, there are various judgments about sex crimes. Albeit sex crimes in Islamic law are most discussed matters, there are still unclear and disputable subjects waiting to be clarified juridically.

2.1.1. Rape in Islamic Law

2.1.1.1. What is *zina* or not?

If we ask what rape is in the post-modern period, we can get several clear and specific definitions of it. Rape, with the simplest meaning, refers to a forcible unlawful sexual intimacy. Nonetheless, in the past, neither definition nor identification of rape was as well-defined as it does now. It was in particular related to the indisputable essence of Islamic law. As Islamic law is one of the components of Ottoman law, the definition of rape in Islamic law is required to be analyzed. Under Islamic discourse, rape has been considered equal with *zina* which is sexual intercourse which is out of a marriage contract.[66] To identify and punish rape, the jurists in Islamic lands had to make deduction through *zina*'s definition. There is a complex situation to clarify what rape is or not. Hence this complexity emerges from the disputable classification of sex crimes in Islamic law. For this reason, we initially need to explain *zina*.

[63] Mahmoud M. Ayoub, Afra Jalabi, Vincent J. Cornell, Abdullah Saeed, Mustansir Mir, and Bruce Fudge, ''Quran'', http://www.oxfordislamicstudies.com/article/opr/t236/e0661 [02.01.2020]
[64] Judith Tucker, **Women, Family, and Gender in Islamic Law**, (Cambridge: Cambridge University Press, 2008), 11-12.
[65] **ibid**., 13-14.
[66] Hüseyin Esen, ''Zina'', https://islamansiklopedisi.org.tr/zina#1, (2016-2020), [20.01.2020]; Eldar Hasanov, ''Zina'', https://islamansiklopedisi.org.tr/zina#2-diger-dinlerde, (2016-2020), [29.02.2020].

In general, sexual relationship is evaluated as being legal and illegal according to Islamic principles. The legality and illegality issues can be determined through either a marriage contract or bondage. Licit sex is limited between a man and a woman who are married to each other. This legal sexual intimacy includes sex with female concubines, masturbation, and the practice of birth control. Illicit sex, in common sense, is any heterosexual intercourse between free Muslims who do not have a marriage contract. Through the marriage contract, the sexual intimacy between a man and a woman can be evaluated as legal intimacy. Marginani, who was an Islamic jurist of Hanafi school (b. 1135/d. 1197), defined that ‘‘*Zina* is the carnal conjunction of a man with a woman who is not his property by the right to sexual access to her under the law.’’ According to Ibn Rushd (b.1126-d.1198), *zina* had been conceptualized as ‘‘Any copulation between a man and a woman without a valid marriage contract, a suspected matrimonial relationship or unlawful concubinage ownership of a slave woman.’’[67] In consequence of these quotations, *zina* is illicit sexual intercourse, grounding on free will and consent of the parties, between a man and a woman who are not married to each other. The two factors came forward naturally, the notions of consent and the marriage contract have been frequently mentioned so far. These terms will build fundamental facts about the identification of rape in both Islamic and Ottoman legal literature.

Adultery in Islam has frequently mentioned in the Quran such as the suras of *Maida*, *Isra*, and *Nisa*, etc. Allah says in the Qur’an, ‘‘and come not near unto adultery. It is an abomination and an evil way.’’ (*al-Isra*, 17: 32)[68] According to this surah, *zina* is seen as behavior that must be stayed away from by all the believers and also a threshold being opened to the whole devilish actions. *Zina* also is prescribed in the surah of *al-Nisa* in verse 15: ‘‘Those who commit unlawful sexual intercourse of your women, bring against them four witnesses from among you. And if they testify, confine the guilty women to houses until death takes them or Allah ordains for them another

[67] A. Salam Sıdahmed, ‘‘Problems in Contemporary Applications of Islamic Criminal Sanctions: The Penalty for Adultery in Relation to Women’’, **British Journal of Middle Eastern Studies**, vol. 28, no. 2 (2001): 187-204.

[68] ‘‘Zinaya yaklaşmayın. Çünkü o, son derece çirkin bir iştir ve çok kötü bir yoldur.’’ https://kuran.diyanet.gov.tr/mushaf/kuran-meal-1/isra-suresi-17/ayet-28/diyanet-isleri-baskanligi-meali-1 [29.03.2020].
All these quranic verses taken from https://quran.com/, (2016), [29.03.2020].

way.''[69] The parties of *zina* are called *zaniye* who is a female person committing adultery and *zani* who is a male person committing adultery with their free wills.[70] The jurists in Islam are supposed to have some well-defined and proved clauses to signify a sexual relationship as *zina* that these are confession (*ikrar*) and testimonial evidence because *zina* is one of the *hadd* crimes and to imply a *hadd* punishment, the jurists have to prove it with concrete pieces of evidence.[71]

In this situation, confession and testimonial evidence has hitherto been playing an important role in the process of the identification of *zina*, but the reliability and accuracy of them are other legal disputes. According to Hanafi, Hanbali which the schools of Sunni Islam and Imamiyya which is the representative school of Shiite Islam, to cite them as evidence, perpetrators have to confess their deeds before a judge or a court and then they must repeat their statements four times within separated times. However, the schools of Maliki and Shafii claim that the confession making once is enough to build a *zina* offense. Furthermore, if a perpetrator wants to retract his or her confession, or change it, it can be acquitted before the implementation of the punishment for *zina*, but except for flogging.[72]

> ''Ibn Abbas told: When Ma'iz ibn Malik came to the Prophet to confess, the Prophet said to him, ''Probably you have only kissed her, or winked, or looked at her?'' He said; ''No, Allah's Apostle!'' The Prophet said, using no euphemism, ''Did you have sexual intercourse with her?'' The narrator added: At that, the Prophet ordered that he be stoned to death.''[73]

To categorize a crime under the *hadd* crimes or to sentence *hadd* punishment, the confession and acceptance of a perpetrator must be in the case. Besides, concrete evidence like four eye-witnesses must be provided to execute *hadd* punishment. In this *hadith*, the perpetrator headed to the Prophet with his reliable confession. In the end,

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[69] ''Kadınlarınızdan fuhuş (zina) yapanlara karşı içinizden dört şahit getirin. Eğer onlar şahitlik ederlerse, o kadınları ölüm alıp götürünceye veya Allah onlar hakkında bir yol açıncaya kadar kendilerini evlerde tutun (dışarı çıkarmayın).'' https://kuran.diyanet.gov.tr/mushaf/kuran-meal-1/nisa-suresi-4/ayet-15/diyanet-isleri-baskanligi-meali-1 [29.03.2020].
[70] Zâni and Zâniye, http://www.lugatim.com/s/zani [29.03.2020].
[71] A. Salam Sıdahmed, ''Problems in Contemporary Applications of Islamic Criminal Sanctions: The Penalty for Adultery in Relation to Women'', **British Journal of Middle Eastern Studies**, vol. 28, no. 2 (2001): 187-204.
[72] **ibid**., 187-204.
[73] Abu Abdallah Muhammad ibn Isma'il al-Bukhari, **Sahih al-Bukhari**, vol. 8, (Beirut: Dar al-Arabia, 1985), 534. Taken from Elyse Semerdijan, **Off the Straight Path: Illicit Sex, Law and Community in Ottoman Aleppo**, (New York: Syracuse University Press, 2008), 11.

the Prophet approved his confession and sentenced him to stone. There are also some provisions about how *zina* must be judged and punished. In the Quran, the second verse of an-Nur, ‘‘The [unmarried] woman or [unmarried] man found guilty of sexual intercourse flog each one of them with a hundred lashes …’’[74] The verse proves that the marriage issue is significant to define *zina* and its punishment. Even though the Quranic verse determines the punishment of *zina* as one hundred lashes for both parties, the verdict is to stone for married *zani* and *zaniye* resulting from judicial interpretation of Islamic law. On the other hand, the punishment for unmarried *zani* and *zaniye* is to flog.[75] As understood, while the Quran implies frankly possible punishment of adultery as flogging, *hadiths* and judicial provisions mostly incline to execute stoning punishment. This judicial diversity strengthens the assumption of the law, which is not a solid entity. To be clear about the provisions of Islamic sects on sex crimes, they cannot be accepted as a universal and admitted punishment because the law can grow and enrich according to the social and cultural norms in which it exists.

Testimonial evidence is built on eye-witnessing and pregnancy for *zina* and rape crimes. The issue of eye-witnessing is based on some principles being reliable and four Muslim men for *hadd* crimes. There are some clauses about the legitimacy of witnessing. The four reliable male eye-witnesses are supposed to make a valid charge for the crime they have already witnessed. Also, the statements they gave with their consent must be coherent and cohesive. These conditionals have been accepting by the four great schools of Sunni Islam.[76] On the other side, Imamiyya the school of Shiite Islam validates the testimony of three or two men and two women or two men and four women. Also, this implementation can be valid only if the punishment is flogging not stoning.[77] In Hanafi school, to be a witness, the person must be a free Muslim man, but if the person is a female agent, the situation changes. In orthodox Islam, two free

[74] ‘‘Zina eden kadın ile zina eden erkeğin her birine yüz sopa vurun …’’ https://kuran.diyanet.gov.tr/tefsir/N%C3%BBr-suresi/2793/2-ayet-tefsiri [29.03.2020].
[75] The Prophet Muhammed explained that the way which Allah approves is stoning for married adulterer (*zani*) and one hundred lashes for unmarried adulterer. (Müslim, **Hudûd**, 12-14) İbn Abbas argued that ‘‘the way which Allah approves’’ means to stone both married adulterer and adultress and also to flog both unmarried adulterer and adultress with one hundred lashes. (Buhârî, **Tefsîr**, 4/1)
[76] H. Yunus Apaydın, ‘‘Şahit’’, https://islamansiklopedisi.org.tr/sahit, (2016-2020), [20.05.2020]. Further, in the Quran, al-Baqarah: 282, witnessing issue is explained for debt matters as two men or one man and two women. But this is not seen suitable for hadd crimes by the jurists of Islamic sects.
[77] Sıdahmed, **ibid**., 187- 204.

Muslim female witnesses are equal to one free Muslim man for debt issues. According to Hanafi school, the main principles of being witness are clearly explained as being able to observe, to perceive, and to perform the incidents they see. Women are also capable, Hanafi school does not make a fuss about female witness except for *hadd* and *qısas* crimes.[78] Thusly, since the Ottoman legal tradition was an adaptation of Hanafi school, women could not be a witness in the cases which require *hadd* and *qısas* punishments. But Shafii school entirely denies female witnesses for both *hadd* and *qısas*[79] and other legal issues. Hanbali and Maliki schools also share some points with Shafii school.

> "Jabir narrated: A man from the tribe of Aslam came to the Prophet and confessed that he had committed illegal sexual intercourse. The Prophet turned his face away from him four times still the man bore witness against himself four times. The Prophet said to him, "Are you mad?" He said, "No." He said, "Are you married?" He said, "Yes." Then the Prophet ordered that he be stoned to death at the Musalla. When the stones troubled him, he fled, but he was caught and was stoned till he died. The Prophet spoke well of him and offered his funeral prayer."[80]

In this hadith, the man came to confess her crime to the Prophet and he supported his confession with his witnessing against himself. The witnessing issue repeated four times to be valid for *hadd* punishment. The marital status is not a determinative factor of adultery but it is a distinguishing element of adultery punishment. The degree of adultery punishment can show differences according to marital status and being free and slave.

> ''Narrated Abu Huraira: The Prophet said that "If a lady slave commits illegal sexual intercourse and she is proved guilty of illegal sexual intercourse, then she should be flogged (fifty stripes) but she should not be admonished; and if she commits illegal sexual intercourse again, then she should be flogged again but should not be admonished; and if she commits illegal sexual intercourse for the third time, then she should be sold even for a hair rope."[81]

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[78] Apaydın, **ibid**.; Burhan al-Din al-Marginani, **The Hedaya; or, The Guide: A Commentary on the Mussulman Laws**, translated by Charles Hamilton, (London: Woodfall and Kinder, Milford Lane, Strand, W.C., 1870), 107.

[79] Qısas is an Islamic legal term which means equal punishmet or retaliation for murder and physical violence crimes. Şamil Dağcı, ''Kısas'', https://islamansiklopedisi.org.tr/kisas, (2016-2020), [20.03.2020].

[80] Abu Abdallah Muhammad ibn Isma'il al-Bukhari, **Sahih al-Bukhari**, vol. 8, (Beirut: Dar al-Arabia, 1985), 531. Taken from Elyse Semerdijan, **Off the Straight Path: Illicit Sex, Law and Community in Ottoman Aleppo**, (New York: Syracuse University Press, 2008), 13.

[81] **ibid**., 823.

Pregnancy is a complicated phenomenon for both *zina* and rape offenses. If we look through the perspective of *zina*, being pregnant without having a husband or legal master is well-liked evidence of adultery. However, at the same time, pregnancy could be a sign of being raped. Maliki school argues that a pregnant woman should be evaluated as a perpetrator of *zina* offense unless there is a sign of rape or compulsion such as a virgin coming bleeding, or her attempts to survive from her culprit by shouting for help.[82] Having a baby without marriage is likely to be reasonable proof of having been raped but the majority of jurists in Islamic lands tend to ignore the possibility of rape.[83] In other words, pregnancy could be the outcome of any sexual intimacy voluntarily or coercively. If there is a judicial doubt or uncertainty in the testimonies, the application of *hadd* punishment could be remitted. The reason is that *hadd* crimes are seen as gross misconduct so the incident must be proved with concrete evidence to penalize the perpetrators. For example, ‘‘Fatma *bint* Hussein from the neighborhood of Qasila. Fatma was removed from her quarter when she admitted committing *zina* with Abdul Karim bin Muhammad who was also present in the court. She confessed that she was pregnant with his child.’’[84] In this case, pregnancy was a sign of adultery because Fatma confessed that she had had sexual intimacy with Abdülkerim who was the son of Muhammed willingly. As a result of consensual sexual intercourse, she got pregnant. Pregnancy was thereby accepted concrete evidence for adultery crime.

To summarize what zina is in Islamic law, it is commonly regarded as a wicked action because it is a threat to public morality and family life. For this reason, the Quranic verses warn people against adultery and they define it as the most disgraceful crime. *Zina* is open to discussion in terms of judicial provision, punishment, and trial. As Islamic law does not own a strict structure, it is quite normal to observe different legal interpretations about *zina* and rape. That is why the conceptualization of zina is so significant to determine the judicial place of rape in Islamic or Ottoman law.

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[82] Sıdahmed, **ibid**., 187- 204.

[83] **ibid**., 187-204. This statement is derived from the research related to identify and distinguish *zina* and rape of Abdel Salam Sıdahmed in the Supreme Court of Sudan in both 1984 and 1992.

[84] SMH 45:145:372 27 Thu al-Hiija 1030H/November 1621. Taken from Elyse Semerdijan, **Off the Straight Path: Illicit Sex, Law and Community in Ottoman Aleppo**, (New York: Syracuse University Press, 2008), 218.

2.1.1.2. What is rape?

The crime of rape arises as a common problem for not only recent societies and also ancient societies. To understand what rape is, we need to clarify it as a sex crime to make a relevant definition. Rape is a criminal event that occurred without the women's consent, involved the use of force or threat of performing violence, and sexual assault towards the victim's body.[85] Furthermore, rape can clarify as an expression of rage, violence, and dominance over a woman. It results in physical and psychological pain, loss of dignity, an attack on the identity of a victim, and a loss of self-determination over her own body. During this event, a rapist is under the influence of feelings of hostility, aggression, power, and dominance.[86] Whilst this explanation reflects comprehensively the post-modern understanding and identification of rape, how a rape offense was investigated and identified in Islamic legal tradition will be my prior concern in this part.

In Islamic law, the crime of rape is evaluated under adultery crime so there is no separate definition and punishment for rape. The concept of rape is defined as '*ightisab*' which means usurpation of property or *zina al –ikrah*'' which means forcible unlawful sexual intercourse. The jurists in Islamic territory also use the notion of '*al-ikrah ala al-zina*' that means sexual relation under coercion.[87] Additionally, the four great sects in Sunni Islam (Hanafi, Maliki, Hanbali, and Shafii) make different definitions of rape. Maliki and Hanafi sects define fortification and rape as sexual relations with a woman who is not a man's property. The statement of ''being the property of a man'' shows that the sexual rights of a man can be provided through marriage or concubinage. However, the notion of property in rape (*ightisab*) definition does not connotate modern meaning, the term indicates 'usage'.[88] Since a man can have legal access to a female body through a marriage contract sexually, any type of assault to the female body is considered as sexual usurpation.[89] While Shafii makes

[85] Randy Thornhill, and Craig T. Palmer, **A Natural History of Rape**, (Massachusetts Institute of Technology Press, 2000), 20.
[86] **Ibid**., 30-35
[87] Azman Mohd Noor, ''Rape: A Problem of Crime Classification in Islamic Law'', **Arab Law Quarterly**, vol. 24, no. 4 (2010): 417-438.
[88] Amira El-Azhary Sonbol, ''Rape and Law in Ottoman and Modern Egypt'', **Women in the Ottoman Empire: Middle Eastern Women in the Early Modern Era**, ed. by Madeline C. Zilfi, (Leiden, New York, Köln: Brill, 1997), 216.
[89] Hina Azam, **Sexual Violation in Islamic Law: Substance, Evidence, and Procedure**, (New York: Cambridge University, 2015), 127-129.

the definition of rape, it also emphasizes the victim's sex. At this point, Shafii sect names the relation between man and man as adultery but if it occurs forcibly, they define it as rape.[90] On the other hand, rape is defined with the terms of ''*fi'l-i şenî'*, *hetk-i ırz*, and *zina bi'l-jabr* and also *fi'l-i livata*'' in Ottoman legal language. Later, I will analyze these terms in the following chapter.

In other words, the legal definition of rape is simply to force a woman to commit adultery under coercion according to Islamic legal tradition. To Hanafi school, rape is illustrated as an illegal sexual intimacy in case of a lack of consent and conscious behavior. Maliki and Hanbali schools also share the common phenomena, consent, and duress, to identify a sexual relationship as rape. In addition to this point, Maliki jurists add some further argumentation on showing resistance, which is regarded as evidence to prove a sexual intimacy as rape such as screaming, bruise, clamor. The schools of Maliki and Hanbali also gain an extension to the condition of resistance, and these are respectively insanity, sleep or being underage, starvation, and suffering from cold or hot accepted as legal excuses for not being able to show resistance.[91] We also observe clamor as a kind of resistance and as a form of self-defense in the *Meclis-i Vala* records about rape cases. It was also accepted as admitted legal evidence which proves sexual intimacy having happened under coercion.[92] Furthermore, in the investigation process of rape cases, the defendant must prove that there is compulsion in sexual intercourse and it is committed against her will. For instance, if X person accuses Y person of rape without proof or concrete evidence, he or she will be sentenced to flogging, which is known as *qadhf* punishment for calumny.

The punishment and trial process of rape is also another legal issue. The blurry description of rape in Islamic law causes some judicial chaos. As *zina* is a common legal term to define sex crimes in Islamic legal tradition, the punishment and trial process of rape is arranged to the principles of *zina* crime. Firstly, a victim of rape is seen as a possible *zina* offender until she proves her accusation with certain shreds of evidence of duress and violation of free-will. Secondly, the verification of the offense

[90] Hüseyin Esen, ''Zina'', https://islamansiklopedisi.org.tr/zina#1 [2016-2020/ 20.01.2020].
[91] Mohd Noor, **ibid**., 417-438.
[92] ''Fatma *Hatun* who was raped by Mehmed was giving her statement about how she got raped, whether she screamed out to be saved or not were asked her to determine the incident as a rape or *zina*.'' BOA, MVL 1079-48, (10 Safer 1284/ 13 June 1867)

whether it is *zina* or rape is another problematic issue in the trial process. To confirm sexual intercourse as a *zina* or a rape, a judge needs four reliable Muslim men, the perpetrator's confession making four times in separate times, pregnant women without having marriage or master, and lastly the statement of rape victim claiming the sexual intimacy having happened by force.[93] The thing we have found so far is that the major factor which implies what sexual intimacy is *zina* or not is duress What if the victim cannot prove the sign of coercion or what if the victim has not got enough eye-witness, then, what will happen to the victim and case?

Supposing that a victim could not substantiate the fact of duress with concrete shreds of evidence or he or she hesitated to apply for court, it would entirely change the course of the trial. The sign of duress would probably disappear and thereby it would be evaluated as either *zina* or false accusation of *zina* (*qadf*). The issue of *qadf* shall be illustrated in the following parts. If the offense was considered as *zina*, both parties, even the victim one, would penalize according to *hadd* punishment. Only if the plaintiff was able to substantiate her allegations, would she get rid of *hadd* punishment. But if she was not able to support her allegation with reliable evidence, she would be charged with making a false accusation of *zina* (*qadf*).[94] On the other side, if a victim establishes her or his accusation with definite pieces of evidence, the perpetrator will be punished according to *hadd* principles, which are flogging, stoning, and exile. These penalties are accepted as legal punishments in Islamic law for both *zina* and rape offenses. In consequence of this gleaning, the penalty for both *zina* and rape seems the same in Islamic legal tradition but the Ottomans also punished the perpetrator according to heavy *ta'zir* which could have been compensation, jail, hard labor, and also *siyaset* which was a variant of customary law. However, it must not be forgotten, rape was judged to *zina* because of the absence of a separate punishment and definition of rape in Islamic law. Therefore, each Islamic state created its own criminal and legal sanctions to prevent the way of social and moral dissolution.

Until now, I have tried to conceptualize *zina* and rape by considering their places in Islamic legal tradition and legal ambiguity about them. What about homosexual relations? Through the history of mankind, the homosexual relationship has been seen

[93] Mohd Noor, **ibid**., 417-438.
[94] Hamza Aktan, ''Kazf'', https://islamansiklopedisi.org.tr/kazf, (2016-2020), [20.05.2020].

as heresy. We can easily find a lot of stories about homosexual relations in not only Muslim societies but also other societies.[95] In the Islamic context, homosexual relations are clearly defined as ‘‘*livata*’’ or ‘‘*fi'l-i livata''* which means bad or indecent acts. In the Quran, homosexuality or sodomy is presented in both the suras of *al-Araf* and *ash-Shuara* as a transgressing act: ‘‘Do you approach males among the worlds? And leave what your Lord has created for you as mates? But you are a people transgressing.’’ (*ash-Shuara*, 26: 165-166)[96] and also ‘‘And we had sent Lot when he said to his people, ‘‘Do you commit such immorality as no one has preceded you with from among the worlds? Indeed, you approach men with desire, instead of women. Rather, you are a transgressing people.’’ (*al-Araf*, 87:80-81)[97] While homosexual relation is described through sodomy, lesbian relation is not mentioned. The same problem we have observed before in the issue of classification and definition of rape is seen in the definition of lesbianism in Islamic legal tradition. While one of the sex crimes is explained legally, the other one is left blank. Therefore, many states adapting Islamic principles have to make their definitions and classifications of sexual crimes.

In the Ottoman judicial language, the homosexual relationship was identified through the notion of *fi'l-i livata*. Also, if *livata* takes place voluntarily, it is accepted as a sex crime which has multiple perpetrators. According to Elyse Semerdijan, since sodomy was evaluated under the sex crimes in the Ottoman *kanunname*, 300 *akçe* (coins) fine for sodomy from a rich person was charged, and besides for a person who has average income range, it was 200 *akçe*.[98] In addition to this, ‘‘If little boys from among the townspeople or peasants perform sexual acts with one another, the *qadı* punish them with fine of which amount is 30 *akçe* are collected from each one.’’[99] However, we cannot categorize *livata* as a variant of *zina* because, in Islamic law, there is no

[95] M. Kamil Yaşaroğlu, ‘‘Livata’’, https://islamansiklopedisi.org.tr/livata, (2016-2020), [28.04.2020].
[96] ‘‘Rabbinizin, sizin için yarattığı eşlerinizi bırakıyor da insanlar arasından erkeklere mi yanaşıyorsunuz? Siz gerçekten haddi aşan bir topluluksunuz.’’ https://kuran.diyanet.gov.tr/mushaf/kuran-meal-1/suara-suresi-26/ayet-165/diyanet-isleri-baskanligi-meali-1 [24.05.2020].
[97] ‘‘Lût'u da Peygamber olarak gönderdik. Hani o kavmine şöyle demişti: ‘‘Sizden önce âlemlerden hiçbir kimsenin yapmadığı çirkin işi mi yapıyorsunuz?’’, ‘‘Hakikaten siz kadınları bırakıp, şehvetle erkeklere yaklaşıyorsunuz. Hayır, siz haddi aşan bir toplumsunuz.’’ https://kuran.diyanet.gov.tr/mushaf/kuran-meal-1/araf-suresi-7/ayet-80/diyanet-isleri-baskanligi-meali-1 [24.05.2020].
[98] Elyse Semerdijan, **ibid**., 98.
[99] Uriel Heyd, **Studies in Old Ottoman Criminal Law**, ed. by V. L. Menage, (Oxford: Clarendon Press, 1973), 103.

explanation for homosexual intercourses and about their judicial process and replacement.[100] According to Abu Hanafi, anal intercourse is not approved as a variant of *zina* so *livata* cannot be compared to *zina* offenses. Since lineage cannot be harmed through *livata* due to the inability of having a child, *livata* cannot be punished accordingly *hadd* but serious *ta'zir* penalty is applicable for this crime.[101]

On the other hand, if *livata* happens against someone's free will or consent, it can be thought of as a rape incident. Just like being in the determination of *zina* and rape, the jurists need to have four reliable eye-witnesses, their testimonies, and the confession of a perpetrator to sentence a culprit correspondingly. After the investigation process, if sexual intimacy happens voluntarily, both parties will penalize according to heavy *ta'zir* punishments. Besides, Abu Hanafi argued that if someone commits *livata* to a boy who is not in puberty, he is sentenced to life imprisonment and also capital punishment.[102] In the *kanunname* of Süleyman I, sodomy or homosexual rape was explained as;

> "And if a boy is abducted, [the abductors] shall be castrated or else be fined 24 gold pieces. And if [the abducted person] is a catamite (*muhannes*), the legal punishment (*hadd)* for fornication shall be inflicted on both parties; if it is not inflicted, each of them shall pay a fine like that for fornication.''[103]

According to the article in the lawbook of Süleyman I, the jurists tried to define sodomy and forced sodomy through the notions of *cebr* and sexual identity. Then the punishment of sodomy and forced sodomy is determined as being castration and fine. The event of abduction in the article is a type of force; therefore, the perpetrator is penalized with castration or fine. However, if both parties are gay, sexual intimacy is evaluated as fornication and the punishment becomes *hadd*. Unless the conditions of *hadd* punishment are provided, the punishment turns into compensation as a type of *ta'zir*. Even if *livata* is not considered as a variant of *zina* according to the provisions of Hanafi school, the Ottoman jurists were evaluated homosexual relationships under *zina*. Probably, it could be related to the usage of the term *zina*. Z*ina* was not simply a

[100] Mustafa Avcı, ''Osmanlı Hukuku'nda Livatanın Cezası'', **Selçuk Üniversitesi Hukuk Fakültesi Dergisi**, vol. 26, no. 2 (2018): 23-26.
[101] Burhan al-Din al-Marginani, **The Hedaya; or, The Guide: A Commentary on the Mussulman Laws**, translated by Charles Hamilton, (London: Woodfall and Kinder, Milford Lane, Strand, W.C., 1870), 185.
[102] Avcı, ''Osmanlı Hukuku'nda Livatanın Cezası'', 16-22.
[103] Heyd, **ibid**., 136.

legal term to define adultery and rape but also a comprehensive legal term to define sex crimes in the Ottoman legal language until the 19th century. Therefore, the proper punishment for *livata* according to the *kanunname* of Süleyman I is *hadd* or fine. The Ottomans mostly implied Islamic punishments for sex crimes. However, they sometimes headed to other punishments which exceed the principles of Islamic law like castration. The punishment issue shall be explained later.

2.2. The Customary Law as a Component of Ottoman Law

The Ottoman law had a dual structure in its legal understanding. This duality is sometimes evaluated as a contradiction in the system; sometimes a sign of secularism in the system; and sometimes a complementary approach to answering the requirements of the Empire. Therefore, Ottoman law could not be defined as either a sole and exclusive form of Islamic law or simply Hanafi interpretation of Islamic law. According to Tursun Beg who was a historian in the reign of Mehmed II (1444-1446 and 1451-1481), the Sultan was capable of making regulations and laws with his own will and desire. These laws and regulations which were out of the warrant of the *shari'a* called *kanun* (law) were primarily based on secular principles and logical work. Their priorities were to secure public and administrative interests and to keep them under the sultanic protection.[104] Şükrü Hanioğlu also interprets the authority of the Ottoman sultans over enactment as;

> ''The exercise of the sultan's right to issue laws in areas outside the sharīa led to the creation of a considerable body of law regulating administration, taxation, and international relations, as well as special rules for taxation and administration in the various provinces; these provincial regulations took local customs and traditions into account. The sultan, as a legislator, could issue *yasaknames* (laws banning certain acts or establishing regulations for new circumstances), *adaletnames* (decrees requiring the authorities to act within the boundaries of the sharīa, sultanic law, or custom), and decrees for implementation by qādīs. These accepted forms of lex principis (sometimes based on ius commune) generated the Ottoman *örfî* (customary, sultanic) law.''[105]

The Sultan could make a law to fulfill the legal gap which the *Shari'a* cannot answer; especially, about administrative, financial, and diplomatic issues. These laws and regulations were prepared with the guidance of traditional and social codes to answer the needs of the Empire. On the other side. Ibn Khaldun who was an important Islamic

[104] İnalcık, **The Ottoman Empire: The Classical Age**, 70.
[105] Hanioğlu, **ibid**., 18.

jurist and scholar claimed that *kanun* defined under the jurisdiction of the Sultan was not necessary to maintain the expediencies of the Empire. For this reason, the *Shari'a* was only needed and mandatory law to find judicial solutions for administrative issues.[106] In this context, the reason why the Ottomans needed a sultanic law is still an argumentative issue. While Islamic law was regarded as a pure and perfect legal phenomenon by the jurists of that period, the Ottomans continued to follow their traditional legal understanding.

There are many assumptions about the rise of the customary law beside the *Shari'a* law. These are, in general, the codification of Islamic law, the politicization of the caliphate, and socio-political requirements. These developments created an area to develop a new legal phenomenon. These evolvements in the legal realm are important to perceive the existence of the customary law in the Ottoman Empire. Initially, the lack of qualified jurists and the hesitation of the jurists of that period about making *ijtihad* forced the authority to create a new legal basis to fulfill legal blanks.[107] Secondly, when the caliphate politically passed from father to son, the jurist in Islamic lands did not generally focus on public law (*amme hukuku*). The blank emerging from this approach led the rulers to make laws to meet the needs in taxation, trade, and penal realms.[108] The last reason was the complementary relation between the *Shari'a* and the customary law. The customary law was used as a guide to help the judgments and penalties of the *Shari'a* implement. According to Schact, the Ottoman sultans believed when they enacted customary laws or *kanun* that they did not ignore or intervene in the *Shari'a* law but they completed it by making *kanuns* which had identical principles with the *Shari'a* law.[109] To make it clear, *hadd* and *qısas* penalties are well defined in the Quran and they have certain clauses to be implied. If one of the clauses cannot be proved, neither of them can be implied. In case of such a legal gap, the rulers used their warrant to make laws; particularly about *ta'zir*.[110]

İnalcık also claimed that penal law was a *kanun* which was implied by *qadıs* to complete the *Sharia*.[111] Besides, the Islamic jurists sometimes headed to customary

[106] **ibid**., 18.
[107] Noel J. Coulson, **A History of Islamic Law,** (Edinburg: Edinburg University Press, 1964), 5.
[108] Ekinci, **ibid**., 165-166.
[109] Joseph Schact, **An Introduction to Islamic Law**, (Oxford: Clarendon Press, 1982), 99-100.
[110] Muharrem Midilli, **Klasik Osmanlı Hukukunda Kanun-Şeriat Ayrımı**, (İstanbul: Klasik, 2018), 56.
[111] Halil İnalcık, **The Ottoman Empire:The Classical Age**, 99.

laws and gave them legal status through Islamic law. Schact argued that ‘‘The theory of the sacred law did not fail to influence practice and custom considerably, albeit in varying degrees at different places and times, but it never succeeded in imposing itself on them completely.’’[112] As understood, there is a legal interaction between the *Shari'a* and customary law because the culture and social norms of a certain society directly affect codification. Just like Schacht's argument, Islamic law is not able to build a hegemony over the customary law. And this fact can be observed as exceeding the boundary of Islamic law in the Ottoman lawbooks like fratricide. Most particularly, the Ottoman authority applied some aggravating implications to prevent the expansion of crime by taking consideration of recent social and political conditions. In the reigns of Bayezid II (1481-1512) and Süleyman I (1520-1566), we met rigid punishments related to fornication, rape, and peculation of state property. For instance, the castrating of genitalia for rape and the cauterizing of the female sexual organ for adultery were used to give a message to the society.[113]

Briefly, the customary law was enacted according to socio-political needs, and hence socio-cultural norms and moral codes seriously affected the essence of Ottoman law. Particularly, the legal gaps in political, economic, and sexual issues became the major reasons to make a general and domestic law. Law is not something completely separate from the environment in which it was born. The Ottoman customary law mostly followed *ta'zir* principles to make laws. Since *ta'zir* is more open to legal interpretation and codification, the Ottoman legal figures preferred to use *ta'zir* principles to create penal codes and *kanunnames* by linking with customary and traditional norms.

2.2.1. Rape in the Ottoman *Kanunnames*, Lawbooks, Before the *Tanzimat*

The ambiguous character of Islamic law makes some legal issues hard to investigate, judge, and punish the perpetrators.[114] To fill up this ambiguous structure, the Ottoman sultans used their authority to enact codes on *ta'zir* punishments. Unlike *hadd* and *qısas* penalties, *ta'zir* punishments are not exactly prescribed in the sacred texts and this situation ensures a free area for legal authority.[115] In this section, I shall examine

[112] Schacht, **ibid**., 77.
[113] Aydın, ‘‘Osmanlıda Hukuk’’, 388-89.
[114] **ibid**., 375-76.
[115] Mohd Noor, **ibid**., 417-438.

and analyze the law of codes[116] before the *Tanzimat* in the reigns of Mehmed II (1451-81), Bayezid (1481-1512), Selim I (1512-20) and Süleyman I (1520-66) and besides the main penal law books after the *Tanzimat* such in 1840, 51 and 58 to illustrate the description of rape offense.

Rape was primarily considered a crime against the public. Then it was recognized as a type of illicit sexual intimacy under Islamic law. At first, sex crimes were clarified through *zina* and this term had been valid in the Ottoman legal vocabulary for a long time. The concept of *zina* is a distinguishing and determinant element of sex crimes in both Islamic and Ottoman legal literature. For instance, in the fundamental penal sources before the *Tanzimat*, the jurists identified rape cases unto the deductions about what sexual assaults were *zina* or not. These legal deductions indicated the sign of lack of consent and duress such as breaking into someone's house, kidnapping, or physical violence to distinguish rape from *zina*. The remarkable change related to rape offenses happened in its punishment with the penal law of Selim I (1512-1520). Selim I exceeded the boundary of Islamic law and enacted much heavier *ta'zir* punishment such as de-masculinization for rape crime.

To distinguish rape from *zina*, the Ottomans used ''*cebren fi'l-i şenî'* (an indecent act under duress), *hetk-i ırz* (violation of honor), *fi'l-i livata* (sodomy or forced sodomy), *tecavüz* (rape) and *zina bi'l-cebr* (adultery under duress). In the Ottoman legal terminology, *fi'l-i şenî'* means bad or evil action and throughout history, the legal usage of *fi'l-i şenî'* has expended. By the 17th century, the term *fi'l-i şenî'* had not been seen as a legal term for *zina* cases but later on, it began to be a legal concept to identify rape and sometimes *zina*.[117] To distinguish the usage of the term, the Ottoman jurists preferred to stress *fi'l-i şenî'* with *cebren* (by force). Moreover, its real legal transformation happened after the *Tanzimat* Edict because the standardization and codification movement in the legal system got the concept of *fi'l-i şenî'* redefined. Especially, in the Imperial Penal Law in 1858, the term was mainly used for rape offenses and besides homosexual relations, instead of *fi'l-i livata*. Another concept to define sex crimes is *hetk-i ırz* that means a violation of chastity or honor. Also, *hetk-i*

[116] For further information, Halil İnalcık, ''Kanunname'', https://islamansiklopedisi.org.tr/kanunname, (2016-2020), [18.03.2020].
[117] AE.SMHMD.III, 3-186 (1181/1767) The term *fi'l-i şeni'* in the records was used to define illicit sexual intercourse, instead of *zina*, not for rape.

ırz referred to the crimes of verbal assault and abuse against someone's chastity or reputation. While *fi'l-i şenî'* was likely to be used for sex crimes, *hetk-i ırz* was mostly used in the petitions of the subjects.[118] Additionally, the term *tecavüz* which is an Arabic word meaning extravagation or transgression (rape) was not mostly used for rape offenses but it was generally used for identifying transgression or abusing someone's right in the *shari'a* records. Yet, the concept of *tecavüz* was rarely used to define rape in the *shari'a* records. The last term *zina bi'l-cebr* means an illicit sexual relation under duress. The phrase is a concept deriving from Islamic law to make the description of what *zina* is not. While we were explaining what rape is in Islamic law, we used two significant concepts, coercion, and consent, and these are the fundamental pillars of rape definition.

Rape was punished according to Islamic law, but sometimes additional punishments were inflicted, too. Particularly *ta'zir* penalties were accorded in the Sultan's *kanunname* when the clauses of *hadd* punishments were not provided. The common point of lawbooks was to collect the whole subject under the scope of the law. Being single and general was a primary aim that this was derived from the understanding of *ukubat* (punishments) in Islamic law. Thus, both Muslim and non-Muslim subjects were accepted as an addressee of common penal law and were in the same situation before the law.[119] From this point of view, we will examine the four penal *kanunnames* before the *Tanzimat* in terms of the description of rape and its punishment.

Illicit sexual relations, in *Fatih Kanunname*, were described in ''*El-fasl ül-evvel fi'l-zina and devaiyye*'' (the First Chapter on Adultery and Its Involving) and besides, in Sultan Süleyman *Kanunname*, were defined in ''*Beray-ı Zina*'' (Regarding Adultery) which was the first chapter including twelve articles. The inviolability and untouchability of honor and chastity got priority in the codification movement before and after the *Tanzimat*. Since the belief of ''Honor belongs to the Padishah'' (*Irz Padişahındır*) was commonly believed by the subjects of the Empire, the Ottomans guaranteed the protection of honor through laws, kanuns.[120] The marital and social conditions of perpetrators in case of being penalized directly affected the process of

[118] Başak Tuğ, **Politics of Honor in Ottoman Anatolia: Sexual Violence and Socio-legal Surveillance in the Eighteenth Century**, (Boston: Brill, 2017), 178.
[119] İnalcık, **Devlet-i Aliyye: Osmanlı İmparatorluğu Üzerine Araştırmalar**, vol. 1, 235-37.
[120] Abdurrahman Şeref, **Tarih Musahabeleri**, abb. by Enver Karay, (Ankara: Kültür ve Turizm Bakanlığı Yayınevi, 1985), 42.

the punishment but those differences did not have any influence on the definition of rape. The distinctive feature of the *kanunnames*, which gained through the comprehensive interpretation of Islamic law, determined the type and amount of the punishment. The common tendency in the Ottoman *kanunnames* was to be imposed fine rather than *hadd* penalty for sex crimes. Let's examine these penal *kanunnames* in terms of rape one by one.

Firstly, *Kanunname-i Ali Osman* (The Imperial Lawbook) was the code of laws in the reign of Mehmed II (1451-81) that were enacted according to two different addressees; respectively administrators, which was about governmental organization and protocol and *reaya* (subject) which was basically on taxation and penalty.[121] The law book *Kanun-ı Osmani* consists of four sections and 68 articles. The first section is about the punishments of *zina* and other sex crimes committed against chastity; the second section mentions the proper penalty for fight and murder; the third one is about drinking and robbery and the last one is about taxation and *Tımar*. Furthermore, this law book had been survived through the rectification and renewal made in the term of Bayezid II who was the son of Mehmed II.[122] In this law book, rape had been described under two notions *zina* and property. As explained previously, through the existence of a marriage contract or concubinage, a woman was accepted as a property of a man.

Article 7: ''If someone breaks into someone's house with the purpose of *zina*, without being taken consideration about the marital state; married or single, the perpetrator will be punished accordingly *zina* offenses.''[123] To be called a sexual assault as rape, firstly, we need the sign of coercion but there is no phrase related to performing duress in the article. On the other side, the statement of ''If someone breaks into someone's house with the purpose of *zina* …'' can be regarded as an evidence of the lack of consent; therefore, violation of someone's body or property can be considered as an attempt to rape. However, these assumptions cannot accurately direct us to the definition of rape. Another significant thing in here, the authority of the period used *zina* to identify rape, that means, the Ottomans treated rape as a variant of *zina*.

[121] İnalcık, **ibid**., 230-37.
[122] İbrahim E. Çakır, **Fatih Dönemi Teşkilat Kanunnamesi: Kanunname-i Al-i Osman ve Osmanlı Devleti'nde Kardeş Katli**, (Gebze Belediyesi Kültür Yayınları: Gebze, 2013), 194.
[123] ''Eğer biregünün (bir kimsenin ya da başkasının) evine girse zina kasdine olursa evlü ceremin vere eğer ergen ise ergen ceremin vere ol zina eden gibi yukarı tafsil üzere ki beyan kılındı.'' Ahmed Akgündüz, **Osmanlı Kanunnameleri ve Hukuki Tahlilleri**, vol. I, (İstanbul: Osmanlı Araştırmaları Vakfı, 1990), 347-48.

Secondly, *Kavanin-i Örfiyye-i Osmani* (The Imperial Customary Codes) was prepared by Sultan Bayezid II (1481-1512). He preferred to adopt the clauses which his father did in the penal law book. In contradistinction to Mehmed II's law book, Bayezid put heavier *ta'zir* punishments for rape issue. To give an example; ''If a person who desires a boy or girl goes into someone's house traitorously and tries to restrain the house owner's wife and daughter, the person will be castrated.''[124] As seen in the article of the Imperial Customary Codes, rape was described through the violation of free will or consent. To restrain someone in her or his home was also evaluated as a violation of freedom. As we known previous explanations on what rape is, the lack of consent or violation of free will is fundamentally a legal clause for a rape accusation. According to the *kanunname* of Bayezid II, the perpetrator of rape can be punished through de-sexualization. However, this kind of punishment is not mentioned in the *hadd* penalty in Islamic law. It is an example of the implementation of customary law in criminal cases.

Thirdly, *Kanunname-i Sultan Selim Han* (The Lawbook of Sultan Selim Khan) was enacted during the reign of Selim I (1512-1520). It was one of the most significant penal codes during the classical age. The main difference, which makes the *kanunname* come one step forward, is that it clarified the blurry description of rape and determined certain penalties for rape. According to the penal code, adultery and rape were completely separated from each other in terms of penalty.[125] For instance,

> ''If a person kisses someone's wife or daughter or chases and makes her feel uncomfortable with his words, the person will be sentenced to birching and for every two birchings, the person is sentenced to one *akçe*. Likewise, if someone makes a comment on someone's concubine and kisses her under duress, it will be punished accordingly the same clause. Also if someone follows a woman or breaks into her home and grabs her hair or tries to take off her underwear and clothes and on condition that this situation is confirmed by a court, the person is sentenced to imprisonment.''[126]
>
> ''If a person breaks into someone's home with the purpose of *zina*, a married person is penalized as a married perpetrator and also an adolescent person is punished as an adolescent person. Also,

[124] ''Kız ve oğlan çeken kimsenin hıyanet ile bir ecnebinin evine giren kimsenin avrat ve kız çekmeğe bile varan kimsenin içmeği kesile.'' Akgündüz, **Osmanlı Kanunnameleri ve Hukuki Tahlilleri**, vol. 2, 42-43.

[125] Adem Yıldırım, ''İslam Hukunda Cinsel Dokunulmazlığa Karşı İşlenen Hetk-i Irz (Tecavüz) Suçunun Cezası Ve Kuran Ceza İlkeleri Açısından Değerlendirilmesi'', **Dokuz Eylul Universitesi Ilahiyat Fakultesi Dergisi**. no.47 (2018): 242.

[126] "Bir kimse başka birinin karısını veya kızını öpse, yahut yolda peşine takılıp laf atsa, mahkeme tarafından sopa atılma cezasına çarptırıldıktan gayri, her iki sopa başına bir akçe ceza alınır. Keza, birinin cariyesine laf atan ve zorla öpen de aynı ceza ile cezalandırılır. Bir kimse, bir kadının arkasına düşse veya evine girip saçını tutsa, yahut külodunu ve elbisesini çıkarmaya çalışsa ve bu durum mahkemece tespit edildiği taktirde adam hapis cezası alır.'' **Yavuz Sultan Selim Kanunnamesi**, vol. 18, translated. by Hadiye Tuncer, (Ankara: Tarım Orman Köyişleri Bakanlığı Yayını, 1987), 12.

if a person goes into someone's house traitorously, the person is penalized by castrating for the sake of penalty itself.''[127]

The article frankly explains rape in various ways. It does not only imply sexual assault but also verbal assault. It is an undeniable fact that the Ottomans began to arrange their categorization of sex crimes and punishments. The phrase ''*siyaset için zekeri kesile*'', cutting genital organ for punishment, gains another dimension to the penalty of rape crimes. This situation clearly describes the differences between adultery and rape in terms of penalty. Instead of *hadd al-zina*, the Ottoman rulers preferred heavy *ta'zir* punishments for rape offenses.

Lastly, *Kavanin-i Örfiyye-i Osmani* (The Imperial Customary Codes) was prepared by Sultan Süleyman I (1520-1566). Just like his predecessors, Sultan Süleyman I enacted two separate *kanunnames*. One of them was about the civil, military, and criminal issues, and the other one was the systematic and united version of the first code of laws between 1520-1566.[128] The *kanunname* consists of three chapters and 19 parts. The first chapter was about penalty law; the second one was related to *zina* punishment and the third was about a robbery, drinking, deforcement, and rape punishments.[129]

Article 5 ''And if a person who desires boy or girl breaks into someone's house traitorously and then assault to the wife or daughter of the house owner, the person will be punished for crime by being cut his genital organ.''[130]

Article 7 ''And if a person kisses someone's wife or daughter or head them off and disturb them with verbal harassment, a judge will penalize him with certain *ta'zir* penalty, which it was one *akçe* for each stick.''[131] As understood clearly from the articles, not only rape crime but also verbal harassment and their punishments framed and determined with heavy *ta'zir* principles. Also, de-sexualization was among legal

[127] ''Bir kişi zina kasdıyla bi kişinin evine girse evlü olursa evlü cürmin vire ve eğer ergen olursa ergen cürmün vire kız oğlan çeken ve hıyanet ile bir kimsenin evine girenin ve kız ve avret çekmeğe bile varan kimesneye siyaset için zekeri kesile.'' Belkis Konan, ''Osmanlı Hukukunda Tecavüz Suçu'', **Osmanlı Tarihi Araştırma ve Uygulama Merkezi**, vol. 29, Bahar (2011): 158.

[128]Ahmed Akgündüz, ''Kanunnamelerdeki Ceza Hukuku Hükmleri ve Şer'i Tahlili'', **İslami Araştırmalar Dergisi**, vol. 12, no. 1(1999): 12-13.

[129] **Ibid**., 13.

[130] ''Ve eğer oğlan çeken veya kız çeken kimesnelerin, hıyanet ile evine girenin ve avret-kız çekmeğe bile varanın siyaset içün zekerlerin keseler.'' Ahmed Akgündüz, **Osmanlı Kanunnameleri ve Hukuki Tahlilleri**, vol. IV, (İstanbul: Osmanli Araştırmaları Vakfı, 1990), 297.

[131] ''Ve eğer bir kimesne bir kişinin evretin veya kızın öpse veya yoluna varup söylese, kadı muhkem tazir edüb ağaç başına bir akçe cürm alma.'' Akgündüz, **Osmanlı Kanunnameleri ve Hukuki Tahlilleri**, vol. IV, 297.

penalties for rape but we had never met such a punishment in the official records.[132] To summarize the general feature of these four penal laws, *kanunnames* were simply based on Hanafi interpretation of Islamic law by constructing their articles in the shadow of *ta'zir* penalties. Unlike Islamic law, the rulers preferred to imply fine as a type of *ta'zir* punishment for *zina* and also a-sexualization for rape.[133]

All in all, the *kanunnames* enacted before the *Tanzimat* have particular characteristics in terms of method and scope. The *kanunnames* are enacted with the consent of the Sultan to meet the needs of the Empire. The *kanunnames* cannot simply be named as secular because it is based on religious principles. When it comes to sex crimes, the *kanunnames* primarily deal with physical and verbal assaults against someone's honor and chastity. The jurists generally use the term *zina* to explain rape offenses by adding the possibilities of coercion and the violation of consent such as breaking into someone's home or chasing her. Until Selim I (1512-20), sexual assaults were punished accordingly both *hadd* principles and *ta'zir* such as compensation, exile, etc. Sultan Selim I expended the definition and scope of sexual assaults by adding verbal and physical harassment.

2.2.2. Rape in the Ottoman Penal Laws (1840-51-58) After the *Tanzimat*

After the *Tanzimat* Edict, Sultan Abdülmecid (1839-1861 and the Ottoman statesmen decided to prepare a general and inclusive penal code that was valid and feasible for every single subject in the Empire. The Edict frankly emphasized the necessity and importance of new laws and the reason and aim behind the codification movement were addressed, too.[134] Furthermore, the Ottoman penal codes included not only the base clauses of *qısas* and *diyet* (blood-money) defined in the *Shari'a* law but also *ta'zir* punishments interpreted through the customary warrant of the Sultan himself. Through the existence of *kanunnames*; particularly the Imperial Penal Codes in 1840, 1851 and 1858, the Ottoman authorities aimed to create a sole and general penal law so that they

[132] Konan, **ibid.**, 159.
[133] İsmail Acar, ''Osmanlı Kanunnameleri ve Ceza Hukuku'', **Dokuz Eylül Üniversitesi İlahiyat Fakültesi Dergisi**, vol. 14, no. 13 (2001): 67.
[134] ''Bundan böyle Devlet-i Aliyye ve memalik-i mahrusamızın hüsn-ü idaresi zımmında bazı kavanın-i cedide vaz' ve tesisi lazım ve mühim görünerek'', ''Velhasıl bu kavanini nizamiye hasıl olmadıkça tahsili kuvvet ve mamuriyet ve asayiş ve istiharat mümkün olmayıp'', ''işbu kavanini mukteziyenin mevaddı esasiyesi dahi emniyeti can ve mahfuziyeti ırz, namus ve mal, tayin-i vergi ve asakir-i mukteziyenin surety celp ve müddet-i istihdamı kaziyelerinden ibaret olup'' İ: MMS. 1/24. Taken from Gümüş, **ibid.**, 166.

could catch standardization and common applicability in the punishments regardless of religious and sectarian differences.[135] The three significant penal laws were enacted to meet the needs of the *Tanzimat* courts such as the *Meclis-i Vala* or *Nizamiye* courts, too. I shall penetrate the scope of these penal codes to frame rape issues by presenting legal phenomena.

Firstly, the 1840 Penal Code was the first legal production of the *Tanzimat* era. The penal law consists of one introduction, 13 chapters,[136] and 42 articles.[137] It is also generally emphasized the crimes which were committed against the ruler and the Empire, *zina*, murder, wounding, crossword, bribery, and taxation. Whilst the 1840 Penal Law included the crimes against the Sultan and the Empire, new order and codes, corruption, rebellion, rape cases were not mentioned separately in this codex. Besides, the 1840 Penal Law mentioned the matters of honor and chastity as a sacred and precious entity as their own lives in its introduction and the third chapter. However, more detailed information about rape offenses was not given even though it was the fundamental judicial source for criminal cases in that period.[138] Although we cannot find a specific description of rape, there is a special chapter; chapter III, for chastity and honor crimes committed against officeholders, not subjects. Lastly, punishments and trail processes related to sexual assaults were presented in this chapter.[139] In addition to this, the penal code adopted the principles of *hadd*, *ta'zir, qısas*, and also customary punishments.[140] Thus, the penal law was the combination of *Shari'a* and customary laws; that is why we cannot undoubtfully label those *kanuns* as secular. Besides, its primary message was to guarantee the principles of the presumption of innocence and the private penalty. Also, the preservation of these principles was ensured with *qadıs*' legal decisions and thus the matter of legality was protected through legal figures.[141]

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[135] Halil İnalcık, ''Osmanlı Hukukuna Giriş: Örfi-Sultani Hukuk ve Fatih'in Kanunları'', **Ankara Üniversitesi Sosyal Bilimler Fakültesi Dergisi**, vol. 13, no. 2 (1958): 122.
[136] For further explanation on the context of the chapters, Rabia Beyza Candan, ''1840 Tarihli Ceza Kanunname-i Hümayunu İncelemesi'', **Anadolu Üniversitesi Hukuk Dergisi (AndHD)**, vol. I, no. 1, (2015): 63-81.
[137] Gümüş, **ibid**., 181-2.
[138] İbrahim Dülger, ''Irza Geçme Suçunun Tarihi Gelişimi'', **Selçuklu Üniversitesi Sosyal Bilimler Enstitüsü Dergisi**, vol. (?), no. 6: 93.
[139] Rabia Beyza Candan, ''1840 Tarihli Ceza Kanunname-i Hümayunu İncelemesi'', **Anadolu Üniversitesi Hukuk Dergisi**, vol. I, no. 1, (?): 76.
[140] Gümüş, **ibid**., 167-170.
[141] **Ibid**., 18.

The common purposes of those penal laws were to decrease the rate of crime in the Ottoman lands and to increase centralization and legality. To make it possible, the Ottoman statesmen tried to minimize the rate of impunity when the *Shari'a* law could not gain enough evidence to be punished a perpetrator.[142] However, there were some systematic deficiencies in the 1840 Penal Law so some amendments were involved throughout time.[143] Kent F. Schull argued that the 1840 Penal Law could not bring a new perception to the crimes and punishments of neither the *Shari'a* law nor the customary law. Furthermore, since the law could not provide an occasion to collect all these legal innovations under one single court, the issue of arbitrary about the punishments went on within the legal system. [144] He explained clearly the failure of the penal law as;

> ''Generally speaking, though, this code did not change traditional forms of punishment. It still allowed discretionary corporal punishments and fines (*ta'zir* and *siyaset*), meted out respectively by *kadıs* and local magistrates. In other words, local Islamic court judges and magistrates continued to possess great autonomy in identifying, trying, and punishing criminals according to their discretionary powers; all of which were sanctioned under official Ottoman-Islamic legal authority.''[145]

As understood through the quotation above, the Ottoman jurists primarily focused on codification to end the subjective and arbitrary punishments. But, as the content of the 1840 Penal Law was not distinguished the *shari'a* from the customary, the arbitrary and personal autonomy of the *qadıs* could not be prevented. This resulted from the lack of the separation of legal institutions and understanding. Indeed, the 1840 Penal Law was prepared within a short period and had a limited scope of crime and punishment, it could not redeem the needs of the society and government. Therefore, the Ottoman authority decided to prepare a more detailed and functional penal code in terms of crime and punishment. After 11 years, the 1840 Penal Law was abolished together with the inurement of 1851 Penal Law, *Kanun-u Cedid*, (the New Code).

Secondly, the 1851 Penal Law-*Kanun-u Cedid* (The New Code) was prepared by *Meclis-i Ahkam-ı Adliyye* in 1851 and designed as three chapters and 43 articles. The New Code had an identical feature in terms of wording, extent, and crime

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[142] Uriel Heyd, ''Eski Osmanlı Ceza Hukukunda Kanun ve Şeriat'', translated by Selahaddin Eroğlu, **Proceedings of The Israel Academy of Sciences and Humanities**, vol. III, no.1-18 (1969): 643-644.
[143] Şerif Mardin, ''Mecellenin Kaynakları Üzerine Açıklayıcı Notlar'', **Türk Modernleşmesi**, ed. by Mümtaz'er Türköne, Tuncay Önder, (İstanbul: İletişim, 2007), 122.
[144] Kent F. Schull, ''Criminal Codes, Crime, and the Transformation of Punishment in the Late Ottoman Empire'', **Law and Legality in the Ottoman Empire and Republic of Turkey**, ed. by Kent F. Schull, M. Safa Saraçoğlu, Robert Zens, (Indiana: Indiana University Press, 2016), 3.
[145] **Ibid**., 4.

categorization. The sorts of crimes were relatively expended, too. The new supplements to crime extent were respectively; falsum, counterfeiting, abduction of girl, molestation, drinking, and lastly gaming.[146] The first chapter was about the crimes committed against individuals and state, second and third chapters were about life, property, and chastity safety and the penalties also were determined by being based on Islamic penal principles in case of violation of them. The 1851 Penal Code also included the crimes which were committed against honor and chastity and emphasized the notion of the immunity of honor and chastity in the introduction part. In its second article of the second chapter, the assaults against honor and chastity shall be penalized according to the *shari'a* judgments; particularly *hadd* punishments. If the clauses of *hadd* penalties cannot be provided, the criminals shall be penalized according to *ta'zir* punishments concerning their social conditions.[147] As we understand from the statement below, '' … penalized according to the *shari'a* judgments …'', that means, there is no clear separation between the *Shari'a* law and the Penal Laws in terms of their scope and limitations. There seems also a complementary relationship between them. Just like the 1840 Penal Law, this penal law was also prepared within a limited time, it did not bring a new understanding to legal life; particularly for sex crimes. However, both 1840 and 1851 Penal Laws could not be sufficient enough to maintain its existence in the system; therefore, 1858 *Kanunname-i Hümayun* (the Imperial Penal Law) was enacted.

Lastly, the 1858 *Ceza Kanunname-i Hümayun* (The Imperial Penal Law) was prepared with the leadership of Ahmed Cevdet Pasha. The Imperial Penal Law was designed as being three chapters, 32 parts, and 264 articles. In the first chapter, the crimes which were committed against the public; in the second chapter, the crimes which were committed against individuals; and in the last chapter, criminal misdemeanors orderly took place.[148] Furthermore, contrary to former penal codes, the Imperial Penal law has a relatively more secular context but it does not mean that it is opposite to Islamic law. For instance; in its first article, there is a phrase, "the scales of *ta'zir* punishments which belong to *shari'a* jurisdiction'',[149] that proves us the coordination between

[146] Gümüş, **ibid**., 184.
[147] Dülger, **ibid**., 93.
[148] Gümüş, **ibid**.,185.
[149] ''Şer'an ulül emre ait olan ta'zirin derecâtını." **ibid**., 185.

them.[150] By 1926, the Imperial Penal Law had been used as a main legal source for criminal offenses, but it got some amendments as new legal needs brought out. On the other hand, the code was a specific production of the *Tanzimat* era and partially western-style enactment.[151] Besides, the penal law aimed to transform the criminal understanding, practice, punishments, which it disclosed the performance of torture during the trial process and prisons.[152]

Rape was described with the term *fi'l-i şenî'* under the title *hetk-i ırz* in this penal code. The Imperial Penal Law initially used the concept of ''*hetk-i ırz*'' to describe and determine its legal punishments in the third chapter, in between the 197. and 200.articles. The chapter was named as ''*Hetk-i Irz Edenlerin Mücazatı Beyanındadır*'' (Regarding the Punishments of Whom Commits Violation of Honor). Additionally, the Imperial Penal Law in 1858 has a more significant effect on our issue. Rape crime firstly defined more precisely and comprehensively in the 1858 Penal Law under the title of ''Regarding the Punishments of Violation of Honor''.[153] Also, rape offenses were identified and the penalties were determined through *ta'zir* principles and customary law. The addendum to the 1858 Penal Law in 1860, the extent of the crimes about chastity was expanded and molestation was also added.[154] Afterward, the amendment in 1914 stated that if the perpetrator gets married to the victim, the penalty is suspended or canceled.[155] When comparing to other criminal codes, the 1858 penal Law has well-defined crime categorizations and more standard and objective penalties about sex crimes during the 19th century. This penal code is abstractively the main legal source of the criminal cases hearing in *Meclis-i Vala*. Resulting from this, every single rape offenses or sexual harassment is penalized according to the articles of the Imperial Penal Law in 1858.

To the consequence of the analysis in the *Meclis-i Vala* registrations between 1858-68, all the sentences about rape offenses were mostly based on the verdict in the 1858

[150] Tahir Taner, ''Tanzimat Devrinde Ceza Hukuku'', **Tanzimat I**, (İstanbul, 1999), 230.
[151] Gümüş, **ibid**., 186
[152] Kent F. Schull, ''Criminal Codes, Crime, and the Transformation of Punishment in the Late Ottoman Empire'', **Law and Legality in the Ottoman Empire and Republic of Turkey**, ed. by Kent F. Schull, M. Safa Saraçoğlu, Robert Zens, 5.
[153] ''Hetk-i ırz edenlerin mücazatı beyanındadır'' **Dustûr**, Tertib I, vol. I., 537-597; Konan, **ibid**.,163.
[154] Zeyl 3 (1277 H.) (1860M.): "Zükur ve inasdan genç kimselere hiref-endazlık edenler bir haftadan bir aya kadar ve elleriyle sarkıntılık edenler bir aydan üç aya kadar hapis olunur." Ahmed Akgündüz, **İslam ve Osmanlı Külliyatı**, vol. 2, (İstanbul: Osmanlı Araştırmaları Vakfı, 2012), 866.
[155] Konan, **ibid**.,163.

Penal Law. The verdict is that ‘‘If someone commits *fi‘l-i şenî‘* to someone forcibly’’ or, ‘‘If someone rapes someone else’’, the person shall be inflicted on hard labor penalty at least three years under Article 198 or imprisonment penalty under Article 197 or Article 201. However, the duration of the punishments might show differences according to the age of a victim and other criminal acts.[156] The articles about rape from Article 197 to 200 shall be analyzed one by one to build the legal framework of rape offenses.

Firstly, Article 197 is about rape offenses which were against a child who is younger than 11 years old. Article 197: ‘‘Whoever commits *fi‘l-i şenî‘* or rapes against a child who is younger than eleven years old, the person shall be punished imprisonment for six months at least.’’[157] This article mainly addresses rape against the child. In 1922, the article was amended and the content was rearranged with rape crimes committed against unconscious and mentally unbalanced people. That ‘‘this situation of a victim must be known by an offender’’ was added to the article and hence his or her punishment could be arranged to that clause.

Secondly, Article 198 was about rape offenses committed against individuals who were elder than 11 years old. Article 198: ‘‘If a person commits *cebren fi‘l-i şenî‘*, an indecent act by force, or rapes, the person shall be put in hard labor provisionally.’’[158] Addedly, in 1860, the article got addendum and the attempt for rape also got punished because of other criminal acts. The addendum of Article 198: ‘‘If a person attempted to rape or commit *cebren fi‘l-i şenî‘* and the action does not occur because of other reasons, the person shall be punished imprisonment for three months at least.’’[159] In 1922, the article was re-amended and the condition of duress and opposition was added.

Thirdly, Article 199 explained rape offenses that were committed by the parents, guardians, teachers, or servants who were charged with the victim’s education and protection. Article 199: ‘‘If rape offense or *cebren fi‘l-i şenî‘* is performed by the

[156] BOA, MVL 661-22, (3 Muharrem 1281/ 8 June 1864)

[157] 197.madde: ‘‘Her kim on bir yaşından aşağı bir çocuğa fi‘l-i şenî‘ icra eyler ise altı aydan ekall olmamak üzere muvakkaten habs cezasıyla mücazat olunur.’’ **Dustûr**, Tertib I, vol. I., 537-597.

[158] 198.madde: ‘‘Bir adem bir kimesneye cebren fi‘l-i şenî‘ icra ider yani ırzına geçer ise muvakkaten küreğe konulur.’’ **Dustûr**, Tertib I, vol. I., 537-597.

[159] Zeyl, addendum: ‘‘Böyle cebren fi‘l-i şenî‘ icrasına tasaddi idübde yed-i ihtiyarında olmayan esbab-ı mani’a hilületiyle fi‘le çıkamamış olur ise üç aydan ekall olmamak üzere habs cezasıyla mücazat olunur.’’ (3 Cemaziye’l-ahir 1277/17 December 1860) **Dustûr**, Tertib I, vol. I., 537-597.

victim's teacher, guardian, or servant, the person shall be put in hard labor for five years at least.''[160] In 1922, the article was also amended and the possibilities of the victim's death, catching infectious diseases, affecting the victim's health condition worse and multiple offenders (gang rape) were added too.

Lastly, Article 200 was about rape offenses which were committed against a virgin woman that in this situation, the perpetrators were imposed compensation for that victim. Article 200: ''If such rape offense or *cebren fi'l-i şenî'a* is perpetrated to an unmarried girl, the person who committed it shall be put in hard labor and also sentenced to a fine.''[161] The addendum of Article 200 in 1860: ''If a person deceives a girl with the promise of marriage and ruins her virginity, and after the sexual intimacy, the person gives up getting married, the person shall be punished imprisonment from one week to six months and also fine; however, the person must confess it or the girl must prove it to be implied the punishment.''[162]

All in all, rape and adultery always found a place in both the *kanunname*s in the classical age and the penal laws in the *Tanzimat* era. The *kanunnames* before the *Tanzimat* are considered rape offenses as a variant of *zina* and its legal entity is explained through the notion of *zina*. On the other side, the *kanunname* of Sultan Selim I distinguished rape from *zina* via harsh *ta'zir* punishments. Cutting genital organs was seen suitable for this crime but we do not have any concrete evidence about whether the punishment was implied or not. After the *Tanzimat* Edict, the penal codes were enacted in 1840,1851 and 1858 so that the rulers could empower the central government and create a general and feasible penal code for every subject in the Empire. Both the 1840 and 1851 Penal Codes, rape, and *zina* issues are tied up with honor and chastity concepts. The influence of religious law and customary law are intensively used during the codification process so these are called local penal codes.

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[160] 199.madde: ''Cebren fi'l-i şenî'a icrası buna düçar olanların üzerlerine hükümleri cari olan mürebbiyeleri veyahut velileri veyahut aylık hizmetkarları tarafından vuku'u bulur ise beş seneden ekall olmamak üzere kürek cezası hüküm olunur.'' **Dustûr**, Tertib I, vol. I., 537-597.

[161] 200.madde: ''Eğer böyle cebren fi'l-i şenî'a henüz bir ara tezviç olunmamış kız hakkında vuku'u bulur ise buna mütecazer olan kimse işbu kürek cezasından başka tazmin virmeğe dahi müstehak olur.'' **Dustûr**, Tertib I, vol. I., 537-597.

[162] Zeyl, addendum: ''tezevvüc ideceği diye iğfal ile bir bikr-i buluğanın bikrini izale idübde sonra almadan istintal iden kimse kendüsünden bedel tazmin bikr alındıktan sonra bir haftadan altı aya kadar habs olunur fakat bu hükmün suduru izdivaç va'adiyle iğfali ya erkeğin ikrar ve itiraf eylemesine veyahut kız tarafının isbat etmesine menuttur.'' (3 Cemaziye'l-ahir 1277/17 December 1860) **Dustûr**, Tertib I, vol. I., 537-597.

However, the 1858 Penal Law is the combination of Ottoman law and the 1810 French Penal Law; therefore, it is not a domestic codification. With the enactment of 1858 Penal code, rape firstly defined through the term *fi 'l-i şenî'* and the term *hetk-i ırz* was used to define physical and verbal assaults against honor and chastity. The punishment and other criminal factors were mentioned in a detailed way in the articles of the Imperial Penal Code. As a result, the Ottomans constituted their legal language.

3. THE DEFINITION OF RAPE IN THE *MECLIS-I VALA* REGISTRATIONS

The rape offenses in the Ottoman Empire were investigated in both the *Shari'a* courts and the local courts. The standardization and modernization movement together with the *Tanzimat* Edict gained a new dimension to the legal system. The division of the courts according to their warrant and expertise such as Commercial and *Shari'a* courts and the enactment of the new codes such as *Majalla* (*Mecelle*)[163] and the Penal Laws in 1840, 1851, 1858 created a new legal understanding in the Empire. That means each legal issue could be heard and investigated according to its context. Rape offenses were the subject of the criminal law and to investigate and conclude rape offense was the duty of the *Meclis-i Vala*. Even if they were examined in the local courts, the final judgment always belonged to the *Meclis-i Vala*. The reason was that the crimes against someone's chastity and honor took place the Penal Laws and they were evaluated as grave crimes. The Ottoman authority frankly promised to save someone's chastity and honor as their rights to live and own property in the penal laws; therefore, the top-rank court in the Empire was responsible for providing justice.[164]

While doing this analysis, the *Shari'a* and the *Meclis-i Vala* registrations will be the focused point to illustrate the definition of rape through case samples. The *Meclis-i Vala* registrations are the main research object of this study to penetrate Ottoman legal literature after the *Tanzimat*. The records are criminal case samples which were held in local courts and sent to the *Meclis-i Vala* for final judgment or re-hearing. The records are approximately fifty case documents regardless of sex, socio-cultural and

[163] *Mecelle* or *Mecelle-i Ahkam-ı Adliyye* was a law which involved the law of obligations, the law of property and the procedure of trial. It was considered as the first civil law of the Ottoman Empire which was prepared with the leadership of Ahmed Cevdet Pasha between 1868-1876. Mehmet Akif Aydın, ''Mecelle-i Ahkam-ı Adliyye'', https://islamansiklopedisi.org.tr/mecelle-i-ahkam-i-adliyye, (2016-2020), [24.03. 2020]. For further information, Samy Ayoup, ''The Mecelle, Sharia, and the Ottoman State: Fashioning and Refashioning of Islamic Law in the Nineteenth and Twentieth Centuries'' (2016).

[164] "…bundan böyle Devlet-i Aliyye ve memâlik-i mahrûsemizin hüsn-ü idaresi zımnında bazı kavânîn-i cedide vaz' ve tesisi lazım ve mühim görünerek işbu kavânîn-i mukteziyenin mevâdd-ı esâsîsi dahi emniyet-i can ve mahfuziyet-i ırz ve nâmus ve mal…".

religious identity and age from all over the Empire between 1858-1868. This period was intentionally chosen because the 1858 Penal Law or the Imperial Penal Law was one of the most comprehensive and well-organized criminal codes of the Empire in terms of crime extension and the scope of punishment. Also, all the terms used for the identification of rape in Ottoman legal language are explained by addressing some certain articles in the 1858 Penal Law. These terms are respectively, *hetk-i ırz* (violation of honor), *fi'l-i şenî'* or *şenî'a* (zina or rape), *fi'l-i livata* (homosexual rape or forced sodomy), and *bikr-i izale* (defloration).

3.1. The Identification of Rape in the *Meclis-i Vala*

In this part of the study, the main focus is to give the meaning of the legal terms which were used to identify rape offenses in the penal laws and court records after the *Tanzimat* Edict. As previously mentioned, the *Meclis-i Vala* was a highly qualified and ranked court in the Ottoman legal system during the *Tanzimat* era and its working conditions and principles were arranged accordingly the values of that era. Considering this, all the rape offenses held in the *Meclis-i Vala* must have been concluded through these principles. Therefore, to get a better conceptual schema, the terms used to identify rape in the legal documents above; especially the 1858 Penal Law, will be studied in terms of their usages in the *Meclis-i Vala* registrations. Also, through the registrations, the factors which affect the identification and definition process of rape offenses and the components of rape definitions will be analyzed by referring to certain rape cases from the *Meclis-i Vala*.

Initially, *hetk-i ırz* (هتك عرض) is a kind of collocation which forms of *heteke* which is an Arabic verb, to attack, and *ırz* which is an Arabic noun, chastity or honor and it was used to define rape offenses in Ottoman legal language; especially for rape.[165] In dictionary meaning, *hetk-i ırz* is referred to the laceration of the chastity curtain, ''*namus perdesinin yırtılması''* in Turkish or for a better English translation, attack on honor or chastity.[166] In this point, the question of how Ottoman jurists conceptualized *hetk-i ırz* as a legal term to define sexual violence in Ottoman legal literature matters increasingly for this study. Further, the term *hetk-i ırz* was the most commonly used

[165] Sabri Erturhan, ''Fıkhi Açıdan Nitelikli Cinsel Saldırı (ırza geçme)'', **Cumhuriyet Üniversitesi İlahiyat Fakültesi Dergisi**, vol.16, no.2 (2012): 27.
[166] Ferit Develioğlu, **Osmanlıca-Türkçe Ansiklopedik Sözlük**, (Ankara: Aydın Kitapevi Yayınları, 2015), 456.

legal term which was frequently observed in the official documents during the 18th century. The term mostly described any form of assault penetrating against someone's family, child, or wife. In addition to this, the term was also used to define any verbal and physical attack against someone's honor, chastity, and privacy.[167] Therefore, the protection of honor or chastity, seemed highly significant to be preserved through kanuns, laws, because violation of a subject's honor or chastity meant threatening the honor of the Empire.[168] Başak Tuğ's study, focusing on the petitions sent to the Imperial Council (*Divan-ı Hümayun*) in the 18th century about sexual violence offenses, showed that Ottoman jurists used *hetk-i ırz* and also *fi'l- şenî'*[169] to define sexual violence offenses in the 18th century. These cases were mostly related to intrusions and brigandage.[170] For example;

> ''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 şenî'*) 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 *fatwa* of the chief mufti that I present here.
> Your humble servant, Karabaşoğlu Hasan Beşe''[171]

Another example; Osman who was the son of Basri was charged with threatening the public order by performing inappropriate actions and also, he attempted to commit rape. Those allegations were proved by the Voyvoda of Günyüzü and he was sentenced to exile.[172] In this case sample, *hetk-i ırz* defines rape as a form of sexual violence;

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[167] Başak Tuğ, ''Gendered Subjects in Ottoman Costitutional Agreements, c.a. 1740-1860", **European Journal of Turkish Studies** , no. 18 (2014): 9-10.
[168] **ibid**., 10.
[169] The term *fi'l-i şeni'* can be translated as an indecent act literally, but it means also adultery and rape at the same time. To separate them from each other, the notion of consent and force must be sought in the document for a better evaluation.
[170] Tuğ, **ibid**., 14-15.
[171] BOA, A.DVN.ŞKT, folder 67, petition 134 (1157/1744). Taken from Tuğ, ''Gendered Subjects in Ottoman Costitutional Agreements, c.a. 1740-1860", 12.
[172] "Kal'a-ı Sultâniye nâ'ibine ve Günyüzü voyvadasına, Günyüzü Kazâsı'na tâbi'Burma Karyesi sâkinlerinden Basri oğlı Osman nâm şahıs kendü halinde olmayub insilâb-ı asâyiş-i fukarâ-yı memleket ve ta'dîl-i mehâmm-ı maslahatı müstelzim hareket ve hetk-i ırz dâ'iyye-i fazîhasına cür'et eylediği bâ-i'lâm u mahzar voyvada-ı mûmâileyh tarafından inhâ' olunmakla kavâs mübâşeretiyle merkūmın Kal'a-ı Sultâniye'ye nefy ve iclâsı bâbında dîvândan emr-i âlî.'' Sibel Kavaklı, ''929/A Numaralı Nefy

however, in the previous case, *hetk-i ırz* and *fi'l-i şenî'*are mentioned in the same line with different purposes. While *hetk-i ırz* defines the attack against honor (*şeref* or *onur*), *fi'l-i şenî'* points out illicit sexual intercourse under duress. This contextual differentiation shows that *hetk-i ırz* gained a different identity to signify any sort of sex crimes within society. This approach can be observed in the *kanunnames* before the *Tanzimat*; thusly, *zina* was both a legal term for illicit sexual intimacy and a comprehensive legal term to define verbal and physical assaults against someone's honor and chastity.

On the other side, the Islamic legal understanding approaches sexual intercourses which are not based on a marriage contract as a crime. The main category for these sex crimes is *zina* to determine any sort of illicit sexual intercourse between a man and a woman. Therefore, rape has always been evaluated under this category.[173] This tendency was also followed by the Ottoman judiciary authority to define sex crimes. The main title was *zina* used to determine any form of sex crimes including adultery, rape, sodomy, molestation, etc. before the *Tanzimat* Edict. After the *Tanzimat,* the term *hetk-i ırz* turned into a general term to state all kinds of sex crimes in the penal code in 1858. To give an example for the conceptual transformation of the term *hetk-i ırz* from the 1858 Imperial Penal Law, ''Chapter II: Part 3: '*Hetk-i ırz idenlerin mücazatı beyanındadır'* (Regarding the Punishments of Whom Commits Violation of Honor)'' After this title, the articles related to sex crimes such as adultery, sodomy, rape, prostitution, and molestation, and also their punishments take place between 197 and 200 articles by using the term *fi'l-i şenî'*. As seen in the case sample, the components of *hetk-i ırz*, breaking into someone's home, attacking someone's chastity or honor, and being a member of a bandit were accepted as reasonable components of *hetk-i ırz*. Except for being a member of an illegal bandit, the other two components are seen in the *Meclis-i Vala* with the name of *fi'l-i şenî*' instead of *hetk-i ırz*. Besides, there is no any example related to the usage of *hetk-i ırz* to state rape offenses in the *Meclis-i Vala* records. It can be the result of terminological transformation after the *Tanzimat*

Defterinin (1826/1833) Transkripsiyon ve Değerlendirilmesi'', (M.A. Thesis, Gaziosmanpaşa Üniversitesi Sosyal Bilimler Enstitüsü, 2005), 527.

[173] Ziba Mir Hosseini, ''Criminalizing Sexuality: Zina Laws as Violence Against Women in Muslim Contexts'', http://lastradainternational.org/lsidocs/islamic.pdf [March, 2010/ 20.03.2020].

because the Ottoman judicial characters preferred to use the term *fi'l-i şenî'* to define *zina* and rape in the *Meclis-i Vala* and the *shari'a* registrations.

On the other hand, according to the *shari'a* record in Üsküdar (1740-1742), the terms, both *şetm,* and *hetk-i ırz* penetrate the range of verbal assault which violates personal rights and dignity in eighteenth-century Ottoman society. This verbal assault includes swearing, insulting, and calumny, and its punishment is mostly exile, *ta'zir,* and dismissed from the profession. Indeed, the term *şetm* (شتم) which is an Arabic word means swearing, cussword, and blasphemy.[174] Further, it was not only used for sex crimes but also to define verbal assaults to offend someone's honor and reputation just like *hetk-i ırz*.[175] Additionally, *şetm* took place as a form of sex crimes in Chapter II; Part 6; Articles 213-216[176] in the 1858 Penal Law. The collocation of *şetm* and *hetk-i ırz* does not exactly state rape offense but it emphasizes the violation of someone's reputation and honor rather than chastity. It is important to know how semantic change is possible through the legal issues in the court records. For example, a case from Üsküdar court in 1740 between Fatma Hatun and Seyyid Mustafa was about defamation and violation of honor. Fatma applied to the court by saying ''Seyyid Mustafa told me harlot and whore to my face. He swore and violated my honor.'' After the confession of Seyyid Mustafa, he was sentenced to *ta'zir*.[177] In another case, *Molla* (Mullah) Mustafa pressed charges against Ali in Üsküdar court. Mullah Mustafa claimed that Ali had sworn to my wife and mother and insulted me by saying ''black-hearted''. He violated my honor. As a result of the trial, Ali confessed his offense and was sentenced to *ta'zir*.[178] As seen from the case samples, *şetm* and *hetk-i ırz* have

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[174] Develioğlu, **ibid**., 1159.

[175] Tuğ, **Politics of Honor in Ottoman Anatolia: Sexual Violence and Socio-legal Surveillance in the Eighteenth Century**, 180.

[176] For further, the Imperial Penal Law (1858) can be examined through the journal of ''Dustûr''.

[177] Ma'rûz; Üsküdar'da Evliyâhoca mahallesinde sâkine ve zâtı vech-i şer'î üzere mu'arrefe olan Fâtıma Hatun hasmı es-Seyyid Mustafa muvâcehesinde târih-i i'lâm günü muvâcehemde bana kahbe ve fâhişe deyü şetm ve hetk-i ırz eyledi deyü ba'de'd-da'vâ ve'l-ikrâr mûcebince mezbûr es-Seyyid Mustafa'ya şer'an ta'zîr lâzım geldiği bi'l-iltimâs huzûr-ı âlîlerine i'lâm olundu. (Üsküdar Mahkemesi 403 Numaralı Sicil (1154-1155/ 1740-1742)

[178] Ma'rûz-ı dâ'î-i devletleridir ki; Vâki' olan mevâddı istimâ' içün taraf-ı şer'den irsâl olunan Ahmed Efendi dâ'îleri Üsküdar'a tâbi' İstavros karyesine varıp ba'de akdi'l-meclis karye-i mezbûre sâkinlerinden Molla Mustafa meclis-i ma'kūd-ı mezkûrda hasmı Ali ile ba'de't-terâfu' mezbûr Ali târih-i i'lâm günü bağda muvâcehemde bi-gayr-ı vechin cimâ' lafzıyla anama ve avradıma şetm ve kalbi kara deyü hetk-i ırz etmekle mûcib-i şer'îsi ba'de'd-da'vâ ve'l-ikrâr mûcebince mezbûr Ali'ye şer'an ta'zîr lâzım geldiğini mezbûr dâ'îleri mahâllinde tahrîr ba'de ümenâ-i şer'le meclis-i şer'a gelip alâ-vukū'ihî inhâ eylediği bi'l-

separated function; while *şetm* defines swearing, *hetk-i ırz* describes insulting and as a result, violating honor. None of these usages are stated sex crimes, but they are for expressing offenses which are committed against personal rights and honor.

Secondly, *fi'l-i şenî'* (فعل شنيع) is a legal term which means bad action and it is commonly used to define not simply rape but also adultery incidents in the Ottoman legal system. There is a terminological shift from *zina* to *fi'l-i şenî*' in the Ottoman legal language from the 16th century. However, the time when the terminological shift exactly completed was unknown because it was a graded shift which had been improved in time. Yet, according to Başak Tuğ, the replacement of the term *zina* by *fi'l-i şenî*' in the Ottoman legal language was rigorously established during the 18th century as a result of the analysis of Ankara and Bursa *shari'a* records.[179]

> ''There seems to have been a gradual increase in the utilization of the term *fi'l-i şenî*' in legal practice. Whereas *fi'l-i şenî*' was not firmly established as a term replacing zina in the Ottoman legal language of the sixteenth century. It apparently started to replace the term to refer to most sexual crimes during the seventeenth century, as we can observe from the Istanbul registers.''[180]

As stated above, the shift from *zina* to *fi'l-i şenî*' was a long-term process in the Ottoman legal literature. The term was basically used to define sexual crimes between the 16th and 17th centuries in the Ottoman legal language. The term began to become a legitimate and common legal term to define most of the sex crimes from the 18th century. But it was clear that the term firmly became common and absolute during the 19th century to define adultery, rape, and sodomy together with the enactment of the 1858 Penal Law.

On the other hand, the term *fi'l-i şenî'* was also used in the *shari'a* records to define rape and adultery offenses. There was no semantical transformation throughout the *Tanzimat* era. The term frequently implies adultery, sodomy, and rape in the Ottoman legal sources. To make the usage of the term clearer, let's analyze the *shari'a* and the *Meclis-i Vala* registers. For example, Mustafa who inhabited in Toygar Hamza neighborhood was convicted for committing *fi'l-i şenî'*, adultery. Mustafa invited whores to his home and he hooked up with those whores on holly days. This allegation was made by *subaşı* Müstedam Beg before the *qadı* and the confession of Mustafa

iltimâs huzûr-ı âlîlerine i'lâm olundu. Fermân men-lehu'l-emrindir. (Üsküdar Mahkemesi 403 Numaralı Sicil (1154-1155/ 1740-1742)

[179] Tuğ, **Politics of Honor in Ottoman Anatolia: Sexual Violence and Socio-legal Surveillance in the Eighteenth Century**, 177.

[180] **Ibid**., 177.

confirmed the allegation. As a result of the trial, he was sentenced to *ta'zir*.[181] In this adultery case, no phrase points out the sing of force together with the term of *fi'l-i şenî'*. If there is a lack of force and consent to have sex, the action is named as adultery. Let's examine the fatwa of Abu Suud in the 16th century about prostitution;

> ''Question: If a group makes it a custom to go from village to village, causing their wives, daughters, and female slaves to commit fornication, what is their sentence according to the *shari'a*?
> Answer: They should all, without exception, suffer an extremely severe chastisement, *ta'zir*, and not be released from prison until their reform becomes evident. Those women whose fornication is proven should all be stoned.''[182]

According to the fatwa of Abu Suud, pandering was sentenced to severe *ta'zir* punishment, which means, they would be kept in imprisonment until they got edified. And the women who were whores were sentenced to *recm*, stoning, to death if their crimes were proven.

Another example, Hasan who was the son of Mehmed claimed that Marko Mihal and Yani Petro; they were identified as dhimmi, non-Muslim subjects, had raped or committed *fi'l-i şenî'*. He appealed to the *Shari'a* court in Istanbul to seek justice.[183] As we understand from this case, rape incident which was committed against a man is labeled as *fi'l-i şenî'* rather than *fi'l-i livata* in this case. That shows that *fi'l-i şenî'* is a comprehensive legal term which can refer to rape and homosexual intimacy. In another case, Fatıma who was the daughter of Veli Hodja was married to Ömer Beşe. Mustafa and his friend Ebubekir intended to rape or commit *fi'l-i şenî'* Fatıma. They broke into her house to rape her. However, Fatıma screamed out and her neighbors saved Fatıma from being raped. To be investigated and punished the crime, the

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[181] ''Odur ki Üsküdar subaşısı olan fahrü'l-akrân Müstedâm Bey b. Abdülmennân nâm kimesne mahfil-i şer'de takrîr-i merâm kılıp Toygar Hamza mahallesinde Mustafa nâm kimesnenin evinde fâhişeler vardır mübârek günlerde fi'l-i şenî' etmek ihtimâli vardır üzerine varılıp keşf olunmasın taleb eylerim dedikde kıbel-i şer'den Mevlânâ Mehmed b. İbrahim el-müstaid varıp zikr olunan odada Satılmış b. Hızır ve Fâtıma bt. İbrahim ve Hûri bt. Hüner Çelebi nâm avretleri üçü bir döşekte iken tutulup kendilere suâl olundukda şeytan belâsına uğradık deyu ikrâr eylediklerinde ta'zîr olunmağa işâret olunduğu kayd şud.'' Üsküdar Mahkemesi 84 Numaralı Sicil (999-1000/1590-1591)

[182] Semerdijan, **ibid**., 50.

[183] ''Mahmiye-i İstanbul'da Parmakkapı kurbunda sâkin olan yasakçıların odabaşısı Mustafa Beşe b. Abdullah nâm râcilin hizmetkârı olan Mehmed b. Hasan nâm emred meclis-i şer'-i şerîfde, Marko v. Mihal nâm efrencî ve Yani v. Petro nâm zimmî mahzarlarında takrîr-i kelâm edip, işbu târih-i kitâb şehrinin yirmi üçüncü gecesi Cum'a gecesidir, ağa-yı mezbûr Mustafa sâir yasakçılar ile mahallâtı beklemeye gittiklerinde, nısfu'l-leyle karîb odadan taşra çıkıp kenîfe vardığımda mezbûrân Marko ve Yani bana fi'il-i şenî' ettiler, suâl olunup icrâ-yı hak olunmak taleb ederim dedikde, gıbbe's-suâl zimmîyân-ı mezbûrân husûs-ı mesfûru inkâr edicek, müdde'î-i mezbûrdan takrîrine muvâfık beyyine taleb olundukda, ityân-ı beyyine için istimhâl etmeğin, mehl-i şer'î ile imtihâl olunup, mâ hüve'l-vâki' gıbbe't-taleb ketb olundu. Hurrire fi'l-yevmi's-sâbi' ve'l-ışrîn min Cemâziyelevvel li sene seb'a ve ışrîn ve elf.'' İstanbul Mahkemesi 3 Numaralı Sicil (1027/ 1618)

plaintiff appealed to the *Shari'a* court in Kayseri.[184] In this example, we observe that *fi'l-i şenî'* is a common term to define rape in the *shari'a* records as being in the registration of the *Meclis-i Vala*. Let's analyze the fatwas of Abu Suud about the identification of rape;

> ''Question: If Zeyd without being married to Hind takes her by force, what should happen to Zeyd?
> Answer: If he is a *muhsan* (a married Muslim), he will be killed.''[185]
> ''Question: Zeyd enters Hind's house, and wants to take her by force. Hind, unable to repel Zeyd in any other way, injures him with an ax. Zeyd dies from the wound. What should happen to Hind?
> Answer: She has performed an act of holy war (*jihad*).''[186]

Through the *fatwas* above, there are some critical phenomena which affect the identification process of rape. Firstly, marital status is quite influential during the determination of range and degree of punishment for sex crimes. Also, the notion of force in the first fatwa is important because there is no certain change in the component of rape from the 16th to the 19th century. The force is the main distinguishable component of rape from adultery. As a result of rape, if the perpetrator is married, he is sentenced to death. But as we know, there is no example of execution for sex crimes, only once in the reign of Mehmed IV (1648-1687) according to Naima's who was one of the historiographers (*vakanüvis*) (b.1655/d.1716) chronicles.[187] In the second fatwa, the perpetrator breaks into the victim's house and abducts her. This behavior is considered as invasion of privacy and attack against someone's free will; therefore, it is seen as a component of rape. The interesting thing here; we will have also observed the same legal judgment in the *Meclis-i Vala* records in the following chapter, is that if wounding or killing occurs with a sharp object, the victim becomes exemption from the punishment. The action of the victim is considered self-defense.

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[184] ''Vilâyet-i Anadolu'da medîne-i Kayseriye muzâfâtından Erguncak nâm karye ahâlîsinden Ömer Beşe b. İbrahim nâm kimesne meclis-i şer'-i şerîfe Mustafa b. Ali nâm kimesneyi ihzâr ve mahzarında takrîr-i kelâm ve bast-ı merâm edip târih-i kitâbdan bir buçuk sene mukaddem mezbûr Mustafa ve refîki olup gāib ani'l-meclis olan Ebûbekir b. ( ) nâm kimesne gece ile karye-i mezbûrede hâlâ zevcem olan Fâtıma bt. Veli Hoca nâm hâtun sâkine olduğu menzilin duvarından aşıp fi'l-i şenî' kasd eylemişdir. Suâl olunup takrîri tahrîr olunmak matlûbumdur dedikde gıbbe's-suâl mezbûr Mustafa cevâbında hizmet eylediğimiz ağamız Hüseyin Bey nâm cündînin mezbûre Fâtıma Hâtun ile husûmeti olup bir gece varın ırz eksikliği edin deyü beni ve gāib ani'l-meclis olan mezbûr Ebûbekir'i irsâl eyledikde biz dahi gece ile varıp mezbûre Fâtıma Hâtun'un sâkine olduğu menzilin duvarından aşıp girdik, mezbûre Fâtıma Hâtun tâyi'a olmayıp feryâd eyledikde, ahâlî-i karye gelip mezbûreyi yedimizden halâs eylediler dediklerinde vâki' hâl hıfzan li'l-makāl ketb olundu. Tahrîren fi'l-yevmi'r-râbi aşer min Zilhicceti'ş-şerîfe li sene isneteyn ve erba'în ve elf.'' Rumeli Sadareti Mahkemesi 56 Numaralı Sicil (1042/ 1633)
[185] Semerdijan, ibid., 50.
[186] **Ibid**., 52.
[187] According to Ekrem Buğra Ekinci, death penalty was only perpetrated in the reign of Mehmed IV for adultery offense. Ekinci, **ibid**., 347.

In the Imperial Penal Law in 1858, Article 198 includes a clear definition of rape to distinguish from *zina*. Article 198: ‘‘Whoever commits rape, *cebren fi'l-i şenî*‘ which means a bad action under duress, the person is sentenced to hard labor.’’ The statement of ‘‘*cebren fi'l-i şenî*‘ (a bad action under duress), generally takes place in the records to indicate sexual intimacy as rape. This tendency probably is implied because of the usage of the term *fi'l-i şenî*‘ for both adultery and rape. In some cases, *fi'l-i şenî*‘ refers to adultery without stating coercion. When this happens, the process of trial and punishment can completely show different results. To avoid such a legal dilemma, the Ottoman jurists preferred to use *cebren* to separate rape cases from adultery cases. To enlighten this distinction, let's analyze some rape cases concluded in the *Meclis-i Vala*.

The adultery case which was examined in Sivas Province in 1868 precisely presents us with the usage of *fi'l-i şenî*‘ for adultery cases. Havva who was the wife of Hüseyin had sexual intimacy with Ovakim and this intimacy happened with both sides' consent and their own free will. They were caught by *zaptiye* and local people, and then they had to confess their crimes.[188] Another case, this petition was written to Thessaloniki Province in 1867 is about the allegation of Anastasya who was raped by Ahmed. Her allegation about Ahmed is recorded with this statement ‘‘*cebren fi'l-i şenî*‘’’ to stress the performance of *cebr* during the sexual assault.[189] Also, Fatma who was a married woman to Çaderlioğlu Mehmed Biray was raped by Mehmed bin İslam; bin is an Arabic word to indicate whose son he is. Fatma was out to check on her animals and then Mehmed grabbed her tightly and raped. Her allegation is indicated in the case documents as ‘‘*fi'l-i şenî*‘’’.[190]

As understood through the rape case samples from the *Meclis-i Vala*, the term *fi'l-i şeni'* is used for both adultery and rape because both they are serious crimes that were seen as a threat against public morality and order. Also, even if there was no certain word to define rape directly in the Ottoman language, Ottoman jurists were likely to use *fi'l-i şenî*‘ for adultery cases but by adding *cebren* to the term *fi'l-i şenî*‘, they thus defined rape offenses with the term *cebren fi'l-i şenî*‘. To interpret the sample cases in terms of the usage of the term *fi'l-i şenî*‘, the first case about Havva and Ovakim was related to *zina* offense and that sexual intimacy was based on both sides' consent and

[188] BOA, MVL 567-9, (26 Ramazan 1284/ 21 January 1868)
[189] BOA, MVL 1030-76, (13 Şevval 1283/ 18 February 1867)
[190] BOA, MVL 1078-37, (20 Şevval 1283/ 25 February 1867)

will. Although Ottoman judicial officers defined *zina* with *fi'l-i şenî*', the absence of force and its variant was not mentioned at all, and thus the case was evaluated as an adultery offense rather than rape. In the other two cases, Fatma's and Anastasya's cases, their allegations were stated by stressing the notion of *cebr* and how it occurred. In this context force, *cebr* is an important factor to define a rape offense in Ottoman legal literature as a component of *fi'l-i şenî*'. What are the other components of *fi'l-i şenî*' according to the Ottoman judicial perspective? These components are respectively *cebr*, intrusion, and intendment (*qasd*).

One of the most significant components of the rape definitions in the *Meclis-i Vala* registrations is *cebr* (جبر) which means force or *cebren* (جبراً) which means by force. In dictionary meaning, force is defined as ''to make something happen or make someone do something difficult, unpleasant, or unusual, especially by threatening or not offering the possibility of choice''.[191] Another explanation for *cebr* or *cebren* comes from Ferit Develioğlu that he defines it as duress or under duress.[192] Also, *cebr* is a direct effect on a person to make him/her commit a crime. Therefore, trussing up of hands or feet, locking down in a place, and any forcible action which violates someone's free will and consent is considered as *cebr*, force.[193] Also, *cebr* was explained in the Imperial Penal Law in 1858 as ''Force is assault and battery which aims to hinder the movements and actions of a victim by trussing up of his or her arms or giving alcohol or poison to enable the victim to show resistance against an offender.[194]

We can also expand the range of duress such as kidnapping and retention by being based on rape cases in the *Meclis-i Vala* registration. Kidnapping is commonly seen in the rape cases and the main point of this crime is to restrict someone's freedom and also to hinder him or her to show resistance to his or her offenders. Also, retention is a variant of kidnapping that it means ''the continued use, existence, or possession of something or someone''.[195] Another definition of retention is that ''to keep someone

[191] Force, https://dictionary.cambridge.org/dictionary/english/force [26.04.2020].
[192] Develioğlu, **ibid**., 144.
[193] Salih Erturhan, ''Fıkhi Açıdan Nitelikli Cinsel Saldırı (Irza Geçme)'', **Cumhuriyet Üniversitesi İlahiyat Fakültesi Dergisi**, vol.16, no.2, 26.
[194] "…ırzına kastettiği kimsenin mukavemetine ve mümanaatına bakmayarak üzerine yüklenip veya kollarını bağlayıp veya kendisini mukavemetten men edecek başka bir fiil-i müessir icra eyleyip mesela bayıltacak bir ilaç içirip veya sarhoş edip vesair bunun emsali şeyler yapıp fiil icra etmektir"
[195] Retention, https://dictionary.cambridge.org/dictionary/english/retention [26.04.2020].

in a somewhere for a while'' or ''to hinder someone to do something'' or to deprive someone of something''.[196] The existence of kidnapping or retention in the rape trials is concrete evidence of rape because it proves the sexual intimacy happening under duress. Also, since kidnapping and retention are crimes which violate someone's right to live and freedom, they are complementary factors of rape trials.

For instance, Merine who was the daughter of Manol claimed that she was raped by thirteen soldiers in the church where she went. The allegation of rape is built around duress notion with the statement of ''*... mezbure Merine'yi kaldırup gezdirdikleri...*'', Merine was taken away or kidnapped and then changed their places, to prove the sexual intimacy that happened under duress.[197] Also, the rape case held in Kastamonu Province in 1280 (1863/64) indicates another kidnapping incident and also retention. Şerife who was the wife of Çekelioğlu Ahmed got kidnapped and raped by İbrahim, and Mustafa. They confessed their crimes with these words; ''*...cebren kaldırub yedi gün şurada burada gezdirerek hakkında fi'l-i şenî' icra ettiklerini...*'' which means after they had kidnapped and kept her retention and forced her to travel with them, they raped her.[198] Another example, Faik who was five and a half years old boy was raped by Mustafa in Balıkesir in 1281 (1864/65). He got taken to a garden and then he got rape there. This accusation was confirmed by the statement of the offender and he was sentenced to imprisonment.[199] Also, when Rukiye was a guest of her relatives in Konya, İbrahim made her leave from her room and locked her in his room. After a while, he came back with his friends Bekir, Emin, and Halil, and then they raped her. Even if she performed resistance against her offenders, she could not escape from them. She also kept in that house for more than four days and she became a victim of pack rape.[200] Lastly, Mehmed, Mustafa, Süleyman, and Ali kidnapped Abdullah's wife Fatma and took her to a mountain. During the attack, Abdullah got injured with a knife and could not save his wife. They took them to the mountain and they got raped Fatma there.[201]

[196] Alıkoymak, https://sozluk.gov.tr/ [26.04.2020].
[197] BOA, MVL 743-114, (4 Zilkade 1282/ 21 March 1866)
[198] BOA, MVL 662-78, (2 Şaban 1280/ 12 January 1864)
[199] BOA, MVL 698-40, (16 Şevval 1281/ 14 March 1865)
[200] BOA, MVL 699-52/2, (28 Zilkade 1281/ 24 April 1865)
[201] BOA, MVL 658-82, (25 Cemaziye'l evvel 1280/ 7 November 1863); BOA, MVL 659-48, (3 Receb 1280/ 14 December 1863)

Furthermore, the notion of clamor is an important sign of self-defense to trace whether *cebr* happened. It might be thought that if there was action, there would be a reaction. In most of the rape cases, when evidence seemed insufficient to build a case, the judicial figures began to seek a sign of resistance. That sign was a clamor in that period. To scream out to be saved is regarded as evidence of duress in many rape cases held in the *Meclis-i Vala*. However, when we state clamor is evidence to prove sexual intimacy under duress, one question emerges naturally. How loud must a woman scream out to indicate the sexual assault happening under duress? This situation creates an argumentative approach to evaluate rape offenses accurately. Silence or not screaming out loudly enough could be considered as a sign of consent or even if a victim screamed out loudly to be heard but no one heard her or him, what would happen to the trial process? To understand these components, we need to know how these affected the investigation process through the records.

According to the example, Reşit who was the slave of Refiye Hatun aimed to rape his mistress and he entered her room without her permission. In order not to be gotten raped, Refiye screamed out and got him out of her room. This event was told before *zaptiye* officers and the attacker confessed his crime. Even if rape did not happen because of unexpected factors such as clamor, the presence of a witness, or security forces, by taking into consideration of other criminal factors such as intrusion and attack towards someone's body got punished according to Article 198 in the Imperial Penal Law in 1858.[202] As a result of these rape cases, showing resistance through clamor is seen as a reaction to force, and also it can be considered as the lack of consent. In both of these cases, there is one of the main components of rape such as breaking into someone else's house and it proves force. Also, clamor can be a significant sign which stresses the performance of sexual intimacy unwillingly for rape offenses because force and consent are the main phenomena to separate adultery from rape. As seen in the cases, *cebr* was regarded as an assault penetrating someone's consent and will. The forms of force were seen as kidnapping, retention, lockdown, and wounding during rape offenses.

Intrusion, as a component of *fi'l-i şenî*', here is an important concept to place it in the identification process of rape. While explaining the content of the term *hetk-i ırz*, the

[202] BOA, MVL 870-105, (21 Muharrem 1282/ 16 June 1865).

inviolabilities of honor, chastity, and privacy has been emphasized to understand the Ottoman legal approach against sex crime. Through intrusion, these violate someone's spatial privacy and also someone's reputation and honor. Just like being in the issue of chastity (*ırz*), the violation of privacy was not merely a criminal act committing against an individual but also the Empire. Because the *Tanzimat* Edict promised to guarantee the inviolability of property, honor, and life, the physical and verbal assaults against the privacy of property and body were seriously judged.[203] As a consequence of this understanding, the Ottoman authority considered intrusion a form of force and violation of privacy. However, the perception of privacy in the Ottoman society is a completely different issue to discuss. In short, privacy broadly means the sphere of life which is protected from unwanted intrusions of power. The perception of privacy in Islam can be regarded as a more extensive fact. It does not only refer to territorial and spatial privacy but also the privacy and the dignity of the human body and the inviolability of reputation and honor of a person.[204] Yet, for the sake of our conceptualization process, I will briefly explain it by building a bridge between intrusion and privacy.

In Arabic, privacy is named as *mahrem* (المحرم) and means forbidden and haram. As a being *fiqh* terminology (*mahram*) defines as someone who is religiously forbidden to get married and a secret which is not being heard by someone else or secrecy. On the other side, *mahremiyet* (محرميت); privacy in English, is a word derived from the Arabic word (*mahram* or *mahram*) and it means the situation of being forbidden or the secrecy of private life in Ottoman Turkish.[205] Abraham Marcus criticized the typical definition of privacy as ''privacy describes the state of limited access to the person, attitudes, and experiences of an individual; it is expressed in a variety of possible restrictions, affecting access to personal information as well as observation, intrusion, and physical exposure.''[206] To Marcus, there are different perceptions and implementation of privacy in terms of practices and norms of people in the Middle East.[207] The important thing for us in the critics of Marcus's privacy definition is the protection of the body,

[203] Tuğ, ''Gendered Subjects in Ottoman Costitutional Agreements, c.a. 1740-1860", 9.
[204] Tuğ, ''Protecting Honor in the Name of Justice'', 13-14.
[205] Cemalettin Şen, ''İslam Hukuku Açısından Mahremiyet-Zaman İlişkisine Mukayeseli Bir Bakış'', **Çankırı Karatekin Üniversitesi Sosyal Bilimler Enstitüsü Dergisi**, vol. 7, no. 1, 930-1.
[206] Abraham Marcus, ''Privacy in Eighteenth Century in Aleppo: The Limits of Cultural Ideals'', **International Journal of Middle East Studies,** vol. 18, 165-6.
[207] **Ibid**., 165-6.

home, and woman that frames the perception of privacy in the Ottoman Empire. Besides, the perception of privacy in Ottoman society could not only be built upon the Islamic principles because non-Muslim subjects emphasize their own spatial privacies.[208] Further, according to Fatma T. Yaşar, there were a lot of complaints about the violation of privacy through the wrong construction plan. For instance, opening a shop opposite the door of a house, home searching without the warrant of the *qadı*, and constructing houses close to each other in the manner of seeing the interior of a house were a few complaints reaching out to the courts about the violation of privacy.[209] Therefore, the *kanunnames* before the *Tanzimat* described several sex crimes that include pandering, intrusion, and the invasion of female privacy. For example, in the *kanunname* of Süleyman I (1520-1566), there was fine punishment for a person who peeps someone's house through a hole, breaks into someone's home, kisses someone else's daughter or wife, crosses their path or performing verbal harassment.[210] Also, any attempt aiming to breach someone's property was considered as the violation of privacy; therefore, intrusion and peeping were seen as concrete evidence of rape. One example from the *Meclis-i Vala* to define the violation of privacy through intrusion, Petro aimed to perform indecent assault against Marya who was the daughter of Dırako, and to do it, he got into her home without her invitation. With the help of her father and local people, she could get rid of being raped. He got punished even if the assault did not happen because he violated the privacy of them by breaking into someone's property and attacking someone's body.[211] In short, privacy can be interpreted as a shield to protect honor, chastity, and private life. Additionally, it emphasizes the untouchability of the human body regardless of sex and religion.

Apart from the terms above, the term *tecavüz*, which is an Arabic word, means transgressing, attacking, molesting, and the violation of personal rights.[212] Whilst the term *tecavüz* has been used to define rape offense in modern Turkish legal language, the term did not mostly point out rape offense in the Ottoman legal language. In

[208] Beyza Karakaya, Osmanlı Toplumunda Mahremiyetin Sınırlarını ''Pencere'' Üzerinden Okumak, ed. by Nazife Şişman, **Mahremiyet: Hayatın Sırları ve Sınırları**, (İstanbul: İnsan Yayınları, 2019), 71.
[209] Fatma Tunç Yaşar, Osmanlı Dünyasında Mahremiyet: İfşa ve İhlal Arasında, **Mahremiyet: Hayatın Sırları ve Sınırları**, (İstanbul: İnsan Yayınları, 2019), 54.
[210] Semerdijan, **ibid**., 43.
[211] BOA, MVL 701-49, (19 Zilkade 1281/ 15 Nisan 1865).
[212] Develioğlu, **ibid**., 1224.

general, *tecavüz* (transgressing or rape) defined transgressing and violation of personal rights in the *Shari'a* court registrations; however; there was no example addressing the usage of *tecavüz* for rape in the *Meclis-i Vala* records. For example, Hüseyin *Reis* applied for the *Shari'a* court to get his money from Voyvoda Mustafa Aga. Mustafa Aga hired the warehouse of Hüseyin Reis and occupied it for twenty-five days. However, Mustafa Aga refused to pay the fee and Hüseyin Reis sued him for the violation of his property by using the term *tecavüz*.[213] All these sex crimes violating privacy, individual rights, freedom, honor, and chastity were under the protection of the Sultan. Since the *Tanzimat* Edict promised to protect the right of life, property, honor, and chastity, these basic rights of the subjects were guaranteed by the Sultan himself. Therefore, the statement of ''Honor belongs to the Padishah'' came out as a material and non-material assurance which claimed the protection of the basic rights of the subjects under the authority of the Sultan.[214]

Another object of the violation of privacy is the female body because the female body represents the honor and chastity of a family. The untouchability of a female body had to be protected either her guardian or husband or herself. Through a marriage contract, a woman could be considered as a property of her husband. Here, the most crucial term is being the property of a man through a marriage contract and this thought is very common in Islamic culture. Because of this understanding, the sexuality of a woman only belongs to her husband; therefore, any physical and verbal harassment to her body or home can be considered as the invasion of female privacy.[215] That is why intrusion, abduction, retention, and physical or verbal threat were accepted as a component of rape since each of them had occurred against someone's free will and violated their chastity and honor.

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[213] ''Ma'rûz.
Rüesâ tâifesinden Hüseyin Reis b. el-Hâc Ahmed sâbıkā Trabzon anbar emîni olup hâlâ Galata voyvodası Mustafa Ağa mahzarında merkūm Mustafa Ağa Trabzon'da anbar emîni olduğu hâlde sefînem ile Trabzon'a îsâl eylediğim ma'lûmü'l-keyl hınta ve şa'îri tamamen kendiye teslîm edip yedime edâ tezkiresi dahi verdikden sonra kabzını ikrâr mâ'adâyı inkâr eylediğinden gayrı medfû'u olan doksan guruş da'vâsından dahi zimmetimi ibrâ ve iskāt eylemişidi deyü def'le mukābele ve def'i isbâta havâle olundukda yirmi gün tamamına değin istimhâl etmekle mehl verilmişidi hâlâ yirmi beş günü tecâvüz edip ikāmet-i beyyineden izhâr-ı acz edip yemîn dahi vermemeğin meblağ-ı mezkûr doksan guruşu müdde'î-i mezbûr[a] red ve teslîme mezbûr Mustafa Ağa'ya tenbîh olunup merkūm Hüseyin Reis ziyâde müdde'âsını isbâta havâle olunmuşdur.
Fî 14 min-Zilka'de sene 1143.'' (21 May 1731) Bab Mahkemesi 150 Numaralı Sicil (H. 1143-1144 / M. 1730-1732)

[214] Şeref, **ibid**., 42.

[215] Semerdijan, **ibid**., 147.

The last component of rape is intendment, *qasd*, (القصد) that it is a judicial term to define the will of a person heading for an action which has legal and religious consequences.[216] In the dictionary, *qasd* means heading for something or doing something on purpose or determine.[217] As a legal term, *qasd* is highly related to will (*irade*). While the notion of will simply refers to a subjective action of a person which is formed through the way of deciding a certain issue, the term intendment expresses the tendency of that action's result. Therefore, *qasd* is a more comprehensive term contrary to the will.[218] In addition to *qasd*, malice aforethought, *taammüd*, (تعمد) which means doing something knowingly and willingly[219] states the consequence of the will and enforcement having much more determination than *qasd*, intendment. Therefore, in Islamic judicial literature, intention (*niyet*) intendment (*qasd*) and malice aforethought (*taammüd*) are accepted as a synonym but there is a basic classification of these terms in usage. These are categorized as *niyet* for prayers, *taamüd* for criminal law, and *qasd* for comprehensive issues.[220] Besides, in the addendum of Article 198: The addendum of Article 198: ''If a person attempts at committing *cebren fi'l-i şenî*' and his action does not occur indeed because of unexpected reasons, that person is sentenced to imprisonment for three months at least''[221] There is a term called *tasaddi* (attempt) (تصدی) which means attempting or starting at something. It was used for defining a criminal action which does not have a legal and religious consequence.[222] Therefore, to speak of intentional crime in criminal law, the perpetrator must have previously envisioned the act which is considered a crime and known that action a crime and wanted to do it. If these conditions are found, the intendment is valid, but the perpetrators are mentally ill, underaged, or completely legally ignored people, the intendment will be invalid.[223]

Moreover, *qasd* was mostly mentioned in Ottoman legal documents. The term was seen as a criminal apparatus even if the crime was not committed. In other words,

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[216] Ali Şafak, ''Kasıt'', https://islamansiklopedisi.org.tr/kasit, (2016-2020), [30.04.2020].
[217] Develioğlu, **ibid**., 566.
[218] Şafak, **ibid**.
[219] Develioğlu, **ibid**., 1176.
[220] **ibid**.
[221] ''Böyle cebren fi'l-i şenî' icrasına tasaddi idüb de yed-i ihtiyarında olmayan esbab-ı mani'a hilületiyle fi'le çıkamamış olur ise üç aydan ekall olmamak üzere habs cezasıyla mücazat olunur.'' (3 Cemaziye'l ahir 1277/ 17 December 1860)
[222] Develioğlu, **ibid**., 1208; Şafak, ''Kasıt'', **ibid**.
[223] **ibid**.

according to Islamic penal understanding, to penalize an action which must have a legal and religious consequence, the action must be performed by the perpetrator himself and had to be proven with concrete evidence. However, to Ottoman criminal perspective, the intendment or the existence of circumstantial evidence seemed enough to punish the perpetrator. Therefore, what are the signs of the intendment in Ottoman law? For rape cases, breaking into someone's home was the most influential and common sign of the intendment to commit rape offense. For example, in the *kanunname* of Selim I (1510/1520), ''If a person enters someone's house with the intendment of committing *zina* if the person is married, let the married fine be given. If he is unmarried, he should be given the boy's fine'' and ''If a person kisses someone's wife or daughter or crosses their path and if he speaks to them, the judge will make strong punishment.'' As understood from the articles, the attempts to commit *zina* or rape could be penalized even if the criminal action did not occur. Although the principal crime did not happen actually, other criminal actions such as crossing the path, breaking into a home, or wounding took consideration in order not to leave any criminal action unpenalized. In a word, the punishments did not directly address an unhappened action but addressed to other criminal actions like intendment or intrusion.

Previously mentioned the addendum of Article 198, the term of *tasaddi* for rape offenses was used to punish the perpetrators due to the invasion of female privacy and also intrusion even if the aimed crime, rape did not happen actually. To give an example to illustrate the role of intendment in rape cases, Kerim who was from Galata, İstanbul, attempted raping Yakup. However, Kerim did not commit rape offense against Yakup actually because of denouncement. Therefore, under the addendum of Article 198: whoever makes an attempt at raping, and the perpetrator cannot commit the crime for some reason, the perpetrator is sentenced to imprisonment for three months at least. According to the article, and besides, since Kerim had a criminal record, he was sentenced to imprisonment for six months from 4 *Şevval* 1281/ 2 March 1865.[224] Another rape case from the *Meclis-i Vala*, Reşid who was a black slave

[224] BOA, MVL 870-48, (28 Zilkade 1281/ 24 April 1865)
''Mazbata 89
Meclis-i Tahkik'in Meclis-i Vala Muhakemat dairesinde mutala'a olunan mazbatası ma'iline nazaran Galatalı Kerim'in sab-ı () Buzcu Yakup cebren fi'l-i şenî' icrasına tasaddi eylediği halde esbab-ı mani'a hilüliyetle mukasaddini icra etmiş olduğu malum esası (?) kimsenin ihbaratıyla tahkik etmiş olduğuna

attempted raping his master's wife, Refiye Hatun. While Refiye Hatun was in her room, Reşit broke into her room at night. But, Refiye Hatun did not surrender to her offender and she began to scream out and made him get out of her room. Because of the resistance performed by Refiye Hatun, Reşit could not rape her. When Reşid confessed his crime before *zaptiye* under the addendum of Article 198: whoever makes an attempt at raping, and the perpetrator cannot commit the crime for some reason, the perpetrator is sentenced to imprisonment for three months at least, he was sentenced to imprisonment for one year from 23 Şevval 1281/ 21 March 1865.[225] Another rape case is that Mustafa who lived in Bozok Sanjak attempted to rape Fatıma who was the daughter of Hüseyin. Mustafa broke into their home with the intendment of committing *fi'l-i şenî*'; however, Fatıma showed resistance by screaming out and Mustafa run away. Mustafa also injured Hüseyin following Mustafa by cutting both of his thumbs. Mustafa was sentenced to hard labor for three years in Sinop from 7 *Rebiü'l-evvel* 1279/ 2 September 1862.[226]

To sum up, the intendment as a component of rape in regard to Ottoman legal understanding was used to define a criminal action which has a pre-conditioned step before committing. Also, there was no certain degree of punishment for the intendment but, at least, the minimum level of imprisonment was clearly described in the 1858 Penal Law. The maximum level of the punishment for the intendment was not mentioned and could change according to other criminal factors such as wounding and having a criminal record. As being in the first case sample, since Kerim had a criminal record, his punishment was decided as six-month imprisonment. In the second case, the slave of Refiye Hatun, Reşid attempted to rape his mistress and he entered her room without her free will and consent. Therefore, Reşid was sentenced to one-year imprisonment because of attempted. The duration of imprisonment the violation of female privacy and her chastity. The last case was between Fatıma and Mustafa. Mustafa got into Fatıma's home without permission with the intendment of rape but

ve kanunu-u cezanın 198.maddesi zeylinde cebren fi'l-i şenî'icrasına tasaddi idüp de yed-i ihtiyarında olmayan esbab-ı mani'a hilületiyle fi'le çıkmamış olur ise mütecazesinin üç mahdan ekall olmamak üzere habs cezasıyla icra-yı mücazatı muharrer idüğüne mebni merkumun bu hükme müteveffikan ve tarihi habsi olan 81 senesi Şevval'in 4.gününden itibaren () sabıkası bulunması cihetiyle altı mah müddetle habs edilmesinin makam-ı vala-yı meşir-i zabıtaya havale buyurulması kılınmağla ol babda emr-ü ferman.''

[225] BOA, MVL 870-105, (21 Muharrem 1282/16 June 1865)

[226] BOA, MVL 651-98, (17 Muharrem1280/ 4 July 1863)

Fatıma screamed out and he had to escape. While escaping, Mustafa injured Fatıma's father Hüseyin by cutting his thumbs. Therefore, Mustafa got penalized three-year hard labor in Sinop under Article 198 not its addendum because of the violation of honor and chastity and wounding.

Thirdly, *fi'l-i livata*, (sodomy or forced sodomy), (فعل لواطه) is a term to describe a homosexual relationship between men. *Livata* has defined in the dictionary as '' sexual heresy between men''.[227] Even if *livata* word has not taken place in the Quran, it has been used with *fahişe* (فاحشْ) or *fevahiş* (فواحش) which means a very indecent act, or prostitute and also indicates the meaning of *livata* as ''an extremely bad action, lewdness, and sodomy'' in the suras of *al-Araf*: 33 and *an-An'am*: 151.[228] Besides, the Quran warns people who head for same-sex intercourse in the sura of *al-A'raf*: 81 as ''Indeed, you approach men with desire, instead of women. Rather, you are a transgressing people''.[229] However, the Quran does not address either any certain punishment or judgment for men who are interested in such action. Moreover, the story of Lot tribe in the Quran does not indicate any judgment and punishment for the deeds of these communities. The sura of *as-Shu'ara*: 165-169 presents us with the event between the Prophet Lot and the tribe;

> ''Do you approach males among the worlds; And leave what your Lord has created for you as mates? But you are a people transgressing. They said: ''If you do not desist, O Lot, you will surely be of those evicted.'' He said: ''Indeed, I am, toward your deed, of those who detest it. My Lord, save me and my family from the consequence of what they do''[230]

Withal, the Prophet Muhammed indicates how indecent action sodomy is but yet he does not point out a clear judgment for sodomy. In other hadiths of the Prophet Muhammed;

> ''Whenever a man merges another man the throne of God trembles; the angels look on in loathing and say, Lord, why do you not command the earth to punish them and the heavens to rain stones

[227] Develioğlu, **ibid**., 636.
[228] Yaşaroğlu, ''Livata''.
[229] ''Hakikaten siz kadınları bırakıp, şehvetle erkeklere yaklaşıyorsunuz. Hayır, siz haddi aşan bir toplumsunuz.'' (A'raf: 81) https://kuran.diyanet.gov.tr/mushaf/kuran-meal-1/araf-suresi-7/ayet-80/diyanet-isleri-baskanligi-meali-1 [30.05.2020].
[230] ''Rabbinizin, sizin için yarattığı eşlerinizi bırakıyor da insanlar arasından erkeklere mi yanaşıyorsunuz? Siz gerçekten haddi aşan bir topluluksunuz. Dediler ki: ''Ey Lût! (İşimize karışmaktan) vazgeçmezsen mutlaka (şehirden) çıkarılanlardan olacaksın!'' Lût şöyle dedi: ''Şüphesiz ben sizin yaptığınız bu çirkin işe kızanlardanım.'' Ey Rabbim! Beni ve ailemi onların yaptıkları çirkin işten kurtar." (Şu'ara: 165-169) https://kuran.diyanet.gov.tr/mushaf/kuran-meal-1/suara-suresi-26/ayet-161/diyanet-isleri-baskanligi-meali-1 [30.05.2020].

upon them?" and ''the Prophet Muhammed cursed the effeminate men and women who act like men, and said expel them from your homes''.[231]

As understood through the verses and the hadiths, sodomy, *fi'l-i livata*, does not have a well-defined legal view about its punishment in the primary source of Islamic law, just like rape. Because of the lack of legal judgment on sodomy, *fi'l-i livata*, Islamic jurists have different points of view related to the punishment of sodomy. Other *Sunni* schools evaluate under *hadd* crimes as *zina* and it is identified as *hadd* crimes and punished with *hadd* punishments. On contrary to this view, Abu Hanafi thought that sodomy is not *zina*, adultery because it is not suited the definition of *zina* in the Quran. Therefore, it cannot be evaluated as *hadd* crime and punishment. Also, unlike *zina*, sodomy is not a threat to the dissolution of lineage.[232] However, Abu Yusuf and Muhammed b. Hasan eş-Şeybani claimed that the perpetrator of sodomy is punished according to *hadd* as well as the perpetrator of adultery. The punishment is to stone for a free and married man (*muhsan*) but for an unmarried man, it is one hundred sticks (*celde*). Their justification points out the evaluation of both adultery and sodomy in the Quran with the term *fahişe* which means a very indecent act. Since Abu Yusuf and Muhammed kept equal to each other, they considered sodomy as a *hadd* crime.[233]

On the other side, in the *Meclis-i Vala* registrations, *livata* is used to define the sexual relationship between men willingly as *zina*. However, *livata* also defines a sexual relationship between men which happens under duress.[234] In many cases, we can frequently see the statement of ''*cebren fi'l-i şenî*' (a bad action under duress)'' instead of using ''*fi'l-i livata*, sodomy'' to identify rape issue in men. That means *fi'l-i şenî*' could be used as a legal term to define sodomy. To give an example, this is a statement of a culprit who was accused of having been raped Abdülkadir who was a twelve-year-old boy. Mustafa said that I and my friends, Mustafa and Hüseyin, had committed *livata* and *fi'l-i şenî*' or another word, had raped him. Also, in the case record, the statement of ''*...livata fi'l-i şenî*' *icra eylemiş olduklarını...*'', which means they

[231]Abu Abdallah Muhammad ibn Isma'il al-Bukhari, **Sahih al-Bukhari**, vol. 8, (Beirut: Dar al-Arabia, 1985), 531. Taken from Elyse Semerdijan, **Off the Straight Path: Illicit Sex, Law, and Community in Ottoman Aleppo,** (New York: Syracuse University Press, 2008), 13.
[232] Yaşaroğlu, **ibid**.
[233] Avcı, **ibid**., 26.
[234] In Islamic legal tradtion, while livata (sodomy) defines illicit sexual intercourse or homosexual relationship between two men, musahaqah (lesbianism) is a term defining sexual intercourse between two women. But this term has not met in the Ottoman legal documents, which were examined fort his study, to define homosexual relationships.

committed sodomy, shows that the usage of *fi'l-i şenî*' and *livata* together indicated a sexual relationship between men happening under duress. However, its final correspondence includes this statement, ''they committed ''*cebren fi'l-i şenî*''', rape to Abdülkadir.''[235] It proves that the term of *livata* can be considered to define a sexual relationship between men with their consent but when it comes to the compulsion issue, the Ottoman jurists preferred to use either *fi'l-i şenî*' or *livata fi'l-i şenî*'to define rape in men.

On the other hand, the term was also seen in the *shari'a* records to identify sodomy and forced sodomy. To give an example, a sodomy case held in Üsküdar court was opened through the accusation of İmrza who was the son of Sevidik. İmirza claimed that Veli and Musa had committed *fi'l-i livata* to my sons Yusuf and Nasuh under duress. After having been questioned, Veli and Musa denied all the allegations made by İmirza. Since İmirza could not support his allegations with concrete evidence, the case was dismissed due to the lack of witnesses.[236] Let's examine the fatwa of Abu Suud related to sodomy;

> ''Question: If Zeyd were to commit sodomy by force with a minor, A'mr, rupturing his anus, and to acknowledge this in the *kadi'*s court.
> Answer: The *Shari'a* permits his execution. If it were not his habitual act, it would not produce this result.''[237]

As understood from the fatwa, the homosexual relationship is limited between men. The punishment of sodomy is mentioned as execution; however, there is no record showing the implementation of execution punishment for sodomy in both the *shari'a* registrations and the *Meclis-i Vala*. For sodomy or forced sodomy, there is imprisonment for minor victims or hard labor punishment for major victims mentioned in the *Meclis-i Vala* registrations; on the other side, in the *shari'a* records, there is the phrase of *ta'zir* or severe *ta'zir* punishment.

Further, Article 197 in the Imperial Penal Law (1858) indicates the usage of the term *fi'l-i şenî*' to define rape against a child by stating not the sex of the victim but the age.

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[235] BOA, MVL 651-16, (8 Muharrem 1280/ 25 June 1863).
[236] ''Vech-i tahrîr-i hurûf oldur ki Karye-i Bulgurlu'dan İmirza b. Sevindik meclis-i şer'de Veli b. Hızır ve Musa b. Mustafa mahzarlarında da'vâ kılıp dedi ki, mezbûrân Veli ve Musa benim oğlanlarım Yusuf'a ve Nasuh'a güç edip livâta etmişler dedikde, mezbûrâna suâl olundukda her biri inkâr edip mezbûr İmirza'dan da'vâsına mutâbık beyyine taleb olundukda şâhidim yokdur deyip mâ hüve'l-vâkı' vech-i meşrûh üzere kayd-ı sicil olundu. Tahrîren fi't-târîhi'l-mezbûr. İnde'ş-şuhûdi'l-mezkûrîn.'' Üsküdar Mahkemesi 26 Numaralı Sicil (970-971/1562-1563)
[237] Semerdijan, **ibid**., 54.

Article 197: ‘‘Whoever commits *fi'l-i şenî*‘ to a child who is younger than eleven, the person is sentenced to imprisonment for six months at least.’’ As seen in the article, there is no statement which indicates the victim's sex but according to the registrations in the *Meclis-i Vala*, homosexual rape against boys was judged and punished under this article. Further, the jurists preferred to use the term *fi'l-i şenî*‘ instead of *fi'l-i livata*, and there is no statement of ‘‘*cebren*’’, as well. The logic behind the absence of *cebren* is relatively related to the biological and mental growth of the victim. Being minor (*gayr-ı buluğ*) can affect the ability to judge sexual assault correctly or the legal and religious consequence of the action. Also, to give consent to any legal action, the mental faculties of a person must be valid, which means, the person must be capable of perceiving and understand what the action is and the consequence of it is.[238] Therefore, since a child cannot present his or her consent for such an act, the said article does not have the phrase of *cebren*. The last example will support the argument; Mehmed who was an eighteen-year-old man raped to İbrahim who was a four-year-old boy. After investigation, he got punished according to Article 197 in the Imperial Penal Law, whoever commits *fi'l-i şenî*‘ to younger than an eleven-year-old child, the person is subjected to imprisonment for at least six months. [239] Most rape cases in men are based on this article to identify and punish the crimes.

To sum up, sodomy is one of the sex crimes and determines sexual intercourse between two men. If sodomy occurs under duress, it is considered rape. Therefore, rape offense is defined by Article 198 and punished under its jurisdiction. On the other side, if the victim is a minor who is younger than eleven years old, the perpetrator is judged under Article 197. Besides, Abu Hanafi stated that if a person commits *fi'l-i livata* to a boy, the person shall be sentenced to life imprisonment.[240] Also, while Article 197 directly aims to prevent child abuse by signifying the age of a victim, not the sex of the victim, it indicates the punishment of forced sodomy indirectly too. Indeed, the rape cases in the *Meclis-i Vala* which include forced sodomy to minor boys are evaluated under Article 197; therefore, I can claim that Article 197 indirectly addresses forced sodomy and its punishment. Besides, even though there is no determinant phrase pointing out

[238] Abdüsselam Arı, ‘‘Rıza’’, https://islamansiklopedisi.org.tr/riza--fikih, (2016-2020) [20.05.2020].
[239] BOA, MVL 652-70, (7 Rebiu'l evvel 1280/ 22 August 1863); BOA, MVL 661-29, (3 Receb 1280/ 14 December 1863).
[240] Abdülaziz Amir, **et-Ta'zir fi'ş-Şeriati'l- İslamiyye,** (Mısır: 1969), no. 322.

sodomy in Article 197, the reference points to the article in the sample cases direct us to make a judgment about the identification and punishment of forced sodomy. Besides, the term *livata* only signifies the sexual intimacy between two men, it can define neither lesbian relation nor adultery. However, unfortunately, there is no example of the rape cases related to minor girls among the registers so I cannot discuss the other side of child molesting through the *Meclis-i Vala* registers. In addition to this, because of the absence of lesbian relations in the *Meclis-i Vala* records, there is no possible argument to identify lesbianism in the Ottoman society.

Fourthly, *bikr-i izale* (*بکر ازاله*) or *cebren bikr-i izale* (جبراً بکر ازاله) means defloration or to deflorate someone's virginity. The term mostly indicates rape crimes committed against unmarried girls and also minor girls. Such cases are mostly evaluated according to Article 200 in the Imperial Penal Law in 1858 that ''Whoever commits rape against an unmarried girl, he will be sentenced to hard labor and also compensation.'' This discourse is also another element of the definition of rape that defiling someone's virginity is regarded as a variant of rape definition.[241] In the *Meclis-i Vala* records, while Fatma who was 12 years old was digging for waterway with her brother, Mustafa and his three friends attacked them and took Fatma away from the garden to a mountain. they raped Fatma there and defiled her virginity. According to Article 200 in the Imperial Penal Law in 1858, whoever commits *fi'l-i şenî*' to an unmarried girl, the person will be put in hard labor and also compensation for her virginity, and besides according to Article 206: ''If someone abducts a major or a minor person or helps to abduction, the person is sentenced to imprisonment from one month to six months'', in the Imperial Penal Law in 1858, whoever kidnaps a minor or major person, and also aids and abets the offender, the person will be sentenced to imprisonment for till six months. As a result, Mustafa who raped Fatma was sentenced to hard labor after the exposure penalty had been implied, and also Musa who helped Mustafa to kidnap Fatma was sentenced to imprisonment for three months.[242] Another example, in Konya, Ayşe who was the daughter of Mustafa had gotten out of her home and her virginity was deflowered by Mehmed Ali who was the son of Davud. The rape is defined with this statement, ''*...cebren hanesinden çıkarup bikrini izale eylediğini ikrar ile tahkik etmiş...*'' it means that Mehmet made her leave her home by force and

[241] BOA, MVL 743-16, (5 Şaban 1282/ 24 December 1865).
[242] BOA, MVL 743-16, (5 Şaban 1282/ 24 December 1865).

then he confessed to having deflowered her virginity.[243] This is the early definition of rape and duress according to the Penal Law in 1851. It showed that there was no big change in the legal interpretation of rape and duress during that period. In addition to these articles, the addendum of article 200 defines *bikr-i izale*, as;

> ''If a person deceives a woman with the promise of marriage and ruins her virginity, and after ruining her virginity, he gives up getting married, the person is initially sentenced to a fine for defloration and then imprisonment for from one week to six months. However, to imply this punishment, the person must confess what he did or the woman must prove her allegation.''[244]

In reference to what the article stated, even if there is the consent of both sides to have sex, sexual intimacy is evaluated under the article of sex crimes as rape. The reason could be that since the victim was convinced through the promise of marriage for a sexual relationship, her free will was governed by someone else.

On the other hand, we can also observe the phrase ''*bikrini or bikrini izale*'' which means removing or defiling someone's virginity in the *Shari'a* court records as a variant of rape. To give an example, in 1788, the case recoded in the *Shari'a* court in Kastamonu was about the rape accusation of Fatma who was the daughter of Abdullah towards Mehmed who was the son of Hüseyin. She stated before the presence of Mehmed at the court that he raped me and defiled my virginity. However, when Mehmed was questioned, he declined all the charges. The court demanded concrete evidence from Fatma to build her allegation but she did not. Although Fatma pressed charges against her offender right after the rape incident, she was not able to prove her allegation with concrete evidence. As a result, she found guilty because of making an unproven accusation.[245]

Additionally, it is important to appeal to the court on time with concrete evidence in order to win a rape case. Because there is a risk of guarding of evidence and alteration of evidence. According to Heyd's study, there was a limitation, *murur-u zaman*, to apply to court. For adultery and rape, it was one month, when one month passed, no one was heard as a witness. [246] But Abu Suud claimed that the rules about limitation

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[243] BOA, A. MKT. MVL 57-40, (24 Cemaziye'l ahir 1267/ 26 April 1851).

[244] Zeyl (addendum of Article 200): ''tezevvüc ideceği diye iğfal ile bir bikr-i buluğanın bikrini izale idüb de sonra almaktan istintak iden kimse kendüsünden bedel tanzim bikr alındıktan sonra bir haftadan altı aya kadar habs olunur fakat bu hükmün suduru izdivaç va'adiyle iğfali ya erkeğin ikrar ve itiraf eylemesine veyahut kız tarafının isbat etmesine menuttur.'' (3 Cemaziye'l-ahir 1277/ 17 December 1860) **Dustûr**, Tertib I, vol. I, 53emrü 7-597.

[245] Boğaç A. Ergene, ''Why Did Ümmü Gülsüm Go to Court? Ottoman Legal Practice Between History and Anthropology'', **Islamic Law and Society**, vol. 17, no. 2 (2010): 238.

[246] Heyd, **ibid**., 240.

could be flexible in certain conditions. And the decision must have left to the *qadı*. But Abu Yusuf and Muhammed argued; from the moment when the incident happened, the one-month delay was considered as a hindrance to building a case.[247] Another case (1788), Ümmü Gülsüm who was the daughter of Hacı Tursun Ali pressed charges against Mehmed who was the son of Hasan. She claimed that ‘‘Mehmed had taken me his home without my consent and he ruined my virginity. And I got pregnant as a result of his action. I demanded him to be questioned.’’ When Mehmet was questioned, he did not accept her allegations. Then the court asked Ümmü Gülsüm to prove her allegation with concrete evidence but she could not do. Therefore, Ümmü Gülsüm was subjected to making a false accusation.[248] In this case, Ümmü Gülsüm, unlike Fatma, did not apply to the court immediately, she waited until her pregnancy became certain. However, without certain and concrete evidence such as confession and witness, her allegation was found groundless even if she was pregnant without having a husband. As stated before, pregnancy could be the sign of either adultery or rape; therefore, it must have been proved with evidence. In addition to this case analysis, the same style of sexual violence cases was studied by Leslie Peirce in the *shari'a* registrations of sixteenth-century Gaziantep. According to Peirce, even if women did not have concrete evidence to support their allegations, they applied to the court to be heard. To illustrate the female side of the stories and to defend their honor and chastity, women went to the court regardless of the legal and social consequences. [249]

After explaining the examples of rape offenses in the *Meclis-i Vala*, a typical court record will be given to observe how criminal factors affect the identification process of rape and how rape is defined in the *Meclis-i Vala*.

> ‘‘*Mazbata* (document) 971
> Regarding *i'lam* (court decree) which was transferred to the *Meclis-i Vala* in 28 *Cemziye'l ahir* 1280 (10 December 1863) and 28 *Teşrin-i sani* 1279 (10 December 1863)from *Kastamonu* Province, *Tosya* district and its attached *mazbata* (document) were considered in *Muhakemat Dairesi* (the Agency of Judgements), Abacıoğlu İbrahim and Mustafa who was the son of Birci/enli Ahmed had taken Şerife who was the wife of Çekelioğlu Ahmed to the mountain while Çekelioğlu Ahmed was serving at night. After they had kidnapped and abducted for seven days, they committed *fi'l-i şenî'* or raped her. During the investigation, the aforesaid İbrahim and Mustafa acknowledged and confessed the crime. And since Ceziloğlu Ahmed who was their friend did not have any allegation about himself, he got released. And according to Article 198

[247] Ala' al-Din al-Kâsânî, **Bada'i al-Sana'i fi Tartib al-Shara'i**, vol. VII, ed. by Muhammed Ali Mu'awiz, Adil Ahmad AbdulBaqi, (Dar al- Kotob al-ilmiyah), 47.
[248] Ergene, ‘‘Why Did Ümmü Gülsüm Go to Court? Ottoman Legal Practice Between History and Anthropology’’, 216.
[249] Leslie Peirce, **Morality Tales: Law and Gender in the Ottoman Court of Aintab**, (Berkeley: University of California Press, 2003), 373.

> of the Penal Code, if a person commits *cebren fi'l-i şenî'* or raped, the person shall be put in hard labor temporarily, the said people are sentenced to hard labor for three years in *Sinop* from the date when they got caught, 29 Safer 1280 (15 August 1280) after they are exposed in their neighborhood under Article 19. The edict about the certain issue has been written to Kastamonu *Mutasarrıflık* (sub-governorship) for further action.''[250]

This record is a typical example of how rape cases were investigated, defined, and concluded in the *Meclis-i Vala* during the 19th century. The term *fi'l-i şenî*' is a legally admitted word to identify rape in the Ottoman legal language. To distinguish rape from *zina*, the record rigidly emphasizes the notion of force. Resulting from this approach, the term *cebren fi'l-i şenî'* became a judicially valid term to determine rape. Finally, the records which have judicial sentences, without exception, involve judicial reference point to manifest the judicial decisions based on the legal source, not a personal judgment. This feature of the *Meclis-i Vala* records makes them valuable and unique sources, when comparing the *shari'a* records, to study the lawfulness of the sentences and punishments comprehensively.

3.2. Representation and Identification of the Parties in the *Meclis-i Vala* Registrations

Just like being in the *Shari'a* court records, the *Meclis-i Vala* registrations are skillfully capable of presenting us with a social and legal portrait of the Ottoman society. Our main concern in these documents is to illustrate as possible as the identification and representation of a woman and a man in the Ottoman society in the 19th century through rape cases. The relation of a plaintiff and a defendant, or a victim and a perpetrator, is evaluated under social and judicial discourse. These social and judicial discourses are briefly related to being minor, *gayr-ı büluğ* (غربلوغ) and being major, *büluğ* (بلوغ), and then being a married and an unmarried person.

Initially, being minor, *gayr-ı büluğ*, (غربلوغ) is a stage of biological and mental growth that it emphasizes being exempt from religious and criminal issues. On the other side, being major, *büluğ*, (بلوغ) means being in a stage of biological and mental growth to become an adult. In other words, it is a transition period from childhood to adulthood to have criminal and religious liabilities.[251] However, there are some judicial preconditions to be called a child major, *büluğ*. Firstly, there is an age limitation that for boys, it is twelve, and also for girls, it is nine. Also, in the *Mecelle* this

[250] BOA, MVL 662-78, (2 Şaban 1280/ 12 January 1864) The original and latinized version of the document can be found in the part of appendix.
[251] Ali Bardakoğlu, ''Buluğ'', https://islamansiklopedisi.org.tr/bulug, (2016-2020), [20.04.2020].

implementation was accepted as a minimum age limit and the allegation of younger boys or girls for being major was not heard under article 988. In addition to this, a boy or a girl who is at the minimum age limit must reach puberty sexually and this situation can be showed differences accordingly climate and external factors. The *Mecelle* explains this stage quite clearly in Article 985. The article is that ''*hadd-ı büluğ ihtilam ve ihbal, hayız ve habil ile sabit olur*'' which means the limit of being major (*büluğ* or *baliğ*) is determined with being able to make pregnant for men and also with menstruating and being able to be pregnant.[252] Secondly, after a girl or a boy completes these biological and mental stages, they need to reach a maximum age limit. According to Abu Hanafi, men must be eighteen years old and women must be seventeen years old. However, other Islamic jurists argue that when a child turns into fifteen years old, he or she is accepted as a major regardless of sex.[253] For instance; Article 197 in the Penal Law 1858 indicates the punishment of *fi'l-i şenî*' against the child by stressing the age limit, eleven years old, like imprisonment. But there is a point about the implementation of this article that it is generally enforced for rape offenses committing against minor boys. Ibrahim who was the son of Köşeoğlu was four and raped by Mehmed who was an 18 years old man. After investigation, due to the existence of strong evidence about rape incident; especially the statement of the boy, he was sentenced to imprisonment for six months.[254] Another case was that Ibrahim who was seven or eight years old boy was raped and after the investigation in the *Meclis-i Vala*, the perpetrator was sentenced for one-year imprisonment.[255] Another example, Fatma who was a twelve-year-old girl was raped by three different perpetrators and as a result of rape crime, she lost her virginity. In addition to article 198 in the 1858 Penal Law, the perpetrators were sentenced to pay compensation to Fatma according to article 200 in the Penal Law.[256]

Lastly, how marital status was described in the *Meclis-i Vala* registration is another social and judicial discourse to visualize the social and judicial identification of men and women in the Ottoman courts. Firstly, when we consider the marital status of a

[252] **ibid**.
[253] **ibid**.
[254] BOA, MVL 652-70, (7 Rebiu'l evvel 1280/ 22 August 1863)
[255] BOA, MVL 661-29, (3 Receb 1280/ 14 December 1863)
[256] ''If *fi'l-i şeni* is committed against an unmarried girl, a perpetrator is penalized hard labor and also forces to pay fine to a victim.'' BOA, MVL 743-16, (5 Şaban 1282/ 24 December 1865)

woman, there are various titles to identify a woman such as a wife, (*zevce*), *hatun* (a married woman or wife), widow (*dul*); but being widow can be considered an unmarried woman because it is used to label a woman whose husband died. On the other side, to identify an unmarried, they used daughter (*kız,* or *kerime*) which is an Arabic word meaning daughter. However, the title of *kız* or *kerime* can be in use for both unmarried and minor women to identify an unmarried minor woman. On the other side, the male victims in the *Meclis-i Vala* documents are defined as a son (*oğul*, or *mahdum*) which is an Arabic word meaning son. For instance, Ibrahim who was a seven or an eight years old boy and was raped by Ahmed who was a cameleer. After the investigation process, the perpetrator was sentenced to imprisonment for one year accordingly Article 197 in the Imperial Penal Law in 1858[257].

Moreover, we can easily observe the same identification style for women in the *Shari'a* court records that women have generally labeled accordingly to their marital status and identified as someone's daughter or wife. In the study of Leslie Peirce, the Morality Tales, she analyzed the *Shari'a* registrations in the Gaziantep region in the 16th century and she pointed out some critical issues related to the representation and identification of women in the Ottoman *Shari'a* courts in that period. According to her study, women were labeled as female but under the patronymic understanding as *bint* (daughter) and also non-Muslims was recorded as *dhimmi* (protected) that we can observe the effect of social and religious identity over the identification of a woman in the Ottoman society in the 16th century. Additionally, the representation of gender in the court was shaped around the life-circle of persons. For females, *kız* who is the female child or unmarried, *gelin* who is newly married young woman and lastly *avert* or *hatun* who is the female adult, married, divorced, widowed; on contrary to femaleness; for male, *oğlan* who is the child or unmarried adolescent and *pir-i fani* who is senile.[258]

To point out a more understandable schema, we need to focus on the differences between the *Shari'a* Courts and the *Meclis-i Vala* in terms of representation and identification of the parties of rape cases. Firstly, the identification of the parties is mainly subjected to their religion in the *Shari'a* court but in the *Meclis-i Vala*

[257] ''Whoever commits *fi'l-i şeni'* against a child who is younger than eleven years old, a person is sentenced to imprisonment on condition that being less than 6 months.'', BOA, MVL 661-29, (3 Receb 1280/ 14 Aralık 1863).
[258] Peirce, **Morality Tales: Law and Gender in the Ottoman Court of Aintab**, 148-154.

registrations, religious identities are generally ignored. They were generally named according to their nations like *Rum millet*, nation. Besides, to prove the generality and feasibility of the *Meclis-i Vala*, for some cases, the *qadıs* required the representatives of non-Muslim communities or their point of view for a fair trial.[259] Then, the identification of women in the *Meclis-i Vala* has the same style and genre such as emphasizing her marital status and being someone's wife or daughter. Also, while the usage of *bin* (son) for men and *bint* (daughter) for women as an Islamic tradition is commonly preferred to identify women and men through their familial lineages in the *shari'a* registrations, these titles are not used in the *Meclis-i Vala* records. It has argued that the tendency to identify a woman through her father or husband is the result of the patriarchal understanding. This understanding is based on Islamic discourse; as stated before, women are considered as the property of their husbands through a marriage contract and fathers.

To sum up, sex crimes such as adultery, rape, and prostitution were always legal issues in Ottoman courts and prior socio-political and judicial concerns of the Ottoman authority. ''*Irz Padişahındır*''-Honor belongs to the Padishah; this word clearly explains the untouchability of honor and the perception of honor among the people. To preserve honor and chastity, any physical and verbal assaults against them are forbidden through *kanunnames*, lawbooks, before the *Tanzimat* and the penal codes after the *Tanzimat*. Thus, the untouchability and invulnerability of honor and chastity are under the protection of the Sultan through the legal documents enacted with his provisions. Therefore, the terms to define rape in Ottoman legal literature is important to understand the legal transformation and conceptualize legal language in the Empire.

These legal terms are the consequence of the interaction of religious and customary laws and also the effect of modern codification should not be underestimated to reform Ottoman legal understanding and language. Indeed, any verbal and physical assaults are evaluated as a criminal act which harms the reputation, honor, and chastity of a person and classified as sex crimes under the title of ''*hetk-i ırz*'' in the 1858 Imperial

[259] ''Uşisa who was an eleven or a twelve -year-old girl claimed that she had been raped by her master Hüseyin. To be able to define this case as rape, she first got examined by non-Muslim doctors whether her virginity was ruined or not. The report of non-Muslim doctors claimed that she had been raped but when she got examined by Muslim doctors, the results proved the opposite. In this case, her trial transferred to the *Meclis-i Vala* in order to make further research to conclude it.'' BOA, MVL 786-28, (19 Safer 1278/ 26 August 1861).
[259] Develioğlu, **ibid**., 477.

Penal Law. While the main category of these sex crimes was being gathered under the title of *zina*, after the *Tanzimat*, especially with the enactment of the 1858 Penal Law, it became *hetk-i ırz*. Most of the terms to identify rape offenses in Ottoman legal literature came from the Islamic legal tradition, therefore; there was continuity in legal language. The terms, *hetk-i ırz*, *fi'l-i şenî*', *fi'l-i livata*, or *livata*, and *bikr-i izale*, are commonly used to identify rape in the registrations between 1858-68. Each term has different functions semantically but the shared point among them is the violation of personal rights, honor, and chastity. Nevertheless, it must be known that *fi'l-i şenî*' was the main legal term to identify and define both homosexual and heterosexual rape and adultery during the 19th century. Besides, early records of the *Meclis-i Vala* include *fi'l-i şenî*', *cebren zina*, which it is was a legal term to identify rape in Islamic legal tradition, *iğfal* (اغفال) which means making someone do a bad act by deceiving and deception or deceived.[260] Also, the main phenomena to identify rape either heterosexual or homosexual rape offenses are force (*cebr*) and consent (*rıza*). Wounding, intrusion, abduction, and retention are counted as a component of the rape identification because if one of these components is proved with certain evidence or witness, the action is called *fi'l-i şenî*' or *cebren fi'l-i şenî*', rather than *zina*. Also, these can be considered as criminal acts against someone's free will and consent and also privacy.

Withal, the records of the *Meclis-i Vala* and *Shari'a* courts can provide us the identification of the parties of adultery and rape offenses. The women in the *Meclis-i Vala* are introduced as being someone's daughter or wife. Respectively, the titles which were defined women are daughter (*kerime*), girl (*kız*), a married woman (*hatun*), and wife (*zevce*). Also, the marital status of women is stated with the title of girl which means unmarried and virgin female, and *hatun*, and also *zevce* which means married and non-virgin female. The men in the *Meclis-i Vala* are defined as being someone's son because fathers are the head of the lineage and this passes from father to son to define a family. Also, son (*oğul*), little child (*sabi*), and *mahdum* (son in Arabic) are used to identify minor men. In addition to this, being minor and major is another issue in Ottoman legal understanding because the maturity in mental functions affects the consent and will of an individual to be able to make a logical and correct decision

[260] **ibid**., 477.

about any legal issues. Therefore, Ottoman jurists used the title of *buluğ* for major people and *gayr-ı buluğ* for minor people. Besides, the *Meclis-i Vala* is open to every single subject regardless of their religion, sex, and social status. And the subjects who are not Muslim are not labeled as non-Muslim but defined according to the community they belonged. On the other side, in the *shari'a* records, women are defined through their father or husband, as well. However, the phrases of *bin* for men and *bint* for women are commonly used to stress whose son or daughter the plaintiffs and the defendants were. Lastly, the marital status; *muhsan* who is a married free Muslim man, or *avrat*/*hatun* who is a married free Muslim woman and religious identities; Muslim or non-Muslim, *gayr-ı müslim* or *dhimmi* are stated clearly.

4. THE TRIAL PROCESS OF RAPE IN THE *MECLIS-I VALA*

The Ottoman judicial understanding significantly guaranteed the rights of every single subject in the Empire by promising to preserve their rights to live and to save their chastity and properties through the legal documents. When it comes to punishment, the Ottoman authority believed that any criminal acts were not be penalized without being heard before the law. To punish someone for any crime, some judicial principles must be performed such as confession and acceptance of a crime, and also concrete evidence showing the crime having happened indeed must be proved through investigation and questioning process. In this part of the study, the rape cases in the *Meclis-i Vala* registrations will be analyzed through legal presences and procedures for a criminal case, as a consequence of a trial, the identification of rape in the sentences which are taken place in both the *shari'a* and the *Meclis-i Vala* records and finally the punishments for rape which was condemned to the offenders. While doing this, the Penal Laws in 1858 and its articles related to rape offenses will be used as the reference point. Also, through the example cases about rape in the *Meclis-i Vala* records, what sort of penalties were implied for rape, the issue of the stiffen or decreasing the punishment, and remission of punishment will be illustrated.

4.1. The Legal Procedure in the Criminal Cases

The trial process of a criminal case in the Ottoman courts was prescribed clearly in the *shari'a* registrations. To start a trial, a plaintiff must have stated his or her allegation and then wanted a defendant to be questioned. After the defendant's statement was recorded in a judicial record, if his or her crime was proved with concrete evidence or confession, he or she would punish according to the *shari'a* or the kanun.[261] Apart from this brief explanation about the legal procedure to be punished a suspect, the real purpose here is to illustrate the process of how a plaintiff and a defendant reached out

[261] Heyd, **ibid**., 244.

to the court and stated their testimonies by comparing the *shari'a* and the *Meclis-i Vala* registrations. This legal producer was the same for both male and female litigants. Ronald Jennings stated that women in the Ottoman society could represent themselves and make their accusations before the *qadı* in the court. Further, other judicial elements such as defenses against allegations, presenting concrete evidence, and becoming a witness for a suit were all expected from female litigants, as well.[262]

The *Meclis-i Vala* was the most significant decision making and judicial organ of the Empire. For this reason, the *Meclis-i Vala*, in the *Bab-ı Ali* (the Sublime Porte), had multi-dimensional relations with both the central government and the Ottoman subjects. Especially, since the *Meclis-i Vala* was considered as a high court and an appeal court, the subjects from all over the Empire could reach out to the court through petitions, *arzuhal*, or in person. The public relation of the *Meclis-i Vala*, in this point, was being executed by the Record Office, *Evrak Müdürlüğü*, of the Chamber of Clerkship, *Tahrirat Odası*. The officers in the Record Office had heard the complaints and wishes of the subjects and then they immediately helped them to get a true, complete, and accurate service.[263] While the procedure to appeal to the *Meclis-i Vala* is like this, in the *Shari'a* courts, there seems a common tendency that it was the issue of representation, unlikely the Western-style legal representation by a lawyer. Some plaintiffs such as women, a minor, etc. were generally represented in the court by a person, mostly her father or her husband, who was fully authorized. The reason why women demanded to be represented by some else lies down under the issue of *muhaddere*, (مخدره). *Muhaddere* which is an Arabic word meaning covered, veiled, and moral Muslim woman is also regarded as a variant of *ehl-i izzet*, people of honor, and related to the visibility of the female body in the public. [264] According to Leslie Peirce, the term *muhaddere* can be translated best as respectable and defines the situations of performing moral acts and intentional veiling and social seclusion. Thusly, the term associates moral status with the partial and controlled visibility of the female body in the public sphere.[265] However, *muhaddere* issue did not drastically

[262] Ronald C. Jennings, ''Women in Early 17th Century Ottoman Judicial Records-The Sharia Court of Kayseri'', **Journal of the Economic and Social History of the Orient**, vol. 18, no.1 (1975), 61.
[263] Seyitdanlıoğlu, **ibid**., 135.
[264] Develioğlu, **ibid**., 774.
[265] Leslie Peirce, ''The Law Shall not Languish'': Social Class and Public Conduct in Sixteenth-century Ottoman Legal Discourse'', **Hermeneutics and Honor: Negoitiating Female ''Public'' Space in Islamic/ate Society**, ed.by Asma Afsaruddin, (USA: Harvard University Press, 1999), 140.

perpetrate to the whole social class such as the elite and the common, the *hass* and the *amm* and it was a common tendency among the elite group. Because if a woman had noble blood or got her status from a notable lineage, she would be expected to perform a higher moral standard within the society. It could relatively be possible not to appear in the public sphere.[266] On contrary to *muhaddere* woman, the non-*muhaddere* woman was defined by a fatwa of Abu Suud Efendi, if a woman cannot be employed as a slave to make her affairs do, and she has to do all her affairs by herself, that woman is labeled as non-*muhaddere*. The more a woman becomes visible in the public sphere, the more common she faces immoral behavior accusation and becomes an easy target of social suspicion, guilty or not.[267] Let's examine four different fatwas about how to be labeled as *muhaddere* and non-*muhaddere* woman;

> ''Question: Can a woman be *muhaddere* if she goes to the public bath or the countryside?
> Answer: Yes, if she goes in honor and dignity and is accompanied by servants and attendants.
> Question: Can a woman be *muhaddere* if she goes to the public bath and the weddings and makes excursions to other neighborhoods?
> Answer: Yes, if she goes with a retinue.
> Question: Can a woman be *muhaddere* if she handles her own affairs with the people of the village and brings water from the spring?
> Answer: No.
> Question: Can a woman be *muhaddere* if she lets herself be seen by her father's freedmen and by the sons of these freedmen and by her sister's husbands?
> Answer: It is not conformity to the prescription of the noble *Shari'a* that is the essential element in being *muhaddere*. That is why non-Muslim women can also be *muhaddere*. A woman is *muhaddere* if she does not let herself be seen by people rather than the members of her household and does not set about taking care of her affairs in person.''[268]

Considering these fatwas about what is *muhaddere* and non-*muhaddere* woman, it is highly about being invisible in the public sphere. The female presence in the public sphere is limited with a few events such as going public bath or wedding but in a decent attitude. On the other side, if a woman takes care of her own business together with the people who are out of her family members or instead of her servants, the woman is called a non-*muhaddere* woman because of her visibility in the public sphere. However, having servants or attendants seems impossible to be required by the women who live in the countryside if the socio-economic conditions of the Empire are evaluated. The concern of being *muhaderre* mostly addresses the women who belong to the elite class. Since the records heard in the *Meclis-i Vala* mostly came from the

[266] Peirce, **Morality Tales: Law and Gender in the Ottoman Court of Aintab**, 157.
[267] **Ibid**., 158-159.
[268] Peirce, ''The Law Shall not Languish'': Social Class and Public Conduct in Sixteenth-century Ottoman Legal Discourse'', **Hermeneutics and Honor: Negoitiating Female ''Public'' Space in Islamic/ate Society**, ed.by Asma Afsaruddin, 141-142.

countryside of the Empire and the women who are the victims of rape are mostly peasants, the issue of *muhaddere* does not affect negatively their appealing process to the court.

Applying to the *Shari'a* court or a *qadı* was easy to be heard and to take judicial help. In many the *shari'a* records, a plaintiff could see the *qadı* in person or explain his or her problem through a petition or a fully authorized representation. However, a trial could not be pursued without hearing a witness, and also a sentence could not be declared in the absence of both the plaintiff and defendant.[269] Even if the plaintiff was a minor; of course, there are some examples in the *Meclis-i Vala* registrations about the representation of a minor by his or her parents, when it comes to the announcement of the verdict, he or she must attend the trial and also investigation process to make her or his allegations and to signify his or her offender. In addition to this, if the crime violated the rights of God, which is against religious principles, the *ehl-i örf*, people of customary, such as *subaşı* or voivode, could submit the evidence they found about the offender to the *qadı* in her or his absence; according to the fatwa of Abu Suud.[270] After a plaintiff applied for a court, a defendant is called to the court. Before the presence of the parties, the defendant commonly stated their misconduct with some certain words. In general, the criminal cases in the *Shari'a* courts, the defendant declared his or her crime as; ''I gave in the devil'', *şeytana uydum*.

On the other side, in the *Meclis-i Vala* records, the defendant mostly expressed his or her offense by saying ''I committed rape and had homosexual intimacy'', *fi'l-i şenî'a icra ve cima livata eyledim*. In most rape cases, the plaintiff litigated to the court by claiming the said person had raped me and his or her allegation was recorded in the *Meclis-i Vala* registrations. Then the defendant gave his or her statement whether she or he committed the crime and this was also was recorded in the judicial documents. After the investigation process, he or she confessed his or her offense. Most of the statements were written down in the *Meclis-i Vala* registrations are like; ''… he declared that he had committed rape and confessed his offense …'', *... icra-yı fi'l-i şenî' ettiklerini ikrarlarıyla tebyin etmiş olduğunu…* or '' … the forenamed person A had raped me …'', *... merkum şahıs bana cebren icra-yı fi'l-i şenî' etti ...*

[269] Heyd, **ibid**., 243-244.
[270] **Ibid**., 242.

According to the study of Uriel Heyd, in many criminal cases held in the *Shari'a* courts, the defendant substantially tended to accept his or her offenses. The reason why the rate of confession was so high among the criminals was partially related to the illustration of a *qadı* in their minds. Since the rank of the *qadı* represented both religious and sultanic power, the criminals were being reluctant about false witnessing or lying under oath. Also, they had the fear to be tortured or being subject to any kind of social or political discrimination.[271] Besides, willingness is an important point in the feasibility of confession and testimony. Torture or physical violence could just be implied with the consent of the *qadı* to make criminals confess their offenses. However, sometimes officers perpetrated torture illegally, and to prevent violence, *ferman* (imperial edict) was sent to the *qadı* to keep them under control.[272] For instance, the statements of Hüsam Reis and his brother İbrahim proves the existence of physical violence and torture in the Ottoman *Shari'a* courts. The case they involved was about suspicious and unwillingness attitudes of Hüsam Reis and İbrahim in the investigation of killed Jewish people. They hesitated to say their father's name correctly during their statements. İbrahim was questioned about his brother Hüsam Reis about his activity at the time of Jewish people's murder. The officer stated that your brother Hüsam said; ''I did not go to the house of killed Jewish people and I did not come close to that house since I came back from Cebeli voyage''. He denied the accusation. Then, your brother Hüsam confessed that ''We had gone to that house with my brother İbrahim.'' So, why did you first deny and then confess the crime? asked the officer. İbrahim said; ''I first confessed but I had been tortured under customary; therefore, I confessed.''[273] Indeed, this sample indicated the implementation of torture during the process of questioning and taking the statement; therefore, it cannot be claimed; the torture neither harmed the process of the trial nor seemed illegal. Further, through Article 89 in Chapter III of Sultan Süleyman I's *kanunname*, the condition to

[271] **ibid**., 244-245.
[272] **ibid**., 255.
[273] ''Ba'dehû
Mezbûr Hüsam Reis'in karındaşı İbrahim'den suâl olunup sen Yahudiler katl olunduğu geceden evvel vakt-i asr karındaşın Hüsam Reis ile mezbûr Hüsam Reis'in Yahudilerin sâkin olduğu evine bilece varmışsın deyicek inkâr ile cevâb verip Cerbe seferinden geleliden dahi ben ol eve varmadım demiş idi sonra karındaşı Hüsam Reis bilece vardık deyu ikrâr edicek mezbûr İbrahim dahi karındaşı tasdîk edip bilece vardım deyu ikrâr etdi ya niçin evvelâ inkâr etdin sonra ikrâr etdin deyicek sonra ikrâr etdim ammâ örf etdiler işkence ile ikrâr etdim dedi.''
Beşiktaş Mahkemesi 2 Numaralı Sicil (966-968 / 1558-1561)

perform physical violence and torture was indicated as; ‘‘If a criminal confesses under torture and there are also signs indicating [his guilt], his confession shall be valid [and capital or severe corporal] punishment shall be inflicted on him according to his crime.’’[274] As seen in the article, since the confession under torture is accepted valid together with the existence of legal signs indicating a certain crime, the punishment of the crime is executed according to the crime. Also, it can be stated that the Ottoman legal authority could accept the confession under torture only if there was some certain evidence pointing out his or her crime. Because of the validity of the confession under torture, it can be said that the trial process of such cases was not affected badly.

On the other side, the testimony taken under duress or by force in the *Meclis-i Vala* harmed the process of the building charge against a criminal. As mentioned before, since the 1858 Penal Law prohibited the implementation of torture and arbitrary legal acts, this kind of action could not be accepted. Further, the Ottoman jurists aimed to prevent arbitrary punishments through the penal law by replacing them with fixed punishments. They also wanted to put an end to corporal punishment except for capital punishment. As a result of this approach, they forbade torture and arbitrary behavior of the local officials.[275] For instance, in a rape case in the *Meclis-i Vala*, a soldier who was called Hüseyin claimed that he had been raped by other soldiers who were respectively Hüseyin, Süleyman, and Halil. Kulağası[276] İbrahim Pasha beat them to confess their offenses when they refused to have raped Hüseyin. Since they kept denying their offenses, *Kulağası* İbrahim Pasha got them beat 80 times to Halil, 200 times to Süleyman and 300 times to Hüseyin. Until now, the performing violence during interrogation supports the Heyd’s study on the *shari‘a* records related to why confession was so common in the Ottoman judicial records. However, although perpetrating violence had been outlawed, Kulağası İbrahim Pasha performed physical violence towards the suspects and it caused a new legal discussion about the legitimacy of the testimonies under duress. For this reason, the confessions of Süleyman, Halil, and Hüseyin were in the danger of being informal to build a rape case. Since the suspicion of the fact that the testimony was given with the fear of being subjected to

[274] Heyd, **ibid**., 118.
[275] Kent F. Schull, **Prisons in the Late Ottoman Empıre: Microcosms of Modernity**, (Edinburgh: Edinburgh University Press, 2014), 28.
[276] ‘‘*Kulağası*’’ is a title used for the commander of a troop.’’

violence could not thereby create a reliable circumstance to sue a rape case against the perpetrators even if they could be real offenders of Hüseyin the victim. Besides, *Kulağası* İbrahim Pasha was, as a result, under military investigation according to the Imperial Civil Law (*Mülkiye Kanunname-yi Hümayun*) because of perpetrating physical violence an Ottoman subject illegally. At the end of the legal investigations of both the offenders and *Kulağası* İbrahim Pasha, the possible offenders got released because their confessions seemed unreliable and unacceptable in terms of legal principles. Also, *Kulağası* İbrahim Pasha was subjected to get the punishment of retiring from public service due to perpetrating illegal violence.[277]

Moreover, taking an oath was another instrument of legal procedures in the Ottoman *Shari'a* courts which has a religious character. It was a common judicial option when there was no concrete evidence to litigate or to support his or her allegation in the *Shari'a* courts. Especially, when plaintiffs could not substantiate her or his accusation with concrete evidence, defendants were able to take an oath to preserve his or her innocence.[278] In other words, when a plaintiff could not provide concrete evidence to support his or her allegation against a defendant, he or she could swear ''oath to God'', *yemin billah*, to affect the *qadı*. According to the study of Leslie Peirce, in the Aintab court records between 1540–1541, defendants taking an oath typically swore the truth of their testimonies, and the judgment was thereby made in their favor by considering the strength of the oath.[279] In addition to this, according to the study of Boğaç Ergene in Kastamonu *shari'a* registrations illustrates the influence of taking oath during a trial in case a plaintiff cannot support her or his allegation with concrete evidence. Boğaç Ergene argued that ''Oath taking seems to have been the second most popular form of judicial documentation used by defendants in those cases that ended in their favor (61 cases, 31 percent). Plaintiffs, on the other hand, won their cases by oath-taking in only 11 cases (5 percent of the 244 cases).''[280] In the *Shari'a* courts, the presence of a reliable witness is one of the most popular judicial apparatus to substantiate allegation and the second one is taking an oath. While having reliable witness seems the favor of

[277] BOA, MVL 786-57, (30 Rebiü'l-evvel 1278/ 5 October 1861)
[278] Ergene, **Local Court, Provincial Society and Justice in the Ottoman Empire: Legal Practice and dispute Resolution in Çankırı and Kastamonu (1652-1744)**, (Leiden: Brill, 2003), 64.
[279] Peirce, **Morality Tales: Law and Gender in the Ottoman Court of Aintab**, 186.
[280] Ergene, **Local Court, Provincial Society and Justice in the Ottoman Empire: Legal Practice and dispute Resolution in Çankırı and Kastamonu (1652-1744)**, 64-65.

a plaintiff, taking oaths are mostly for the sake of a defendant. Besides, another study conducted by Elyse Semerdijan through the records of Ottoman Aleppo points out the function of taking oaths in rape cases. Semerdijan argues;

> ‘‘Rape in Aleppo was complicated by the rules of evidence applied in the court, namely whether or not there were witnesses. Rape victims were not always able to prove their cases if witnesses were not present. Although oath-taking was always an option for powerful testimony, many rape victims did not take oaths and their cases failed in court.’’[281]

The study shows that through the trial process, to support the allegation or to substantiate innocency, the existence of witness seems the only way to win a rape case. The issues of why rape victims cannot take an oath can probably be related to what party of the case they are; plaintiff or defendant. Additionally, according to the study of Amira El-Azhary Sonbol, in the rape cases which do not have a witness or enough witness, a victim generally asked her possible offender to take an oath before the *qadı* to substantiate her allegation. Since an alleged would not perjure and state false testimony under oath, a rape victim could head for taking an oath to make an alleged rapist confess. However, the defendant was likely to deny the allegations against him by taking an oath. Therefore, when victims were asked to take an oath to substantiate their allegations, most of them did not accept and their cases were destined to dismiss.[282] Previously, the study of Ergene seriously indicates that taking oaths is favor of the defendant, not the plaintiff. On the other part, unlike the *Shari'a* courts, in the *Meclis-i Vala* registrations which were latinized, there is no example of swearing a vow. It can be probably related to the executive structure. The principles of the trial were described through written codes; especially, after the *Tanzimat*, Ottoman authority attempted to increase lawfulness of the judgment and punishment made by the *qadı*. When the function of taking an oath is considered, it might not able to meet the expectancy of lawfulness.

On the other hand, denial also seems a reasonable escape plan for criminals. According to the Ottoman legal understanding, to judge someone, he or she should admit his or her offense and say it before a *qadı* willingly.[283] For example, in a rape case held in Thessalonica, Ahmed was accused of having raped Anastasya. However, Ahmed did

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[281] Semerdijan, **ibid**., 216.
[282] Amira El-Azhary Sonbol, ‘‘Rape and Law in Ottoman and Modern Egypt’’, **Women in the Ottoman Empire: Middle Eastern Women in the Early Modern Era**, ed. by Madeline C. Zilfı, (Leiden, New York, Köln: Brill, 1997), 217.
[283] Heyd, **ibid**., 120.

not accept the accusation made by Anastasya and he did not give his testimony. As a result, the case was sent to the *Meclis-i Vala* for further investigation and final judgment with this statement in the record; ‘‘in the offender’s case, there was no a just testimony and his confession. Since there was no concrete evidence that proves *fi'l-i şenî*‘ happened under duress.[284] While most of the offenders were likely to confess and admit their deeds before the *qadı* because of being subjected to judicial and social discrimination or torture, sometimes, the offenders did not confess and admit what they had done before or not. Besides, in some of the rape cases in the *Meclis-i Vala*, apart from denial, when there seemed insufficient evidence to support his or her allegation or the offender denied what he had done, having a witness naturally led the direction of the trial. Therefore, the issue of witnessing in the Ottoman criminal courts must be cleared out.

Witnessing is also the most common phenomena of Ottoman judicial tradition. It is completely a different legal term to be explained but, in general, witnessing means telling the event which was seen by the witness or heard by the witness before the *qadı.* In Islamic law, there are some clauses to be a witness and these can be interpreted accordingly religious sects. But generally, to be a witness, the person must be free Muslim major and also must have the mental maturity to be able to perceive and understand the event he or she had witnessed. Also, the number of witnesses can be different according to the topic of cases. Except for *hadd* and *qısas* cases, the witness must be four free Muslim men or three free Muslim men and two women in *Hanafi* school. Especially, for *zina* cases, there must have four witnesses to be sentenced the offenders to *hadd* penalty. If the sufficient number cannot be provided, the witnesses will be inflicted on *kazf haddi*[285] because of the attempt of defamation to a chaste woman. Except for *hadd* and *ta'zir* cases, two male witnesses or one man and two women seem enough. As understood, two female witnesses equal to one male witness in some cases. Also, the main contribution to the female witnessing is systematically done by the Hanafi school. According to Hanafite principles on being witness, women can be a witness because the main condition to be a witness is to have the ability to perceive and understand the event, so women can do. However, Hanafi school has an

[284] BOA, MVL 1030-76, (13 Şevval 1283/ 18 February 1867)
[285] *Kazf* is a judicial term which means slandering a chaste woman by declaring her to have committed adultery. Hamza Aktan, ‘‘Kazf’’, https://islamansiklopedisi.org.tr/kazf, (2016-2020), [20.05.2020].

exemption about *hadd* and *qısas* cases and women cannot be accepted as a legal witness.[286]

Haim Gerber also discussed the witnessing issue under two categories respectively; normative witnessing and expert witnessing. For the study here, these two judicial discriminations seem more significant than the judicial clauses of being a witness in the Ottoman courts. He suggested that normative witnessing was generally seen in the cases of habitual offenders and he urged, normative witnessing was mainly used as a functional substitute for modern police record or police probe. According to his study, most of the normative witnessing cases were related to indecent actions committed against public order and morality. To give an example, the normative witnessing cases were usually observed in the cases about immorality. An immoral woman in Bursa did not welcome in the region because her indecent behavior was well known by local inhabitants and so the inhabitants applied to the court to banish her from their residence.[287] Besides, an example of the implementation of normative witnessing the *Meclis-i Vala* records will be useful to illustrate its function for the trial process of sex crimes. In a fornication case, Havva and Ovakim had a sexual intimacy willingly and they were caught by *zaptiye*. Expect for their confession and recital, the testimony of the local inhabitants supported the charge made against them to open a case and to penalize.[288] Another example, a rape case held in the *Meclis-i Vala*, Fatma sued Mehmed who had raped her, and Mehmed denied her allegation. To open a case against Mehmed, Fatma has to prove her allegation and if she cannot do so, the court investigated both parties whether the perpetrator has a criminal record or such immoral reputation in the society and also the defendant is also investigated whether she is a member of *ehl-i izzet* (people of honor). In order to do this, the court consulted the local habitant where the crime occurred about their habitual situations. When it comes to the significance of *ehl-i izzet* and criminal record during the denial of the allegation, these two phenomena must be explained correctly.

Firstly, being people of honor or chastity, *ehl-i izzet* or *ırz*, may have a vital significance when the possible perpetrator keeps denying or there is no certain evidence which proves the notion of duress in rape. These phenomena can frequently

[286] Apaydın, **ibid**.
[287] Gerber, **ibid**., 39.
[288] BOA, MVL 567-9, (26 Ramazan 1284/ 21 January 1868)

use to define a chaste and honorable woman in a society in the *Meclis-i Vala* registrations. The term *ehl-i izzet* means respect, honesty, and highness. Therefore, the person who has such quality or has been known such is relatively accepted as a reliable person in society. Also, *ehl-i ırz* (people of chastity) is highly related to honor. Honor is a pretty intense concept in the Turkish language. In Arabic, and also Ottoman Turkish, *ırz* means fame and honor, chastity[289]; therefore, the usage of honor does not all the time indicate chastity (*namus*). When a person in the Ottoman Empire was labeled as *ehl-i ırz*; primarily this must be thought, the person had good fame (*şan* or *nam*) and honor (*şeref* or *onur*) and then pudicity (*iffet*) and chastity (*namus*). All these italic words are semantically different from each other as a result of the richness of the language. Besides, while, fame (*şan* or *nam*) and honor (*şeref* or *onur*) mostly address males, pudicity (*iffet*) and chastity (*namus*) point out females.[290] Honor is generally tried to explain through a gendered perspective. From a gendered perspective, honor is generally described as the physical and moral quality of a woman which ought to be had and protected. Any indecent and dishonored action happening to a woman easily becomes a bad label not only for her but also for her family. The sexuality of a woman must be preserved by herself because it is commonly seen as an important instrument to be trusted in society.[291]

Further, these terms seem undoubtedly significant for the female party of a rape case during the lack of concrete evidence to prove duress to solve legal conflicts. Because after the *Tanzimat*, the judges also began to give a verdict by depending on circumstantial evidence.[292] To give an example, the rape case heard in Tuna Province prescribes the influence of being people of honor or chastity on the trial process of the rape case. Fatma alleged that Mehmed had raped her but Mehmed denied her allegation. He claimed that sexual intimacy had happened with her free will. However, Fatma did not naturally accept his claim. After the investigation conducted by consulting the local inhabitants about their habitual attitudes within society and their reputations, Fatma was as a result confirmed as being people of honor in her

[289] Develioğlu, **ibid**., 456.
[290] Aysan Sev'Er, Gökçeçiçek Yurdakul, ''Culture of Honor, Culture of Change: A Feminist Analysis of Honor Killing in Rural Turkey'', **Violence Against Women**, vol.7, no. 9 (2001): 972-3.
[291] **Ibid**., 972-3.
[292] Melike Karabacak, "Irzımı İsterim": 19. Yüzyılda Cinsel Saldırı Davaları Üzerine Bir Vaka İncelemesi, **Osmanlı Mirası Araştırmaları Dergisi**, vol. 6, no. 14 (2019): 204.

neighborhood. Thus, Fatma got out of being labeled ''*zaniye*'', adultress, and being punished with *hadd* penalty.[293] Another case recorded in Kastamonu is that Emine was kidnapped and taken to a mountain and she got raped there by Ali and his friend Ali. Then, Ali and other Ali also made her wear male clothes and forced her to come with them. During that time, they raped her. However, Emine could not recall how or where they kidnapped her. The missing pattern in the investigation led the judicial authority to question whether she was people of honor or not. Therefore, the case was sent to the *Meclis-i Vala* to reinvestigate deeply.[294]

Moreover, reputation was also highly related to being people of honor within a society. Reputation is a fluid term and social, cultural, religious, and ethical norms determine what your reputation is or ought to be. When social dynamics and norms change, people's behavior and reaction towards human interactions are going to change, naturally, reputation does. Additionally, the legal system in all societies determines the norms are defined as proper and improper behaviors; as a result, the norms both make and break a reputation. To give an example, if a married woman has an affair with another man, and when this relationship comes out, she and the man who is having an affair will probably lose their reputations to be respectable in society.[295] According to Peirce, reputation was a measurable phenomenon, and mutual memory could be charged with being committed to moral violations. Since the criminal record of someone can be traced when it is needed in modern times, and likewise, the reputational record could be tracked in sixteenth-century Aintab.[296]

Secondly, the criminal record is also another judicial instrument to find out whether a perpetrator is guilty or not in case of denial. The criminal record is an official document that includes the list of crimes which a person has committed recently or before.[297] In many rape cases, having a criminal record has directly the sentence of a judge changed. Especially when a victim cannot prove the notion of force during the sexual relation or the perpetrator keeps denying, the judicial authority checks out the offender's criminal past. If there is a criminal history or complaint about the offender, they can

[293] BOA, MVL 1078-37, (20 Şevval 1283/ 25 February 1867)
[294] BOA, MVL 743-74, (18 Ramazan 1282/ 4 February 1866)
[295] Lawrence M. Friedman, **Guarding Life's Dark Secrets**, (California: Stanford University Press, 2007), 1-3.
[296] Leslie Peirce, **Morality Tales: Law and Gender in the Ottoman Court of Aintab**, 195.
[297] Criminal record, https://dictionary.cambridge.org/tr/s%C3%B6zl%C3%BCk/ingilizce/criminal-record

get punished for him under the penal law. It could also happen vice versa. For instance, a woman namely Anastasya claimed that Ahmed had raped her. However, there was no clear evidence about whether it happened under duress or not as a result of the investigation. Also, Ahmed refused to give a testimony about the allegation. In this case, the court appealed to check his criminal record. Besides, Anastaya was subjected to the investigation about whether she was the people of honor. As a result of the investigation, it was learned that Ahmed did not have any criminal record and also complaint and besides, Anastasya was known as the people of honor. In this case, the local court could not open a criminal case against Ahmed because of a lack of concrete evidence so they sent the case to the *Meclis-i Vala* for further investigation and final sentence.[298] In another case, Miço was accused of having abducted and also embarking on rape Asiye Hatun. However, Asiye Hatun showed resistance to him and the sexual assault did not happen. Moreover, the attempt to rape and kidnap, and besides having a criminal record related to sex crime made him penalize.[299]

In addition to the normative witnessing argument of Gerber, he examined the expert witnessing notion, as well. According to Gerber, it fundamentally means asking reasonable advice about the legal issue which needs to be explained by an expert on the issue to resolve the legal disagreement.[300] To give an example to the expert witness, Uşisa who was eleven or twelve-year-old girl claimed that she had been raped by her master Hüseyin. As a result of sexual assault, she lost her virginity. To prove her virginity defiled by Hüseyin, she went to see her community's doctor. However, the doctor told her that she lost her virginity but, in the court, he claimed vice versa. Also, Hüseyin denied having raped Uşisa and Uşisa did not bear a child even if she lost her virginity. Because of all these judicial contradictions, the case sent to the *Meclis-i Vala* to be examined, this time, by Ottoman doctors.[301] This attempt, asking advice of an expert to solve the judicial contradiction, can be considered as a legal instrument to create a judicial infrastructure. When such a legal event occurs again, the legal procedure will be shaped accordingly in the previous sentence.

[298] BOA, MVL 1030-76, (13 Şevval 1283/ 18 February 1867)
[299] BOA, MVL 699-55, (3 Zilka'de 1281/ 30 March 1865)
[300] Gerber, **ibid**., 53-54.
[301] BOA, MVL 786-28, (19 Safer 1278/ 26 August 1861)

4.2. Sentence

The main concern in this part is to penetrate the structure and feature of the sentences in the judicial records such as in the *Shari'a* courts and the *Meclis-i Vala*. The aim is to illustrate the similarity and the difference by comparing the registrations of these two legal institutions in terms of structure and the method of pronouncing the sentences. The analysis of the sentence will be focused on the types of judicial documents and the issue of lawfulness.

Therefore, what is a sentence? A sentence, in general, means decision, judiciary; knowledge, and understanding through gaining judicial investigations; in other words, it means an article which comes from the rules or the collection of certain judicial conclusions about specific topics.[302] The sentences recorded in the *Shari'a* courts takes place in the different types of documents such as *hüccet*, *i'lam*, *maruz*, and *mürase*, etc. Especially, the term *i'lam* is occasionally mentioned in the *Meclis-i Vala* records to show the interactive relation between the *Shari'a* court and the *Meclis-i Vala*. As mentioned before, the Ottoman legal system had a dual structure within itself but this duality is an example of a coherent working system rather than a legal contradiction. To be clear, when a case involves multiple crimes, its *shari'a* part was heard in the *Shari'a* court or the plaintiff applied for the *Shari'a* court which was served as an inferior court, it was sent to the *Meclis-i Vala* for final judgment, which it was only valid in criminal cases. For example, in a rape case, Fatma alleged Mustafa that he had attempted to rape her. But during the offense, Fatma killed Mustafa by stabbing to defense herself. His brother Hasan sued Fatma because of his brother Mustafa's death. In the *Shari'a* court, they made a deal on paying five thousand and five *akçe* to Hasan as blood money. Since the murder was considered as a criminal case, the *shari'a* sentence, *şer'i i'lam*, was sent to the *Meclis-i Vala* for the final sentence. According to article 186 in the Penal Code 1858, her action was accepted as self-defense to protect

[302] İlyas Üzüm, ''Hüküm'', https://islamansiklopedisi.org.tr/hukum, (2016-2020), [25.05.2020]; Ahmet Özel, ''Ahkam'', https://islamansiklopedisi.org.tr/ahkam, (2016-2020), [23.03.2020].

her chastity and she was not subjected to any punishment. Fatma was thus impunity from murder punishment according to article 186[303] in the 1858 Penal Law.[304]

To understand *i'lam* comprehensively, the comparative analysis between *i'lam* and *hüccet* will be useful to evaluate the sentences in the judicial records. *Hüccet* means bill, credential, proof in the dictionary.[305] In legal terminology, *hüccet* is a document which does not include the judgment of a *qadı* but includes the confession of one of the parties or the other. At the top of the sentence, there is the signature and seal of the *qadı*. Then, the parties' names and addresses, the topic, the kind and condition of the legal issue, and also the information of a receiver or sender if there is such thing takes place in a *hüccet*.[306] On the other hand, *i'lam* means notifying or informing as a dictionary meaning but as a legal term, it is a document including the sentence of a judge with the signature and seal of a *qadı* at the bottom of the sentence. However, according to Ali Akgündüz, whether a document involves a judgment of a *qadı* or not is called *i'lam* which has the signature and seal of the *qadı* in a customary tradition.[307] For example, the daughter of aforesaid Yusuf claimed that Eyüp had raped her. Then Yusuf was accused of having killed Eyüp because he raped his daughter. This information takes place in a document called *i'lam-şer'i* and it was directed to the *Meclis-i Vala* for the final judgment about the case.[308] The previous case example which was about Fatma's rape case and the killing of her perpetrator and this one enlighten the usage of the term *i'lam* in the judicial registrations. In the first example, *i'lam* has a verdict about paying blood money for murder, but in the second example, *i'lam* does not have a verdict about murder or sexual violence. The real concern is, in the document, to inform the *Meclis-i Vala* about what they did and found about the case and to ask judicial advice. As understood here, *i'lam* can be used to state both a

[303] ''bir kimse birinin hanesine veya dükkanına zorla girerse, hane ve dükkan sahibi o kişiyi def ettiği sırada vuku' bulan öldürme, yaralama ve darp gibi eylemlerden muaf tutulmalıdır'', should a person enter someone else's house or shop without permission and the killing, wounding, and beating occurring while making the person get out of his or her house or shop, the houseowner or shopowner is impunity from the crime. **Dustûr**, Tertib I, vol.1, 537-597.
[304] BOA, A.MKT.MVL 110-36, (26 Safer 1276/ 24 September 1859)
[305] Develioğlu, **ibid**., 388.
[306] İbrahim Hakkı Uzunçarşılı, **Osmanlı Devleti'nin Saray Teşkilatı**, (Ankara: Türk Tarih Kurumu, TTK, 1988), 121.
[307] Halil Cin, Ahmed Akgündüz, **Türk-İslam Hukuk Tarihi**, vol.2, (İstanbul: Timaş Yayınları,1990), 42.
[308] BOA, MVL 741-62, (28 Rebiü'l-ahir 1282/ 20 September 1865)

judicial document having a sentence and an ordinary judicial document to inform what has been going on in the case.

In general, after finding certain concrete evidence through legal investigation, the qadı either absolved the suspect from a certain accusation or sentenced the suspect to the crime. The *qadıs* in the Ottoman Empire were capable of inflicting *hadd, qısas,* and *ta'zir* penalties when an accused found guilty of certain offenses. *Hadd* and *qısas* punishments have their well-defined instruction to be sentenced, so *ta'zir* punishment has an extensive place in the Ottoman penal codes because of its interpretive structure. Also, when the *qadı* sentenced someone to certain *ta'zir* penalty, the *qadı* mostly did not prefer to record the number of beats for flogging. Additionally, the *qadı* sometimes turned the penalty of flogging into fine punishment in some cases but he did not mention how much money must be paid for flogging; only stated one *akçe* for every single beat. On the other hand, for serious crimes such as murder, theft or bodily harm, he avoided performing capital punishment but mostly sentenced to the cutting of an organ like a hand, or forced to pay blood money for murder by stating the amount of money in Ottoman currency.[309]

According to the study of Heyd, the judicial records between the 15th and the 16th centuries did not include the specific name of penalty but the *qadı* only mentioned either guilty or innocent. This approach aims to illustrate not the legal explanation and procedure of the case but the fact of the case.[310] To give an example, Memi who was a six-year-old boy was abducted and by Sefer with the purpose of rape. However, the boy screamed out and two witnesses namely Davud and Musa saved him to be raped. The witnesses took Memi to his mother. Until now, the record only mentioned the parties involving the case and what they did. Then, the record ends with this word; ''… they claimed that they had witnessed the incident and the record was kept …''[311] As seen in the example, the record corresponds to the result of Heyd's study, there is

[309] Heyd, **ibid**., 254.
[310] **Ibid**., 254.
[311] Hani bt. Hasan'ın Memi adlı şahsın küçük oğluna tecavüze teşebbüs ettiği şikayeti
Hâni bt. Hasan mahfil-i kazâda Memi nâm çingene muvâcehesinde takrîr-i kelâm edip mezkûr Memi tahmînen altı yaşında işbu Sefer nâm sagīrimi tutup bir bağçede güç eylemiş lüzûm taleb ederin dedikde gıbbe's-suâl merkūm Memi inkâr ile mukābele edip akībü'l-istişhâd Devran b. Dâvud ve Pazarlı b. Musa nâm kıbtîler hâzırân olup bir feryâd işidip vardığımızda merkūm Memi mezbûr Sefer'in üzerinden kalkıp kaçdı oğlanı alıp anasına götürdük deyû şehâdet eyledikleri bi't-taleb kayd-ı sicil olundu. Tahrîren fî târihi mezbûr evâsıt.'' Üsküdar Mahkemesi 56 Numaralı Sicil (990-991/ 1582-83)

no certain sentence about whether the offender was punished, and if he did, what his punishment was. Besides, Suraiya Faroqhi argues that the court registers commonly determine the state of cases and there are only social facts. It is highly related to Ottoman legal understanding because some cases are solved between the parties before applying for a court. Therefore, the judgment and procedure held in the courts stay in the background.[312] The *shari'a* registrations generally did not indicate the trial process, which is the stories of the parties, the statements of the parties, the roles of *ehl-i örf* and the explanation of certain pieces of evidence and witnesses, and sometimes the amount of the punishment but only mentioned the name of punishment as *ta'zir*.

On the other side, there is something to be known about the *Meclis-i Vala* registrations that every record did not have the final judgment. But there were various sentences about what should be done to get the final judgment or a general summary of what have done during the trial in the local courts. The reason was probably related to the function of the *Meclis-i Vala* because it was both a high court for serious crimes to make a final decision and an appeal court for all sorts of courts in the Empire. For instance, the case between Emine, Ali, and the other Ali was a significant representation of a judicial document which did not have a final judgment or a proper sentence. Since Emine could not recall how she got abducted and prove duress during the sexual relation. The case was sent to the *Meclis-i Vala* to investigate and to be heard with this statement; ''since the punishment will be illicit, thanking you in advance for your attention to this matter…''[313] To interpret this statement correctly, when all clauses are not gained to open a case against someone, the case with its all documents is transferred to the *Meclis-i Vala* for a true, complete, and accurate judgment. Another case example of sexual assault was kept in Eyüp court in the 18th century is important to present the content of the *shari'a* sentences. Aişe Hatun who was the wife of Dervish İbrahim was sitting in her place and Dervish Feyzullah intruded her place. Then Dervish Feyzullah attempted to rape her, and for his offense, he was sentenced to severe *ta'zir*.[314] In this case, again, the statement of ''… sentenced

[312]. Suraiya Faroqhi, **Osmanlı Tarihi Nasıl İncelenir: Kaynaklara Giriş**, translated by Zeynep Altok, (İstanbul: Tarih Vakfi Yurt Yayınları, 1999) 55-56

[313] ''… tahdid-i caiz kayl olamayacağından bade icabına bakılmak üzere tedkikat () icrasıyla netice-i hasılanın izahan ba mazbata ve istintakname iş'arı hususunun subb-u şeriflerine bildirilmesi tezkere ve tebliğ kılınmış olmağla ol-vechle ifa-yı muktezasına himmet () siyakında şukka.''

[314] Ma'rûz; Sâhib-i arzuhâl Derviş İbrahim'in zevcesi Âişe bt. Ali nâm hatun medîne-i Eyüb'de Vâlidesarayı ustası

to severe *ta'zir*…'' gives us the type of punishment for rape but it did not mention what *ta'zir* punishment ought to be. Also, since there is a lack of information about the punishment, where, how, and how long the punishment will be implied is a big question to be answered. On the other side, in general, the *Meclis-i Vala* registrations, most of them have a precise prescription of a certain punishment such as hard labor, imprisonment, exposure, etc. Also, for hard labor and imprisonment which were penalties restricting liberty, the duration of each penalty and the date when each of them will start are recorded in detail and besides, where a criminal will be kept is stated, as well. Both the amount of fine as blood money and the amount of fine for sex crimes are precisely described in the *shari'a* and *Meclis-i Vala* registrations. In this case, how the sentence was described in the *Meclis-i Vala* records is a significant point to see the continuity.

The sentence part in the *Meclis-i Vala* was recorded after the trial process properly ended, which was involved to hear allegations, testimonies, and also witnesses. Especially, the most exclusive feature of the *Meclis-i Vala* records is that the sentence and the punishment are explained by pointing out their references. Indicating the related article in the penal law for each sentence and punishment naturally gains them more legal identity. Also, the judicial documents in the *Meclis-i Vala* do not have a specific classification as *i'lam*, *hüccet*, etc. However, in general, the documents passing by the *Meclis-i Vala* were labeled as an official certificate (*tezkere*), *shuqqa* (*şukka*), and also document or record (*mazbata*). To give an example to a typical sentence in the *Meclis-i Vala*, İbrahim, who was the son of Hacı İbrahim, was a seven or eight-year-old deaf boy lived in Seyyidhan summer range where was located within Konya sanjak. İbrahim was raped by the cameleer namely Turcoman Ahmed working for Hayrullah who was the son of Hacı Halil. Turcoman Ahmed confessed his offense during the investigation process. And whoever commits *fi'l-i şenî*' to a child younger than eleven years old, the person will be subjected to imprisonment for at least six

mübâşeretiyle ihzâr-ı şer' etdirdiği Derviş Feyzullah muvâcehesinde mezbûr Feyzullah Emir Buhari Mahallesi'nde sâkine olduğum menzile bana fi'l-i şenî' kasdıyla duhûl edip bir tarîk ile yedinden halâs olmuş idim mûcib-i şer'îsini taleb ederim deyü da'vâ etdikde ol dahi mezbûre Âişe Hatun'un menziline fi'l-i şenî' kasdıyla beni da'vetine binâ'en duhûl etmiş idim deyü ikrâr ve i'tirâf etmekle alâ-mûcib-i ikrârihi mezbûr Derviş Feyzullah'a şer'an ta'zîr-i şedîd lâzım geldiği medîne-i Eyüb mahkemesinde ba'de't-tescîl bi'l-iltimâs huzûr-ı âlîlerine i'lâm olundu.Fermânmen-lehü'l-emrindir. Fi'l-yevmi't-tâsi' aşer min-Muharremi'l-harâm sene ihdâ ve sittin ve mi'e ve elf.'' Eyüp Mahkemesi 182 Numaralı Sicil (1154-1161/ 1741-1748)

months according to Article 197 of the Penal Law. In the eye of Article 197, the said person was inflicted on imprisonment as from 28 *Muharrem* 1280, 15 July 1863, for one year.[315]

To put it all in simple terms, the common pattern of the *Meclis-i Vala* registration, especially the sentence, the parties are defined well by stating whose relative they were and also their titles. And their addresses are briefly mentioned as *sanjak*, district, and village. After indicating the place where the crime happened and introducing the parties and their stories, the sentence, as a result of a legal investigation, is stated by referring the related article in the penal law in force. Also, the punishment takes place right after the proclamation of the sentence in a well-defined statement. To see the main differences between the *shari'a* and the *Meclis-i Vala* registrations in terms of judicial genre, the two rape cases; the first was the case of Aişe heard in the *Shari'a* court in the 18th century[316] and the second was the case of İbrahim heard in the *Meclis-i Vala* in the 19th century[317], help us to understand their exclusive structure. In general, the *Meclis-i Vala* records present the information of where the crime occurred, who the parties were, what their allegations and defenses, and the statements of the public officers. Besides, if there is their intervention, what the sentence was, and what the reference point of it was and what the punishment was is also clarified in detail. Finally, the duration and place of the punishment and the final judgment are written by referring a certain article in the penal laws in force. On contrary to the *Meclis-i Vala*, the *shari'a* registrations are mostly related to representing the facts and the influence of the parties to these facts. Also, there is no clear explanation of what kind of punishment was sentenced. However, the only *ta'zir* is indicated by stressing with the adjective ''severe''; therefore, the execution of punishment could probably be heavy. Also, the amount or duration of the punishment is not mentioned at all.

[315] BOA, MVL 661-29, (3 Receb 1280/ 14 December 1863)

[316] The judicial record mentioned in footnote 300. Eyüp Mahkemesi 182 Numaralı Sicil (1154-1161/ 1741-1748)

[317] ''… Konya sancağı dahilinde Seyyidhan nam yayla sakinlerinden Hacı Halil oğlu Hayrullah'ın devecisi Türkmen oğlu Ahmet, Hacı İbrahim'in yedi, sekiz yaşında bulunan sağır oğlu İbrahim'e fi'l-i şeni' icra eylediğini () ve her kim onbir yaşından aşağı bir çocuğa fi'l-i şeni icra eyler ise altı Aydan ekall olmamak üzere habs olunması kanun-u cezatın 197.maddesinde muharrer bulunduğuna mebni merkumun bu hükme tevki'an be tarih-i habs olunduğu beyan olunan 80 senesi Muharrem'in 28.gününden itibaren bir sene müddetle habs olunması zımmında valiliğe cevabname-i sami tesdiri tezkere kılınmış ol babda emrü ferman.'' BOA, MVL 661-29, (3 Receb 1280/ 14 December 1863)

4.3. Punishment

In the Ottoman legal structure, there was no clear separation or classification about the diversity of criminal acts. Especially, when it comes to punishment, the punishments of criminal offenses can relatively be characterized as ambiguous. The Ottoman jurists made only a strict classification between grave crimes, which are required mostly capital punishment or severe corporal punishment, and the other crimes, which are required *ta'zir* punishments. Also, the third class of offenses, which are subjected to *ta'zir* punishment, and also imprisonment accordingly the *Shari'a,* is petty offenses.[318] In this part, the types of punishment in the Ottoman law will be analyzed through the notions of ''*siyaset* and *bedel-i siyaset*, *hadd*, *qısas*, and *ta'zir*. Then, the case examples related to rape offenses in the *Meclis-i Vala* will be examined in terms of the range of the punishments and their varieties.

Initially, *siyaset* is an important phenomenon in Ottoman judicial literature. The term was used in both administrative and judicial dimension. *Siyaset* relatively means having political power to run a state or an empire. Also, an Ottoman scholar Ebu'l Beka el-Kefevi (b.1619/ d.1684) argued that *siyaset* is to edify the conditions of the subject by building a way for earthy and ethereal salvation.[319] Dede Cöngi who was an Ottoman jurist (d.1567) also explained *siyaset* in his famous work (*Siyaset-i Şer'iyye*) as to make the punishment of a crime, which has a *shari'a* provision, aggregate to prevent sedition.[320] Another interpretation related to what *siyaset* is in Ottoman legal understanding comes from Colin Imber. He claims that *siyaset*, in general, is a criminal act which is out of the *shari'a* jurisdiction to provide social order by a legitimate ruler.[321] Also, Imber argues that since *siyaset* was mostly associated with public authority, the Ottomans used *siyaset* as a sanctioning power for the sake of public order. In this perspective, Imber identifies *siyaset* as the de facto verdict of administrative authority.[322]

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[318] Heyd, **ibid**., 259.
[319] Midilli, **ibid**., 95.
[320] **Ibid**., 96.
[321] Colin Imber, **Ebu's-suud: The Islamic Legal Tradition**, (Edinburg: Edinburg University Press, 1997), 98.
[322] Colin Imber, ''Zina in Ottoman Law''**, Contribution à l'Histoire Economique et Sociale de l'Empire Ottoman**. (Paris: Institut Français d'Etudes Anatoiennes d'Istanbul and l'Associacition pour le Developpement des Etudes Turcques), Collection Turcica 3, 179.

On the other side, there was a general approach among Islamic jurists that they saw *ta'zir* and *siyaset* legally equal to each other. They even claimed that *ta'zir* and *siyaset* had a rational interaction by fulfilling each other's legal sedition. Merginani who was an Islamic jurist (d. 1197) emphasized the importance of this collaborative work between *ta'zir* and *siyaset*.[323] On contrary to this approach, Baber Johansen argues that *siyaset* is not a part of the *shari'a*, unlike *ta'zir*. However, even if *siyaset* was not a part of the *shari'a* jurisdiction, it was not completely independent from it. Because *siyaset* is commonly considered as an executive power which gains judicial conformity for some criminal issues seeming unlawful to prevent the expansion of crime in society.[324] In addition to this, Heyd argued that *siyaset* was a legal term which was frequently in the Ottoman penal laws with its different meanings. He also claimed that *siyaset* was one of the most ambiguous legal terms in Ottoman judicial literature but it could be considered as punishment in an extensive meaning.[325] To Heyd; ''In its widest sense, it seems to denote punishment in general, which may include strokes and banishment. As a technical term, however, it generally means either execution or severe corporal punishment or both.''[326] Through the different explanations of *siyaset*, the term can be evaluated as a legitimate power to execute punishment for certain crimes which have judicial ambiguity.

The place of *siyaset* in Ottoman penal laws can easily be likened to *ta'zir* punishment, and even it can be considered as a secular power, too.[327] The reason why *siyaset* and *ta'zir* often show similarity in function is that they both are open to administrative intervention and also the degrees of the punishments can be increased or decreased by taking into consideration current and dominant judicial views. Besides, another argument about its secularity issue is quite complicated because if it is seen as a sultanic punishment, it is naturally evaluated as secular. On the other side, the legitimacy issue of *siyaset* immediately emerges. When its main reason is thought, to fulfill up the legal ambiguity between *hadd* and *ta'zir* penalties, its origin can be illustrated as the collaboration and interaction of religious and customary law. Whereas one of the reference points of *siyaset* is the *shari'a*, it cannot be regarded as a secular

[323] Baber Johansen, **Contingency in a Sacred Law**, (Leiden, Boston, Köln: Brill, 1999), 216-17.
[324] Midilli, **ibid**., 103-106.
[325] Heyd, **ibid**., 257-60.
[326] **ibid**., 259-60.
[327] Midilli, **ibid**., 103-117.

power in Ottoman penal laws. As a consequence, *siyaset* refers to a legitimate power, which was perpetrated by a licit ruler to punish crime, to provide and preserve public order. For instance, in Selim I (1512-1520)'s *kanunname*, the offender of rape was sentenced to cutting his genital organ. However, this punishment does not have a place in both *hadd* and *ta'zir* in a legal sense. To prevent and secure public morality and order, the sultan could enact such heavy punishment for serious crimes as a result of *siyaset*.

Siyaset included capital punishment or execution and also severe corporal punishment. Also, when the clauses of capital punishment did not seem sufficient enough, *bedel-i siyaset* (fine) was implied as a variant of *siyaset*. Initially, capital punishment was described in the *kanuns* made by the sultans for a few crimes such as homicide, rubbery, heresy, crimes committing against public order and security, vituperation of the Prophet, and apostasy. Also, capital punishment was mostly executed through hanging, stoning, and killing by a weapon. And the execution was performed by the Janissary corps and *ehl-i örf* (the people of customary). Stoning (*recm*) was also another execution form but it was only implied for fornication.[328] The executions were generally carried out with a weapon such as a sword and a bullet so that the perpetrators die quickly. Hanging was rarely performed since it was not associated with human dignity.[329] However, to Heyd's study, the Janissaries hung the body of the criminal on a tree, they mostly used them as a target to improve their archery skills.[330] According to Ekrem B. Ekinci, stoning punishment was only implied in the Ottoman Empire in the reign of Mehmed IV (1648-1687) for an adultery offense. The execution was so rare that the Sultan Mehmed IV attended to observe it.[331] To give an example for capital punishment for both brigandage and rape in 1785, Hasan, labeled as blind, who had been doing brigandage for more than twenty years around Çirmen, today's Greece, his brother İdris, and his three men raped two virgin young women in the field in Edirne. Because of the shame, the girls got raped, they poisoned themselves. After the investigations, the said five persons were executed and their cut heads were sent to İstanbul.[332] In this case, whilst rape incidents are mostly penalized through hard labor,

[328] Heyd, **ibid**., 263.
[329] Ekinci, **ibid**., 336-339.
[330] Heyd, **ibid**., 263.
[331] Ekinci, **ibid**., 347.
[332] Konan, **ibid**., 164.

imprisonment, and rarely exile, there is capital punishment as punishment. Brigandage is mostly penalized through capital punishment, the crosscut of hands and feet, and exile.[333] Therefore, in this case, capital punishment was applied for either brigandage or rape is important to be thought.

Severe bodily punishment was accepted as a variant of *siyaset*. The most common implementation of severe bodily punishment was the amputation of a hand, which it was for robbery and repeated robbery, as a *shari'a* penalty. The amputation of a hand did not only inflict for theft or repeated theft but also applied for stabbing people or wounding them a knife and counterfeiting.[334] Additionally, castration was another form of severe corporal punishment. Besides, it did not have a place in religious law and it was completely administrative power, ''*siyaseten*''. The *kanunname* of Selim I (1512-1520) included castration punishment for rape offenses. In the *kanunname* of Süleyman I (1520-1566) castration was applied for kidnapping a woman, a girl, or a boy and also homosexual intimacy.[335] However, the registrations related to rape offenses in the *Meclis-i Vala* do not include such punishment for rape offenses. Also, the branding was considered as corporal punishment and it was applied for pandering and fraud by marking the forehead of a criminal. Besides, the branding of a female genital organ for eloping with a man voluntarily and also the cutting of an ear or a nose for an army deserter was in the category of severe bodily punishment.[336] The codification movement after *Tanzimat* must have excluded such severe punishments because there was no example sentence which includes one of these punishments for sex crimes under the Penal Law 1858.

To execute capital or severe bodily punishment, the offender must be heard before the *qadı* and his or her crime must be provided through the confession and concrete evidence. After a certain investigation, the criminal could be convicted and executed. Also, *ehl-i örf* (the people of customary) had to see the judicial record including the sentence of the criminal and the execution was performed at the place where the crime committed in order to prevent escape and to be a warning and a deterrent example.[337]

[333] Ali Bardakoğlu, ''Eşkıya'', https://islamansiklopedisi.org.tr/eskiya, (2016-2020), [20.04.2020].
[334] Heyd, **ibid**., 265.
[335] i**bid**., 19.
[336] **ibid**., 265.
[337] **ibid**., 271.

Lastly, *hadd, qısas*, and *ta'zir* punishments are significant components of Ottoman penal understanding. While *hadd* and *qısas* have already explained in detail the Quran and the Hadith and the Sunnah, *ta'zir* relatively seems open and feasible to make interpretation and to interfere with its judicial context. *Hadd* (الحد), in plural *hudud* (حدود), means preventing or separating in the dictionary.[338] The other words, *hadd* linguistically refers to boundary or limitation, and its context is described clearly in the Quran and the Hadiths.[339] As a legal term, *hadd* describes criminal sanctions which of amount and conditions are determined by divine decrees and also its punishments are decisive.[340] To imply *hadd* penalty, the crime must be committed against the rights of *Allah*, God, which means the boundaries, measurements, prohibitions, and provisions decided by *Allah*, God, for the sake of communities. Also, there cannot be any kind of individual intervention to the process of determining punishment and its implementation, unlike *qısas* and *ta'zir*. Since the execution of *hadd* penalties primarily concerns the benefit of the whole society, individual intervention is intolerable. For this reason, the executions of *qısas* and *ta'zir* are associated with personal rights and on the contrary, *hadd* punishments are inflicted on the rights of the society.[341]

There are commonly accepted crimes which are evaluated under *hadd* definition such as theft, adultery, consumption of alcohol, apostasy (*irtidad*), and an armed rebellion against a state (*bağy*).[342] Especially, *zina* is the main concern of this study because the identification and definition of rape are gained through adultery itself. *Hadd* punishments are respectively stoning, flogging, and exile. *Hadd* punishment for adultery offense is also called as *zina haddi*. Furthermore, the homosexual relationship is considered adultery but it is mostly not considered as *hadd* punishment but *ta'zir*.

To execute *zina haddi*, the crime must be proved with concrete evidence such as confession and four eye-witnesses but if one of the witnesses is missing *zina haddi* cannot be implied and is commutated to *ta'zir*. Also, the amount of punishment can change according to the marital status of the parties and their social situations. The

[338] Develioğlu, **ibid**., 353; 434.
[339] **ibid**., 418-22.
[340] Ekinci, **ibid**., 328; Ali Bardakoğlu, ''Had'', https://islamansiklopedisi.org.tr/had—fikih, (2016-2020), [20.04.2020].
[341] Bardakoğlu, **ibid**.
[342] **ibid**.

punishment of a married man and woman is stoning to death and also the punishment of an unmarried man and woman is one hundred floggings. If the adulterer and adulteress are slaves, they get half of the certain punishment, fifty floggings. According to Abu Hanafi, prostitutes are not sentenced to *zina haddi* but severe *ta'zir* and besides imprisonment, because they are no threat to public order and lineage. However, to İmameyn, a title used for Abu Yusuf and Muhammed who were the students of Abu Hanafi, both slaves and prostitutes must be sentenced to *hadd* punishment.[343] An example of the punishment from the *hadith*, the Prophet is reported as saying, "Take it from me! Take it from me! God has now appointed a process for females; the unmarried with the unmarried, one hundred lashes and twelve months' banishment; the married with the married, one hundred lashes and death by stoning.''[344] Another hadith says;

> ''A man from the tribe of Aslam came to the Prophet and confessed that he had committed illegal sexual intercourse, *zina*. The Prophet turned his face away from him four times; still, the man bore witness against himself four times. The Prophet said to him, "Are you mad?" He said, "No." He said, "Are you married?" He said, "Yes." Then the Prophet ordered to be stoned to death at the Musalla. When the stones troubled him, he fled, but he was caught and was stoned till he died. The Prophet spoke well of him and offered his funeral prayer.''[345]

On the other side, since rape was considered under the category of *zina* as a sex crime, its punishment was decided according to *hadd* penalties such as stoning, flogging, and exile. Despite *the hadd* penalty, out of individual intervention, the pioneers of Hanafi school, Abu Hanafi and Abu Yusuf interpreted the punishment of rape by considering a lack of witness and marriage option. If one of the witnesses in rape cases dies before the sentence has concluded or if an offender gets married to his victim, *hadd* punishment was changed.[346] The interpretation of *hadd* punishment when its conditions were not produced, the Ottomans preferred to impose a new punishment for the crime. However, the registrations of the *Meclis-i Vala* do not present the example of marriage as extenuating circumstances or remission of punishment in rape cases.

Qısas, القصاص, means an equal punishment for murder. *Qısas* (reprisal) includes homicide, quasi-intentional killing, manslaughter, and intentional or unintentional injuries. Unlike *hadd*, *qısas* is open to individual intervention; that means, the victim

[343] Ekinci, **ibid**., 345-346; Mohd Noor, **ibid**., 418-22.
[344] Semerdjian, **ibid**., 4.
[345] **ibid**., 13.
[346] Sonbol, ''Rape and Law in Ottoman and Modern Egypt'', **Women in the Ottoman Empire: Middle Eastern Women in the Early Modern Era**, ed. by Madeline C. Zilfı, 217.

can forgive the criminal or can demand compensation as blood money for the person who was killed.[347] In the sura al-Baqarah, the content and scope of *qısas* punishments have explained.

> ‘‘O you who have believed, prescribed for you is legal retribution for those murdered- the free for the free, the slave for the slave, and the female for the female. But whoever overlooks from his brother anything, then there should be a suitable follow-up and payment to him with good conduct. This is an alleviation from your Lord and a mercy. But whoever transgresses after that will have a painful punishment.’’ (2:178)[348], and ‘‘And there is for you in legal retribution [saving of] life, O you [people] of understanding, that you may become righteous.’’ (2: 179)[349]

For homicide crimes, the degree of *qısas* punishment has determined accordingly casualties’ social and sexual identity. The logic behind *qısas* is to penalize equally. However, unlike *hadd*, if the relative of a victim forgives the offender, the punishment turns into compensation, which means, blood money, for the loss. In addition to this, ‘‘*Diya* means the compensation which is payable in cases of homicide, the compensation payable in the case of other offenses against the body being more particularly *arsh.*’’[350] Despite *diya* or *diyat* (blood-money) determinant punishment for murder, the other physical attacks against the body is sentenced to *arsh*.

Arsh is a monetary punishment which is known as a portion of *diya* for bodily injuries and also partial limb loss in Islamic law. Its amount, just like being in *diya*, is also arranged according to the law.[351] Besides, *arsh* is inflicted on rape offenses because of bodily injury.[352] The rape offenses committed against a virgin woman in the *Meclis-i Vala* have both hard labor and fine punishment. Besides, the term *arsh* does not take place neither the *Meclis-i Vala* registrations not the 1858 Penal Law by meaning monetary punishment. Additionally, in some rape cases transferred to the *Meclis-i*

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[347] Mohd Noor, **ibid**., 418-422; Şamil Dağcı, ‘‘Kısas’’, https://islamansiklopedisi.org.tr/kisas, (2016-2020) [20.03.2020].

[348] Bakara Suresi, 178. ayet: ‘‘Ey iman edenler! Öldürülenler hakkında size kısas farz kılındı. Hüre karşı hür, köleye karşı köle, kadına karşı kadın kısas edilir. Ancak öldüren kimse, kardeşi (öldürülenin vârisi, velisi) tarafından affedilirse, aklın ve dinin gereklerine uygun yol izlemek ve güzellikle diyet ödemek gerekir. Bu, Rabbinizden bir hafifletme ve rahmettir. Bundan sonra tecavüzde bulunana elem dolu bir azap vardır.’’ https://kuran.diyanet.gov.tr/mushaf/kuran-meal-2/bakara-suresi-2/ayet-179/diyanet-isleri-baskanligi-meali-1 [28.03.2020].

[349] Bakara Suresi, 179. ayet: ‘‘Ey akıl sahipleri! Kısasta sizin için hayat vardır. Umulur ki (bu hükme uyarak) korunursunuz.’’ https://kuran.diyanet.gov.tr/mushaf/kuran-meal-2/bakara-suresi-2/ayet-179/diyanet-isleri-baskanligi-meali-1 [28.03.2020].

[350] **Encyclopedia of Islam**, ‘‘Diya’’, (Leiden: EJ. Brill, 1965), 340.

[351] Rudolf Peters, **Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth Century to the Twenty-first Century**, (New York: Cambridge University Press, 2005), 52.

[352] Elyse Semerdijan, “Off the Straight Path”: Gender, Public Morality and Legal Administration in Ottoman Aleppo, Syria’’, (Ph.D. Thesis, the Faculty of Arts and Sciences of Georgetown University 2002), 64.

Vala, not only was the punishment under the penal law approved but also *qısas* punishment was inflicted. According to the study of Fehminaz Çabuk, during the investigation process of a rape offense, one of the parties gets harmed bodily, the perpetrator shall be subjected to both the punishment under the penal law and *qısas*. For example, while Emine who was the daughter of Mehmed Efendi and her sister were heading to their vineyard, Ali raped Emine. Then, Ali fled to a mountain and hid there for a while. After the news about which Ali came back to his home had gotten released, *zaptiye*, Mehmed, and local people surrounded his home. However, when Ali shot around not to get caught, Mehmed Efendi got injured from his chin and his thirteen teeth fractured. *Fatwahane* (house of fatwa) ordered to pull out thirteen teeth of Ali in return Mehmed's loss. And under Article 200 of the penal law, Ali was sentenced to hard labor for three years.[353]

Ta'zir (التعزير) is defined as edification and deterrent penalty to keep criminals in the line and to prevent them to commit it again. Another word, *ta'zir* (edification or deterrent) is a legal term which includes the punishments under the jurisdiction of a ruler or a judge except for *hadd* and *qısas* punishment.[354] Also, *ta'zir* can be considered as an alternative punishment in the case because *hadd* and *qısas* crimes are not proven with concrete pieces of evidence. Especially, the Ottomans mostly preferred to imply *ta'zir* punishment when rape offenses did not happen, which means, the crime was an only attempt or lack of evidence. This tendency emerged naturally, since if all legal principles to implied *hadd* punishments were not provided or the existence of legal sedition or blank existed in the case so that any of possible offenders did not go unpunished. The legitimacy source of *ta'zir* punishment comes from the verses of the Quran; ''when judges decide which penalty to apply in *ta'zir* offenses, they are governed by the Quranic injunctions to judge with justice'' (4: 58)[355] and ''to find a punishment to fit the crime'' (42:40)[356] There are several types of *ta'zir* punishments

[353] Fehminaz Çabuk, ''Osmanlı'da Meclis-i Vala'ya İntikal Eden Irza Geçme Davaları ve Uygulanan Cezalar (1850-1862), **Sosyal Bilimler Dergisi**, vol. 4, no. 14 (2017): 624.
[354] Mohd Noor, **ibid**., 418-422; Tuncay Başoğlu, ''Tazir'', https://islamansiklopedisi.org.tr/tazir, (2016-2020), [20.02.2020]
[355] Nisa Suresi, 58. ayet: ''Allah size, emanetleri mutlaka ehline vermenizi ve insanlar arasında hükmettiğiniz zaman adaletle hükmetmenizi emreder. Allah size ne güzel öğütler veriyor. Şüphesiz Allah her şeyi işitmekte, her şeyi görmektedir.'' https://kuran.diyanet.gov.tr/mushaf/kuran-meal-2/nisa-suresi-4/ayet-58/diyanet-isleri-baskanligi-meali-1 [24.04.2020].
[356] Şuara suresi, 40. ayet: ''Bir kötülüğün karşılığı ona denk bir davranıştır; ama kim bağışlar, düzeltme yolunu tutarsa onun mükâfatını Allah verir. Hiç şüphe yok ki O haksızlık edenleri sevmez.''

but the decided punishments for rape in the *Meclis-i Vala* registrations are respectively exposure (*teşhir*) hard labor (*kürek*), imprisonment (*habs*), fine (*tazminat*) shackle (*pranga* or *prangabentlik*), exile (*sürgün*). All these punishments for rape offense will be demonstrated with their certain article in the Penal Law 1858 and their case examples by pointing out the logic behind the punishments.

In the *Meclis-i Vala* registrations, rape offenses were penalized through the Ottoman penal laws in 1840, 1852 and 1858. However, the only source of the punishments was not the penal laws, sometimes; especially in the early years of the *Meclis-i Vala*, the implementation of the *shari'a* was common, as well. And also, the existence of *mufti* within the *Meclis-i Vala* was an undeniable fact about the feasibility of the *shari'a* and the co-existence of the religious and customary laws in Ottoman penal understanding. For example, a rape case from the year 1847, Veli who was a sergeant serving in Bolu raped or committed '*cebren zina*' (adultery by force) Esma Hatun who was the daughter of Salih Efendi. The court decree (*i'lam*) of the *Shari'a* court and the document (*mazbata*) of Kastamonu Council which include the information about the requirement of the *shari'a* practice related to the case was sent to the *Meclis-i Vala* for final judgment. According to the *i'lam*, Sergeant Veli had closed to Esma Hatun from her back and he attacked her with a knife. Then he raped her. He confessed and acknowledge that he had committed adultery by force (*cebren zina*) to Esma before the *qadı*. As a result of the investigation, the judicial authority headed to the house of *fatwa* (*fetvahane*) so that the *shari'a* judgment would be applied to Sergeant Veli. And this judicial progress was submitted to *Meclis-i Vala* through *tezkere* (missive) which is an official letter.[357] In this case, even though the *Meclis-i Vala* had its own legal sources, the penal codes, the *shari'a* principles were also part of the trial process of rape offenses during that period. In another case, Mehmed namely Kastamonlu raped Rüstem who was the apprentice of Reşid Efendi, and stole a certain amount of money from the drawer of Reşid Efendi. As a result of the investigation held in the council of *zaptiye*, Mehmed confessed that he had raped Rüstem and stolen the money. The *mazbata* (document) related to the case was sent to the *Meclis-i Vala* and he was

https://kuran.diyanet.gov.tr/mushaf/kuran-meal-2/suara-suresi-26/ayet-40/diyanet-isleri-baskanligi-meali-1 [24.04.2020].

[357] BOA, MVL 17-2, (4 Şevval 1263/ 15 September 1847)

sentenced to shackle (*pranga*) for six months according to the penal law in force.[358] In contrast to the registrations of the rape cases between 1858-68, there was no reference to the related article of the penal law. Also, the degree of the punishment was less heavy than the punishment given according to the 1858 Penal Law.

To the registrations, the general pattern in the punishments is the interaction of religious and customary laws. The influences of modernization and standardization over the penal codification in the Ottoman legal literature can be observed through the articles in the Penal Law 1858. As a result of the *Tanzimat*, the generality and feasibility of the laws are the objectives of Ottoman codification to increase the lawfulness of the judgment and punishment. Also, the clear definitions of crime and punishment, including their criminal factors and degrees, are clearly explained through the articles. To illustrate the Ottoman legal understanding and approach toward sex crimes, approximately fifty documents which of sentences based on the Penal Law 1858 will help us to analyze penal verdicts about rape cases. The Penal Law 1858 prescribed the punishments for sexual assaults between 197. and 200.articles.

Firstly, exposure (*teşhir*) means showing or making someone famous but as a legal term, it means showing a criminal to the public to make him or her feel offended.[359] Exposure is considered as *ta'zir* punishment. This penalty was generally applied for crimes which harmed the confidence of people such as false testimony, highway robbery, theft, pandering, and sex crimes. The exposure penalty primarily aims to inform the people about the crime and the criminal. The most important principle of the exposure penalty is to be publicity.[360] Exposure was a part of Ottoman penalty understanding and its implementation could be observed in Beyazid II (1481-1512)'s

[358] ''Buyuruldu
Hayriye tüccarından Reşid Efendinin 12 yaşında çırağı gulamı Rüstemi teb'adan Kastamonlu Mehmed iğfal ile efendi-yi mumaileyhin çekmecesinden 6552 kuruşluk kaime ve () akçe ahz eylediği merkum Mehmed'in ikrarıyla sabit olmuş ve meblağ-ı mezbur bi'l- istirdad sabi mumaileyhe verilmiş olduğu beyanıyla merkumun icra-yı mücazatı istibzatına dair zabıta meclisinden bi't-teslim takdim kılınan mazbata Meclis-i Vala'ya verilerek siyak-ı iş'ara nazaran merkum Mehmed gulam merkumu iğfal ile () mezkur () ikrar eyledikten ber müceb kanun-u ceza merkumun mahbusiyeti tarihinden itibaren altı ay müddet vaz'ı pranga olunarak hitam müddeti sebilinin tahliyesiyle memleket-i canibince def'i kılınmış tensib olunmuş olmağla al vechle icabı icra olunmak.'' BOA, A.} MKT. MVL 22-42, (24 Muharrem 1266/ 10 Aralık 1849)

[359] Develioğlu, **ibid**., 1277.

[360] Ahmet Kılınç, ''Klasik Dönem Osmanlı Devleti'nde Teşhir'', **International Journal of Science Culture and Spot**, August, (2015): 454.

kanunname[361] and also in the *kanunnames* of the Sultan Selim I (1512-1520)[362], Süleyman I (1520-1566)[363], and Murad III (1574-1595)[364], as well. As seen in these lawbooks before the *Tanzimat*, exposure was generally used for falsum in officially fixed price (*narh*) and sex crimes such as pandering. However, the exposure penalty took place in the Ottoman penal law; especially the Imperial Penal Law (1858), with certain articles after the *Tanzimat*. Despite the penal laws in 1840 and 1852 defined as local penal laws, the exposure penalty did not find a definite and clear place in the Penal Law 1840 and 1851 because of the diversity of crimes and punishments limited.[365] On the other side, the Penal Law 1858 of which context was accepted as the combination of religious law and the French Penal Law (1810) was much richer in terms of the diversity of crime and punishment. And, the exposure penalty was explained in Article 19 together with hard labor punishment in the Penal Law (1858). Article 19:

> ‘‘The person who is subjected to hard labor is also sentenced to the exposure punishment at the same time. The summary of the imperial document which is the final sentence is written with bold letters and this notice is put on the chest of the person. The person is kept standing in a square or in a neighborhood where it is a busy spot used by everyone for two hours. After being showed people, the person is taken to his or her neighborhood by chaining his or her ankles. The person who is younger than eighteen and elder than seventy will be accounted for impunity.’’[366]

The exposure penalty was, in some cases, considered as additional punishments rather than principal punishment. Especially, capital punishment and hard labor were perpetrated with the exposure penalty to make the punishment public and to become a

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[361] ‘‘ve pezevenklik daima adeti ve sanatı ola, burnı kesile ve ill eşeğe bindürüb teşhir oluna’’ Ahmed Akgündüz, **Osmanlı Kanunnameleri ve Hukuki Tahlilleri**, vol. 2, (İstanbul: Osmanlı Araştırmaları Vakfı, 1990), 169.

[362] ‘‘Liva-yı mezbureye müte’allik şehirlerde ve köylerde ve kasabalarda mazmunu nida olunub amme-i nasa i‘lam ve i‘lan oluna, ba’de haza her kimden şirret ve şea’at sadır olur ise, ol yerin kadıları marifetiyle siyasetname mucibince hakkından geline’’ Ahmed Akgündüz, **Osmanlı Kanunnameleri ve Hukuki Tahlilleri**, vol. 3, (İstanbul: Osmanlı Araştırmaları Vakfı, 1990), 192.

[363] ‘‘ve bu hükm-i şerifim ne gün varub ve ne vecihle i’lan olunub bedayi ref olunduğun yazub bildüresiz’’, Ahmed Akgündüz, **Osmanlı Kanunnameleri ve Hukuki Tahlilleri**, vol. 5, (İstanbul: Osmanlı Araştırmaları Vakfı, 1990), 380.

[364] ‘‘eğer bir kimesne püzevenklik eylese … ta‘zir ve teşhir idüb cürm alına.’’ Ümit Kılıç, ‘‘Nişancı Feridun Paşa Kanunnamesi’’, **Atatürk Üniversitesi Türkiyat Araştırmaları Enstitüsü Dergisi**, vol. 2, no.28 (2005): 289.

[365] Ahmet Kılınç, ‘‘Osmanlı Ceza Hukukunda Yaptırım Türü Olarak Teşhir’’, (Ph.D. Thesis, Gazi Universitesi Sosyal Bilimler Enstitüsü, 2013), 350-359.

[366] ‘‘Kürek cezasına müstahak olan şahıs hakkında teşhir usulü dahi icra olunur. Şöyle ki cezaya hükmeden divan mazbatasının bir hülasası gayet kalın huruf ile yazılıp mücazat olunacak şahıs bulunduğu şehirde bir meydana veya memer-i nas olan bir mahalle götürülüp işbu hulasa göğsüne konularak iki saat orada tevfik ve halka irade olunduktan sonra ayaklarına demir konularak mahal-i mücazatına götürülür. Onsekiz yaşından aşağı olan ve yetmiş yaşından ziyade bulunan ashab-ı cinayet işbu teşhir kaidesinden muaf olacaktır.’’ **Dustûr**, Tertib I, vol.1, 537-597.

warning for the public. The final judgments about rape cases written in the *Meclis-i Vala* generally include the exposure penalty together with hard labor. The sentence is defined like this; ‘‘… in Article 198 of the Penal Law, if a person commits *fi'l-i şenî*‘ by force, the person is sent to hard labor. By referring to the mentioned article, the said persons, İbrahim and Mustafa, were put in hard labor for three years in Sinop from 29 *Safer* 1280 (15 August 1863) after the exposure in his neighborhood according to Article 19.’’ [367] Another final judgment is that ‘‘… to make the said Emine get out of her home, he perpetrated violence and under Article 198 of the Penal Law, the perpetrator is sent to hard labor. By referring to the mentioned article, the said person, Mehmed, was put in hard labor for seven years in the shipyard from 5 *Cemaziye'l-evvel* 1280 (18 October 1863) after the exposure in his neighborhood according to Article 19 …’’.[368] Briefly, the exposure penalty was applied as both the principal punishment for false testimony, falsum in officially fixed prices, and the additional punishment together with capital and hard labor punishments. The main purpose of the exposure penalty is to make the crime and the criminal show the public and to make the criminal embarrass about what he or she did so that the crime is not repeated habitually and to prevent the expansion of the crime within society.

Secondly, hard labor (*kürek*) which was one of the penalties restricting liberty was used to meet the need of oarsman in the imperial navy and also to make manual labor in the shipyards around the Empire. In advancing years, the Empire created three important sources to meet the need of oarsmen in both the imperial navy and shipyard. These sources were respectively *avarız*[369] tax, prisoners of war, and hard labor

[367] ‘‘… ve kanun-u cezanın 198.maddesinde bir adem bir kimseye cebren fi'l-i şeni' icra eder ise muvakkaten küreğe konulur deyü muharrer bulunduğuna mebni merkumanın bu hükme tevfikan ve tarih-i () olduğu gösterilen 80 sene Safer’inin 29. gününden itibaren 19. madde icabınca mahalinde bade’l-teşhir 3’er sene müddetle Sinop’da vaz’ı kürek olunmalarına Kastamonu Mutasarrıflığına emr-ü iş’arı. BOA, MVL 662-78, (28 Cemaziye’l-ahir 1280/ 10 December 1863)

[368] ‘‘… endaht eylemiş olduğu ikrar ile cebrin vuku’unu suret-i inkar bulunmuş isede mezbureyi tahlisi içün üzerine gidüp () vuku’ cebr-i hükme kafi olduktan başka () cezayı dahi mucib görüldüğüne ve kanunnamenin 198.maddesinde bir adem bir kimseye cebren fi'l-i şeni' icra edildiği, ırzına geçer ise muvakkaten küreğe konulur deyü muharrer bulunduğuna binaen merkum Mehmed bu hükme tevfikan ve tarih-i habsi olan 80 senesi şehr-i Cemaziye’l-evvel 5.gününden itibaren 7 sene müddetle tersanede küreğe vaz’ı olunmak üzere 19.madde icabınca mahalinde teşhir bu tarafa gönderilmesi hususuna mahaline emr-ü iş’ar ve zabita-yı müşarünileyh canib valasına dahi şehriran buyudulduğu ali istar olunmuş tezkere kılınmağla ol babda. BOA, MVL 663-8, (1 Receb 1280/ 12 December 1863)

[369] *Avarız* is a financial term and a kind of taxes in the Ottoman finace system which is arrenged according to the rate of working member of a family during the time of war or extraordinary situations. After the Tanzimat, the tax was demolished. Halil Sahillioğlu, ‘‘Avarız’’, https://islamansiklopedisi.org.tr/avariz--vergi. [2016-2020/ 29.05.2020].

punishment.[370] This punishment had not been observed in either Ottoman lawbooks or fatwas by the 16th century, then, it was recorded as punishment in *mühimme* registrations.[371] After the *Tanzimat*, the hard labor punishment firstly took place in the 1851 Penal Law throughout Articles 5: ‘‘If a person or people provoke/s a person or people, or say something against the Empire, law, and regulation, the person shall be put in hard labor and shackle from one to five years according to the severity of provocations.’’[372] and 14: ‘‘… since the procedure about the real murderer is done through the *shari'a* and kanun (law), the instigator, considering the situation, and the collaborator shall be put in hard labor and shackle from one year to five years.’’[373] and also in the Penal Law 1858 throughout Articles 7: ‘‘… if a person who is sentenced to perpetual *kal'abentlik* [374] flees, the person shall be sentenced to perpetual hard labor’’[375], 19: ‘‘… hard labor is paid, in chained feet, by serving.’’[376], 21: ‘‘Hard labor, after exposure punishment is executed, is paid in a place determined by the Empire from three years to fifteen years by serving.’’[377], 57: ‘‘… if a person perpetrates one of the mentioned crimes together with a brigand or attempts to perpetrate so, the person shall be sentenced to perpetual hard labor or hard labor according to the severity of the crime.’’[378], 60: ‘‘… whoever attends and supports oppositional actions and discussions, the person shall be put in perpetual hard labor.’’[379] and 62: ‘‘Whoever

[370] Mehmet İpşirli, ‘‘XVI. Asrın İkinci Yarısında Kürek Cezasıyla ile İlgili Hükümler’’, **Tarih Enstitüsü Dergisi**, no. 12 (1982): 205-206.
[371] Mehmet Koç, ‘‘Osmanlı Hukukunda Ta'zir Suç ve Cezaları’’, (Ph.D. Thesis, Necmettin Erbakan Üniversitesi Sosyal Bilimler Enstitüsü, 2017), 28.
[372] “… eğer bir kimse veya birçok kimse diğer bir kimse veya kimseleri devlete karşı ve kanun ve nizamlara aykırı harekete kışkırtıcı sözler söyleyecek olursa, kışkırtmanın derecesine göre, bir seneden beş seneye kadar kürek ve pranga cezasına çarptırılmalılar.” Ahmet Lütfi, **Osmanlı Adalet Düzeni**, abb.by Erdinç Beylem, (İstanbul: Fatih, 1979), 142.
[373] “… asıl katil hakkında şer'an ve kanunen gereken hüküm tatbik edileceğinden, öldürtmek isteyen kimse duruma göre bir seneden beş seneye ve katil yardımcısı da keza bir seneden üç seneye kadar kürek ve pranga cezasına çarptırılır.” Ahmet Lütfi, **Osmanlı Adalet Düzeni**, abb.by Erdinç Beylem, (İstanbul: Fatih, 1979), 144-145.
[374] Kal'abentlik, or *Kalebend* is one of Ottoman punishments, the criminal is incarcerated in a castle. Ömer İşbilir, ‘‘Kalebend’’, https://islamansiklopedisi.org.tr/kalebend [2016-2020/ 25.05.2020].
[375] “Nefîi muvakkat ve habs-i muvakkat kalʿabendlik ve muvakkat kürek cezalarına müstehıkk olanlar muvakkaʿ cezalarından firâr iderler ise tutulduklarında müddet-i bâkıyelerine asıl müddet cezalarının sülüsünden nısfına kadar müddet zımmiyle cezaları tezyîd olunur …. Müebbed kalʿabendlikten firâr eden kimse müebbeden küreğe konulur.”
[376] “… kürek ayaklarında demir olduğu halde hıdemât-ı şâkka'da kullanılmaktır…”
[377]‘‘Muvakkat kürek, kezalik bade't-teşhîr devletin tayin edeceği yerlerde üç seneden on beş seneye kadar demirbend olarak hıdemât-ı şâkkada kullanmaktır…”
[378] “…beyân olunan fesâtlardan birini bir takım eşkıyâ birlikte olarak icrâ eder veyahut icrâsına tasadî eylerler ise… deracâtına göre müebbeden yahud muvakkaten küreğe vazʿ olunur”
[379] “Devlet-i Aliyyenin asâkiri muvazzafe ve zabtiyesini i'mâl ve istihdâma memur olanlardan her kim olur ise olsun… ahz-i nefarât-ı askeriye maddesi aleyhine hareket… eder ise nefyi ebed… âmir olan

plunders and curbs the property and land of the Empire, or a non-Muslim, … if it is commander, the person is sentenced to capital punishment, the person is sentenced to hard labor.''[380].

On the other side, when these articles have examined, an important issue has arisen. While *Pranga* (shackle) and *kürek* (hard labor) were being mentioned separately in the legal sources, sometimes they could be used as an alternative legal term for one to another. In a general sense, both punishments aimed to restrict the freedom of the prisoners, make them suffer while meeting their basic needs, and prevent absconding by binding an iron chain around their ankles. But the real purpose to give such punishments was to force prisoners to perpetrate a public service. Further, the only difference between these punishments was the place where the prisoners would serve their sentences. Whereas the place for shackle was *Bab-ı Seraskeri* (Ministry of War), for hard labor, it was either *Tersane-i Amire* (The Imperial Arsenal) for the prisoners in İstanbul or close to Istanbul or other shipyards for the other prisoners in the country-sides.[381] Even if shackle and hard labor seemed similar punishments legally, the 1858 Penal Law only addressed hard labor punishment for sex crimes. Most of the hard labor punishments for rape offenses in the *Meclsi-i Vala* registers were served in Sinop, Kıbrıs (Cyprus) Island, Sakız (Chios) Island, Rodos (Rhodes) Island, and their own regions where the crime occurred.

Indeed, the articles about the hard labor punishment in both the 1851 and 1858 have a great deal of importance to understand the reference point to illustrate the legality of the punishment. Also, these articles frame the extensiveness of the punishment by stating the crimes such as despoliation, brigandage, rebellion, and incitement to murder. While the duration of hard labor was clearly stated one to three years in the 1851 Penal Law in Article 14, in the 1858 Penal Law, the duration was rearranged as three to fifteen years in Article 21. Moreover, the authority to execute hard labor

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kimse idam ile mücâzât olunur ve böyle hilâf-ı marazî emre mutâvaat edenlerin zâbit ve sergerdeleri dahî muvakkaten kürek cezasıyla mucâzât kılınır"

[380] "Her kim devlet-i ʿaliyyenin emlâk ve emvâl ve nukûdunu veya ahâleden bir cem-i ğafîrin emlâkını zabt ve yağma ve ğaret etmek… baş olur veyahud… bir kumanda sahibi olur ise idâm olunur… kumanda sahibi olmayanlar… muvakkaten küreğe konulur." Ceza Kanunnâme-i Hümâyunu (1274/1858 Ceza Kanunnânmesi), (İstanbul: Takvimhâne-i Âmire), (1274/1858), 5, 6, 13, 14, 15.

[381] Yasemin Saner, ''Osmanlı'nın Yüzlerce Yıl Süren Cezalandırma ve Korkutma Refleksi: Prangaya Vurma'', **Osmanlı'da Asayiş, Suç ve Ceza**, ed. by Neomi Levy, Alexandre Toumarkine, (İstanbul: Tarih Vakfı Yurt Yayınları, 2008), 177-182.

belonged to the sultan himself and the Imperial Council, *Divan-ı Hümayun*. After the *Tanzimat*, this warrant was performed by the *Meclis-i Vala*, the Supreme Court, from the late 19th century.[382] Besides, hard labor punishment was also applied for rape offenses. Article 198, ''If a person commits *fi'l-i şenî*' by force, the person is subjected to hard labor''[383] and besides Article 199, ''If the rape offense is committed by the teacher, guardian, or servant of the victim, the offender is sentenced to hard labor for five years at least''[384] were illustrated the common punishment for rape cases. Also, other criminal factors occurring during rape offenses such as kidnapping, wounding, beating, also collaborationists drastically affect the heaviness of the punishment by considering the least and highest limits of the duration of the punishment.

To give an example, while Abdullah, Salih, Mercan, and other Abdullah with their wives were staying on the farm of Martiyo in Bergama, Ali, Mustafa, İsmail, Hasan, and the other Mustafa had intruded and beaten them. By threatening them with their guns, they abducted their wives and took them to a mountain. They raped the women there. With the statements of the victims and the existence of the guns, Ali, Mustafa, İsmail, Hasan, and other Mustafa were subjected to hard labor for seven years in Sakız (Chios) Island from 11 *Cemaziye'l-evvel* sene 1279 (4 November 1862).[385] Since perpetrating violence, threatening someone's right to live, and also kidnapping happened during rape offense, the degree of the punishment was applied higher than the least level. Another case, while Yousaf who was a thirteen or fourteen-year-old boy was traveling to Kayseri with his father, Lazari, Arif, Osman and Ahmed crossed their path and took Yousaf to a covered room to rape him. His father Lazari's statement and the other witness confirmed that they had raped Yousaf. Also, one of the perpetrators Arif had a criminal record related to sex crimes. For this reason, even if they denied having raped to Yousaf, the existence of witnesses and the criminal record of Arif was enough to sentence them to punishment. According to Article 198, if a person rapes someone, the person will be put in hard labor. By referring the article,

[382] Mehmet İpşirli, ''Kürek Cezası'', https://islamansiklopedisi.org.tr/kurek-cezasi, (2016-2020), [21.05.2020].
[383] "Bir adam bir kimseye cebren fi'l-i şenî' icra eder ise yani ırzına geçerse muvakkaten küreğe konur." **Dustûr**, Tertib I, vol. I, 537-597.
[384] ''Cebren fi'l-i şenî'a icrası buna düçar olanların üzerlerine hükümleri cari olan mürebbiye veyahut velileri veyahut aylık hizmetkarları tarafından vuku'u bulur ise beş seneden ekall olmamak üzere kürek cezası hüküm olunur.'', **Dustûr**, Tertib I, vol. I, 537-597.
[385] BOA, MVL 663-45, (29 Cemaziye'l-ahir 1280/ 11 Aralık 1863)

they were subjected to hard labor for three years in Sinop after being shown in their neighborhood to the public.[386] As mentioned before, other criminal factors directly affect the amount or duration of punishment because the articles related to rape offense indicates the least amount of duration of the punishments. Therefore, the highest amount or duration of the punishments are determined by considering other criminal factors such as beating, wounding, retention, etc. In this case, even if retention occurred before the rape offense, the punishment was given according to the least level of hard labor. However, to the sentences in the *Meclis-i Vala* registers, when the same criminal acts performed to a female victim, the duration of the punishment was arranged accordingly at the highest level.

Another case example to penetrate the range of the punishments for rape, Ali living in Konya tied the hands of İsmail to rape him. Since İsmail could not show resistance against his offender, and this situation was confirmed with Ali's confession, Ali was sentenced to hard labor for three years in Kıbrıs, Cyprus, after being shown to the people in his neighborhood from 27 Şevval 1279 (17 April 1863)[387] There seems something to pay attention to these cases that in the cases of both Yousaf and İsmail, the perpetrators used violence like tying hands or keeping in a room by force but their punishments are decided accordingly at the least limit. According to Article 21, the duration of hard labor punishment was limited between three years and fifteen years, which means, the judge could not sentence hard labor punishment either less than three years or more than fifteen years. Therefore, to arrange the right duration of the punishment was in the jurisdiction of the judge. Further, the court records about rape offense in the *Meclis-i Vala* showed that the judge highly used this jurisdiction to determine the duration of the punishment. As mentioned before, the duration of the punishments could demonstrate differences when other criminal acts were added to the case.

Thirdly, imprisonment which is a punishment restricting freedom has been used in both Islamic law and Ottoman law as cautionary and principal punishments.[388] Especially, when a criminal did not confess and accept his or her crime, the criminal

[386] BOA, MVL 661-22, (3 Muharrem 1281/ 8 June 1864)
[387] BOA, MVL 650-3, (20 Muharrem 1280/ 7 July 1863)
[388] Mehmet Koç, ''Osmanlı Hukukunda Ta'zir Suç ve Cezaları'', (Ph.D. Thesis, Necmettin Erbakan Üniversitesi Sosyal Bilimler Enstitüsü, 2017), 26.

was put in jail or tortured until he or she confessed what he or she did with the verdict of the *qadı*. Also, in the *Meclis-i Vala* records, imprisonment punishment was a common cautionary act to prevent escape by the time the investigation about the accused was over. And this time in jail was also added to the duration of the principal punishment after the accusation was proved. According to Islamic jurists, imprisonment as a type of *ta'zir* has commonly used as both a complementary punishment together with *hadd* and *qısas* penalties and also a principal punishment for *ta'zir* crimes.[389] Moreover, in Ottoman lawbooks, before the *Tanzimat*, the duration of imprisonment was not clearly stated but according to the seriousness of the crimes, the duration of imprisonment intentionally left the jurisdiction of the *qadı*.[390] After the *Tanzimat*, the imprisonment punishment was mostly inflicted for indictment (*töhmet*) commercial issues, the situation when the conditions of *hadd* and *qısas* were not provided, the crimes against the public order and security, and misdemeanor (*cünha*).[391] For sex crimes, especially, rape, adultery, and prostitution, imprisonment was frequently preferred. The 1858 Penal Law gave place to the imprisonment punishment for sex crimes in Articles 197 and 198; its addendum in 1860, the addendum of Article 200 in 1860, and 201.

Prelusively, in Article 197: ''If a person rapes a child who is younger than eleven years, the person is sentenced to imprisonment for six months at least.'' For example, in Bursa, Faik who was a five and a half-year-old boy was raped by Mustafa. After the investigation held in *Muhakemat* (Judgement) Agency, Mustafa was also proved guilty as charged with his confession and cognovit. He was sentenced to imprisonment for one and a half years according to Article 197. As seen in the case example, if a victim is a child; in other words, if a victim is minor, *gayr-ı buluğa*, the perpetrator is inflicted imprisonment punishment. Although the least limit of imprisonment was clearly stated as ''six months at least'', the highest limit was not mentioned. This implementation can relatively be related to the existence of other criminal factors and the duration of imprisonment left to the judge himself.

Another case, İbrahim who was a four-year-old boy lived in Isparta. His father claimed that Mehmed had raped my little boy and run away. However, Mehmed did not accept

[389] **Ibid**., 26-28.
[390] Mustafa Avcı, **Hukuk Tarihimizde Hapis**, (Ankara: Adalet Yayınevi, 2019), 163.
[391] Bardakoğlu, ''Hapis'', https://islamansiklopedisi.org.tr/hapis, (2016-2020), [20.04.2020].

the accusation. He stated: ‘‘The boy had entered my home and I just took his hand. I did not do anything to the boy, I did not commit *fi'l-i şenî*‘. When the neighbors came in, I got scared and run away.’’ After the investigation, Mehmed was sentenced to imprisonment for six months from 15 *Muharrem* 1280 (2 July 1863) under Article 197.[392]

In the addendum of Article 198 in 1860[393]: ‘‘If a person attempts to rape someone, but the crime does not occur due to unplanned reasons, the person is sentenced to imprisonment for three months at least.’’ To give an example, Reşid who was a slave attempted to rape Refiye Hatun. One night, Reşid came into her room and tried to rape his mistress. However, Refiye Hatun did not surrender to her culprit and screamed out to be saved. Reşid accepted all the charges before the *zaptiye*. Since Reşid did not rape indeed, he was sentenced to imprisonment for one year from 23 Şevval 1281 (23 March 1865) according to Article 198's addendum.[394]

In Article 201: ‘‘If a person seduces a young man and woman to be prostitution or encourages him or her to act against public morality, the person is put in jail from one month to one year at least.’’[395] To give an example, Yorgi who was the son of the innkeeper in Isparta claimed that he had raped by three Muslim and two Christian men. However, Yorgi could not recognize two of the suspects through their pictures and did not recall their names. Also, since Yorgi did not want to make a false allegation, he hesitated to allege his offenders, Sö/üteri, Vastan, Osman, Hafız Ahmed, and Ahmed the innkeeper. However, the situation of Yorgi's damaged clothes and the violence perpetrated by Vastan could not legitimize rape offense. Yet, *fi'l-i şenî*‘ could be committed by only Vastan and Sö/üteri or it happened with the help of the others, the *qadı* preferred penalizing them. When considering the ambiguity in the allegation, the *qadı* did not make his final judgment under Article 198 but under Article 201. Because of the lack of concrete evidence, the *qadı* sentenced them imprisonment for one year according to Article 201. Sö/üteri, Hafız Ahmed, Osman, and Ahmed the innkeeper

[392] BOA, MVL 652-70, (7 Rabiü'l-evvel 1280/ 20 October 1863)
[393] ‘‘Böyle cebren fi'l-i şenî‘ icrasına tasaddi idübde yed-i ihtiyarında olmayan esbab-i mani'a hilületiyle fi'le çıkamamış olur ise üç aydan ekall olmamak üzere habs olunur.’’, **Dustûr**, Tertib I, vol. I, 537-597.
[394] BOA, MVL 870-105, (21 Muharrem 1282/ 17 June 1865)
[395] ‘‘Her kim zükür ve inasdan genç kimseleri izlal ve iğfal iderek fuhşiyyata tahrik ve igra ve esbab husulunu tehsil itmek i'tiyad iderek adab-ı umumiyeye mühafi harefete cesaret eyler ise bir ydan bir seneye kadar habs ie mücazat olunur…’’ **Dustûr**, Tertib I, vol. I, 537-597.

was inflicted on one-year imprisonment under Article 201, which is if a person seduces a young man and woman to be prostitution or encourages him or her to act against public morality, the person is put in jail from one month to one year at least. But, the punishment of Vastan was different from the others because it was certain that he perpetrated violence to Yorgi and hindered him to do his job. For this reason, he could be sentenced to either imprisonment from two-month to two-year imprisonments under Article 178[396] or fine under Article 78.[397] As understood from the case example, if the concrete evidence such as confession and acceptance, or the testimony of a witness is not proved concretely, the rape offense cannot be penalized under Article 198 but Article 201. Further, the other criminal acts such as wounding and beating were judged and sentenced to according to the penal law together with the rape offense. It might be claimed that the Ottoman judges could solve criminal issues which required a separate case within a single case which included these criminal acts.

Fourthly, fine which is a financial punishment is a variant of *ta'zir* penalty. Fine is accepted as *ta'zir* because its content and context are not bound to any primary source of Islamic law. Therefore, its content and context leave the judicial authority to determine the degree of the punishment and so its scope does.[398] Fine aimed to meet the damage caused by an accused, destroyed good and interest and it was called *tanzim* (decretive or fine) or *bedel-i tanzim* (the cost of decretive or fine) in Ottoman legal language. However, there were judicial disagreements about the legitimacy issue of fine among Islamic jurists. According to Abu Hanafi and İmam Muhammed who were the main figures of the Hanafi school, the fine was not warrantable but Abu Yusuf who was the student of Abu Hanafi claimed that fine was a licit punishment. But the property of the criminal must be returned if the criminal swore off and besides if the criminal did not give up the crimes committing, the property of the criminal was used for the need of the public. Also, other Islamic schools considered fine as a licit punishment to edify the criminal.[399] According to Heyd, there were three types of fine

[396] ''Bir adem bir şahsı 20 günden ziyade işinden kalmasını yahud hastalanmasını mücib olacak suretle cerh ya darb eyler ise ik aydan iki seneye kadar habs olunur….'' **Dustûr**, Tertib I, vol. I, 537-597.
[397] ''Bir ademin hakk-ı makrun bir işi olubda anın ruiyyet ve tesviyesi zımmında müracaat mecbur olduğu memur tarafından akçe istenilür ve o dahi karar-ı haber verir ve isbat eyler ise maslahatı bir vech hakkaniyet görüldükden başka kendüsünden istinkaş olan akçe talebinden ahz ile nasfı mükâfat kendüsüne ita olunur ve reşütü taleb olan hakkında mürteşi mücazatı icra olunur.'' **Dustûr**, Tertib I, vol. I, 537-597; BOA, MVL 743-52, (22 Şevval 1282/ 10 March 1866)
[398] Koç, **ibid**., 34.
[399] **ibid**., 35.

in Ottoman legal literature. The first one was a fixed amount of money which was paid *cizye* (poll-tax) and *diyet* (blood-money). The second one was the fine which was the combination of the *shari'a* punishment of *ta'zir*; flogging of which number was determined by the *qadı* and the numbers of flogging could be changed to monetary punishment. The third one was the fine which was paid for the physical and financial damages.[400] For our study, the third class is valuable to understand the logic behind the fine punishment in rape cases in the *Meclis-i Vala*. The Ottoman jurists also used fine as punishment for rape offenses. This punishment was only executed when the victim was a virgin woman and was deceived for marriage. The fine punishment was stated in Article 200 and its addendum in 1860 in the 1858 Penal Law.

In Article 200: ''If the *fi'l-i şenî'a* incident happens to an unmarried girl; that means a virgin woman, the criminal person is sentenced to hard labor and besides deserving of paying fine, (*tanzim*).[401] To give an example, while Fatma who was a twelve-year-old minor girl and her brother were digging for a waterway in the field, Mustafa and his three friends came their sides. They beat and injured Fatma's brother and tied up his hands. After that, they kidnapped Fatma and took her to a mountain to ruin virginity. However, Mustafa claimed: ''I abducted the said woman but I did not beat and injure her brother and I did not rape her.'' Even if Mustafa denied having ruined her virginity, the expert stated vice versa. And also, beating and injuring her brother and at the same time making him disable requires more than one man to abduct Fatma. After the investigation, according to Article 200, ''If the *fi'l-i şenî'a* incident happens to an unmarried girl; that means a virgin woman, the criminal person is sentenced to hard labor and besides deserving of paying fine'', and Article 206, ''If someone abducts a major or a minor person or helps to abduction, the person is sentenced to imprisonment from one month to six months'', the judgment of the case must be included both hard labor and fine for rape. By referring these two articles, Mustafa was sentenced only hard labor for three years in Karesi, today's Çanakkale, Manisa, Balıkesir provinces, and his collaborationist Musa was also sentenced to imprisonment for three months.[402] As understood, even if the article states clearly the punishment of the rape offenses

[400] Heyd, **ibid**., 283-286.
[401] ''Eğer böyle cebren fi'l-i şenî'a henüz bir ara tezviç olunmamış kız hakkında vuku'u bulur ise buna mütecazir olan kimse işbu kürek cezasından başka tanzim virmeğe dahi müstehak olur.'' **Dustûr**, Tertib I, vol. I, 537-597.
[402] BOA, MVL 743-16, (5 Şevval 1282/ 21 February 1866)

against an unmarried virgin woman, the offender was only inflicted on hard labor. In this case, the principal and determining punishment for rape is hard labor but fine is not mentioned at all.

Another example, in Saruhan sanjak, Hasan, son of Cafer, had taken Fatma who was the daughter of Hacı İbrahim to the mountain and he raped Fatma there. After the investigation, he was found guilty. Besides, Hasan was called for conscription but he did not go to his duty station. Hasan was inflicted to pay 2000 *kuruş* because he ruined Fatma's virginity. From the time when he got into jail on 5 *Muharrem* 1278/ 13 July 1861, he was sentenced to hard labor in Rodos for three years according to the aforesaid article. After Hasan completes his punishment, he will be submitted to his duty station.[403] In this case, the virgin Fatma got raped by Hasan and as a defloration fine, she got paid 2000 *kuruş*. Since Hasan raped Fatma, he was also inflicted on hard labor for three years in Rodos Island. Besides, during the investigation, it was figured out that Hasan was a deserter. The case included two separate criminal issues but with one trial, both were solved. After Hasan serves his sentence, he will be handed in his duty station.

Another case, it was claimed that Gosid who lived in Edirne had abducted Dimiki who was the daughter of Nikol, and raped her. However, as a result of the investigation, the sign of force in the case could not be found and since the statement of the woman was not accepted as concrete evidence, the court wanted to search the age of the woman. As a result of the investigation, Gosid confessed that he had ruined her virginity with the promise of getting married to the sixteen-year-old Dimiki but then he gave up getting married. On contrary to what she said, there was no sexual relationship by force, it happened with both sides' consents. Under the addendum of Article 200, ''If a man seduces a virgin woman with the promise of marriage and ruins her virginity, the person has to pay compensation to her. Besides the person is sentenced to imprisonment from one week to six months'', Gosid was sentenced to paying fine for defloration and since he was in jail from 7 Şevval 1277 (18 April 1861), he got released.[404]

[403] BOA, A.} MKT. MVL 140-62, (2 Şevval 1278/ 3 February 1862)
[404] BOA, A.} MKT. MVL 141-2, (9 Şevval 1278/ 9 February 1862)

Lastly, *pranga* or *prangabentlik* (shackle) which was performed from the 16th century is a punishment restricting the liberty of a criminal. *Pranga* (shackle) is executed by manacling the ankle of the criminal with an anchor chain for serious crimes. *Pranga* was firstly mentioned in the 1851 Penal Law, then1858 Penal Laws for different crimes[405] and lastly, it began to inflict serious crimes in Military Penal Law (1869).[406] However, according to Yasemin Saner, *pranga* or *prangabentlik* firstly took place in the addendum of the 1840 Penal Law to punish homicide.[407] Further, *pranga* was not one of the primary punishments taking place in the 1858 Penal Law but it was mentioned in Article 33: ‘‘The mentioned execution, perpetual or temporary *pranga*, and *kal'abentlik* …’’[408] and in Article 154: ‘‘The person who forges a document intentionally shall be sentenced to *prangabentlik* or *kal'abentlik* for seven years’’.[409] The duration of *pranga* could show a difference according to the seriousness of the crime and the effect of the other criminal factors but in general, the duration was limited between three and fifteen years.[410] For sex crimes, particularly rape, *pranga* was mostly inflicted as a major penalty by referring to the 1851 Penal Law. For example, Sergeant Mustafa got Ayşe who was the daughter of Mustafa out of her home by force and ruined her virginity. Sergeant Mustafa confessed and accepted the allegation and he was sentenced to *pranga* for one year in Karesi. To confirm the final judgment, the document was sent to the *Meclis-i Vala*.[411] However, after the enactment of the 1858 Penal Law, the determined punishments for sex crimes were respectively hard labor, imprisonment, and fine. Yet, there were only two rape examples which were sentenced to *pranga* in the records used for this study 1858-1868. In 1858, one rape case was sentenced to *pranga* punishment. In Cyprus, Ali who was a black person, Osman who was the son of Yusuf, and Ali who was the son of Osman confessed that

[405] Mustafa Avcı, ‘‘Osmanlı Uygulamasında İnfazı Özellik Gösteren Hapis Türleri: Kalebentlik, Kürek ve Prangabentlik’’, **Yeni Türkiye**, vol.45, Mayıs-Haziran (2002): 133.
[406] Sevcan Öztürk, ‘‘XIX. Yüzyıl Osmanlı Ceza Sisteminde Dönüşüm: Zindandan Hapishaneye Geçiş’’, (M.A. Thesis, Adnan Menderes Üniversitesi Sosyal Bilimler Enstitüsü, 2014), 77.
[407] Yasemin Saner, ‘‘Osmanlı'nın Yüzlerce Yıl Süren Cezalandırma ve Korkutma Refleksi: Prangaya Vurma’’, **Osmanlı’da Asayiş, Suç ve Ceza**, ed. by Neomi Levy, Alexandre Toumarkine, (İstanbul: Tarih Vakfı Yurt Yayınları, 2008), 173-177.
[408] ‘‘Zikr olunan idam ve müebbed veyahut muvakkat pranga ve kal’abentlik …’’ **Dustûr**, Tertib I, vol. I, 537-597.
[409] ‘‘Maddeteyn-i () beyan olunan sahte evrakı bilerek isti’mal idenler yedi seneyi tecavüz itmemek üzere muvakkaten prangabend or kal’abent konulur.’’ **Dustûr**, Tertib I, vol. I, 537-597.
[410] Ahmet Gökcen, ‘‘Tanzimat Dönemi Osmanlı Ceza Kanunları ve Bu Kanunların Ceza Müeyyideler’’, (M.A. Thesis, İstanbul Üniversitesi Sosyal Bilimler Enstitüsü,1987), 56.
[411] BOA, A.} MKT. UM 57-40, (24 Cemaziye’l ahir1267/ 26 April 1851)

they had raped a girl as a result of the investigation. They all were sentenced to *pranga* for one year in Cyprus.[412]

Another example, in Trabzon, Abdullah who was the son of Salih raped Mehmed's daughter, Gül, who was a minor. Abdullah accepted that he had raped that little girl and ruined her virginity. According to Article 200 in the 1858 Penal Law, Abdullah was sentenced to one thousand and five hundred *kuruş* fine for defloration and also *pranga* for five years. However, when the decision was sent to the *Meclis-i Vala* to confirm the final judgment, the *Meclis-i Vala* suggested hard labor between three and five years after the determined amount of fine was paid. As a result, after the fine for defloration got paid to the victim, the offender was sentenced to shackle for three years in Trabzon.[413] In this case, the trial held in the countryside decided to shackle punishment for five years and fine for defloration; however, when the case was sent to the *Meclis-i Vala* to confirm their final judgment, it decreased the duration of the punishment. Besides, the usage of both shackle (*pranga*) and hard labor *(kürek*) in this example at the same time supports the argument of Yasemin Saner. She argued that the usage of these two legal terms at the same time might originate from either semantic confusion or being synonymous terms.[414] Indeed, both shackle and hard labor were manpower of the Empire; therefore, the Ottoman judges mostly used them to get the heaviest works in the Empire done by the criminals. Further, except for the sentence about rape case under the 1851 Penal Law, *pranga* punishments in the cases, which are indicated in the footnotes 408 and 409, could be used as a synonymous term to define hard labor punishment because of some certain reasons mentioned before. Besides, the articles about sex crimes in the 1858 Penal Law do not include the term *pranga* as a punishment so the phrase of *pranga* in the aforementioned documents can be evaluated as an alternative term to determine hard labor punishment.

To sum up, through the proclamation of *Tanzimat* in 1839, the Ottoman legal system got changed and gained a more modernist and systematic content and identity. The *Meclis-i Vala* was one of the most significant products of the *Tanzimat* era. The cases held in sanjak or province were sent to the *Meclis-i Vala* to be checked out and confirmed. After the examination in the *Meclis-i Vala*, the case was transferred to

[412] BOA, A.} MKT. MVL 103-25, (15 Rebi'ül-ahir 1275/ 22 November 1858)
[413] BOA, A.} MKT. MVL 113- 25, (10 Cemaziye'l-ahir 1276/ 4 January 1860)
[414] Yasemin Saner, **ibid**., 177-182.

Meclis-i Umumi to present it to the Sultan himself. After the Sultan approved the final judgment, the case was sent back to the sanjak or province to imply the sentence.

In the Ottoman Empire, the cases about misdemeanor and sex crimes could be heard by the courts in the countryside and the *Meclis-i Vala*. The plaintiffs could apply for either the local courts or the *Meclis-i Vala*. If the result of the trial was not satisfied with one of the parties, the sentence was transferred to the *Meclis-i Vala* to be heard again for a just trial. Also, the plaintiffs could directly apply for the *Meclis-i Vala* in person or through a petition (*arzuhal*). Especially, if the plaintiffs were afraid of local pressure over the case or there were illicit actions which could change the course of the case or the case was complex which could not be solved through the local courts, the cases like this were heard in the *Meclis-i Vala*. And the *Meclis-i Vala* called the parties to İstanbul and the case tried to be solved there. However, there is no any example indicating a direct application to the *Meclis-i Vala* among the records.

Even though the Western-style courts were established, the *Shari'a* courts were still active in the Ottoman legal system. Therefore, some sex crimes like adultery were penalized according to *hadd* or *ta'zir* principles and also *kanun*. Especially, rape which was committed against public morality and individual rights was generally penalized according to the Ottoman penal codes but there were still rape cases held in the *Shari'a* courts and penalized accordingly *ta'zir* punishment. After the *Tanzimat*, the codification movement increased the generality and feasibility of the punishments for every single subject in the Empire. The main purpose of the penal laws was to collect criminal acts under a unified and extensive law. The Ottomans also targeted to increase the principles of lawfulness and generality of the sentences and punishments. In addition to this purpose, they wanted to decrease the rate of crime by determining the scope and penalty of crimes. Therefore, the 1858 Penal Law is a substantial legal source to comprehend the categorization of sex crimes and the penalties of them. Particularly, the definition and punishment of rape in a nineteenth-century Ottoman legal literature can elaborately be studied.

The rape offenses in the *Meclis-i Vala* between 1858 and 1868 were penalized according to the 1858 Penal Law. The 1858 Penal Law was spared one part for sex crimes in chapter two. The articles related to rape took place in part there with the title of ''*Hetk-i ırz idenlerin mücazatı hakkındadır*'', (regarding the punishments of the

whom commit sexual assaults). The punishments were explained in starting with Article 197 to article 200 and were respectively hard labor, imprisonment, fine, exposure, and shackle. The degree of punishment could change according to other criminal factors such as abduction, wounding, and beating.

To illustrate rape offense and its punishment through the *Meclis-i Vala*, 52 case documents between 1858-1868 were analyzed. As a result of this analysis, 21 out of 52 cases were sentenced to hard labor (approximately % 41) and 2 out of 52 (approximately % 5) cases were sentenced to shackle. Also, 10 out of 52 cases were concluded as jail punishment (approximately % 20) and 3 out of 52 cases were sentenced to fine (approximately % 6). Thusly, approximately % 73 of the rape cases in the *Meclis-i Vala* was concluded within one month at the earliest or one and a half year at the latest. The duration of the trials held in the *Meclis-i Vala* could show differences when the geographical distance between the courts in local administration and other criminal controversies were added. Also, 15 out of 52 cases were not concluded (approximately % 29). These cases which do not have enough concrete evidence to make a final judgment were sent to the *Meclis-i Vala* to investigate in detail.

The main patterns of the punishments in the *Meclis-i Vala* were that they were recorded by addressing the related article to state the legality and generality of the punishment. Also, the beginning date of the punishment and the place of the punishment; significantly for hard labor and shackle, were stated clearly. While the duration of hard labor, shackle, and imprisonment was being determined, the time of imprisonment during the investigation was taken into consideration. Besides, the age and marital status of the victims affected directly the duration and amount of the punishment such as being minor (*gayr-ı buluğ*), or major (*buluğ*). On the other part, sex was not a fundamental factor while determining punishment. In the 1858 Penal Law, the articles did not emphasize gender differences while indicating crime and punishment. The articles only seriously urged on gender to protect the victims of rape. To Ze'evi,

> ‘‘In fact, the gender difference is mentioned only rarely on the victim’s side, when women or young girls are abducted or raped or lose their virginity. In most cases, the sexes of the perpetrator and the victim are not mentioned, and there is never any mention of different punishments or even separate but equal ones for men and women.’’[415]

[415] Ze'evi, **ibid**., 73.

I assume that it is the most dioristic feature of the criminal laws after the *Tanzimat*, particularly the 1858 Penal Law. Whilst Islamic law treats the objects of judiciary differently such as Muslim-non-Muslim, free-slave, and married-unmarried, etc., the definition and punishment of sexual crimes are quite comprehensive, equal, and feasible in the penal law. As a matter of fact, the Ottoman Empire provided every option to its subjects to preserve public order and morality and perform justice through its legal institutions.

5. CONCLUSION

Rape, one of the sex crimes, has always been subject to legal, religious, moral, and social literature. Throughout history, rape has defined a wicked behavior against someone's free will, consent, personal right, and honor. Historically, rape was described as being illicit sexual intercourse with a woman against her will and consent. To get a better identification and definition of rape in Ottoman legal literature, the registrations, 52 official records, of *the Meclis-i Vala* between 1858-1868 has used to build the backbone of this study. The outcome resulting from these documents only reflects the legal identification and criminal interpretation of rape notion during that period. Namely, the notions recorded in the *Meclis-i Vala* to identify rape offense have merely subjected to this study; therefore, the other terms were not discussed.

The *Tanzimat* Edict (1839) was a change to improve and innovate governmental, administrative, and judicial dissolution within the Empire. Furthermore, it was interpreted as an important legal, political, and socio-economic incident to make the Empire reform and modernize to regain its power. The Edict primarily guaranteed the protection of life, honor, and chastity; then, the welfare and security of the subjects; finally, the equality before the law. To keep these promises, Ottomans gave priority to the codification movement and these codes aimed to increase lawfulness and objectivity of sentence and punishment. For this reason, the *Meclis-i Vala* (1838-1876) was established with the order of Sultan Mahmud II (1808-1839) to arrange and control the *Tanzimat* innovations. Additionally, the Penal Laws in 1840, 1851, and 1858 were seriously prepared to create a legally objective and general realm for grave crimes like rape.

Indeed, the *Meclis-i Vala* was at the top of the Ottoman legal system during the 19th century. It had legislation, judicial, and besides execution authorities, which was perpetrated through the government and the *Meclis-i Umumi*. Thusly, the *Meclis-i Vala* was an appeal court for criminal cases which requires severe *ta'zir* punishment such

as adultery, rape, murder, theft, etc. Also, the *Meclis-i Vala* was the approval point for these crimes. Before the sentence was executed, the *Meclis-i Vala* must have gotten it approved by the Sultan through the *Meclis-i Umumi* which was gathering with the leadership of *Sadrazam* (grand-vizier). The approved punishment could finally be applied by the local administrations like *vilayet*/*valilik* (province/governorship) or *mutasarrıflık* (sub-governorship).

This working structure of the *Meclis-i Vala* indicated that even if it was at the top of the Ottoman legal system, its decisions and operations were drastically inspected. This situation suggested that there was a check mechanism within its structure and functioning to increase the objectivity and lawfulness of the sentences. The main logic behind the structure and functioning of the *Meclis-i Vala* indicated a democratic atmosphere to improve and increase objectivity and lawfulness within the system. Further, from 1838 to 1876, the *Meclis-i Vala* divided into sub-departments for several times. The most significant one is that the council separated as *Şura-yı Devlet* (Council of State) and *Divan-ı Ahkam-ı Adliye* (High Court of Justice) in 1868. While *Şura-yı Devlet* performed execution power on behalf of the Sultan, *Divan-ı Ahkam-ı Adliye* performed legislative and judiciary powers. This separation could be seen as the beginning of the division of powers in the Ottoman Empire.[416]

The registrations kept in the *Meclis-i Vala* also reflect this democratic and objective character while defining and hearing rape cases. Nonetheless, some of the registrations do not include a final judgment. This generally causes the function of the *Meclis-i Vala* because the *Meclis-i Vala* was both appeal court and a high court in which troublesome cases were investigated. The records have such rich content that researches can easily follow the leaks and check them in the current penal law. To be clear, the records provide significant and detailed information about rape in terms of time, place, offender, victim, and other criminal factors. The detailed information about how the crime occurred gives important clues about the trial process of rape in the *Meclis-i Vala*. For example, while torture, before the 1858 Penal Law, was a legal implementation through the permission of *qadı*, it was indecent action to make a suspect confess after the 1858 Penal Law. Even, it can seriously harm the process of building a criminal case. Abstractively, the records involve a well-defined statement

[416] Seyitdanlıoğlu, **ibid**., 137-143.

of what the crime and the punishment were by referring the related article in the penal law in force. This data provides us a chance to check whether the *qadıs* were bound up the penal law or the judgments of the *qadıs* followed the current judicial principles. As a consequence, it can be stated that the judgments of the *qadıs* are strictly subject to the principles of the penal law. As their warrant was restricted by the law, their judgments could not exceed the limitations. Besides, the free structure of the articles ensures an independent atmosphere. Thereby, the *qadıs* had a great deal of liberty while making their legal decisions. The articles also state the minimum and maximum limit of the punishments for rape but the last call is up to the jurisdiction of the *qadı*. They mostly determined the degree of the punishments by considering other criminal acts such as wounding, beating, and abducting. The coherent and objective feature of the *Meclis-i Vala* registers determines their worth for the Ottoman social, judicial, and political history.

To analyze correctly the identification process of rape before the *Tanzimat*, the influence of Islamic legal tradition over the Ottoman law cannot be ignored. In Islamic law, rape is considered as a variant of *zina* (adultery). Therefore, rape has been identified with either *zina bi'l cebr* (adultery by force) or *ightisab* which means usurping something that belongs to another by force and against the will of that person.[417] These two legal terms made us realize the distinguishing factors of rape from *zina* are consent and force. Abduction, intrusion, and kidnapping generally signify the violation of will, the lack of consent, and force. In addition to this, the concrete evidence includes confession, witness, or the reliable proof that indicates force or violation of will.

On the other side, in the Ottoman legal tradition, rape was also identified upon the definition of *zina* until the 19th century. Nonetheless, Selim I attempted to distinguish rape from zina by adding new verbal and physical attacks to the definition of rape and heavy *ta'zir* penalties. Yet, the Ottoman jurists collected all kinds of sex crimes under *zina* until the enactment of the 1858 Penal Law. To define any verbal and physical assaults against honor, chastity, privacy, and will, they used the term *zina*. As there was no separate term to define rape, the Ottomans used the notion of force to

[417] Sonbol, **Women of Jordon: Islam, Labor, and the Law**, 205

distinguish rape from adultery. They also followed the same trial procedure as being in the Islamic legal tradition.

To identify sex crimes after the enactment of the 1858 Penal Law, the Ottoman jurists used *hetk-i ırz* (the violation of honor) just like *zina* in the Ottoman lawbooks before the *Tanzimat*. While the term was used to define adultery and rape during the 18th century, after the 1858 Penal Law, it became a general legal term comprising physical and verbal sexual assaults in the Ottoman legal language. That title took place in Chapter II: Part 3 in the 1858 Penal Law to define sex crimes such as adultery, rape, harlotry, sodomy, pandering, abduction of girls, etc. The articles related to rape were between 197 and 200. As a result of the analysis of the *Meclis-i Vala* registrations, *fi'l-i şenî*' (an indecent act: adultery or rape), *cebren fi'l-i şenî*' (rape), *fi'l-i livata* (sodomy or forced sodomy), and *bikr-i izale* (defloration) are the common terms to define rape offenses. Thusly, the issue of rape has been analyzed in terms of both heterosexual and homosexual understanding to find out whether sex is a distinguishing factor while determining punishment.

The term *fi'l-i şenî*' is seen during the 16th century at earliest according to the *shari'a* records. The term is mostly used to define adultery offenses in the records. The same result can be observed in the *Meclis-i Vala* registrations, too. Therefore, it cannot be claimed that there is no legal term to identify sex crimes in Ottoman legal literature. However, the term also defines rape by emphasizing the fact force in Ottoman legal literature; especially, in Articles 198, 199, and 200 of the 1858 Penal Law. But in Article 197, there is not the phrase of *cebren* (by force) because the article addresses rape offenses against children. According to Ottoman legal understanding, a minor (*gayr-ı buluğ*) cannot comprehend the meaning and function of consent and will and they are not grown mentally. Here, the term *fi'l-i şenî*' indicates not only rape against women but also a child. Interestingly, Article 197 is indirectly a reference point for homosexual rape. Since all rape offenses against boys were evaluated under Article 197 in the *Meclis-i Vala*, it could relatively be considered as reference authority for forced sodomy. Therefore, it may not be a wrong assumption to call Article 197 referring to forced sodomy in the Ottoman legal literature. Indeed, if the victim is a minor, the reference point is Article 197 but if the victim is a major, the reference point is Article 198. As understood, Article 197 also aims to prevent child abuse within

society. Other rape cases of which victims are major (*buluğ*) are concluded to the aforesaid articles in the 1858 Penal Law through the term *cebren fi'l-i şenî*'. These articles do not only involve sentences and punishment of heterosexual but also homosexual rape offenses. The blurry structure of rape definition before the *Tanzimat* was relatively cleared out by using the term *cebren fi'l-i şenî*' and determining its legal definition and punishment through the penal law.

The term *fi'l-i livata* (sodomy) or *livata fi'l-i şenî*' (forced sodomy or homosexual rape) is a legal term which identifies homosexual and anal intercourses. The term *fi'l-i şenî*'is also commonly observed in sodomy cases in the *Meclis-i Vala* without mentioning '*livata*' word. The term *fi'l-i livata* can be seen in the *shari'a* registrations during the 16th century. The term generally signifies anal intercourse and forced sodomy according to the registrations. Even if there is no clear statement indicating sodomy and forced sodomy, the case samples on forced sodomy committed against a boy direct us to Article 197. In the registrations of the *Meclis-i Vala*, rape against the child is defined in Article 197 and the victim is only defined in terms of age, not sex. However, as explained above, the registrations indicate Article 197 to conclude forced sodomy against the boy. Besides, there is not an example of sodomy which is based on free will and consent among these 52 documents. On the other side, if forced sodomy is perpetrated to elder than an eleven-year-old boy, the crime is sentenced under Article 198. For this reason, age is an important fact to determine the sentence and attendantly punishment.

The last term is *bikr-i izale* (defloration) to identify rape offense against an unmarried woman. Virginity symbolizes purity and chastity in a patriarchal society. If someone ruins this purity, the person is penalized for not only rape but also defloration. Because defloration was considered as bodily harm, the perpetrator was also forced to pay fine. In addition to this, the study of E. Semerdijan indicates that virginity is considered as the property of a woman in Islamic legal tradition and any attacks are subjected to compensation. There is a monetary punishment implied in the Ottoman Aleppo namely *arsh* for rape incidents that happened to unmarried women. In the 1858 Penal Law, the phrases of ''an unmarried girl and *bikr-i izale*'' are mentioned in Article 200 and the addendum in 1860. The Ottoman jurists prepared the articles of sex crimes elegantly

to protect the victim by considering intendment, criminal attempt, and being deluded for marriage and also to prevent calumny.

Every element of the trial process, from appealing the court to the determination of punishment, has been analyzed by making a comparative study between the *Shari'a* and the *Meclis-i Vala* registrations. The appealing process to the courts does not show a big change. A plaintiff can apply to the courts either in person or via his or her representative. However, to appeal to the *Meclis-i Vala*, the plaintiff first must apply to the local courts and then the *Meclis-i Vala* just like being in the *Divan-ı Hümayun* (the Imperial Council). This method of appealing to the court can freely be observed through the *Meclis-i Vala* registrations.

The effect of Islamic culture is generally felt through the usage of *bin* (son) and *bint* (daughter) titles in the issue of introducing the parties. In Islamic society, individuals are introduced through their familial connections or their lineages. For non-Muslim subjects, the title dhimmi (protected) was used to introduce them via their religions. However, in the *Meclis-i Vala*, *kerime* or *kızı* (daughter), *hatun* or *zevce* (lady or wife), and *oğlu* (son) or *sabi* (little child) are mostly observed in the records to make the parties of a case know. Also, non-Muslim subjects can be introduced through their religious community (*millet* system) rather than the labels in Islamic culture.

Punishment is the most interesting part of this study. As a result of the analysis in the *shari'a* records, there is not a clear statement of punishments for rape offenses. While the amount of fine punishment is recorded in detail, other punishments are recorded with the term *ta'zir*. During the 17th and 18th centuries, there are some rape cases of which sentences only include ''*i'lam olundu*'' (being sentenced) or ''*ketb olundu*'' (being recorded). The explanation for this implementation came from S. Faroqhi; to Faroqhi, the aim is to enlighten the facts of the incidents; therefore, punishment is paid less attention. In the *Meclis-i Vala* records; as a result of the *Tanzimat*, all the sentences and punishments are depended on the related articles in the 1858 Penal Law to increase the lawfulness and objectivity. The punishments of rape according to the 1858 Penal Law are respectively exposure (*teşhir*), hard labor (*kürek*) or shackle (*pranga*), imprisonment (*habs*), and fine (*tazminat*). As a result of the research, there is a dilemma about the usage of hard labor and shackle. It can be claimed that before the enactment of the 1858 Penal Law, *pranga* was a common punishment for criminal

actions, attendantly for rape, too. However, after the enactment of the 1858 Penal Law, the primary punishment for rape is hard labor; yet there are a few rape cases including the punishment *pranga*. As Yasemin Saner stated, it is possibly related to either the adaptation problem of the new legal terms or being familiar terms, of which aims were to make the criminals suffer while performing public service.

Moreover, the duration, degree, and amount of these punishments are recorded in the records with a clear and certain language by stating its beginning date and the place where they are served. Also, the least and highest limit of these punishments; except for exposure, are stated in the 1858 Penal Law. However, the determination way of the highest limit of the punishments is not mentioned and thus it is left to the judgment of the judge. Thereby, that provides the judges with a free area to make their decisions without feeling the pressure but, within the legal limits determined by the penal law in force. Thanks to the analysis of the *Meclis-i Vala* records, we can observe the other criminal factors which affect the duration, degree, and amount of the punishments such as bodily injury, abduction, retention, and beating. Further, the heaviness and type of the punishments do not determine according to the sex of the victim but his or her age and her marital status. Also, intendment and attempt to rape are penalized according to the 1858 Penal Law with imprisonment. Since they were considered as a component of rape crime and were part of the planning stage of crime, they were punished under the addendum of Article 198.

All in all, the main reference point of identification of rape is the 1858 Penal Law for this study to see the objectivity, clarity, and lawfulness over the sentences and punishments related to rape. But it must be known that there are several issues about sex crimes waiting to be searched like prostitution among the articles of the 1858 Penal Law and also the *Meclis-i Vala* registers. Further, it is significant to observe how the Ottoman jurists created a new legal term to identify sex crimes by not using directly Islamic legal language and to create its own penal sanctions. Besides, it is important to observe clearly how these legal terms and criminal sanctions about rape offenses were practiced throughout the years. Therefore, the records of the *Meclis-i Vala* have helped to comprehend the identification and definition of rape in the Ottoman society during the 19th century. Furthermore, the terminological change in the Ottoman legal literature can present the reflection and influence of the *Tanzimat* on people to

understand its social and legal dimensions. Finally, the registrations of the *Meclis-i Vala* can provide an opportunity to bring out continuity or change in the trial process of rape cases by referring to the *shari'a* records before the 19th century.

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APPENDIX

Appendix 1: The example of the *Meclis-i Vala* registrations and correspondences

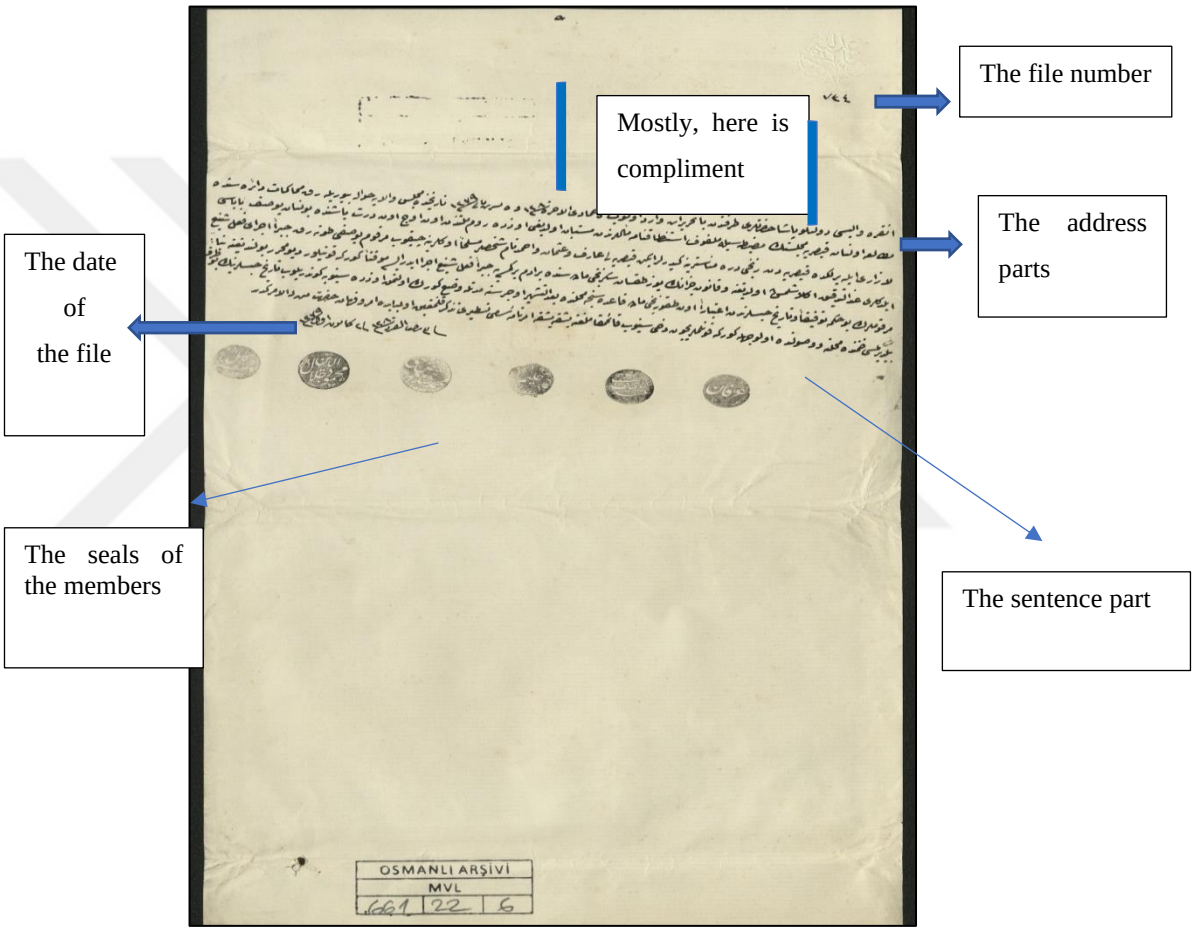


IMAGE 1: A typical example of the *Meclis-i Vala* registrations.

CADB, MVL 661-22/6, (3 *Muharrem* 1281/ 8 June 1864)

Appendix 1: The transliteration of the document above

‘‘Ankara Valisi devletlü Paşa hazretleri tarafından bi’t-tahriran varid olup 5 Cemaziye’l-ahir sene1280 ve 5 Teşrin-i sani sene 1279 tarihinde Meclis- Vala’ya havale buyurularak Muhakemat Dairesinde mutala’a olunan Kayseriye meclisinin mazbatasıyla melfuf istintakname maillerinden müsteban olunduğu üzere Rum milletinden 13-14 yaşında bulunan Yosaf’a babası Lazari ile birlikte Kayseriye’den Zencidere Manastırına giderler iken Kayseriyeli Arif ve Osman ve Ahmed nam şahıslar müsellemen önlerine çıkup merkum Yosaf’ı tutarak cebren fi‘l-i şenî‘ eylediklerini inde’l-tedkik anlaşması olduğuna ve kanun-u cezanın 198. Maddesinde bir adem bir kimseye cebren cebren fi‘l-i şenî‘ icra ide rise muvakkaten küreğe konulur deyü muharrer bulunduğuna binaen merkumların bu hükme tevfikan ve tarih-i habslerinden itibaren 19. madde kaidesince mahallesinde bade’l-teşhir 3’er sene müddetle vaz’ı kürek olunmak üzere Sinob’a götürülüb tarih- habslerinin bu zarf bildirilmesi zımmında mahaline vusulunde ol-vechle küreğe konulmalarıcün dahi Sinob Kaymakamlığına başka emirname-yi resmi tesdir tezkere kılınmağla ol-babda emrü ferman hazret menlehü’l-emrindir.’’

Appendix 2: The example of testimony in the *Meclis-i Vala*

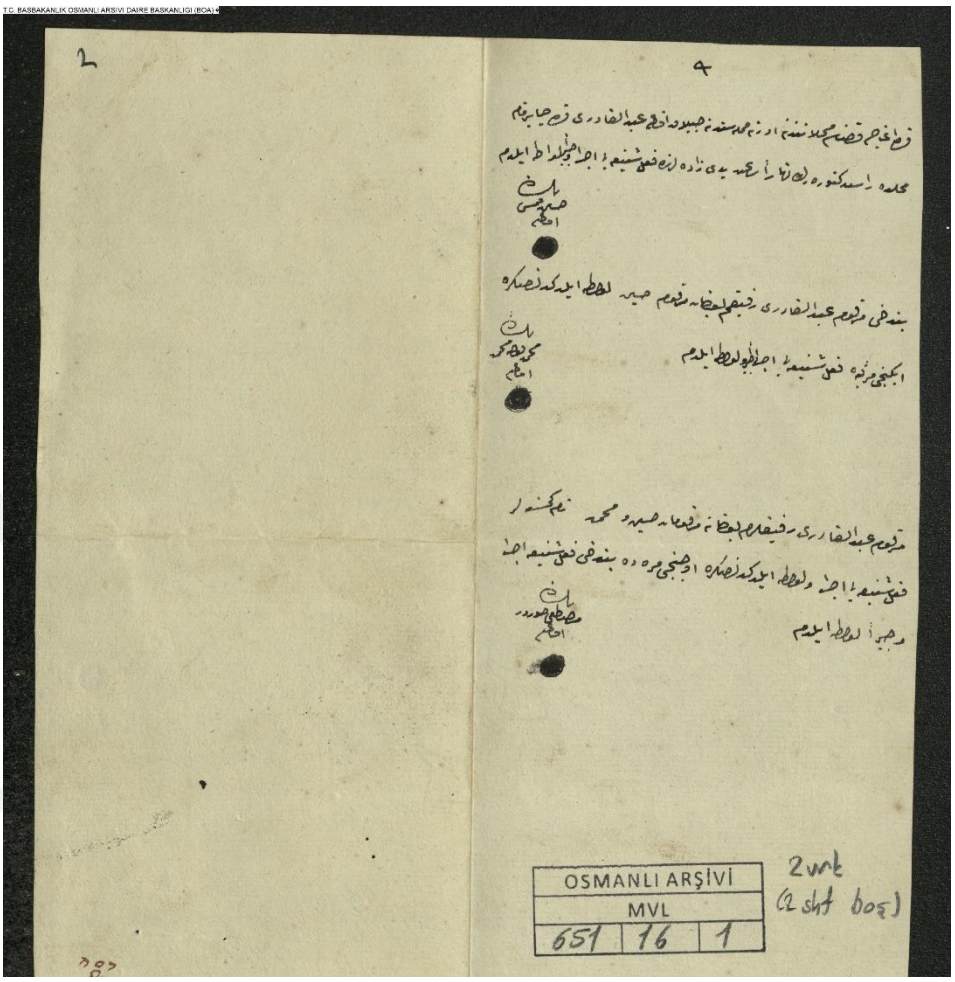


IMAGE 2: An example of testimony document in the *Meclis-i Vala*

BOA, MVL 651-16/1, (8 *Muharrem* 1280/ 25 June 1863)

Appendix 2: The transliteration of the document above

‘‘Karaağaç kazası mahalatından Orta mahalesinden Çaylakoğlu Abdülkadir’i Kara Çayırkam mahalede rast götürerek () () yedi zadelerinde fi‘l-i şenî‘a-yı icra ve cima livata eyledim.’’
Hüseyin Memiş
‘‘Ben dahi merkum Abdülkadir’i refikim () merkum Hüseyin livata eyledikten sonra ikinci mertebe-i fi‘l-i şenî‘ayı icra () livata eyledim.’’
Mehmed Koca Mehmed
‘‘Merkum Abdülkadir’i refiklerim () merkuman Hüseyin ve Mehmed nam kimesneler fi‘l-i şenî‘ icra ve livata eyledikten sonra üçüncü merada ben dahi fi‘l-i şenî‘a icra ve ceyyiden livata eyledim.’’
Mustafa Horoz

Appendix 3: The example of a court decision about the rape attempt

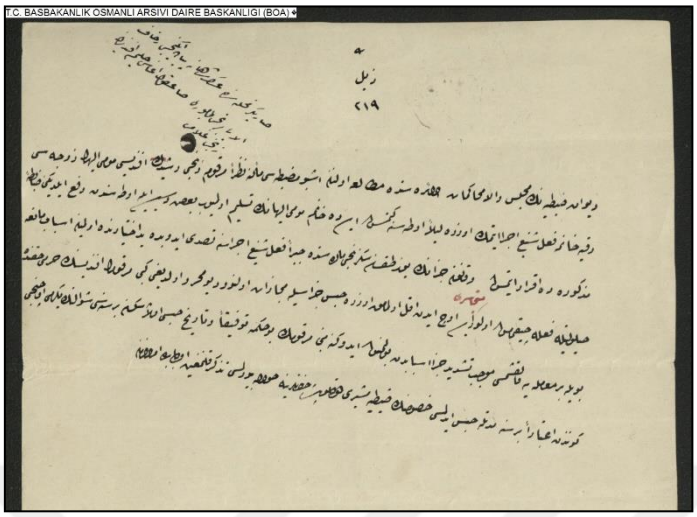


IMAGE 3: A court decision about rape attempt

BOA, MVL 870-105, (21 *Muharrem* 1282/ 17 June 1865)

Appendix 3: The transliteration of the document above

‘‘Zeyl 219

Divan-ı Zabtiye’nin Meclis-i Vala Muhakemat Dairesinde mutala’a olunan işbu mazbatası mailine nazaran Sarıklar mahallesinde asker şahanepenahi İkinci Zühaf Alayı Birinci Tabur Sa’a Kulağası Halim efendinin Zenci Reşid efendisi mumaileyhin zevcesi Refiye hanıma fi‘l-i şenî‘ etmek üzere leylen odasına gitmiş ise de hanım mumaileyhanın teslim olmayıp ba’z ve sesi ile odasından def'i eylediğini zabtiye-yi mezkurede ikrar etmiş ve kanun-u cezanın 198. Maddesinde cebren fi‘l-i şenî‘ icrasına kasdi idübde ber ihtiyardan olmayan esbab-ı mani’a hilaliyetle fi‘le çıkmamış olur mütecaserisi ise 3 aydan ekall olmamak üzere habs cezasıyla mücazan olunur deyü muharrer olduğu gibi merkumun efendisinin haremi hakkında böyle bir muameleye kalkışmış mucib teşdid ceza-yı esbabından bulunmuş olduğuna mebni merkumun bu hükme tevfikan ve tarihi habs olan 81 senesi Şevval’inde 23. gününden itibaren bir sene müddetle habs edilmesi hususunun zabtiye meşir () hazretlerine havale buyurulması tezkere kılınmağ... ol babda emrü ferman.’’

Appendix 4: The example of the punishment given for rape in the *Meclis-i Vala*

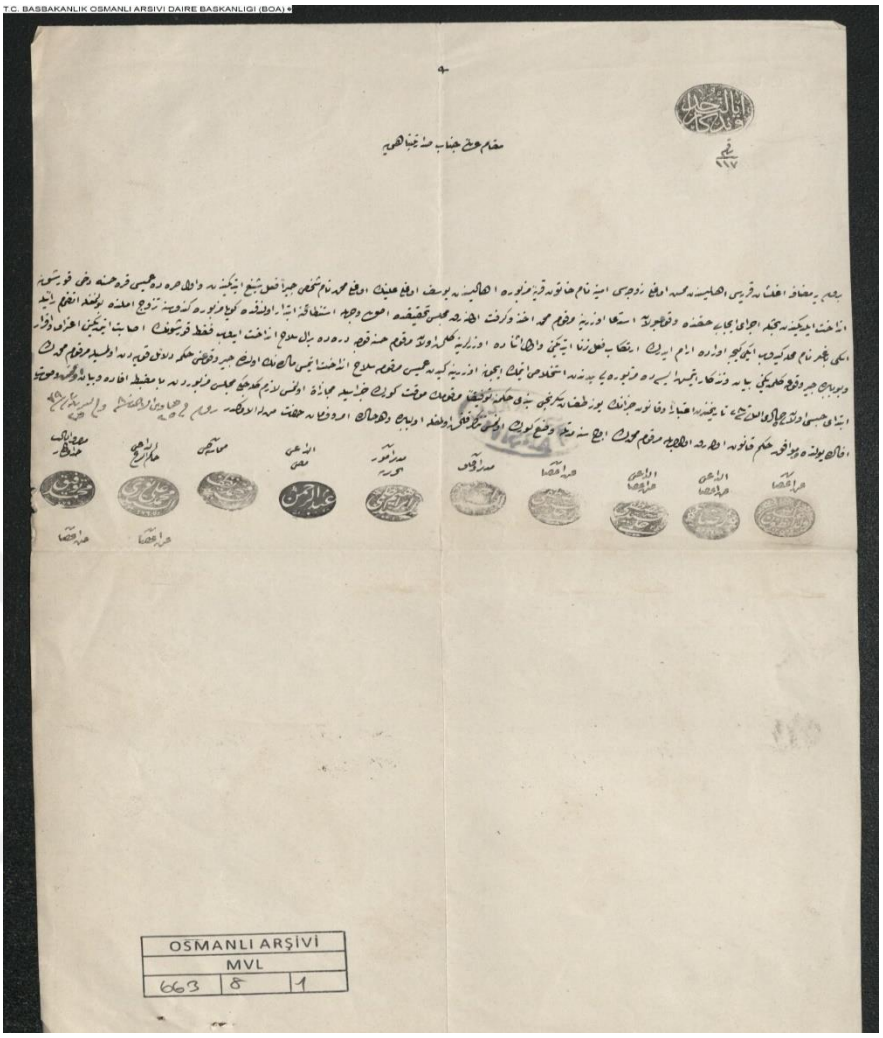


IMAGE 4: Illustrating one of the punishments for rape in the *Meclis-i Vala*

BOA, MVL 663-8/1, (1 *Receb* 1280/ 12 December 1863)

Appendix 4: The transliteration of the document above

‘‘Makam-ı Ali Cenab-ı Sadaretpenahiye
Bursa’ya muzaf Ağlaşan karyesi ahalisinden Memiş oğlu zevcesi Emine nam hatuna karye-i mezbure ahalisinden Yusuf oğlu Ali’nin oğlu Mehmed nam şahıs cebren fi‘l-i şenî‘a icra ettiğinden ve ol sırada () karahane dahi kurşuna endaht eylediğinden sicile icra-yı icabı hakkında vuk’u bulan istid’a üzerine merkum Mehmed ahz-ü kerfet olunarak Meclis-i Tahkik’de usul-u vechle istintakına ibtida olundukda güya mezbure kendüsüne tezevvüc emelinde bulunmağla ittizaham rai’yle İkibağlar nam mahale gidüp ikinci orada idam ederek irtikab fi‘l-i zina ettiğini ve ol esnada üzerlerine gelmiş olan merkum Hasan koca derede bir el silah endaht idüp fakat kurşunun isabet etmediğini itiraf ve ikrar ve bu babda cebir vuku’u gelmediğini beyan ve tezkar etmiş ise de mezbureyi bedenden istihlas itmek içün üzerine giden ayyaş merkuma silah endaht etmiş () olunmağla cebir vuku’una hükme delail-i kuvayeden olmasıyla merkum Mehmed’in ibtida-yı habsi olan fi 5 Cemaziye’l- evvel sene 280 tarihinden itibaren ve Kanun-u Ceza’nın 198. bendi hükmüne tevfikan merkumun muvakkat kürek cezasıyla mücazat olunması lazım geleceği meclis-i mezbureden ba mazbata ifade ve beyan olunmuş ve suret-i ifade yolunda ve muvaffak hükm-ü kanun olarak ol vechle merkum Mehmed’in 3 sene müddetle vaz’ı kürek olunmuş tezkere kılınmış olmağla ol babda ve her halde emr-ü ferman hazret menlehü’l emrindir.

Appendix 5: The court decision indicating rape and theft offenses under the 1840 Penal Law

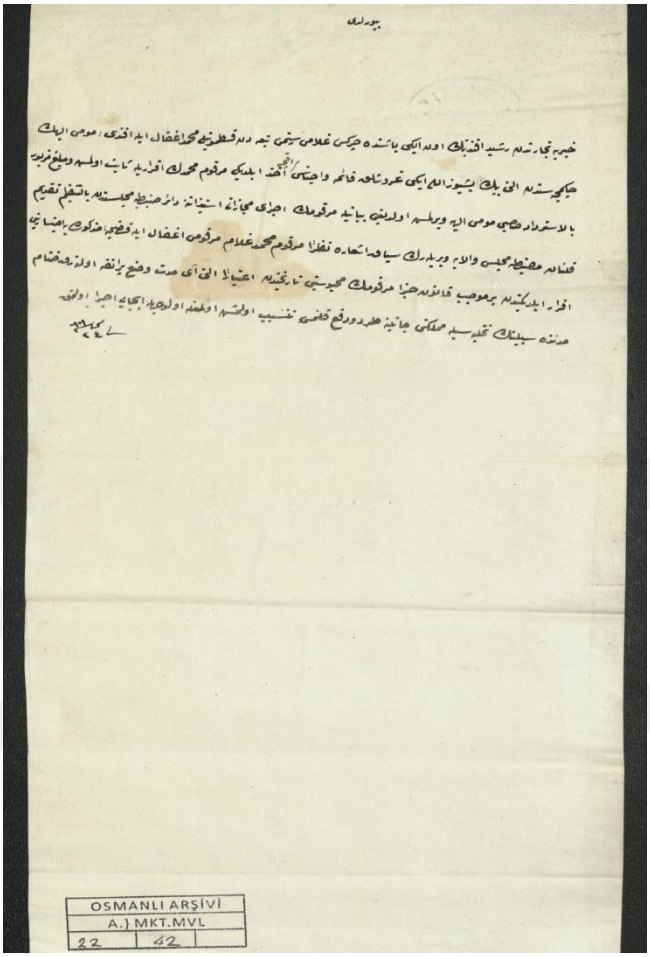


IMAGE 5: An example of the *Meclis-i Vala* registrations in 1849

BOA, MVL 22-42, (24 *Muharrem* 1266/ 10 December 1849)

Appendix 5: The transliteration of the document above

‘‘Buyruldu
Hayriye tüccarından Reşid Efendinin 12 yaşında Çerkes gulamı Rüstemi teb'adan Kastamonlu Mehmed iğfal ile efendi-yi mumaileyhin çekmecesinden 6.552 kuruşluk kaime ve ecnası akçe ahz eylediği merkum Mehmed’in ikrarıyla sabit olmuş ve meblağ-ı mezbur bi’l-istirdad sahibi mumaileyhe verilmiş olduğu beyanıyla merkumun icra-yı mücazatı istibzatına dair zabıta meclisinden bit-teslim takdim kılınan mazbata Meclis-i Vala’ya verilerek siyak-ı iş’ara nazaran merkum Mehmed gulam merkumu iğfal ile ( ) mezkureye iziyareti ikrar eyledikten ber müceb kanun-u ceza merkumun mahbusiyeti tarihinden itibaren altı ay müddet vaz’ı pranga olunarak hitam müddet-i sebilinin tahliyesiyle memleket-i canibince def’i kılınmış tensib olunmuş olmağla ol vechle icabı icra olunmak.’’

Appendix 6: The investigation of rape offense in the *Meclis-i Vala* in 1851

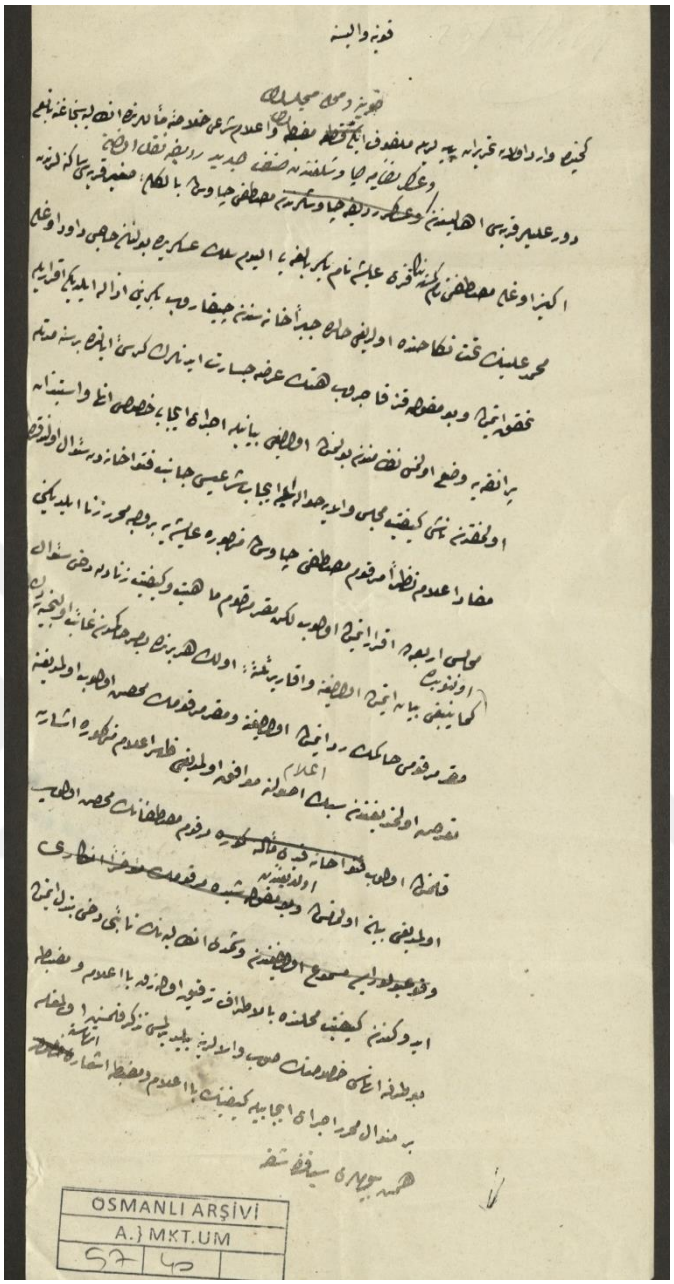


IMAGE 6: The investigation of rape in the *Meclis-i Vala* and its punishment under the 1851 Penal Law

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BOA, A.} MVL.UM 57-40, (24 *Cemaziye'l-ahir* 1267/ 26 April 1851)

Appendix 6: The transliteration of the document above

‘‘Konya Valisine
Geçende varid olan tahrirat beyyeleriyle melzuf Konya ve mahali meclisleri mazbataları ve i‘lam-ı şer‘i hulasa-yı mailerinde Antalya Sancağına baki Dur/evraliyyeler karyesi ahalisinden ve Asker Nizamiye Çavuşluğundan sınıf-ı ceride () nakil olunan Mustafa Çavuş Balıklızamir karyesi sakinelerinden Ekizoğlu Mustafa nam kimsenin kızı Ayşe nam bekr-i buluğaya () askeriyede bulunan Hacı Davud oğlu Mehmed Ali’nin taht nikahında olduğu halde cebren hanesinden çıkarup bekrini izale eylediğini ikrar ile tahkik etmiş ve bu () kız kaçırub hakkında ırza cesaret idenlerin Karesi eyaletinde bir sene müddetle prangaya vaz’ı olunması nizamından bulunmuş olduğu beyanıyla icra-yı icabı hususu ile istibzan olunmakdan nası keyfiyete Meclis-i Vala’ya havale ile icab-ı şer‘i canib fetvahaneden sual olundukda müzad i‘lam nazaran merkum Mustafa Çavuş mezbure Ayşe’ye bir gece muharrer zina eylediğini mecalis-i erbe’ada ikrar etmiş olub lakin makarr merkum mahiyet ve keyfiyet zandan dahi sual olunub da kime beyan etmiş olduğu ve ekarib () alan her birinden baher hükmünden gaib oluncayadek makarr merkum-u hakimin red etmiş olduğuna ve makarr merkumun muhsan olub olmadığını () olunmadığından sebk-i i‘lam usulune muvaffak olmadığı nazar-ı i‘lam-ı mezkure işaret kılınmış olub merkum Mustafa’nın muhsan olub olmadığı beyanı olmamış olduğundan ve şimdi Antalya naibi dahi tedkik olunarak ba i‘lam ve mazbata bu tarafa irtası hususunun sub-u valalarına bildirmesi tezkere kılınmış olmağla bir minval muharrer icra-yı icabıyla keyfiyyetin ba i‘lam ve mazbat iş'ar-ı irtasına himmet buyurmaları siyakında şukka.’’

Appendix 7: An example of the cooperative relationship between the *Shari'a* Court and the *Meclis-i Vala*

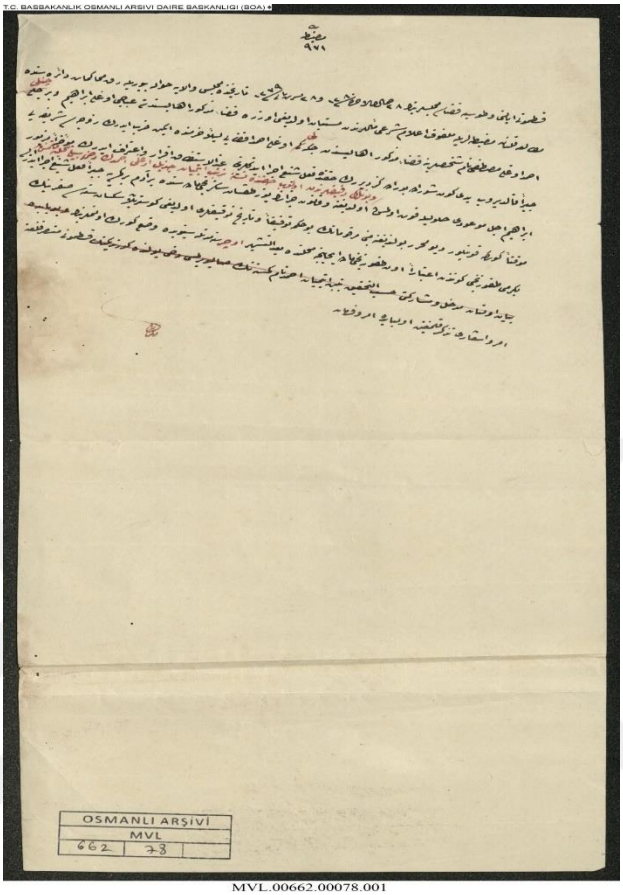


IMAGE 7: A court decision presenting the executive function of the *Meclis-i Vala* for final judgment from the *Shari'a* Court

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BOA, MVL 662-78, (2 *Şaban* 1280/ 12 January 1864)

Appendix 7: The transliteration of the document above

‘‘Mazbata 971
Kastamonu eyalati ve Tosya kazası mahallelerinin 28 Cemaziye’l-ahir sene 1280 ve 28 Teşrin-i sani sene 1279 tarihinde Meclis-i Vala’ya havale buyurularak Muhakemat Dairesinde mutala’a kılınan mazbatalarıyla melzuf i‘lam-ı şerif maillerinden müsteban olduğu üzere kazayı mezkur ahaliyesinden Abacıoğlu İbrahim ve Biranli Ahmed oğlu Mustafa nam şahısların kaza-yı mezkür ahalisinden Çekelioğlu Ahmed ikzayı leylen hizmette iken harb iderek zevcesi Şerife’ye cebren kaldırub 7 gün şurada burada gezdirerek hakkında fi‘l-i şenî‘ icra ettiklerini inde’l- istintak ikrar ve itiraf iderek muahharen mezbur İbrahim ecel-i mu’udi haluliyle gün olmuş ve bunların refikalarından olub hakkında () tertib etmeyen Ceziloğlu Ahmed’in dahi sebili tahliye kılınmış olduğuna ve Kanun- u Cezanın 198. maddesinde bir adem bir kimseye cebren fi‘l-i şenî‘ icra eder ise muvakkaten küreğe konulur deyü muharrer bulunduğuna mebni merkumanın bu hükme tevfikan ve tarih-i tevfikleri olduğu gösterilen 80 (sitte) sene Sefer’in 29. gününden itibaren 19. madde icabınca mahalinde bade’l- teşhir 3’er sene müddetle Sinop’da vaz'ı kürek olunmalarına Kastamonu Mutessarıflığına emr-ü iş'arı tezkere kılın ol babda emrü ferman.’’

Appendix 8: The request of the local courts from the *Meclis-i Vala* for further investigation

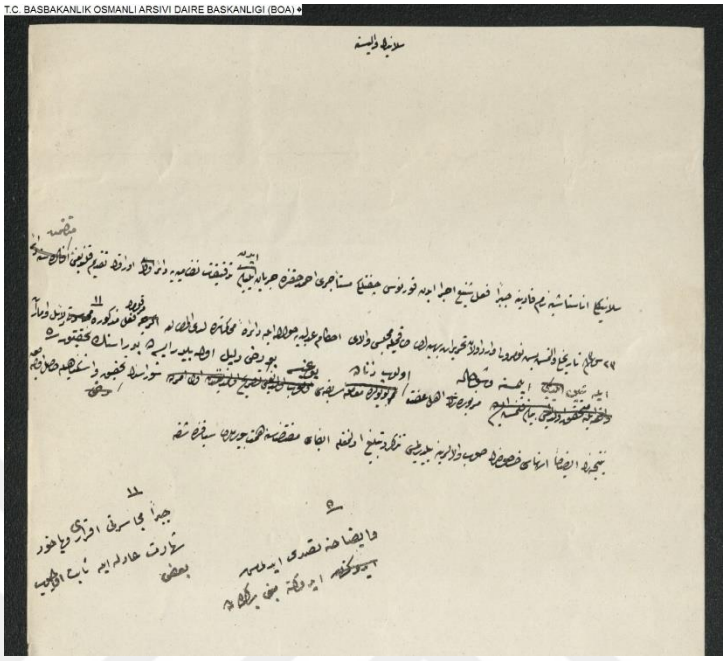


IMAGE 8: An example of correspondence between the local courts and the *Meclis-i Vala* indicating the request for further information

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MVL 1030-76, 13 *Şevval* 1283/ 18 February 1867)

Appendix 8: The transliteration of the document above

‘‘Selanik Valisine
Selanikli Anastasya nam kadına cebren fi‘l-i şenî‘ icra iden Kornos çiftliği müsteciri Ahmed hakkında cereyan iden tedkikat-ı nizamiyeye dair evrakın takdim kılındığı mütezammın23 Şevval sene 83 tarihli ve 65 numerolu varolan tahrirat behiyeleri () Meclis- Vala-yı Ahkam-ı Adliye’ye havale ile Daire-i Muhakemat’da ledi’l-mutala’a merkumun fi‘l- mezkure cebren mücasereti ikrarı veyahut şehadet adile ile sabit olmayup bazı delail olmadan ile () itmesine ve şu halde mezbure ehl-i izzet olub zat da sabıkası yoğsa bu dahi delil olabilir ise de burasının tahkikat ve izahına tasaddi edilmemiş idüğüne mebni yerinde neticenin izahan () hususunda sub-u valalarına bildirilmesi tezkere ve tebliğ olunmakla ifa-yı muktezasına himmet buyurulmaları siyakında şukka.’’

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