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Adulteresses and fornicatrices in Serbian law in the first half of the XIX century*

SUMMARY

During the First and Second Uprising, under the influence of historic, social, cultural and ethnic processes which played a significant role in forming and development of the Serbian state, women were punished for the criminal acts of adultery and fornication, which is proven by a large number of verdicts, but also by custom and canonic rules which stipulated specific sanctions in these cases.

It can be concluded from mentioned verdicts in cases of adultery that the penal policy enforced by Karadjordje (First Uprising) was milder compared to Grand duke Miloš's (Second Uprising) penal policy. At the time of Grand duke Miloš's rule, on the basis of preserved rulings, it can be seen that in the period between 1825 and 1828 punishing of adulteresses covered 50 to 100 whip lashes or the fine included exile in cases when women were committing adultery with Turks. The period between 1837 and 1843 is characterized by milder penal policy which is similar to the one from the time of Karadjordje's rule (fines of 25 whip lashes), and even milder (10 whip lashes, 25 sticks), but with a one difference – aside from whipping punishments jail terms were also frequent, but only for a short periods.

As for the punishing of fornicatrices, as opposed to punishing adulteresses, there is a discrepancy between canonic and custom rules on one side and legal regulations on the other side. Fornicators were most frequently awarded the sentence of whipping (12 to 50), but the several cases of fornicator deliberation were recorded regardless to the fact of committed fornication. If misbehavior of a girl had been discovered before her marriage, she would be exposed to a laughingstock (she and her entire family), chances for a regular marriage of such offender were minimal, and the most violent reaction of the village was to stone or exile offenders.

Sanctions stipulated by two legal systems – clerical canons and customary law norms, when it comes to the criminal acts of adultery and fornication, were in their essence almost identical. Namely, the church and the village stipulated as the harshest fine

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for female transgressors – the excommunication. The basic sanctions imposed by the Orthodox Church against the “fallen” female members ranged from mild ones – denial of communion over a certain period of time, to those which, aside from the holy communion, also denied a female transgressor the presence during the second part of liturgy after prayer for non-christened, and the anathema – excommunication, which included exclusion from the church community (this was practiced in the most severe cases). These were not fines in the true sense of the word, but were more like categories of present spiritual state of a particular member of the church, regardless of the type of committed transgression. However, the “sinner” always had to repent and return back to the community. This was also the true purpose of all these penances. As far as the customary law is concerned, it is known that it has developed under a certain set of circumstances. Serbia, when it fell under the Turkish rule, lost its legislative continuity. In the absence of state regulations, the customary law, simultaneously with church law and under his significant influence, became the only orient in regulation of basic social relations and at the same time, its protector and guardian. All actions of individuals which differed from established social norms fell under the impact of public criticism and condemnation and were sanctioned in an appropriate way. Excommunication from the church or social community for these women was more severe than the death sentence which was sometimes levied for some of these criminal acts.

Key words: adulteresses, fornicatresses, legal rules, custom rules, canonic rules

Słowa kluczowe: cudzołożnice, nierządnice, prawo stanowione, prawo zwyczajowe, prawo kanoniczne

1. Introduction

It is a commonly known fact that legal awareness of a nation, during its historic development, can be judged by provisions on sanctions defined by the criminal legislation of that time. Furthermore, in order for the fine to be adequate and proportionate, it must be compliant with local customs, because they are worth as much as people understand and acknowledge them. In opposite, fines can not survive and must be replaced with more adequate and better ones.

At the end of the XVIII and at the beginning of the XIX century, at the time of turbulent uprisings in Serbia, outside of battles and conflicts, victories and defeats, diplomatic correspondences and negotiations, which are witnessed by the official historiography, inside of the traditional, patriarchal pattern, women had their own determined role. They were valued as labor and reproductive force, serving their fathers, husbands, fathers in law, but also other male members of the family. They were owned by men and personified their “rz” – honor or feminine honesty¹. Dishonest women were named “whores” or “vixens”,

¹ V. S. Karadžić, *Materials for Serbian history of our time*, Belgrade 1898, p. 10.

while the saying for their families was: "They hung their noses to their teeth, dropped their shame to their feet and threw honor to the mud"².

The aim of this essay is to describe how women of the first half of the XIX century (until adoption of the Serbian Criminal Code in 1860) were punished for the criminal acts of adultery and fornication. Since the customary law rules were used for defining of the criminal law, but also for the fining of women for committed criminal acts simultaneously with the positive law from that period, it was necessary to conduct a research by simultaneously analyzing the official and customary law. On the basis of replies to questions posed by Mr Bogišić in "Materials" in accordance with the old Latin saying "*Quis, quid, ubi, quibus auxiliis, cur, quomodo, quando?*" it turned out that the customary law for some of the listed criminal acts were pointing to the application of the canon rules of the Orthodox church. For this reason it was also necessary to process canon law materials which relate to the adultery and fornication. Finally, only after bringing rendered court verdicts to the focus of attention one could conclude that the practice involved the parallelism of customary and legal norms in the segment of fining women for committed criminal acts.

2. Adulteresses and fornicatresses

Adultery most frequently included the physical punishment, while Grand duke Miloš Obrenović in 1833 issued a "Decree on villages and parties" against the fornication, which states: "Among other abuses which we ought to root out, there is also the gathering between men and women during night for parties, songs and collective work. This bad custom is not only contrary to the good intentions, but also gives reason for quarrels, mutual fights and even murders"³. It is further stated that he decided, in order to prevent such misfortunes, but also to "root out the vice of fornication during these gatherings" to prohibit men to meet with women at night to collectively work or do something else. Women can meet to spin wool, but in someone's home, and only with other women, and not in the field as before. Captains were responsible for all offences of this kind, and they had the right to punish offenders with beatings in proportion to the magnitude of their guilt⁴.

² S. M. Mijatović, *Serbian customs (from Levc̃a and Temenić)*, book I, *Serbian Ethnographic Collection VII, Life and customs 4*, Belgrade 1907, p. 100.

³ T. R. Djordjevic, *Materials for Serbian customs from the time of the first rule of Grand duke Miloš*, book I, *Serbian Ethnographic Collection XIV, Life and customs 8*, Belgrade 1909, p. 458–459.

⁴ This order was repeated by Mihailo Obrenović in 1841 probably because the young people continued to meet in this way at such gatherings, and because of the rise in passion criminal acts were being committed. T. Živanović, *Legal sources of Serbian criminal law and his historic development and the development of criminal justice between 1804 and 1865*, Belgrade 1967, p. 87, 159–160.

In 1839 Mihailo Obrenović, in his military law abstract, stipulated in the Article 27 that each adultery and fornication would be severely fined, and the short decree from 1840 states the following: "Individuals loving jointly in adultery shall be separated by civic authorities and sent to their legal spouses if they have them. Public fornicatresses 'shall be fined more severely', they should give up their ill-mannered life, or they shall be banished"⁵. Ten years later, in his "Declaration on conclusion of the National Assembly held on St. Peter's Day", Aleksandar Karadjordjevic in the Article 71 orders courts to start fining more severely all cases of adultery⁶.

It was not uncommon for the village to hold a trial according to its own customary law when it becomes known that a woman illegally lives with someone else's husband. The village court, comprised of male family heads from the village, usually met at sunset at the house of the village alderman. Because of the shame brought to the family of the woman accused of adultery, during the evidentiary proceeding the main argumentation was delivered by her closer relatives. If there were no witnesses to the crime the accused would be acquitted, and if there were – she would be convicted. It sometimes even happened that the accused was beaten in order to obtain a confession concerning adultery. After the guilt was proved, the adulteress became a subject of the village punishment, that is – to the public ridicule and mockery. One letter from town Požarevac from 1840 says that in the village Klekovnik, some Svetomir Stojanović, a musician, caught his wife in infidelity, and "after giving her a good beating, he cut all of her hair and took her naked through the village"⁷. As far as fornication is concerned, in one of replies collected by Mr Bogišić in his "Materials", it is stated: "The priests try the cases of fornication by denying communion to fornicatresses. The people, of course, despise them, but is not trying them, as it is said: the God shall judge upon them!"⁸.

In Karadjordje's Code there are no provisions which directly regulate adultery and fornication, but the Article 29 directly relates to these criminal acts: "Legally married woman and man may not be separated without a significant cause and the high court and bishop"⁹. Since the church (clerical) court is also mentioned here this article in accordance with the Rule 9 of Saint Vasil the Great, which states: after the "word of God", the marriage can not be divorced

⁵ T. Živanović, *Legal sources of Serbian criminal law and his historic development and the development of criminal justice between 1804 and 1865*, op. cit., p. 139, 149.

⁶ T. Živanović, op. cit., p. 206.

⁷ T. R. Djordjević, *Village as a court in our customary law*, [in:] *Collection of the Faculty of Philosophy, book I*, Belgrade 1948, p. 275–277.

⁸ V. Bogišić, *Materials from replies from various parts of the Slavic south*, Zagreb 1874, p. 577.

⁹ T. Živanović, op. cit., p. 87, 12.

except in the case of adultery¹⁰. At the time of the first Serbian uprising there were two eparchies: Belgrade Archdiocese and Šabac-Užice Eparchy. They were headed by Greeks, Metropolitan Leontije and Episcopo Atim, who were not liked by people as they were acknowledging the Turkish rule. At the time of ruling of Karadjordje first courts were established (magistracy, principal and administrative) in liberated regions, which also deliberated on certain cases in the segment of canonic law in principle, and within the jurisdiction of clerical courts. Transposition of their jurisdiction over matters regulated by canonic law was not without foundation, because the courts were also comprised of the parson, cleric, priest and archpriest, while the court proceedings were organized each holiday after gathered believers leave the church¹¹. For this reason in 1807 the assembly and Administrative Council met in order to introduce clerical courts. At the beginning of November 1808 Mr K. K. Rodofinikin in his report stated that there are three types of clerical courts – for priests, schools and divorce and marriage. However, as stated by Mr Vukićević, since Šabac Magistracy also deliberated marital disputes there is no clear boundary between secular and clerical courts¹². This can also be seen from the verdict of Šabac Magistracy from May 2, 1808, which orders for Sava Tomić to be divorced from Marija, since her first husband Petar Miletić returned after seven years from the army and demanded for his wife to return. Slightly more than a year after Petar joined the army (not knowing if he was dead or alive) Marija married Sava and gave birth to four of his children. The court, by threatening a punishment, ordered Marija to leave three older children to Sava, and take with her only the youngest one, which she was still breastfeeding¹³. The secular court ruled in accordance with the canonic rule 93 of the V–VI Council of Trullo, which states: “A woman, whose husband left on a trip and if no news come of his welfare, and if she fails to wait and becomes certain of his demise and marries another man, such woman has committed an act of adultery. The same verdict shall also fall upon wives of soldiers, who get married for not

¹⁰ It is important to say that St. Vasil the Great in this rule equally strives for divorce in the case of adultery of both men and women. Equality is stressed exactly because it didn't exist in pre-Christian, Roman laws, and it took a long time to establish itself in the christian society. Namely, according to these laws, women were subordinated to men in every aspect, and were even denied the right to a divorce when they discovered adultery of their husbands. Women had to put up with their husbands, regardless of their behavior, while they were allowed to get a divorce over infidelity. However, according to the teachings of St. Vasil the Great, other holy fathers and the church itself, the adultery was considered the cause for divorce for both husbands and wives. N. Milaš, *Rules of the Orthodox Church with explanations, book II*, Novi Sad 1896, p. 360–364.

¹¹ M. Vukićević, *Courts and their set-up at the time of uprising between 1804 and 1813*, “Police Bulletin”, 1905, nr 32, p. 307.

¹² M. Vukićević, *Courts and their set-up at the time of uprising between 1804 and 1813*, “Police Bulletin”, 1905, nr 34, p. 324, 326.

¹³ R. Popović, *Protocol and register of Šabac Magistracy between 1808 and 1812*, Belgrade 2010, no. 93, p. 30.

having any news of their husbands, as they, too, when their husbands leave, fail to wait for their return. Some lenience may only be granted when there is some certainty that a husband has passed away... But if the soldier returns after some time, whose wife went to another man in his absence, such soldier shall take his wife again, if he desires so; while she is to be given forgiveness because of her ignorance"¹⁴. Mr Djordjević also confirms that there were cases of polyandry in Serbian customary law for the same reasons as mentioned in canons of the Orthodox Church. Namely, he explains that in these cases women, after having no news about their husbands, got remarried and thus formally had two husbands¹⁵. Regardless of the fact that strict fines were stipulated in the cases of adultery by the Orthodox Church (denial of communion in the period of 3 to 18 years), Šabac Magistracy acts in accordance with this exception among canonic rules (by granting forgiveness) and does not punish Marija, but only orders her to return to her original husband Petar.

It is also interesting to show different attitude of Šabac Magistracy in three more verdicts dealing with adultery. Because of "bad" behavior of his wife Ana, Stanko Todorović addressed the court for the third time. In its decision from August 25, 1808, the court adopted a decision that they can get separated, but that he and she can not again marry, while the male child is to stay with Stanko, who will pay Ana the sum of groschen¹⁶. In this case again the court acts in accordance with canonic rules. Namely, the marital bond between spouses can only be broken by the death of a spouse or some cause which supersedes the church idea of undividedness of a marriage and which dissolves its moral and religious foundation, and which also includes death, only in a different form (this relates to the adultery and its different forms)¹⁷. Accordingly, the church considered only the first marriage "as the holy act blessed by God", while the second marriage was defined as epythymy. To those entering the second marriage the second rule of St. Nikephoros the Confessor was applied which stated that those "entering the second marriage shall not be wed"¹⁸. This verdict is also in accordance with customary rules. According to the customary beliefs, it was allowed for a husband to "let his wife go", while he had the obligation to support his former wife¹⁹. As stated in the verdict, Stanko had to pay Ana the sum of 10 groschen. In the same

¹⁴ N. Milaš, *Rules of the Orthodox Church with explanations, book I*, Belgrade–Šibenik 2004, p. 579–580.

¹⁵ T. R. Djordjević, *Materials for Serbian customs from the time of the first rule of Grand duke Miloš, book II, Serbian Ethnographic Collection XIX, Life and customs 11*, Belgrade 1913, p. 460.

¹⁶ R. Popović, *Protocol and register of Šabac Magistracy between 1808 and 1812*, op. cit., no. 338, p. 58.

¹⁷ N. Milaš, *book I*, op. cit., p. 573.

¹⁸ N. Milaš, *book II*, op. cit., p. 417, 511.

¹⁹ T. R. Djordjević, *Materials for Serbian customs from the time of the first rule of Grand duke Miloš, book I*, op. cit., p. 316.

year, on October 24, the court decided that Petra, who wanted to divorce her husband, was guilty of adultery. She was fined with 25 whips lashes and was ordered "to stay with her husband, that she must not quarrel with him and that they should live in peace"²⁰. Listed verdicts show that the court acted strictly in cases where the divorce was sought by wives caught in adultery. The decision of the court from April 13, 1811, it states that it releases from prison Beljo Vučetić, who committed adultery with virgin Marija (she gave birth to his out-of-wedlock son). He spent three weeks in prison and got 75 sticks on two occasions. Unfortunately, since the verdict hasn't been preserved, one can not know for certain whether Marija got off with any fine or not. After this decision the Protocol of Šabac Magistracy mentions no other court deliberations and verdicts on marital disputes.

After a reform conducted in January 1811 dukes were forbidden to interfere with the clerical court (competent to try marital, clergy and clerical disputes) as these cases would be tried by the Metropolitan²¹. From the documents we have at our disposal it can be seen that since this reform secular courts were separated from clerical courts²².

While deliberating on the basis of its laws and provisions on extramarital relations the Orthodox Church made a difference between the categories of fornication and adultery. Namely, fornication was considered to be an act with which someone was fulfilling its "lustful" desire, but without any offence to others. Hence, the fornication was tied to a person who was not married, so the fornication was not offending any third party – either a husband or

²⁰ R. Popović, *Protocol and register of Šabac Magistracy between 1808 and 1812*, op. cit., no. 406, p. 69.

²¹ In more than ten "decrees" issued to dukes in the period between January 1811 and January 1812 a similar formulation can be seen: "You should not interfere with the clerical and spiritual, as the Metropolitan would be put on trial here, while clergy and monks should not interfere in secular and military matters". V. B. Savić, *Karadjordje, Documents II (1810–1812)*, Gornji Milanovac 1988, no. 583, 584, 585, 586, 587, 588, 589, 593, 594, 654, 683, 707, 791, p. 864, 866–867, 869, 872, 874, 877, 879, 884, 886, 954, 984, 1010, 1111.

²² It can be seen from Karadjordje's Protocol Registry (no. 867) dated July 1812 that marital disputes are being forwarded for processing to Metropolitan: "It was written to the duke Miloš Marinković not to allow woman Stanika to get married until Mr Metropolitan arrives as she was forcefully took away from her husband this winter, while her husband is now seeking her back". Protocol Registry (no. 934) also states Karadjordje's order from September 1812: "It was written to the Metropolitan concerning his work, that he should act by the law and manage clerical and clergy matters, and that he should not be prevented in these matters by anyone". I. Stojanović, *Registry Protocol from May 21, 1812 until August 5, 1813 of Karadjordje Petrović, supreme leader and the patron of Serbian people*, Belgrade 1848, p. 48; During the processing marital disputes the Metropolitan was issuing the book of release to a party, which then had the right to marry. Such book of release was issued in March 1813 by the Metropolitan Leontije to some Magdalena: "Party to the dispute Magdalena, after being rightfully released by her former first husband Risto, is now being issued a release so she could be able to find another opportunity, and in such case she should be married without any prejudice and allowed to enter the second marriage, which is why we are issuing such verification and marital release letter". M. Vukićević, *Courts and their set-up at the time of uprising between 1804 and 1813*, "Police Bulletin", 1905, nr 34, p. 373.

a wife. According to this, the fornication is different than the adultery, which is spiteful and offering to a third party, from which it can be concluded that adultery is an illegal relation with someone else's husband or wife. St. Gregory of Nyssa, the younger brother of St. Vasil the Great, claimed, however, that fornication was also an adultery, as the only legal relation was the marital relation blessed by God and the church. However, Fathers have adopted the listed difference, and have stipulated in their canons harsher fines for adulterers, as their transgression desecrated the holy institution of marriage²³.

The canonic rule 20 of the I Synod of Ancyra fines the adulteress with a seven-year epythymy, while the canonic rule 87 of the Quinisext Council of Trullo further develops the same rule defining the following: "such must weep for one year, listen for two years, belong for three years, and stand with faithful on the seventh year, if they truly repented in tears"²⁴. It is interesting that brothers St. Vasil the Great and St. Gregory of Nyssa stipulate much harsher fines. The canonic rule 58 of St. Vasil the Great denies communion to the adulteress over a period of fifteen years, while the rule number 4 of St. Gregory of Nyssa allows her a communion after eighteen years²⁵. St. John the Faster says that the adulteress ought to be given a communion after three years, but that she needs to "pray in modesty and fast, and eat simple dry meal in the evening, while she needs to pray 200 times per day". Furthermore, he says, if she is not diligent in performing defined actions she should endure fifteen years of fine²⁶.

Aside from marital infidelity the church also considered the following cases as an adultery: when the lawful husband releases his wife from home, it is considered that such woman can not marry any more, and if she nevertheless gets married to another man, she should be considered as an adulteress (and if the husband is at fault by leading his wife into adultery, the wife shall also be convicted of adultery, as she was called an adulteress by the Lord himself); but also a woman's consecutive marriage before definitive and verified pronouncement of death of her former husband (this relates to cases in which the husband went to war, army, work outside of his place of residence, and generally on a trip from which he didn't return for years, without any news of him, which practically meant that it remained unknown if he was alive or dead). In order to prevent remarriage of women whose husbands were still alive, the church requested a written confirmation of their death, and the people had a custom stating that women in these situations (having no news from her husband for a long time), had to wait for nine years for their

²³ N. Milaš, *book I*, op. cit., p. 81.

²⁴ N. Milaš, *book II*, op. cit., p. 22; *book I*, op. cit., p. 572.

²⁵ N. Milaš, *book II*, op. cit., p. 408, 460.

²⁶ N. Milaš, *book II*, op. cit., p. 508, 512.

husbands to return, and only then to be allowed to marry another man. If a woman received news on her lawful husband's death, the widow had the right to remarry after one year spent in mourning²⁷. In all cases of adultery the canonic law forms a fine of fifteen years of penance, while women who honestly confessed and stood before the priest were allowed to avoid being publicly fined by standing among other sinners, and they could stand in church during liturgy among other believers, so their serious sin could remain undetected²⁸. This rule was probably introduced so these women would not be embarrassed publicly, as the adultery of a woman was also frequently the cause of her death. According to the records gathered by Mr Djordjević, in 1830 duke Milovan Kukić from Požarevac writes to Grand duke Miloš how he went to the village Boževac to participate in execution of a death penalty over Jovan Zivković, who together with Kumrija, with whom he lived in illegal relations, killed her husband Raka. Because of the fact that she had six children, Kurmija was pardoned, but regardless of this fact "women from the village took the stones, gathered and stoned Kumrija to death"²⁹. Hence, a woman could sometimes not escape their ill fate even in the case of a liberating court verdict for adultery.

As stated by Mr Vukićević, many provisions of written medieval Serbian state laws, after a long application, were accepted by people and later became a folk custom³⁰. Dušan's Code from XIV century contains no provisions on adultery because this segment was regulated in detail by Syntagma Canonum which contains two interesting provisions: that the adulteress, after the execution of a physical punishment (cutting off of the nose, total haircut and beating), also had to stay for two years in a monastery prison (M-3,4) and that murder of a lover by the wronged husband was allowed if he caught his wife in an adultery with her lover (M-3,2)³¹. Customary law, which was in force in Serbia during the first half of the XIX century, was characteristic exactly because of the fines stipulating cutting off of hair and beating of the adulteress.

Magistrate Court in Čuprija on August 6, 1825, convicted Paun Korlanović and ordered him to pay 100 groschen since he, as a married man, engaged in an adultery with a virgin Ruža. Furthermore, Ruža remained pregnant and gave birth to a child. Since the child died after birth "parents of a virgin smartly behaved, fearing of the punishment from two sides, and honestly treated their child, burring him with dignity, while other people also witness that the child

²⁷ V. Bogišić, *Collection of present legal customs of South Slavs, book I*, JAZU Zagreb 1874, p. 184–186.

²⁸ N. Milaš, *book II*, op. cit., p. 402, 392; N. Milaš, *book I*, op. cit., p. 579.

²⁹ T. R. Djordjević, *Village as a court in our customary law*, op. cit., p. 273.

³⁰ M. Vukićević, *Courts and their set-up at the time of uprising between 1804 and 1813*, "Police Bulletin", 1905, nr 29, p. 276.

³¹ A. Solovjev, *Dušan's Code 1349 and 1354*, Belgrade 1980, p. 218–219; A. Solovjev, *The history of Slavic laws, Laws of Stefan Dušan, the emperor of Serbs and Greeks*, Belgrade 1998, p. 490–491.

died naturally, without any foul play at stake". After clearing that a woman had nothing to do with her child's death, and that she only committed adultery, she was fined with 50 whip lashes³². In this case it is important to note how much attention judicial investigative bodies paid to reliably determine whether a child was murdered, since in this case the fine would be much harsher. As stated earlier, parents would also be fined for murder of their child had this been the case, so they, fearing the penalty, buried the child properly. Two years later, on January 23, Magistrate Court in Valjevo convicted Marta to 100 whip lashes for committing adultery with the younger brother of her husband Petar and giving a birth to a female child from this extramarital relation. Petar decided to remain in a family household only until he finds himself a new wife, and he even obtained a letter of release (so-called book of release)³³ from Šabac Archbishop. When a bastard is born in a marriage the husband may release his wife, with an obligation for the lover and wife's father to pay him a compensation determined by the court. In this case, since they all lived together in a family household, this rule was not applied. Petar decided that Marta could stay, and that he would leave the family household³⁴. Seeking of the book of release from the Archbishop falls within the delimitation between jurisdictions of secular and clerical courts in the matters of family rights, while extremely high fine of 100 whip lashes was explained by the court that by doing this, Marta "as older, smarter and more mature let the younger lover upon her"³⁵.

Belgrade Court in two verdicts convicted two adulteresses to exile. The first verdict is from May 28, 1826: "there are two women – Velika, who has a husband in township Grocka – and Stanica, who also has a husband there, but does not live with him; and they have both grossly transgressed. They were the cause of the death of late Živko, who was killed by the gunner. Velika has also previously making adultery offences with Turks, she was arrested here and handed over to her husband to take her back to Grocka, but she ran away from him while he was returning her home and she again ran to Turks gunners. After we sent our guard Stojan to bring her back from Turks she tried to grab the knife from his belt and cut his arm and yelled to Turks for help; she was later tied and brought back to the jail. In consideration of such developments, it was decided for both women to be punished by death". However, since the case of Velika and Stanica was presented to the Grand

³² O. Gavrilović, *Magistrate Court in Čuprija 1815–1865*, Belgrade 1991, no. 108, p. 141–142.

³³ The book of release was issued by the Metropolitan or Archbishop in cases when the marriage divorce was allowed, and it served as a proof that another marriage can be entered into. See footnote no. 22.

³⁴ It is interesting to state an opinion that the number of adulteries in Serbia grows from the moment of dissolution of family unions. V. Erlih, *Yugoslav families in transformation*, Zagreb 1971, p. 311.

³⁵ O. Gavrilović, *Magistrate Court in Valjevo 1815–1865*, Belgrade 1973, no. 56, p. 249–250.

Vizier, he decided on June 2 of the same year “that it would be hideous to punish these two women by death and that it would be better if they would be exiled somewhere that to spill their blood and have them on conscience”³⁶. In the second verdict from January 18, 1828, the court acted upon complaint filed by Gliša from village Veliko Selo: he asks for his wife Ana to be returned to him with whom she has two children, as she ran away from home and when to Turks for the purpose of marrying Topci-Mehmet. For this reason the Grand Vezier was asked to act who, with much difficulties, returned this woman from Turks. When the court informed Gliša and aldermen from Veliko Selo that his wife was returned, aldermen agreed that “they would not be having Gliša’s wife back in the village again, as this was her third time to run away, especially since she was not acting honestly in the village but was doing many fornicating acts”³⁷. It was decided that this woman should be exiled as the village adopted such decision, while Gliša, as he didn’t want to leave his household, changed his mind and decided to get a divorce. Both verdicts show that punishments involving exile (and almost a death penalty) were being adopted for adultery of women with Turks. That this remained the same even during the later period before other courts as well is also shown by the request of duke Miloslav Zdravković (former president of Belgrade Court) filed to the Magistrate Court in Čuprija on April 27, 1832. Miloslav asks Grand duke Miloš to exile local barkeeper Damjan and his wife who committed adultery with Turk Sulejman. This Turk wounded this woman with a gun and fled, but this was not the first time that she causes a fight with Turks because of her “ill behavior... let them go somewhere else, and they should not remain here causing further trouble”³⁸.

Belgrade Court on July 18, 1835 issued a decree to all captains: “Many married women are leaving their husbands in Austria or leaving them here and moving to Austria thus doing a great harm to their husbands, who are not free to get married for the second time if their wives are alive. This is why his grace, our merciful master and our Grand duke decided that each woman who left her husband in Austria, if her husband would want her back, must return back to her husband without any excuse or objection”³⁹. The Grand duke probably issued this decree because many adulteresses were running away to Austria. This is also confirmed by the verdict of Požarevac Magistracy from November 28, 1839, according to which Marija, after eight days spent in prison, was fined with 25 whip lashes. Regardless of the fact that she

³⁶ B. Peruničić, *Belgrade Court 1819–1839*, Belgrade 1964, no. 220, p. 247–248; no. 314, p. 249.

³⁷ B. Peruničić, *Belgrade Court 1819–1839*, op. cit., no. 60, p. 399–400.

³⁸ O. Gavrilović, *Magistrate Court in Čuprija 1815–1865*, op. cit., no. 620, p. 165.

³⁹ B. Peruničić, *Belgrade Court 1819–1839*, op. cit., no. 702, p. 633.

was married, she committed adultery with Ivko Rajković, while the adulterers were caught at the moment when they were trying to flee to Austria⁴⁰. There is also an interesting verdict adopted on May 30 of the same year, as Bogdana filed a lawsuit against her husband Bogdan, complaining that he allegedly unjustly beat her. However, Požarevac Magistracy determined that Bogdana deserved this beating as she was constantly going out and committing adultery, so the court fined her with 10 whip lashes⁴¹.

Two more verdicts confirm that clerical courts were competent for marriage dissolution cases. Namely, on October 4, 1843, Petar Martić filed a suit against his wife Nara because she was not doing anything around the house and was constantly going out, committing adultery, speaking to him in a foul language before aldermen. The court decided that Nara, after spending two days in prison, should be fined with 25 whip lashes and to become a good wife to her husband "and if this proves to be impossible and if there is no improvement in the future, as the described by the holy marriage, they should turn themselves to the competent clerical authority with their problems"⁴². In the second verdict from March 4, 1837, Magistrate Court in Valjevo fined with a 25 stick beating both Pantelija and Ilinka, wife of his neighbor. The verdict also states that Ilinka and her husband, along with Pantelija, are to be sent to the competent Episcopo "since solution to this case falls into the jurisdiction of clerical authority, and she should be deciding in this case"⁴³. However, the verdict of February 11, 1829, testifies that there was no final demarcation of jurisdictions between secular and clerical courts in the segment of marital law. Namely, Grand People's Court after three days of attempts to reconcile Toma Stojković from Belgrade and his wife Hristina decided "for the marital union to be dissolved and Toma's house in Belgrade to be left to his wife Hristina and children, while other Toma's assets are to be left to him to enjoy... and he should leave the house and his wife to live in peace". The request for marriage dissolution was filed by Toma because of wife's adultery, but the court in the meantime determined that he was a bad man who beat his wife with a log for no reason during any given time of day or night, commits adultery and even brings to his home his mistresses. During all three attempts at reconciliation Hristina was asking for forgiveness from her husband and did not wish to get a divorce, but the court in its justification stated that it was divorcing this married couple for the fear that some greater evil might happen between them

⁴⁰ S. Maksimović, *Trials in Principality of Serbia before written laws from the archive of Požarevac Magistrate*, op. cit., no. 977, p. 133.

⁴¹ S. Maksimović, *Trials in Principality of Serbia before written laws from the archive of Požarevac Magistrate*, op. cit., no. 747, p. 128.

⁴² S. Maksimović, op. cit., no. 302, p. 171.

⁴³ O. Gavrilović, *Magistrate Court in Valjevo 1815–1865*, op. cit., no. 349/1837, p. 281.

and in order to prevent a potential murder⁴⁴. This verdict disputes the finding of authors who say that in the period of the Second Uprising, more precisely since Karadjordje's reform from 1811, there was a definitive demarcation between the competence of secular and clerical courts in the matters of marital disputes⁴⁵.

It can be concluded from mentioned verdicts in cases of adultery that the penal policy enforced by Karadjordje was milder compared to Grand duke Miloš's penal policy. At the time of Grand duke Miloš's rule, on the basis of preserved rulings, it can be seen that in the period between 1825 and 1828 punishing of adulteresses covered 50 to 100 whip lashes or the fine included exile in cases when women were committing adultery with Turks. The period between 1837 and 1843 is characterized by milder penal policy which is similar to the one from the time of Karadjordje's rule (fines of 25 whip lashes), and even milder (10 whip lashes, 25 sticks), but with a one difference – aside from whipping punishments jail terms were also frequent, but only for a short periods.

As far as fornication is concerned, St. Vasil the Great in the canonic rule no. 26 stresses that fornication (unmarried life) is not a marriage or a foundation for marriage, while those living in such relations should separate as soon as possible, "and if they wouldn't, then they should stay together so they would not generate a greater evil" (this probably relates to unmarried couples), but in this case they ought to be punished with a fine stipulated for fornication. Aside from concubinage, the church also considered the following cases as a form of fornication: when a woman enters marital relations with a man for which she didn't know that he was previously left by his wife, while such wife later returns to her husband, after which the original marriage resumes, so the second wife is therefore guilty of fornications, even though out of ignorance; and when a woman fornicates with a relative, two brothers or a eunuch. The fornicator shall be fined with nine years of confession deprivation as per the 4th rule of the St. Gregory of Nyssa, with seven years as per 59th rule of the St. Vasil the Great (with an explanation that she ought to cry for two years, to listen for three years, to belong for two years, to stand among believers for one year, and can get a communion in the eighth year), and with three years as per the 24th rule of the St. John the Faster with an obligation to fast each day (she is allowed to eat a non-cooked and non-seasoned meal in the evening alone) and does five hundred prayers. With precisely set rules for fornication and adultery St. John the Faster also adds the rule 13 which states

⁴⁴ B. Peruničić, *Belgrade Court 1819–1839*, op. cit., no. 27, p. 426–429.

⁴⁵ Mirković thinks that from the time of the Second Serbian Uprising the matter of the marital right was undoubtedly in the competence of the Orthodox Church. Z. S. Mirković, *Karadjordje's Code (criminal, family and state law during the uprising period in Serbia)*, Belgrade 2008, p. 127.

that epythmy also covers women which come in to contact with men and kiss them, even though they have no bodily transgressions⁴⁶. This rule matches Miloš's "Decree on villages and parties", which stipulates fines in the case when men meet women at gatherings "to spin wool or do something else".

A girl which acted in a fornicating manner usually got married to some poor man or widower, frequently far away from her village, and in worst cases, a young man and woman who transgressed in this way would be banished from the community or stoned. Mr Djordjevic even mentions the case from town Risan where a priest, adopting a decision on young offenders on the basis of Nomocanon, ordered for them to be stoned, while the execution of this punishment was supposed to be initiated and first stones thrown by parents of those sentenced to death⁴⁷.

At the time of the First Uprising, Šabac Magistracy adopted different verdicts in three cases of the criminal act of fornication. In the verdict from May 20, 1808 the court harshly fined the fornication between Stevan Mihajlović and Andjelija Živanović with 100 sticks to the boy and 50 whip lashes for the girl, threatening them with drowning in case they repeat the same crime. In the same year, on August 25, "we tried Pavo Jekšerić and Marko's daughter from village Brdarica, who had fornicated with Pavo as her uncle. They were also caught before when they lied to the girl's father Marko and priest Janko that they were stolen 500 ducats, after which they were both given 200 sticks. In spite of this they wouldn't join the righteous way, but Pavo went on Saint Elijah day for her and took her half way to town Valjevo, and they again fornicated, and on third occasion Pavo hired a dray and went from Šabac for her to Brdarica, and took her over night from her father and mother, wanting to flee to Austria with her, but her father learned of this plan and told us. This is why we issued the following verdict: girl should be sent home, and no one should speak ill to her, while Pavo should is to be sent to Belgrade jail". One year later, on July 4, Arsen Rakić reported to the court that girl Marija came to him without any force. After the questioning of aldermen from Šabac county and Marija, the court concluded that no force was exerted in this case, which is why the court allowed for Arsen and Marija to get married⁴⁸. In this case the matter of the marriage law was in the competence of the secular court.

At the time of the Second Uprising the verdict of the Belgrade Court stands out, which was adopted on August 18, 1819, which states that Nikola and Andjelija have confessed to the fornication without force, for which Nikola

⁴⁶ N. Milaš, *Rules of the Orthodox Church with explanations, book II*, op. cit., p. 382, 400, 408, 506, 507, 509, 519.

⁴⁷ T. R. Djordjević, *Innocence of girls in our people*, "Ethnographic Museum Bulletin" 1928, nr 3, p. 15.

⁴⁸ R. Popović, *Protocol and register of Šabac Magistracy between 1808 and 1812*, op. cit., no. 163, p. 38; no. 339, p. 58; no. 587, p. 99.

was ordered to pay Andjelija the sum of 100 groschen⁴⁹. Almost ten years later, before the same court, on January 13, 1828, Marija Vlainja from Savska mala, was fined with 12 whip lashes because of fornication with an unmarried man Djordje Vasiljević⁵⁰.

The cooperation between clerical and secular authorities in prevention of fornication is also witnessed by the letter of the Episcopo of Belgrade Archdiocese Petar Joanović sent to Belgrade Court on February 24, 1838 in which it is asked for the court to undertake measures against this criminal act. The Episcopo in his letter states the names of fifteen couples for which the Consistory determined and established that they committed fornication. Some of these relations resulted in the birth of children, which is why "the Glorious Grand duke's Magistracy is being herewith kindly asked to bring the above-named individuals to the court and oblige them to give up their fornicating life by separating them and threatening them with harsh bodily fines, thus prohibiting them from ever again living in fornication, while taking into consideration that some of these individuals could eventually get married, which is why they should be ordered that for this reason they should appear either before the Consistory or the local Protospresbyter Josif Stefanović"⁵¹.

Tragic consequences of fornication are also witnessed by a verdict dated November 19, 1839, adopted by the Magistrate Court in Valjevo. Namely, Marko Stepanović, a widower, engaged in fornication with his stepdaughters Jovana and Ivana. They both remained pregnant with him, while Jovana, who got married in the meantime, hung herself from shame, while Ivana, after being given a gunpowder to drink by Marko during her pregnancy, had a stillbirth and threw her dead infant to pigs, after which she got married to Mitar Vukašinić. The court decided that Marko should be fined with a year in prison shackles after which he should undergo six rounds of whipping by three hundred men, while Ivana is ought to get 50 whips. The Appellate Court increased the fine to Marko asking that he should undergo ten rounds of whipping by three hundred men after serving jail term in shackles, while Ivana was left with the same punishment. Grand duke's regents in their decision were prone to a more lenient solution and ruled that a verdict of the Magistrate Court in Valjevo should be executed, after which the Court of Appeals delivered this ruling to the Magistrate Court in Valjevo and approved execution of the verdict⁵². Therefore, Ivana who committed the crimes of fornication and infanticide got the punishment of 50 whip lashes. Before the same court,

⁴⁹ B. Peruničić, *Belgrade Court 1819–1839*, op. cit., no. 395, p. 69.

⁵⁰ B. Peruničić, op. cit., no. 51, p. 399.

⁵¹ B. Peruničić, op. cit., no. 104, p. 371.

⁵² O. Gavrilović, *Valjevo Magistrate Court 1815–1865*, op. cit., no. 2228, 361, 1380, 2317, 657/1839, p. 293–301.

on April 18, 1846, Milivoje Cesarović and Manda, the widow of late Marko Cesarović, were accused of fornication as they got a male child born in fornication. Brother-in-law and sister-in-law got the same fines: six months in jail “first in chains and the other one in shackles” and with 50 lashes (sticks for him, whip for her) out of which 25 at the beginning of the jail term and 25 at the end. The Appellate Court has upheld the verdict⁵³.

That not only female adulteresses were running away to Austria is confirmed by the verdict from April 16, 1841 adopted after a trial before Požarevac Magistracy. Janko Nikolić and Stojadin Milosavljević have proposed to their girls Stana and Anka, but because of kinship the clerical authorities could not provide consent to and perform such marriage. For this reason they succeeded in finding people who would help them flee to Austria, get married there, and return upon wedding. All of them confessed to their guilt and the court decided the following: Janko and Stojadin are to receive 25 sticks each and a month in jail in shackles, while Stana and Anka are to get 20 whip lashes each, and then return to their parents⁵⁴. As the obstacle for conclusion of the marriage is kinship, it is possible that the Magistracy in Požarevac stood and upheld the measures which were requested against fornication by the Episcopo of Belgrade in 1838, so in accordance with such request the court fined the fornicators. That such measures were necessary is also shown by the following verdict before the same court adopted on May 26, 1841. Pavle Roškić, Mijat Budimirović and Jovo Kokorić have committed fornication with the virgin Marija from the village Melnice, while this shameful act was mediated by Marija's older cousin Pavle Martinović and neighbor Janoš Musija. Not knowing with whom of these three men she got pregnant with Marija had an abortion. This is why the court decided to punish her with 30 whip lashes, while fornicators and panders were punished with 30 stick strikes each⁵⁵. The verdict from February 16, 1844 shows how differently the court acted in a similar case. Namely, Marta remained pregnant by fornicating with her boyfriend Stojadin Bogdanović and had an abortion. Požarevac Magistracy reached a decision to let her free because she believed that Stojadin would marry her and got married to another man in the meantime, while Stojadin was ordered to pay the girl and competent aldermen 3 ducats⁵⁶. Almost thirty years earlier the verdict of Belgrade Court issued only a financial fine, which was paid by the fornicator the same as in this case. The time period between these two verdicts

⁵³ O. Gavrilović, op. cit., no. 1282, 89/847, p. 314–315.

⁵⁴ S. Maksimović, *Trials in the Principality of Serbia before written laws from the archive of Požarevac Magistracy*, op. cit., no. 117, p. 143–144.

⁵⁵ S. Maksimović, op. cit., no. 204, p. 145–146.

⁵⁶ S. Maksimović, *Trials in the Principality of Serbia before written laws from the archive of Požarevac Magistracy*, op. cit., no. 34, p. 172–173.

is rich with examples of harsh fines, both for male fornicators (from lashes by three hundred men, jail term ranging between one month to one year in chains or shackles to stick beating of 25–50 strikes), and female fornicators, who were most frequently punished by 12 to 50 whip lashes and a jail term in shackles.

If we adopt the definition of the Orthodox Church according to which the fornication represents an act which “happens with an individual not tied in a marriage, and is thus not offending the third party”, we can say that this frame also partially includes the prostitution. Selling women for money is mentioned among the residents of village Takovo where so-called “Friday women” existed – women who went on Friday (market day in town Gornji Milanovac) “to allegedly sell something on the market, but actually went to Gornji Milanovac to sell themselves for money and gifts in kind”⁵⁷. Women prostitutes were called bad names and were morally considered as a fallen person with no place among other women, but responses from Mr Bogišić’s “Materials” state that such women were being mildly punished, or not punished at all: “there is a lot of public fornication, which is generally known; but as no one is reporting this to authorities, it goes on unpunished... This type of activity should be more severely punished in district Zemun, where there are a lot of inns, in which women fornicators operate in backrooms”⁵⁸.

The “Police Directive Act” of May 27, 1850, in its fourth chapter (Articles 27–30) stipulates fines in cases of public fornication: for “women” and their panders the jail fine of 3 to 12 days, and if “caught for the third time in this offence, they should be fined more severely, and then exiled from the place for a period of 3 to 12 months”; and also for “innkeepers, who provide the opportunity for fornication” to pay a financial penalty of 5 to 10 thalers⁵⁹. The fine of exile which was defined by Mihailo Obrenović in this decree remained in force only in the case of repeated offence, while jail term and financial fines represent novelties, but because of the short time period and small financial amounts, it can be concluded that the custom and existing laws did not differ much when it comes to the prostitution. In the case of adultery, the Article 33 determines the following: “A man who illegally lives with someone else’s wife or girlfriend should be sent to a police detention and fined with a jail term of 6 to 12 days, while such woman or girlfriend should be sent home, to her husband or parents, or if she has no home, she should be exiled to another country”. From materials on legal customs it can be seen that women being forcefully returned to their husbands or parents in the case of adultery were

⁵⁷ M. Filipović, *Residents of Takovo, Ethnological observations, Serbian Ethnographic Collection LXXX, Discussions and materials 7*, SANU Belgrade 1972, p. 63.

⁵⁸ V. Bogišić, *Materials from replies from various parts of the Slavic south*, op. cit., p. 577.

⁵⁹ T. Živanović, *Legal sources of Serbian criminal law and his historic development and the development of criminal justice between 1804 and 1865*, op. cit., p. 232.

yet to face the fine, as the village was then due to try this matter. According to Mr Bogišić, one adulteress was stoned near town Leskovac: "A man, who has transgressed with her, was forced to climb her on his back and take her to the streets, while anyone who was passing by was spitting her and throwing rocks at her until she expired. Even her dead body was not spared, but was buried without priest and outside of the wings of church"⁶⁰. As far as exile of women without home is concerned, this is covered by the case which is defined by the Orthodox Church as an act of adultery: when a man drives his wife off, and she starts living with another man. Regardless of the fact that her husband has forced her to live in adultery, she was nevertheless called an adulteress.

Not a single legal act in the time of Miloš does not include all listed fines which could be imposed on convicted individuals. As opposed to him, Mihailo Obrenović in his "Set-up of county courts" from January 26, 1840, in Article 22 lists in detail all stipulated fines: "death penalty, life in prison, eternal or temporary incarceration, temporary servitude with light or heavy iron or without iron, light public imprisonment or domestic incarceration, body punishment, which will be consisted of stick hits on buttocks up to 100 hits in total, and no more than 50 at once, or whip lashes up to the same count; financial fines, which will be ordered for smaller offences, which would not carry a fine of more than 25 sticks, or a prison term longer than one month, and can not be higher than 25 thalers"⁶¹. From the listed fines from court verdicts at disposal it can be seen that women were most frequently fined with body punishments including whip lashes and as the mentioned Article 22 states the maximum count were 100, two times of 50 whip lashes. Police Act of May 18, 1850 stipulates (Article 49, Item 3): "If by law a body punishment is ordered, but if it is determined that a transgressor because of some weakness or disease or some personal body condition, such is the case of pregnancy of women, can not endure such punishment; then such punishment shall be replaced with a comparative jail time which can be simple or strict"⁶². Three years later and after adoption of the Law on replacement of body punishments from January 31, the court was authorized to divide whiplashing punishment into four instances (Article 9), while police authorities were ordered to medically examine each convict scheduled to undergo physical punishment before it is executed, so it could be determined whether the convict is able to stand it, and if not, than such fine shall be replaced with another one (Article 18). The same Act stipulates (Articles 9–14) the following: the fine of 10 whip lashes shall be replaced

⁶⁰ V. Bogišić, *Materials from replies from various parts of the Slavic south*, op. cit., p. 535.

⁶¹ T. Živanović, *Legal sources of Serbian criminal law and his historic development and the development of criminal justice between 1804 and 1865*, op. cit., p. 145.

⁶² T. Živanović, op. cit., p. 226.

with a 15-day prison term, the fine of 20 whip lashes shall be replaced with a 2-month prison term, the fine of 40 whip lashes shall be replaced with an 8-month prison term, while the fine of 100 whip lashes shall be replaced with 12 months of heavy iron jail term⁶³.

3. Conclusion

Issues pertaining to marriage law fall within authority of Magistrate Courts starting from the First Upraise and these courts acted in accordance with canonic rule which says that adultery is the only reason on the basis of which a couple could be unmarried. A couple would most frequently be unmarried in accordance with canonic regulations, since it was the only way for a man to be legally free to establish a new marital union. Clerical courts have been constituted since 1807 while from the Šabac Magistrate Court judgments could be seen that the issues pertaining to marriage law remained within authority of Magistrate Courts until the judicial reform in 1811. Opinion prevailing in science says that after the said Reform, issues of marriage law were regulated by clerical courts only, but a Grand People's Court judgment on divorce of a couple from 1829 confutes this. By passing decisions related to offences of adultery the courts were acting in accordance with legal regulations (couples were to remain married regardless to the fact of adultery), canons (divorce was permitted while entering the second marriage was not allowed) and customary law (when a husband releases his wife he is obliged to pay her for allowance). With regard to punishments for offences of adultery, courts strictly adhered to legal regulations (Miloš stipulated corporal punishment, Mihailo – sentence of exile, while Aleksandar Karadjordjević in his "Punishment Law for crimes to be dealt by police" stipulates imprisonment). The most frequent was the whipping sentence (10 to 100 whips), which was sometimes established as a single punishment, or jointly with imprisonment (2 to 8 days). The sentence of exile was awarded in cases where an adulteress's affair was conducted with Turks, and there is such example that the court, at the request of the rural mayor, appointed exile because the village no longer wanted the adulteress to remain. Even a case of a liberating judgment was recorded, due to exceptional circumstances since the adulteress had six children, but women from the village gathered and stoned her to death. Such examples prove the influence of the village court. According to the recorded traditions adulteresses were stoned, haircut, beaten or bound to pass through the village. So if the village did not kill the adulteress, she would be exposed to public ridicule.

⁶³ T. Živanović, *Legal sources of Serbian criminal law and his historic development and the development of criminal justice between 1804 and 1865*, op. cit., p. 289–292.

As for fornication, legal regulations mention general formulation “to be strictly punished”, except for cases of fornication in public (prostitution), where 3–12 years imprisonment was stipulated as well as the sentence of exile. Fornicators were most frequently awarded the sentence of whipping (12 to 50), and several cases of fornicator deliberation were recorded regardless to the fact of committed fornication. There were two specific judgments, the first judgment, in addition to 50 whips, warns the adulteress they would be thrown into water in case of duplicative fornication. The second judgment, in addition to 50 whips, awards the adulteress with 6 months of hard labor in double shackles. Lack of legal regulations related to this crime is probably the reason for such difference in appointing judgments. If misbehavior of a girl had been discovered before her marriage, she would be exposed to a laughingstock (she and her entire family), chances for a regular marriage of such offender were minimal, and the most violent reaction of the village was to stone or exile offenders. Statements of Mr Bogišić suggest that in cases of fornication the customary law requires application of canonic rules.

Punishment should be treated as obligatory consequence of a criminal act and should not be wearing a vengeful character. However, according to the court ruling in the case of sexual promiscuity and adultery, the most important feature of the sentence was not characteristic which distinguished Serbian criminal law to punish women during the first half of the nineteenth century.

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