THE DILEMMA OF AMNESTY POLITICS IN THE AKP ERA:

BALANCING THE QUESTIONS OF LEGITIMACY AND INSTRUMENTALITY

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DECLARATION OF ORIGINALITY

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ABSTRACT

The Dilemma of Amnesty Politics in the AKP Era:

Balancing the Questions of Legitimacy and Instrumentality

The Ankara Bar Association Human Rights Commission (*Ankara Barosu İnsan Hakları Komisyonu*) underlines that 158 amnesties in total, except for the 1999 Conditional Release Law, were legislated in Turkey before the AKP period, and 12 of these laws were general amnesties. Regarding the content of these laws, the Turkish state has tended to release the prisoners who commit petty crimes having a non-political character. However, the continuity in the use of amnesty mechanism in Turkey was broken at a certain historical moment: the beginning of the Justice and Development Party (AKP) era. For the first time, the ruling party has officially declared its disapproval of general amnesty, especially for crimes against individuals. This thesis aims to examine why general amnesty, as a long-term phenomenon in Turkey, has not been applied during the AKP period. Following the introductory Chapter One, Chapter Two looks into how three premises of neoliberal penality are used in the AKP era for an effective struggle against crime: punitiveness, responsibilization and managerialism. Chapter Three examines the ways in which the AKP government copes with the problems facing the judicial system of Turkey, i.e. high incarceration rates, and the high workload of the judiciary, without the amnesty option. Chapter Four explores the controversial debate on the legitimacy of amnesty by interrogating the AKP's alternative moral stance on amnesty, whereas Chapter Five concludes the thesis. Briefly, this thesis develops insight into the AKP's policy on amnesty circumscribed by both the questions of legitimacy and instrumentality, as well as by the dynamics of political conjuncture.

ÖZET

AKP Döneminde Af Politikası Açmazı:

Meşruiyet ve Araçsallık Sorularını Dengede Tutmak

Ankara Barosu İnsan Hakları Komisyonu'nun 2000 yılında yayınladığı rapora göre, kamuoyunda *Rahşan* Affı olarak bilinen 1999 Şartlı Salıverme Yasası haricinde Türkiye'de, 12'si genel af olmak üzere toplam 158 tane af yasası geçirilmiştir. Bu yasaların içeriğine bakıldığında ise devletin çoğunlukla politik karakteri olmayan *sıradan* suçları affetme eğiliminde olduğunu görmekteyiz. Ancak af mekanizmasının Türkiye'deki bu seyrinde önemli bir kırılma noktası yaşanmıştır: Adalet ve Kalkınma Partisi'nin iktidara gelişi. Türkiye'de ilk kez bir iktidar partisi, özellikle bireye yönelik suçlarda genel affa sıcak bakmadığını deklare etmiştir. Bu tez affa ilişkin devlet politikasındaki bu dönüşüme bakarak, bu zamana dek Türkiye'de olağanüstü sıklıkla kullanılan affa AKP Döneminde neden başvurulmadığını ve affın yokluğunda ceza adaleti sisteminin nasıl idare edildiğini sorunsallaştırmaktadır. Giriş niteliğindeki Birinci Bölüm'den sonraki İkinci Bölüm, neoliberal hukuksallığın üç veçhesini hükümetin suçla etkin mücadele perspektifinden bakarak anlamaya çalışmaktadır: cezalandırıcılık, sorumlulaştırma, yönetimsellik. Üçüncü Bölüm AKP'nin Türkiye'de adalet sisteminin başlıca iki sorunuyla, cezaevlerinin doluluğu ve yargının iş yükü, direkt olarak affa başvurmadan nasıl baş ettiğini analiz etmektedir. Dördüncü Bölüm Türkiye'de af tartışmalarının zeminindeki meşruiyet sorunsalını, hükümetin affa ilişkin alternatif ahlaki tavrını merkeze alarak incelemekteyken Beşinci Bölüm tezi noktalamaktadır. Kısaca, bu tez hem politik konjonktürün dinamikleriyle hem de araçsallık ve meşruiyet sorularıyla çevrelenmiş olan AKP dönemi af politikasını açıklamayı amaçlamaktadır.

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CHAPTER 1

INTRODUCTION

The broad use of the term amnesty refers to a legal initiative whereby a certain group of people who have committed a criminal offense are granted immunity from prosecution by the state. According to Krapp (2005), amnesty is not a denial of punishable acts, nor is it an excuse or a way of removing legal grounds. Amnesty proper only means that despite the specific act, no prosecution and no expected consequences are to follow (p. 193). The decision to offer such a blanket abolition of criminal offenses in very exceptional circumstances is at the discretion of judicio-political authorities. For instance, the Grand National Assembly of Turkey has a constitutional right to grant amnesty.[1] This suggests that the power to enact an amnesty law lies with the legislative organs in Turkey, rather than with the judicial branch of the state, which has always fostered a heated debate on the extra-legal and/or political status of amnesty. Another key point to underline is the extraordinary frequency of amnesty laws in Turkey. The Amnesty History Report (2004), published by the Ankara Chamber of Commerce (*Ankara Ticaret Odası*), reveals that Turkey shattered a record which is considerably hard to be broken in the sense that more than 100 amnesty laws were introduced under different names throughout the history of Turkish Republic. The Ankara Bar Association Human Rights Commission (*Ankara Barosu İnsan Hakları Komisyonu*) also underlines

[1] For the Article 87 of the Turkish Constitution: "The duties and powers of the Grand National Assembly of Turkey are to enact, amend, and repeal laws…to decide with the majority of three-fifths of the Grand National Assembly of Turkey to proclaim amnesty and pardon" Available from: https://global.tbmm.gov.tr/docs/constitution_en.pdf

that 158 amnesties in total, except for the 1999 Conditional Release Law known as the Rahşan Pardon, have been legislated in Turkey until now,[2] and 12 of these laws are general amnesties (Cengiz & Gazialem, 2000). In the light of these facts, I argue that amnesty has been the rule rather than the exception in the political history of Turkey, i.e. a widely-used legal mechanism which is normally supposed to be a rare phenomenon. In terms of the content and implementation of these amnesty laws, the Turkish state has tended to release prisoners who commit petty crimes having a non-political character. Indeed, a series of amnesties for students dropping out of their universities, disciplinary punishments of civil servants, press crimes and tax debts were extensively introduced in Turkey. Even before 2001, political crimes defined in Article 14 of the Turkish Constitution were exempted from the scope of amnesty (Aydın, 2006, p. 15). Of course, amnesties for those convicted of political offenses, especially state officials, were enacted in Turkey, supported by plausible-sounding excuses.[3] Compared with non-political crimes, nonetheless, political offenses have been rarely added to the scope of amnesty laws up until the AKP period in Turkey. This stance contrasts with the amnesty policies of many European countries whose primary aim in appealing to amnesty for political offenders is to facilitate political reconciliation. Unlike in the Turkish case, the Greek 1975 Constitution restricted the power of the Greek Parliament to grant amnesty

[2] In fact, 204 amnesties are regarded in the article, but this number includes the amnesty laws enacted since 1921. However, I decided to count the amnesties granted since the establishment of the Turkish Republic in 1923.

[3] Some examples: In 1960 those convicted of staging the 27 May coup d'état were forgiven with the excuse that this crime had been committed for the sake of liberty. Moreover, in 1962, a partial amnesty was offered for some officials of the Democrat Party who had been accused of violating the Constitution, since the fragmentation of politicians due to the hot debate revolving around this amnesty had made the government increasingly unworkable.

only for political crimes, and granting an amnesty for petty crimes was forbidden (Gözler, 2001, p. 315).

Amnesty is an excessively-used legal mechanism covering primarily non-political offenses in the Turkish judicial system. This continuity in the implementation of amnesty program in Turkey, however, was broken at a certain historical moment: the beginning of the Justice and Development Party (AKP) era. For the first time in the Turkish politics, the ruling party officially declared its disapproval of general amnesty. President Recep Tayyip Erdoğan has indicated insistently that any general amnesty is out of question for the AKP government (2003):[4]

> For a long time, I have said 'There is no such thing as general amnesty on our agenda'. I have said it so many times. I am telling you my dreams, you are talking about general amnesty. There is no such thing, definitely not (See Appendix, 1).

In contrast to past practices, the AKP officials emphasize that it is possible for their party to work on a legislation for amnesty as long as it covers only crimes against the state, as Nihat Ergün, the Former Minister of Science, Industry and Technology asserts (Esendemir, 2011):

> Forgiving certain crimes will not be the right thing to do. We [the Parliament] cannot forgive the offenses against the person and the community…The amnesty option can always be brought up for crimes against the state (See Appendix, 2).

The AKP's argument that the state has the right to forgive only crimes against its own existence contradicts prior historical tendencies to use the mechanism of amnesty in

[4] Recep Tayyip Erdoğan made this statement when he was the Prime Minister of Turkey, and the head of the AKP. "Erdoğan'dan 'genel af' açıklaması", *Milliyet*, 19 November 2013, http://www.milliyet.com.tr/erdogan-dan-genel-af-aciklamasi/siyaset/detay/1794504/default.htm

Turkey. There is no doubt that this refers to an important puzzle or an anomalic case which is worth investigating. Until the AKP era, the predominant trend was mostly towards appealing to amnesty for non-political offenses in a frequent manner. There has been a kind of paradigm shift, however, in terms of state-led discourses and practices on amnesty during the AKP period. This thesis aims to capture the core of that shift by examining the basic tenets of the AKP's amnesty policy.

Most studies in the field of amnesty have centered around the question of transitional justice, mainly due to the increasing attention, within the international community, on the post-conflict societies. In their comparative study on Latin American amnesties, Popkin and Bhuta (1999) explore the demands of reconciliation in the new democratic, post-war governments followed by the end of authoritarian rule and/or by the termination of internal armed conflicts. To alleviate the tension of this fragile political environment, amnesty serves as a tool for peacebuilding. Furthermore, Lessa and Payne (2012) argue that two key positions can be recognized in relation to amnesties. The first view is that amnesties have acted as a block to democracy, since they perpetuate impunity, which makes them incompatible with the international human rights law. The second view is that the phenomenon of amnesty refers to a necessary evil, since they have functioned as a useful tool for conflict resolution in countries undergoing the period of transition. As Gülener (2012) reveals in his research on the mechanisms of transitional justice, amnesty is the most commonly used tool as a post-conflict modality in the sense that 72 countries under a transition period have appealed to amnesty 229 times (p. 52). Likewise, Mallinder (2010) made a global comparison of amnesties all around the world through constructing a comprehensive Amnesty Law

Database. This database contains data on analyzing the trends in the use of amnesties in all regions of the world, but it is limited to exploring the use of amnesty in the context of civil unrest, military coups, international or internal conflict and/or authoritarian governments. Hence, the beneficiaries of these laws are the armed forces of a state, public officials, political prisoners and refugees. The amnesty debate in Turkey, however, has revolved around different questions and concerns. The primary objective of amnesty programs up to now has been to forgive the citizens' criminal acts, rather than to grant amnesty for the previous regimes in charge of committing state crimes. Moreover, a series of amnesty laws enacted until the AKP period have not directed towards the aim of ending internal ethnic conflict in Turkey. To put it another way, a large-scale political amnesty has never been systematically deployed as a modality of transitional justice. Of course, there has always been a heated debate on political amnesty in Turkey, especially in terms of the systematic release of Kurdish prisoners. In state-led practices, however, an amnesty law with this specific purpose has not been the case in Turkey until the AKP era.[5] I have raised an argument at this juncture that the main goal which has led to the excessive use of amnesties in Turkey is not to restore the dynamics of political reconciliation. Rather, the judicio-political authorities have fallen back upon amnesty when they failed to come to grips with the urgent needs of the Turkish judicial system to function properly. Relative to other countries appealing to

[5] In line with the AKP's argument that amnesty should be granted only to crimes against the state itself, however, many Kurdish political offenders benefited from the "Etkin Pişmanlık Yasası" legislated via changes in the Struggle Against Terrorism Law in 2005. For a detailed analysis of this legislative change, see: Volkan Aytar, *Towards a darker Future? Amendments to the anti-terror law*, Istanbul: TESEV Yayınları, 2006.

amnesty, the underlying logic behind the use of this mechanism has thus pointed to a divergent set of purposes and considerations in Turkey.

Jehle and Wade (2006) explore, using a comparative perspective, how different European countries initiate reforms to cope with the overloaded character of their criminal justice system (pp. 5-6). They emphasize that a heavy workload has been a challenge facing judicial systems across Europe. Amnesty is not envisaged in this book, however, as a systematic solution to tackle this caseload problem. This suggests that Turkey constitutes a discrete case by regarding amnesty as a standard, conventional remedy to fix the malfunctioning legal system, at least until the AKP period. Moreover, the existence of periodically granted amnesties is not representative of the state's penal tolerance in Turkey. The excessive numbers of amnesty laws up until the AKP era neither reflect the state's forgiveness nor do they indicate that the Turkish state has lenient ways to deal with crime. Rather, the number of condemned and jailed people has always been significantly high in Turkey,[6] which has ultimately made amnesty indispensable for alleviating the overloaded criminal justice system. According to Schmitt (2005), all significant concepts pertaining to the theory of the modern state are secularized theological notions in the sense that the omnipotent God has become the omnipotent lawgiver (p. 36). The exception in jurisprudence in this framework is tantamount to the miracle in theology. In Turkey, amnesty has always been employed as an emergency button from which the officials have expected to repair the dysfunctional judicial system. The decision-makers who agree on this exception, that is, those who

[6] The current prison population is 179.611, and the current prison population rate is 228 in Turkey. ICPS (International Centre for Prison Studies), *World Prison Brief*, available (online): http://www.prisonstudies.org/country/turkey

enact amnesty laws or determine the scope of prospective amnesties, have made this unusual mechanism something normal in Turkey.

There have been mainly two interrelated problems facing the current judicial system of Turkey: high incarceration rates, and the high workload of the judiciary. Prior to the AKP period, amnesty frequently functioned, as a crucial remedy for resolving these problems. Nonetheless, the AKP government has not yet appealed to a general amnesty to overcome these problems. The problematic functioning of the judicial system is still a relevant phenomenon in Turkey. The continuing existence of legal problems has signaled a challenge which must be met by the current government, too. Hence, this thesis addresses the following questions: How does the AKP manage to organize the legal system without utilizing the amnesty option? What options have they tried to operationalize during the AKP period for coping with the aforementioned operational problems? The purpose of this thesis is not simply to point out the anomalic absence of general amnesty in the current political climate of Turkey, but also to find out the AKP's alternative ways of compensating for this absence when handling the ongoing problems of the Turkish judicial system. In other words, the whole issue is not what the AKP has not done yet, rather what the government has done *instead of* appealing to amnesty. The mentality shift concerning the phenomenon of amnesty in the AKP era, when more subtle or indirect ways of amnesty have been deployed, has also something to do with how the state-criminal relations have been perceived by the government, or with the question of how to deal with crime by the state-led agencies. The amnesty policy has thus been a direct reflection of how the state punishes the citizens, not simply how it forgives them.

On the basis of this general framework about the dynamics of amnesty in Turkish history, it is necessary to delve more deeply into the basic question under scrutiny in this thesis: Why has the AKP era been an exception to the previous general trend to use in amnesty laws? More explicitly, why has the ruling party of Turkey not granted a general amnesty? Furthermore, why has it approved of forgiving only crimes against state? According to Beccaria ([1794] 1986), a legal system must guarantee that all criminal offenses will be inevitably sanctioned under the criminal code. However, amnesty has violated the principle of recidivism, since it paves the way for future crimes by corroborating the idea that some crimes can be granted immunity from prosecution.[7] However, the Turkish Statistical Institute (*Türkiye İstatistik Kurumu* - TURKSTAT) (2013) reveals that there have been only 2,211 convicts (out of 161,711 received into prison in total) whose criminal acts resulted in re-arrest, reconviction or return to prison with a new crime in 2013 (p. 28). The number of convicts who previously benefited from amnesty is only 86, and those having a previously suspended sentence is 118. Considering this statistical data, the concern for recidivism cannot be the primary reason why the AKP government has been reluctant to introduce a general amnesty. This suggests that the efforts at grasping the AKP's amnesty policy need further explanations.

This thesis is divided into three basic parts to examine the AKP government's stance on amnesty in a systematic way. The first chapter takes account of the neoliberal attitude in the AKP's penal discourses and practices, which has had a key role in shaping its perspective towards amnesty. I examine three main premises of neoliberal penality in

[7] The phenomenon of "recidivism" refers to a person's relapse into criminal behavior after he or she receives sanctions or undergoes intervention for a previous crime.

the AKP era while considering the amnesty debate in Turkey: punitiveness, responsibilization and managerialism. To begin with, I underline the punitive attitude of the Turkish state in its crime control strategies. High incarceration rates prove that prisons and detention houses have not lost their importance in the operations of the Turkish penal system. However, the AKP government has developed alternative crime execution methods such as the introduction of conditional liberty, which refers to the expansion of the penal net in Turkey. I claim that the current government is reluctant to give up its authority to punish, for an effective struggle against crime, by releasing prisoners on a mass scale through a general amnesty law. Then, I scrutinize how the responsibilization strategy of the neoliberal penality has operated in the Turkish criminal justice system. The AKP government has officially declared its disapproval of granting amnesty for those who commit crimes against the individuals. In line with this stance, the offenders have been forced to take the full responsibility for their criminal acts which refer to primarily individual failures, rather than benefiting from any tolerance the state provides them through granting amnesty. The state have no mercy on the criminals in terms of offering amnesty to them, since the burden of criminal responsibility lies with the offenders themselves. Lastly, I analyze the endeavors to increase the organizational rationality of the Turkish legal system. In the security-oriented managerial logic, crime has been regarded as a manageable problem that can be addressed effectively through rational and systemic solutions as integral parts of the legal system itself. I argue that the AKP has thus striven to resolve the operational failures of the Turkish penal apparatus by means of procedural (i.e. internal) remedies, rather than appealing to amnesty as an extraordinary (i.e. external) mechanism. In other words, the AKP has aimed to redress the problematic nature of the Turkish judicial

system so as to it has no longer needed amnesty as an exceptional, unconventional aid. Briefly, this chapter seeks to understand how the combination of a selectively tough attitude towards crime, a stress upon the individual criminal responsibility and a managerial approach to organize the legal domain have influenced the AKP's amnesty agenda.

In the second chapter, I look into the current malfunctioning of the judicial system in Turkey, which must deal with two intertwined problems: high incarceration rates and a high workload of the judiciary. The overloaded character of the Turkish criminal justice system has previously brought a demand for amnesty. I intend to shed light, in this chapter, on the question of why the AKP government has tried to handle the ongoing problems of the Turkish legal system without enacting a general amnesty law. Given the centrality of this issue, I argue that the AKP has operationalized a number of indirect mechanisms instead of granting amnesty to deal with the dysfunctional aspects of the judicial system. In this way, the AKP government has attempted to alleviate the overburdened criminal justice system in a subtle way rather than directly appealing to amnesty. The AKP has attempted to invalidate the requirement of amnesty for judicial problems through mechanisms such as probation (*denetimli serbestlik*) and electronic surveillance; prescription (*zamanaşımı*); discretion used by legal authorities; the enactment of alternative dispute resolution methods such as pre-payment, the Ombudsman Institution and the Mediation Law, and improving legal infrastructure; increasing the number of judges, prosecutors and other judicial personnel; the introduction of the National Judiciary Informatics System (*Ulusal Yargı Ağı Bilişim Sistemi* - UYAP) and the Justice Academy (*Adalet Akademisi*); the District Courts of

Appeal (*Bölge Adliye Mahkemeleri*). The neoliberal logic of the AKP's penal attitude, as an important pillar of its amnesty policy, has led all these subtle mechanisms to become institutionalized. This is because the AKP government has attempted to administer the legal domain through a means–end calculation, whereby the Turkish judicial system has attempted to be systematized as much as possible to deal with the long-term judicial problems. The aforementioned indirect mechanisms have thus been utilized to increase the speed and productivity of legal operations in Turkey. Even if such efforts to rationalize the Turkish judicial field have not fully succeeded, there are significant state-led efforts to consolidate an instrumental logic for managing the legal domain during the AKP period. Nonetheless, it is worth bearing in mind that the international context, apart from the internal dynamics of the country, is also significant in terms of the new legislations and amendments enacted in Turkey. The European Union (EU) membership process has been determinative in recent legislative changes in the Turkish legal system especially through new reform packages. Yenisey (2011), a professor of criminal law, underlines that Turkey's aim of becoming an EU member has been a crucial motivation for many recent constitutional reforms. For instance, the mechanism of probation (which means supervised release) being included the new criminal code of 2005, was instituted on the advice of the Council of Ministers in European Commission. The Strategic Plan 2015-2019 published by the Ministry of Justice underlines that the Judicial Reform Strategy, initiated in 2010 as part of the process of participating in the EU, is the main political document according to which Turkey must create effective policies and projects in the field of jurisdiction (p. 13). The judicial efforts undertaken to accomplish managerial rationalization via these alternative mechanisms have thus depended not

simply on the AKP government's initiative, but also on the demands and recommendations of the international communities as well.

I assert that the aim to comprehend the AKP's amnesty policy inextricably involves the question of the government's moral stance on the phenomenon of amnesty. The third chapter discusses the AKP's alternative moral perspective towards amnesty. Amnesty has always been quite sensitive to a debate about legitimacy based on the twin questions of who has the right to forgive, and of who (which type of criminal-citizen) deserves to be forgiven. The humanitarian viewpoint underlines that criminal responsibility is linked to the existing social order with a great deal of inequalities and injustices, rather than to the individuals themselves. The proponents of this idea maintain that all offenders in the prisons and detention houses should be released with a general amnesty law. There is a different view about the phenomenon of amnesty as being primarily a favor of the state, whereby the state manifests its merciful and protective character, and reasserts its power and sovereignty when forgiving its faulty citizens. I claim that the AKP government offers an alternative morality with a new populist discourse in terms of its amnesty policy. Recep Tayyip Erdoğan, as the former head of the AKP, declares that he does not have the authority to forgive a murderer and that only the inheritors of those who were killed have this right:[8]

> I cannot, as the Prime Minister, forgive a murderer. I even find it inappropriate for the state to forgive a murderer. (If I forgave these murderers), how could I give an account of this to the victim or the family of those murdered? (See Appendix, 3).

[8] ATV & A Haber, 20 November 2013, accessed 18 March 2016. http://www.sabah.com.tr/gundem/2013/11/20/basbakan-a-haber-ve-atv-ortak-canli-yayininda#

The phrase “give an account of” is quite meaningful in the sense that the government's disapproval of a general amnesty law can also be explained through a moral discourse on the protection of “rightful share” (*kul hakkı*). I argue that this stance has some implicit references to the tenets of Islamic law, which gives the authority to grant amnesty to the victim, not to the state as in the case of positive law. I have thus addressed the question of how the mechanism of amnesty has been circumscribed by moral dilemmas, which suggests the continuing validity of substantive considerations in modern law. This chapter also questions how the bad reputation of the Rahşan Pardon, regarded as the last amnesty law in Turkey, has influenced the AKP’s policy on amnesty.

This thesis aims to discuss both the internal dynamics of the Turkish judicial system, as well as the AKP’s moral, political and ideological considerations based upon both the principles of neoliberal penality and the tenets of Islamic law. I examine how the AKP government has endeavored to resolve the tension between the amalgam of its neoliberal and Islamic underpinnings, and the relevance of instrumental concerns, i.e. the push for efficiency to restore the judicial field. I argue that the AKP has preferred the use of alternative mechanisms without granting amnesty, not because it has renounced the short-term practical acquisitions which can be possibly attained by an amnesty, but because these alternative mechanisms have already constituted a practical choice compliant with its moral stance on a legitimate amnesty. The AKP government has thus tried to find a way, via its amnesty agenda, for being both practical and legitimate at the same time.

The mechanism of amnesty has also an ambiguous character in Turkey, since the scope of a possible amnesty law has not been standardized under the provisions of the Turkish Criminal Code. Of course, to completely formalize any legal phenomena is nothing but a utopian ideal. However, the conditions under which amnesty can be granted by the state have not been specified in Turkey. Even a lawyer from The Platform for Supremacy of Law (*Hukukun Üstünlüğü Platformu*) argues that the specification of a prospective amnesty's boundaries is incongruent with the techniques of legal enforcement, since it is by nature an extraordinary mechanism.[9] I claim that this exceptional unstandardization makes amnesty a political mechanism rather than a judicial category, as well as a phenomenon susceptible to a moral debate. The tension between the concerns of legitimacy and instrumentality has thus been arisen partially from or at least intensified by the legal ambiguity regarding amnesty in Turkey.

There has been a myriad of studies in the field of socio-legal research to address the question of how the state punishes, yet the question of how the state forgives has rarely been focused on. Starting from this lacuna in the literature, I argue that the exploration of amnesty laws is as significant as studying the state's punitive mechanisms to understand the socio-politics of law. Thus, I analyze amnesty in Turkey as a multi-layered socio-legal phenomenon and examine the changing terrain of amnesty in the AKP period. I claim that the mechanism of amnesty has never been examined in a sociological perspective in Turkey, i.e. as a complex, multi-dimensional social institution by either underlining the dilemma of state law or identifying the historical trends and patterns of amnesty via a tripartite explanation of judicial, politico-

[9] Based on my interview with him on December 6, 2014.

ideological and moral core of it. Indeed, the existing material on my research topic to capture the actual dynamics and contingencies of amnesty is quite limited. There are two studies — a thesis focusing on how the amnesty debate has been represented by the national newspapers[10] and an ethnographic study on the attitude of the police towards amnesty.[11] The rest of the literature is mostly limited to studies within the legal discipline providing some descriptive information on the processes of amnesty legislation in Turkey.[12] I have aimed to make a fresh contribution to the current literature on the issue of amnesty in Turkey.

Furthermore, I want to provide methodological detail on how I have interrogated my research topic by first making some conceptual clarifications about my thesis. I am interested in amnesty for the sanctions under the criminal law throughout this study. Regarding the official statistics on the rates of amnesty, for instance, there have been a considerable number of amnesties in France (Bayraktar, 2010, p. 90). However, nearly all of these amnesties have been linked to administrative law, not to criminal law. I have thus needed to take a stance on this distinction and restrict the focus of my research to analyzing the amnesty policies of Turkey in terms of criminal offenses. The amendments referred to as tax amnesties in the AKP era[13] or the example of two sick prisoners

[10] Onur Öksüz, *Türkiye'deki Ulusal Gazetelerin Kamuoyu Oluşturmadaki Rolü: 1999 Af Yasası Örneği*, Ege Üniversitesi Gazetecilik Anabilim Dalı Yüksek Lisans Tezi, 2001.

[11] Kenan Bayhan, *Polisin Af Kavramına Bakışı: Ankara'da 8 Polis Karakolu'nda Yürütülen Sosyal Antropolojik İnceleme*, Ankara Üniversitesi Sosyal Antropoloji Anabilim Dalı Yüksek Lisans Tezi, 2003.

[12] For an example, see: Kemal Gözler, Karşılaştırılmalı Anayasa Hukukunda Af Yetkisi, *Anayasa Yargısı*: *Anayasa Mahkemesi Yayını, 18*, 2001: 298-330; Selahattin Keyman, *Türk Hukukunda Af*, Ankara Üniversitesi Hukuk Fakültesi Doktora Tezi, 1965.

[13] Hacer Boyacıoğlu, "100 Milyarlık SGK Affı Yolda", *Hürriyet*, 2 June 2014. Available from: http://www.hurriyet.com.tr/100-milyarlik-sgk-affi-yolda-26526930

forgiven by the President Recep Tayyip Erdoğan via a special amnesty[14] are beyond the scope of this research. The term amnesty has generally referred to the laws enacted in the post-conflict period, whereas the notion of pardoning is preferred for the other sorts of crimes. Amnesty also differs from a pardon, as the former is the blanket abolition of the criminal offence, whereas the latter is regarded as forgiveness. In addition, a pardon is perceived mainly as something given to an individual, while amnesty may be granted to a group of people. In theory, an amnesty law is introduced before prosecution has been initiated, whereas a pardon is announced after the prosecution. If I had made such a distinction between amnesty and pardon in my research, however, it would have been a little bit confusing. This is because I would have used two different conceptualizations of the same phenomenon in different chapters of my thesis. I have thus used amnesty as a kind of umbrella term in this thesis to refer to the release of any kind of criminal offenders.

Garland (2001) emphasizes that the changes in official policy statements or the crediting or discrediting a particular vocabulary by the state officials, in the field of crime control, must not be mistaken for alterations in actual working practices (p. 22). In other words, those who implement penal policy must consider the official representations with political rhetoric and the state-led practices together. The material aspects of state law can overlapped with or work in tandem with the discursive level. I have thus looked into the penal practices of the AKP government, including its policies and legislations, as well as into the official statements. In addition, Watts (2001)

[14] "Cumhurbaşkanı Erdoğan 2 Mahkûmu Affetti", *Posta*, 3 July 2015. Available from: http://www.posta.com.tr/siyaset/HaberDetay/Cumhurbaskani-Erdogan-2-mahkumu-affetti.htm?ArticleID=289675

underlines that a research project may deploy differing logics of inquiry about the rules linking theory and evidence (p. 10). I intend to use two different logics in my thesis: the historical-dialectical logic, which will be deployed in the analysis of textual evidence, and the phenomenological interpretative logic, which will be operationalized in the analysis of interviews. In this way, I plan to benefit from common sources of data collection and analysis in a qualitative research, i.e. the review of documents and interviews. More specifically, the data sources in my research are composed of the archival repositories such as assembly reports, journals and newspapers, the annual activity reports and strategic plans published by the Turkish Ministry of Justice, the judicial statistics offered by the Turkish Statistical Institute (*Türkiye İstatistik Kurumu*-TURKSTAT), and eight interviews with professors of law, human rights activists, and the representatives of non-governmental organizations:

Progressive Lawyers Association *(Çağdaş Hukukçular Derneği)*; Human Rights Association *(İnsan Hakları Derneği)*; The Association for Free Opinion and Educational Rights *(Özgür-Der)*; Libertarian Democratic Lawyers Association *(Özgürlükçü Demokrat Avukatlar Grubu*);[15] The Faculty of Theology at Marmara University *(Marmara Üniversitesi, İlahiyat Fakültesi)*; Nationalist Lawyers Association *(Milliyetçi Avukatlar Grubu)*; The Platform for the Supremacy of Law *(Hukukun Üstünlüğü Platformu)* widely known as its closeness to the AKP government**,** and Criminal Law Association *(Ceza Hukuku Derneği)*. The lawyers I have interviewed from different associations are representative of different ideological and political backgrounds. For

[15] This association is close to the pro-Kurdish political party in Turkey called the Peoples' Democratic Party (*Halkların Demokratik Partisi*).

instance, they participated in the election of the head of Istanbul Bar Association on different sides. The non-governmental organizations in this list have striven to bring up the amnesty debate or have declared their opinion on a prospective amnesty law. The reason I consulted with a professor of theology at Marmara University was to comprehend the religion-based moral core of amnesty, as well as the tenets of Islamic law on granting amnesty.

I asked my informants whether amnesty laws violate the sense of justice or equality in the society, or how they evaluate different categories of crime when thinking about who deserves to be released via amnesty. I also wondered how they consider both the responsibilities and limits of the state law. This raises the question of what kind of a relationship between state and society they perceive. I tried to analyze how they interpret the possibility of social and political reconciliation in Turkey through these amnesty laws, too. Consequently, the results of these interviews contribute to an understanding of the societal perception of both the phenomenon of amnesty in general and the AKP government's use of it. They offered me an opportunity to see the overall picture of the controversial amnesty debate in Turkey due to their different political and ideological backgrounds. Indeed, they had different opinions on some sensitive questions such as who deserves to be forgiven, or who ought to have the right to grant amnesty. They converged on some key matters, however, such as the idea that amnesty operates in Turkey as a political mechanism rather than a judicial category. I observed that an important distinction between the ideologically and/or morally ideal, and the politically feasible was also the case in their speech, as in the acts of the AKP government. For instance, they all started to talk about what *ought to* be through a possible amnesty law

in Turkey. However, their statements finally and almost inevitably turned into an evaluation of the current practical conditions, that is, the boundaries of what the current political climate has offered. For example, my informant from the Association of Free Thought and Education Rights (*Özgür-Der*) admits that amnesty is a problem-solving mechanism in the existing political conjuncture in Turkey, i.e. for both resolving the Kurdish question and compensating unfair and erroneous judicial decisions, although he does not approve of amnesty in principle.[16] In other words, there has been a constant ebb and flow in their statements on amnesty. This is because all of them regard amnesty as a conflict-ridden and even risky arena which is full of compromises and negotiations in Turkey, especially in terms of the Kurdish question, which lies in the controversy of the amnesty debate in Turkey. They also agree with each other on the argument that a prospective amnesty law must be enacted through protecting the public conscience, at least by persuading the public to believe in the necessity and fairness of amnesty as a state-led decision. This suggests that the moral justification of any amnesty decision is fraught with difficulty.

Briefly, this thesis explores the question of why general amnesty, as a long-term phenomenon in the Turkish politics up until now, has not been appealed to during the AKP period. Nevertheless, state law is not a fully coherent entity which always functions in a predetermined way, but a fragile phenomenon which works in a dynamic and contingent manner. The AKP's amnesty policy is not a gapless project whose details or future directions can be discerned with a clear-cut formula. I have thus raised neither

[16] Based on my interview with him on October 20, 2014.

a policy question which would purport to predict the AKP's next move on amnesty, nor a guarantee or an infallible analytical tool to explain conclusively the government's amnesty agenda. Rather, this thesis provides an insight into the underlying dynamics of the AKP's amnesty policy, referring to an ongoing process constantly shaped by the interplay of multiple factors. In an attempt to capture the great complexity and variability of the government's amnesty agenda, I have taken into consideration both the question of legitimacy, the dynamics of political conjuncture and the push for efficiency. Only through such a multi-layered analysis of socio-legal phenomena, i.e. the policy on amnesty in the AKP era, it is possible to examine the dilemma of state law based upon the compelling effort to balance the concerns for legitimacy and instrumentality.

CHAPTER 2

THE PREMISES OF NEOLIBERAL PENALITY IN THE AKP ERA

According to Bourdieu (1987), the legal field is relatively autonomous in the sense that it is neither entirely self-referential, nor totally instrumental (p. 806). Law is not reducible to a question of political interests, but it is surely not indifferent to other modalities of state control. Hence, a better understanding of the AKP's amnesty policy requires a greater insight into the government's penal mentality, which has broader political and ideological implications. I argue that there is a neoliberal attitude in the penal discourses and practices of the AKP government, which refers to a new operational logic in the Turkish penal system to which the amnesty policy is quite responsive. This chapter aims to explore three main premises of neoliberal penality in the AKP period while considering the amnesty debate in Turkey: punitiveness, responsibilization and managerialism. First, I examine the punitive attitude of the Turkish state in its crime control strategies. High incarceration rates reveal that prisons and detention houses have not lost their importance in the operations of the Turkish criminal justice system. The AKP government, however, has developed alternative crime execution methods which refer to the expansion of penal net in Turkey. For an effective struggle against crime, I maintain that the government is reluctant to give up its authority to punish by forgiving the offenders on a mass scale through an amnesty law. Second, I look into how the responsibilization strategy of neoliberal penality has operated in the Turkish penal system. The AKP government has officially declared its disapproval of granting amnesty for those who commit the crimes against individuals. In

other words, this group of offenders has been forced to take the full responsibility for their criminal acts rather than benefiting from any mercy or tolerance the state provides them via general amnesty. Third, I interrogate the current efforts to increase the organizational rationality of the Turkish judicial system. In the security-oriented managerial logic, the state regards crime as a manageable problem which can be dealt with through the effective systematization of penal operations. I thus assert that the AKP has attempted to resolve the operational failures of the Turkish penal apparatus via procedural, systemic remedies rather than directly appealing to amnesty as a shortcut, extraordinary solution.

The prison trends in Turkey are not as evident as those in the United States.[17] This suggests that more complex and subtle relations have prevailed in the organization of the penal apparatus in Turkey, which does not fit unproblematically into a definite schema. For this reason, the argument that Turkey has experienced an utterly neoliberal turn in its judicial system is too simplistic and far from being reasonable. I have thus confined myself to claiming that the AKP has embraced a neoliberal mentality in terms of its crime control strategies, and these three characteristics are quite useful to comprehend the dynamics of this penal attitude: (1) punitiveness, (2) responsibilization and (3) managerialism. These three pillars of neoliberal penality provide a useful framework for the analysis of recent changes in the field of penal policy in Turkey.

[17] The penal strategies of the United States has been regarded as distinctively punitive, since it has an exceptional incarceration rate with 2.3 million people behind the bars. The prison industry complex, expanding through that carceral boom, has pointed out tough crime control strategies. Hence, that country has been widely regarded as a reference point for comparing punitive trends throughout the world. For a more detailed analysis of penal severity in the United States, see Clear and Frost's book *The Punishment Imperative: The Rise and Failure of Mass Incarceration in America* (New York: NYU Press, 2013).

Following the broader implications of such changes, this chapter aims to examine how the combination of these three logics helps to understand the AKP's policy on amnesty.

2. 1 Punitiveness

According to Wacquant (2001), the ascendancy of neoliberal ideology involves a triple operation composed of "erasing the economic state, dismantling the social state and strengthening the penal state" whereby the criminal justice apparatus becomes crucial to the management of insecurity (p. 404). He places harsh penal policies not in the context of the development of a particular punitive culture but in the very practice of neoliberal statecraft. However, as opposed to Wacquant's central claim that punitiveness is intrinsic to neoliberalism, Bell (2011) argues that there is no direct link between these two phenomena (p. 3). Penal severity has been mainly the practical outcome of neoliberalism, not necessarily an inevitable result. I embrace Bell's more nuanced position that punitiveness provides, not inherently but practically, a framework to comprehend the logic of neoliberal penality. For instance, there is an indirect link between these two phenomena in the sense that the rise of the security state, which has constantly used optimal policies to combat crime, points to the penal expansionism in the neoliberal era. The individualistic conceptions of crime and criminal responsibility and the use of the technologies of risk in penal policies also refer to such indirect link.

In her book exploring the current crime and punishment practices in Turkey in relation to neoliberalism, Özkazanç (2011) underlines the dual character of the Turkish state's new punitive approach based on neoliberal governmentality (p. 164). This refers to two indicators of punitiveness which seem to be irreconcilable but are actually complementary to each other in terms of solidifying the neoliberal penal mentality in

Turkey: the tendency for mass incarceration and the development of alternative sanctions to imprisonment. Both the increase in the prison population and the continuous extension of judicial supervision via a widening penal net have pointed out a common mentality on how to manage the field of crime and punishment in Turkey. Regarding these two indicators, I study how the intensification of punitiveness is linked to the dynamics of the amnesty debate in Turkey.

As the database of the International Centre for Prison Studies (ICPS), the World Prison Brief (WPB) presents information about the penal institutions across the world. Both the number of people sentenced to imprisonment and prison population rates per 100,000 of the national population are measured for all countries. Before comparatively evaluating the Turkish case in relation to international data, I scrutinize Turkey's penal trends on their own. In recent years, there has been a staggering increase in the Turkish prison population. Considering changes in the current population of Turkey, however, it is more plausible to look into the prison population rates per 100,000 of inhabitants in Turkey. Table 1 clearly shows the increase in incarceration rates per 100,000 people in Turkey since the beginning of the 2000s:[18]

Table 1. Prison Population Rate in Turkey

Year	2000	2002	2004	2006	2008	2010	2012	2014	2015
Prison Population Rate	73	85	81	101	144	164	180	204	212

Source: International Centre for Prison Studies, 2015

[18] All tables in this chapter were prepared according to the data presented by WPB. For more specific outcomes on global prison trends, see the data offered by ICPS (International Centre for Prison Studies).

In his book *World Prison Population List* on the global incarceration trends, Walmsley (2013) indicates that more than the half of countries and territories (54%) have a prison population rate below 150. This suggests that the current prison population rate in Turkey (212) is significantly high relative to a considerable part of the world. Moreover, I compare all these rates to the outputs on the penal trends of other countries. Regarding the total number of prison population, as shown in Table 2, Turkey is in second place among the European countries and tenth in the world, while ranking first among the Middle Eastern countries:

Table 2. Prison Population Total in Europe

Ranking	Title	Prison Population Total
1	Russian Federation	673 818
2	Turkey	165 033
3	United Kingdom: England and Wales	85 704
4	Poland	78 139
5	Ukraine	71 811
6	France	66 761
7	Spain	65 604
8	Germany	61 872
9	Italy	54 122
10	Belarus	31 700

Source: [ICPS (International Centre for Prison Studies), 2015]

Based on the data on prison population rates per 100,000 of the national population, Turkey sits in the top ten among 57 European countries in terms of its prison population rate. Furthermore, Turkey's rate (212) is considerably ahead of the average prison population rate in Europe (135,81), as shown in Table 3:

Table 3. Prison Population Rate in Europe

Ranking	Title	Prison Population Rate
1	Russian Federation	468
2	Belarus	335
3	Lithuania	314
4	Latvia	264
5	Georgia	232
6	Estonia	224
7	Azerbaijan	218
8	Turkey	212
9	Moldova (Republic of)	206
10	Poland	203

Source: [ICPS (International Centre for Prison Studies), 2015]

As Table 4 shows, Turkey has the third highest prison population rate among Middle Eastern countries, whose average rate (119,0834) is well below that of Turkey:

Table 4. Prison Population Rate in the Middle East

Ranking	Title	Prison Population Rate
1	Israel	240
2	United Arab Emirates	229
3	Turkey	212
4	Bahrain	175
5	Saudi Arabia	161
6	Iraq	133
7	Lebanon	108
8	Jordan	95
9	Kuwait	86
10	Syria	60
11	Yemen	53
12	Qatar	53
13	Oman	36

Source: [ICPS (International Centre for Prison Studies), 2015]

All these data reveal that Turkey's incarceration rates have risen in a sharp manner over recent years, and that Turkey has a significantly above-average prison population rate at international level.

Bekir Bozdağ, the Minister of Justice, declares that high incarceration rates in Turkey show the success of the current government to cope with crime efficiently (Keskinkılıç, 2014). In this regard, he argues that new types of crimes were articulated in the new criminal code,[19] and that penalties increased through the changes in the laws on criminal execution. In their report on the new Turkish Criminal Code, Tezcan and Erdem (2004) indicate that deteriorating the balanced proportion between crimes and punishments through codifying new categories of crime has intensified the over-crowding problem of prisons, rendering the criminal justice system, which is already overloaded, entirely ineffective (p. 355). However, I argue that the AKP is reluctant to give up its punitive attitude and to try to relieve the overburdened penal institutions in Turkey via general amnesty. Rather, it seeks to resolve the overcapacity problem of prisons without a systematic decriminalization, i.e. without a systematic release of many offenders by means of a general amnesty.

High incarceration rates are an enduring problem in Turkey, where prisons have increasingly encountered the pressures of overcrowding. However, the prison population is not a sufficient indicator of punitiveness on its own. Punitiveness is reflected, as Bell (2011) argues, not just in the number of people sentenced to imprisonment, but also in the number of people who remain outside prison but who are nonetheless subject to the

[19] New types of crime which are criminalized in the new criminal code are cyber-crimes, especially the criminal use of social media, and crimes against the environment.

surveillance of the penal system (p. 43). This is because the boundaries between inside and outside prison walls are, as Özkazanç (2011) underlines, blurred in a surveillance society where the security-minded state logic prevails (p. 150). Therefore, the use of these alternative mechanisms to incarceration is not a real antidote to the prison population explosion in Turkey, rather a complementary part of it. As Rose (2000) elegantly puts it:

> The spread of community types of correction such as fines, probation orders, community service and so forth goes hand in hand with an inexorable increase in the prison population and the constant expansion of the prison building programme. (p. 322)

Probation orders, the use of electronic surveillance and community services have thus aimed to take the high-risk profile offenders under a constant control.

Probation was included in the Turkish criminal justice system with the enactment of the new criminal code in 2005. Electronic surveillance has also started to be used with conditionally released offenders so that they can effectively be supervised in public. All these efforts have been made to alleviate the problem of overloaded penal institutions in Turkey. Nevertheless, Bell (2011) underlines that non-custodial sentences are claimed to be not just supplementary or intermediate penalties (p. 56). Rather, their use has mostly become routinized through the proliferation of mandatory minimum sentences and increasing numbers of minor offences, whereby they enmeshed more people in the criminal justice system. This is because the number of people covered by penal sanctions has expanded significantly through an expanding continuum of control. Increasing numbers of people are now locked up in penal institutions or placed under

surveillance. In a broader circuit of social control, it is much more difficult for individuals to escape the controlling gaze of the state. Therefore, it is worth bearing in mind that probation is not a form of conditional amnesty but a method of criminal execution or a judicial control mechanism. The state does not give up its authority to punish when using this mechanism as an alternative to incarceration. Rather, through implementing these tools, it finds a different way of including people within the boundaries of the widening penal net. On the other hand, amnesty is a mechanism which has directly referred to a way of setting aside of punishments, i.e. an unconditional release of the offenders with no expectation or demand. The state's punitive attitude refers to a low level of penal tolerance, which has thus led to the official disapproval of amnesty.

Beckett (1997) argues that the origins of such punitive shift in crime control policies lie in the political rather than in the penal realm (p. 12). As Garland (1990) indicates,

> It is not crime or criminological knowledge which most affects policy decisions, but rather the ways in which the crime problem is officially perceived and the political positions to which these perceptions give rise. (p. 20)

The ascendance of a “tough on crime” approach in the neoliberal criminological discourse has thus resulted in the expansion of entire penal apparatus, since penal organizations are vulnerable to external political pressures. Furthermore, Bell (2011) claims that states still attempt to seek legitimacy in a neoliberal world through adopting tough penal policies (p. 7). Punitive policies become a legitimation strategy which allows the state to reassert its power. As Garland (2001) states,

> A show of punitive force against individuals is used to repress any acknowledgement of the state's inability to control crime to acceptable levels. A willingness to deliver harsh punishments to convicted offenders magically compensates a failure to deliver security to the population at large. (p. 134)

For instance, an official report prepared by the Ministry of Justice underlines the "frightening" picture of the public order in Turkey due to the explosion of ordinary crimes from 2009 to 2013, especially in terms of murder, theft and sexual offences (Kaya, 2015). This suggests that the use of harsh, state-led penal policies has been fueled by the urgent need to do something about increasing crime rates. Bekir Bozdağ, the Turkish Minister of Justice, has also recently declared that the significant augmentation in the Turkish prison population shows the current government's success to cope with crime effectively (Keskinkılıç, 2015), rather than an organizational or political failure to prevent crime. The questions of whether the state's over-criminalizing tendency or the existence of disproportionate penal sanctions have led to a prison population explosion in Turkey is not officially taken into account. Gambetti (2009) declares that neoliberalism never envisages, as a logic of governance, a society which is totally devoid of crime (p. 153). In this regard, the neoliberal state aims to manage a certain degree of criminality by means of intensifying punishments. Regarding the performance criteria of the penal institutions, the massive increase in the Turkish prison population is not a problem on its own, as long as the criminal violations can be detected and punished efficiently by the state. The expanding penal machine in Turkey, i.e. high incarceration rates and the widening penal net, has thus been officially presented as being illustrative of the government's efficient fight against crime.

Briefly, I argue that these two indicators, i.e. the tendency for mass incarceration and the development of alternative sanctions to imprisonment refer to the intensification of the punitive attitude in the penal practices of the Turkish state during the AKP period. I claim that the AKP government has attempted to handle the crime problem without sacrificing its punitive authority. In this way, it has incarcerated more and more people, made investments on the establishment of new prisons and detention houses and released conditionally the offenders, but not forgiven them.

2.2 Responsibilization

The Conditional Release Law in 1999, known popularly as the Rahşan Pardon, was enacted through the use of a populist rhetoric based upon the discourse of victimhood for those committing certain ordinary, petty crimes. One study, carried out by the General Directorate of the Democratic Left Party (*Demokratik Sol Parti* – DSP) (2002), demonstrates that Rahşan Ecevit wanted an amnesty to be granted in that period for those presented as victims of fate (*kader kurbanları*). This conveys the idea that criminal responsibility cannot be totally attributed to the individuals themselves. Rather, inequalities and unjust living conditions, intrinsic to the functioning of an unequal social order, have paved the way for the existing crimes in Turkey. The proponents of this amnesty law thus asserted that the state's forgiveness or mercy should be provided for the offenders pushed into crime. However, I claim that there has been a change, from that period to the AKP era, in the character of populist discourses on the criminal justice in Turkey, since the AKP government's neoliberal penal mentality points to the principle of individual criminal responsibility.

The individualistic conceptions of criminal responsibility, i.e. the idea that offenders must take the responsibility for their criminal acts is linked to the protection of the victims' sensibilities, too. The proponents of victims' rights movements that blossomed in the United States at the end of the twentieth century argue that victims have been neglected in the criminal justice processes in the sense that neither their needs nor their preferences are adequately taken into account in penal procedures (Strang & Sherman, 2003, p. 16). This is because the criminal justice mechanisms, in their view, have focused mostly on what will happen to the offender rather than to the victim. Victim participation has not become an integral part of the Turkish criminal justice system yet, but it was officially announced as an important target of the prospective Legal Reform Bill in 2015. In the presentation of this package, Ahmet Davutoğlu, the Prime Minister of Turkey, declared that a new victim-centered approach would be developed in the Turkish judicial system to strengthen victims' rights.[20] With this in mind, the Department of Victim Rights was established in 2013 under the General Directorate for Criminal Affairs of the Turkish Ministry of Justice.[21] I argue that the AKP's amnesty policy refers to a populist rhetoric which claims to defend victims' rights, rather than prioritizing the demands of offenders by giving them a second chance with an amnesty law. This suggests that the state officially intends to respond primarily to the interests of the victims of crime, rather than providing an opportunity to convicts to be forgiven via amnesty. Such reliance on personal responsibility in the penal sphere is also based upon the portrayal of the criminal as a rational agent. As Rose (2000)

[20] "Başbakan Ahmet Davutoğlu Yargı Reformu Paketini açıkladı", 17 Nisan 2015, retrieved from http://www.cnnturk.com/video/turkiye/basbakan-ahmet-davutoglu-yargi-reformu-paketini-acikladi

[21] T.C. Adalet Bakanlığı, Ceza İşleri Genel Müdürlüğü, Mağdur Hakları Daire Başkanlığı; accessed 1 April 2016, http://www.magdur.adalet.gov.tr/baskanlik/tarihce.html

argues, governing through responsible citizenship refers to a controlling state whose aspiration is to govern at a distance by creating active individuals who take the responsibility for their own fate through the exercise of free choice:

> The pervasive image of the perpetrator of crime is not the juridical subject of the rule of law, nor the bio-psychological subject of positivist criminology, but the responsible subject of moral community guided by ethical self-steering mechanisms. (p. 337)

Garland (2001) also underlines that the opportunist, normal, rational offenders have started to stand much closer to center-stage in the criminological study and crime control practices, while the needy, pathological offender is much less prominent (p. 187). Crime has thus been conceptualized, in a social world built upon the imperatives of individual choice, as a freely chosen act or a cost–benefit decision. Crime control agencies have begun to apply a responsibilization strategy, whereby the state defers some responsibility for the job of handling the crime problem. This refers, nevertheless, not to the retreating of the state from the field of crime and punishment but to the denial of responsibility that requires an effective governing of the penal sphere. The neoliberal state demands not the responsibility for criminal acts, but a far-reaching authority to control criminals.

Regarding the individualistic conception of crime, probation (*denetimli serbestlik*) is a system whereby penal authorities force the offenders to take overall responsibility for their criminal behavior. In other words, rather than being released unconditionally via an amnesty law, the offenders on probation must fulfill the requirement of good will (*iyi hal gösterme şartı*). Probation refers to a testing period for

the conditionally released offenders under the supervision of a probation officer. As shown in the Annual Activity Report 2014 published by the Ministry of Justice, this mechanism based on such a responsibilization strategy was included the Turkish criminal justice system in 2005 (p. 100). In this respect, Morgan (1994) states that the rehabilitative ideal has been profoundly transformed through the ascendancy of a "neo-rehabilitative ideal", which refers to a system whereby the ultimate responsibility for the rehabilitation of offenders is placed on their own shoulders, rather than on the criminal justice authorities (pp. 135-137). According to Lynch (2000), the crime control agencies have constructed the parolee subject[22] as one who is dispositionally flawed and ultimately responsible for his or her own imprisonment (p. 40). Offenders are assumed to operate as autonomous beings, whereby crime is regarded as a personal attitude problem. The parolee can and must choose to stop his or her offending behavior via the calculation of relative costs and benefits. Criminal sanctions have thus turned into a duty for individuals to pay for their own wrong choices, rather than releasing them via general amnesty. Probation is a method of criminal execution, not a conditional amnesty, whereby the offenders are expected to compensate for their own criminal acts. Thus, they are sentenced to individualized penalties rather than being forgiven in an unrequited manner via a general amnesty.

According to Garland (2001), parole agencies downplay their traditional re-integrative functions and prioritize the close monitoring of released offenders (p. 177).

[22] Parole is an alternative mechanism to incarceration which refers to early release from prison. In Turkey, the offenders can be released both prior to or instead of jail, and during prison time. Therefore, controlled liberty measures in Turkey have an operational logic compatible with parole as well as probation services.

The emphasis on the supervisory capacities of these agencies as risk-managers has underestimated their social work affiliations, whereby this mechanism has been represented as a community punishment or a means of control. The ideal of rehabilitation is redefined as a means of managing risk, not a welfarist end in itself. Rather than being abandoned altogether, however, the rehabilitative ideal has been redefined as an effective strategy of risk assessment through utilitarian penal narratives. The ideal of rehabilitation still continues as an official rhetoric in Turkey. The annual activity reports and strategic plans of the Ministry of Justice highlight this objective, as this statement in the Constitution clearly shows:

> The main aim of the execution of custodial punishments is the rehabilitation of the offender and his reintegration into society. (Yenisey, 2012, p. 251)

There is a responsibilizing strategy, however, behind this or such official statements. Individuals are all ultimately accountable for their own actions, which justifies tough penalties for those who fail to respect the law. The extensive use of probation services in the AKP era has thus gone hand in hand with the government's neoliberal stance in its penal practices.

In addition to the probation services, the responsibilization strategy is utilized in the operations of some other mechanisms that are used to alleviate the overloaded penal system in Turkey. For instance, the Annual Activity Report 2014 reveals that developing alternative dispute resolution methods, e.g. pre-trial remedies to resolve the legal disputes, is an important official target for the Turkish Ministry of Justice (p. 64). I claim that these alternative dispute resolution methods have pushed the individuals to

take an initiative for settling legal disputes on their own. For example, those who committed certain crimes, mostly minor offenses, have the right to reconcile with the victim via the intermediacy of a mediator. Those committing certain petty crimes also have the possibility to compensate the damages or losses of the victim through the mechanism of pre-payment (*ön ödeme*). In addition, citizens have the right to demand ombudsman service to express their complaints about the judicial administration to be investigated. In this way, the citizens appeal to an external auditing mechanism that advises the legal authorities to fix their erroneous judicial decisions. These pre-trial remedies require non-state parties to become responsible for ending legal disputes in which they are involved. This suggests that not only the offenders, but also ordinary citizens take part of the initiative to determine or at least influence the trajectory of penal operations. Rather than being subject to amnesty as a state-centered decision, the parties of legal disputes must take the responsibility to find a pre-trial solution. In this way, the state has retreated from the role of governing individual relations within the penal sphere, i.e. from the duty of being responsible for them.

The responsibilizing attitude in penal practices lies in the legislative changes in Turkey as well. My informant from the Platform for the Supremacy of Law (*Hukukun Üstünlüğü Platformu*)[23] argues that the old Turkish Criminal Code, which was replaced with a new one in 2005, had a state-centered approach rather than embracing the principle of the "state for citizens".[24] In other words, the repealed criminal code in

[23] This platform was constructed to participate in the elections of Istanbul Bar Association in 2006. Their nominee Abdullah Arar ranked second in the last election in 2014, just behind *İlke Progressive Lawyers' Association* whose nominee Ümit Kocasakal was elected once again as the head of Istanbul Bar Association.

[24] Based on my interview with him on December 6, 2014.

Turkey was arranged to regulate the criminal sanctions towards crimes against the state with highly severe punishments, while relegating the act to punish crimes against individuals to the background. In this respect, he indicates that the new criminal code is a legislation which prioritizes the penal sanctions for crimes against persons that had been previously in a secondary position.[25] Indeed, the current Turkish Criminal Code in its modified version underlines the state's intention to carry out a more effective struggle against crime. In his book *Criminal Law in Turkey,* Yenisey (2012) emphasizes that the new criminal code changed the listing of existing crime categories by placing crimes against individuals at the beginning of Book Two, which deals with specific crimes (p. 123). Nevertheless, crimes against the nation and the state were placed in the last part of that section.[26] In other words, the crimes against individuals have preceded the crimes protecting state in the schematic structure of new Turkish Criminal Code. The AKP's attitude towards amnesty, in terms of its disapproval of forgiving the crimes against individuals, refers to an official demonstration of the importance of individual protection in principle. This conveys the idea that offenders, especially those committing ordinary crimes, must take responsibility for their criminal acts rather than being forgiven through general amnesty. Instead of suspending the criminal sanctions by granting amnesty, the government has pushed the offenders to take the full responsibility for their criminal acts. As the prime driver of punitive policies, the focus is centered on the individual

[25] Some specific examples of that category are crimes against life, crimes against property, crimes against sexual inviolability, and crimes against the integrity of the body.

[26] Some specific examples of that category are crimes against the administration of government, crimes against judicial administration, crimes against the security of the state, and crimes against the constitutional order.

criminal responsibility of offenders themselves when the government becomes increasingly preoccupied with appearing to be tough on crime.

2.3 Managerialism

I looked into the spread of management ideology as the third and last premise of neoliberal penality in the Turkish criminal justice system. Bell (2011) argues that criminal justice agencies have become increasingly concerned with risk management, rather than bringing offenders to justice or tackling the root causes of crime (p. 119). This refers to a new managerial logic in which the success of penal regimes is not measured by their transformative capacity but according to their capacity to meet a series of objective management targets (Bell, 2011, p. 84). In their study on the development of "new penology", Feeley and Simon (1992) also indicate that the ultimate goal of such a managerial mentality is not to eliminate crime but to make it tolerable through systemic coordination by identifying and managing unruly groups (p. 455). In a similar vein, Rose (2000) indicates that the role of custodial institutions is now redefined not in terms of their reformatory potential but in terms of the secure containment of risk (p. 333). There is a shift in the objectives of probation services (*denetimli serbestlik*) from the normalization of offenders (whether through work or treatment) to their management. The officers aim to supervise offenders in the community and manage the risk they represent to society to protect public security, whereby recidivism is prevented via new technologies of control. In her study on criminal sanctions against recidivists in the Turkish penal law, Çaylak (2014) reveals how recidivism became an issue of safety measurement and risk evaluation under the tenets of the new criminal code enacted in 2005:

> The biggest difference made by the new Code arguably is that recidivism was turned into an institution that requires safety measures and bases on dangerousness; while the former code expressively stated that recidivism was based on fault and increased the penalty. (p.254)

According to the Annual Activity Report 2014 published by the Ministry of Justice, the system of risk evaluation was initiated under the Probation Department in Turkey to detect the risks and needs of the offenders on probation (p. 100). For this reason, in the Turkish penal system, there is an increasing reliance on risk assessment as a crime control strategy.

In addition to embracing a risk-oriented approach, as Garland (2001) argues, criminal justice organizations become more self-contained, more inwardly directed and less committed to externally defined social purposes, and increasingly subject to state-imposed standards (p. 120). The new performance indicators are designed to measure what the organization does, not on what, if anything, it achieves. The promise to deliver law and order is now increasingly replaced by a promise to process the complaints or apply punishments in a just and efficient way. In other words, the evaluative criteria of penal institutions have been transformed from a concern with adjudication to administration. Bekir Bozdağ, the Turkish Minister of Justice, emphasizes that new technologies used in the Turkish criminal system and the efforts to increase the number of courts and judges have led criminals to be caught more easily in Turkey, which also explains the massive increase in the prison population in the country. These objectives, i.e. new informatics systems, developing legal infrastructures, and increasing judicial personnel have been tried as a way to alleviate the overloaded judicial system in Turkey, but also as a way to effectively struggle against crime. Even the overcrowding of prisons

is officially announced as a success of the Turkish penal apparatus in reaching its objectives to cope efficiently with crime. In a similar vein, the success of penal policies and legislation has started to be measured via an effective assessment of internal operations of the legal system in Turkey. The Ministry of Justice began to publish several official documents on its structure and operations in recent decades. The official targets have been constantly determined through strategic plans and estimated in the annual activity reports.[27] In this way, the judicial institutions have recently started to measure their own outputs as indicators of performance via the delivery of quantifiable objectives.

As McDonald (1991) argues, the immediate daily task of today's bureaucratized justice systems is to cope with caseloads (p. 2). Unlike earlier times when the problem was to find ways to get the law prosecuted, today's problem is to get cases terminated as quickly as possible or to keep them out of the system altogether. In other words, whereas the problem was to find ways to get cases into the system in the past, today the problem is to get cases out of the system. Thus, states have to manage finite resources of the penal apparatus in the face of enormous caseloads and intractable security problems. I claim that the AKP government has used some indirect mechanisms as alternatives to amnesty in order to resolve this workload problem by increasing the organizational rationality of the Turkish legal machine. Instead of appealing to amnesty as short-cut, exceptional mechanisms in which penal sanctions are suspended temporarily for certain crimes, the AKP seeks an organizational, systemic response to the problems facing the

[27] For all these reports and strategic plans, see the website of the Turkish General Directorate of Prisons and Detention Houses: http://www.cte.adalet.gov.tr/

Turkish judicial system. In this regard, the AKP has a neoliberal attitude in its penal mentality in the sense that it tries to investigate the capacities or inefficiencies of the Turkish criminal justice system, and undertakes some efforts to make this system work efficiently. To put another way, it sees the judicial system as being a "machine," the effective use of which is officially targeted. For instance, as shown in the Strategic Plan 2015-2019 published by the Turkish Ministry of Justice, the National Judiciary Informatics System (*Ulusal Yargı Ağı Bilişim Sistemi* – UYAP) as an information technology, was started in the AKP era to provide the standardization and uniformity of legal services among the different units of the Ministry of Justice (p. 46). Furthermore, the initiation of in-service training programs for the judicial bureaucracies such as judges and prosecutors with the Justice Academy in 2003, [28] as well as the establishment of education centers for the prison personnel in 2004[29] point out the attempt to standardize and systematize the practices of those working for legal services. In such managerial state logic, the current problems in the Turkish legal system have stemmed from either the inadequate capacity of technical infrastructure, insufficient human resources, or organizational deficiencies which can be resolved in a technocratic way.

The logic of neoliberal penality also facilitates contemporary punishment practices by encouraging the belief that the legitimate space for government intervention is in the penal sphere. According to Beckett (1997), the neo-classical vision of criminals as rational and freely-choosing agents implies that expanding the scope of criminal law and increasing the severity of penalties are the most appropriate responses to the crime

[28] Türkiye Adalet Akademisi Kanunu, accessed 12 March 2015. http://www.mevzuat.gov.tr/MevzuatMetin/1.5.4954.pdf
[29] The Ministry of Justice, "Stratejik Plan 2015-2019", 51.

problem (p. 9). The neo-classical criminology stresses that the failure to control crime resulted from the failure to punish criminals enough. This is because the new managerial approach sees criminality as an inevitable function of nature. Due to the view that crime is viewed as a naturally occurring phenomenon, neoliberal penality seeks simply to manage the phenomenon rather than to focus on its genesis. Moreover, the emergence of managerial criminology is related to the rapid growth of the criminal justice system through prioritizing social control over social welfare. This is because the responsibility for crime belongs to the individual, but maintaining social control is still a state-centered task. Therefore, the AKP government is reluctant to empty prisons and detention houses, which are an integral part of the current legal machine in Turkey. Rather, when managing both crime and the problems of the judicial system, it has attempted to devise efficient techniques to protect the boundaries of its punitive authority.

There are also some labor market consequences of incarceration due to the implicit link between unemployment rates and imprisonment. In a panel discussion on the amnesty debate in the 1970s, Tunaya (1974), a professor of law, underlined that a general amnesty in itself would not turn a country into heaven, unless employment opportunities were provided for the released offenders (p. 57). This view suggests that an extensive amnesty law might probably intensify the current employment problem. The official data offered by TURKSTAT show that approximately 40 percent of the prison population in Turkey is composed of those who are unemployed and retired or those who have previously had unqualified jobs.[30] Moreover, a substantial number of

[30] Turkish Statistical Institute, "İş Durumuna Göre Ceza İnfaz Kurumlarına Giren Hükümlüler", accessed 28 May 2015, http://tuikapp.tuik.gov.tr/girenhukumluapp/girenhukumlu.zul

employers are reluctant to hire applicants with a criminal history. Thus, an amnesty law enacted without a detailed plan or a careful assessment is very likely to bring about an unemployment problem or at least intensify the current problems in the labor market. Considering the political economy of the penal apparatus, amnesty is a cost–benefit decision which requires taking into account the current conditions and dynamics of the legal machinery.

In addition to all efforts to increase the productivity and efficiency of the Turkish penal system and to protect the needs of the legal machinery via a cost–benefit analysis, the AKP government must please the public on its penal policy, too. The amnesty topic has long been a controversial issue, i.e. a conflict-ridden and even risky arena which is full of compromises and negotiations in Turkey. Hence, I assert that the AKP has preferred to solve the problems facing the Turkish criminal justice system through utilizing internal remedies, i.e. instead of taking the responsibility for an amnesty decision. These organizational, systemic solutions have constituted not just procedurally effective but also substantively reasonable options. This is because they provide, as state-led penal practices, the popular support much more easily in comparison to the effort at persuading the majority of the population for the necessity of an all-encompassing amnesty law. Instead of amnesty as a controversial solution to handle the expansion of the penal machinery, the AKP has thus used relatively unproblematic alternative mechanisms on which the public opinion might agree on. Moreover, I argue that the lack of amnesty also refers to an opportunity for the state to assert its symbolic power. Amnesty is an extraordinary mechanism which has been widely used until the AKP period to alleviate the urgent problems of the Turkish judicial system. The AKP is

reluctant, nevertheless, to appear in need of a general amnesty, since such a necessity means the government's inability to produce a strong alternative to the amnesty option for resolving the current problems facing the Turkish penal apparatus. The government has thus attempted to become capable of solving its problems via technocratic measures or reforms in efficient way. The AKP wants to be not the one that decides the exception, but the one that does not need an exception.

To sum up, the question of how the state forgives is directly related with how it punishes, since the current offenders are the prospective subjects of a possible amnesty law. The ways in which criminals are officially conceptualized, and how the crime issue is politicized signalize on what grounds the government has possibly granted amnesty. The AKP's stance on amnesty is intrinsically linked to its discourses and practices on how to manage the Turkish criminal justice system. All the efforts to examine the AKP's amnesty policy become insufficient without questioning how the government deals with crime in general. In this chapter, I have thus explored how the AKP operates the penal apparatus with a neoliberal state logic while considering the dynamics of amnesty debate in Turkey. This is far from being a gapless project. For instance, the attempt to totally manage and control certain undesirable populations is ultimately destined to become a failure. The will to increase the standardization of judicial services can be challenged by the discretionary power of prosecution services or by the substantive considerations of legal authorities. The objectives in the strategic plans of the Ministry of Justice to manage the judicial system effectively might not be completely met. Therefore, the AKP's amnesty policy is not a coherent or unified policy choice, as my informant from The Platform for the Supremacy of Law *(Hukukun Üstünlüğü Platformu)* said, "This

(the AKP's attitude towards amnesty) refers to an approach in principle, not a guarantee."[31] As Garland (2001) asserts, there is no omnipotent strategist, no all-seeing actor with perfect knowledge and unlimited powers (p. 26).

Regarding the fragility and variability of state law, this chapter explores how three premises of neoliberal penality, i.e. punitiveness, responsibilization and managerialism have operated in the Turkish judicial system in the AKP era, which provides an insight into the government's policy on amnesty as well. First, I looked into the punitive attitude of Turkish state in its penal strategies through considering both high incarceration rates and the widening penal net by means of alternative mechanisms to incarceration. Second, I studied how the responsibilization strategy has operated in the Turkish criminal justice system. Third, I analyzed the efforts to increase the organizational rationality of the penal apparatus in Turkey via a security-oriented managerial logic. In this way, I examined how the combination of a selectively tough attitude, a focus on individual responsibility and a managerial approach in the AKP's penal discourses and practices has constantly influenced its amnesty agenda. Convinced of the need to restore the legal sphere, but reluctant to restrict its punitive power; unwilling to take the responsibility for social insecurity, but determined to maintain social control; and hesitant to release the criminals unconditionally, but to responsibilize them, the AKP government has attempted to manage the penal apparatus in Turkey in an efficient way without appealing to general amnesty.

[31] Based on my interview with him on December 6, 2014.
"Bu mutlak değil, bir prensip yaklaşımı."

CHAPTER 3

COPING WITH THE ONGOING PROBLEMS OF THE TURKISH JUDICIAL SYSTEM IN THE AKP PERIOD

Kafka ([1925] 2006) tells, in his unfinished novel *The Trial*, the story of a bank officer charged with an unspecified crime by unidentified agents Joseph K. is arrested without an indictment or a legitimate investigation, and what he was accused of is never explained to him. Hence, his lawyer cannot even prepare a statement of defense for him. K. has constantly attempted to prove his innocence while struggling against the unknown charges in an extraordinary system of rules and procedures. The legal authorities are totally inaccessible to him. He does not even know where the judge and the High Court are. He faces only the gatekeepers who sit before the law, but never gains an entry into it. The idea of justice is beyond that gate which is out of sight, too. This remarkable story elegantly reveals how fragile the formal properties of law are in the face of bureaucracy and policies. Thus, it provides an insightful lens or a relevant portrait through which to consider flaws in the Turkish judicial system has been quite meaningful today.

The principle of judicial quality requires accurate decisions taken through a prompt delivery of judgement. Judicial services need to function without undue procrastination, since extended trials have led to delayed justice which ultimately impairs the public confidence in judiciary. Regarding the judicial processes of extreme delay and almost never-ending criminal prosecutions, the Turkish criminal justice

system seems to have a Kafkaesque character. The Strategic Plan 2010-2014 published by the Ministry of Justice exposes how problems of human resources and technical infrastructure facing the Turkish judicial system prevents it from operating in an efficient manner (p. 38). The workload of the Turkish judiciary becomes an obstacle to the increase in the speed of criminal and administrative proceedings. In addition to such caseload problem, the over-capacity of prisons is a long-term burden for the effective performance of the legal system.[32] This raises the issue of how the judicial and political authorities have dealt with these problems up until now in Turkey. Tosun (1974), a Professor of criminal law and Criminal Procedure, underlines that the political decision-makers have constantly appealed to the mechanism of amnesty when not managed to cope with the malfunctioning of the Turkish judicial system (p. 22). Kocasakal (2010), the President of the Istanbul Bar Association, claims that a new form of amnesty was derived by the Turkish policy: "amnesty for emptying prisons." (p. 94). To put it another way, the overloaded character of the Turkish criminal justice system has ultimately led amnesty to become a solution at least until the AKP era.

The continuing relevance of the problems facing the Turkish legal system has constituted a challenge which must be met by the AKP government, too. However, the AKP has not appealed to general amnesty to handle these problems. Therefore, I raise this question: How are the ongoing problems in the Turkish judicial system resolved without making use of amnesty in the AKP period? I claim that the AKP government

[32] The current prison population is 179.611, and the current prison population rate is 228 in Turkey. ICPS (International Centre for Prison Studies), *World Prison Brief*, available (online): http://www.prisonstudies.org/country/turkey

has made an effort to use some indirect mechanisms, instead of amnesty, in order to fix the dysfunctional properties of the Turkish legal system. In this way, the AKP has compensated for the absence of general amnesty by utilizing these alternative mechanisms. This chapter aims to delve deeply into what has happened in the Turkish judicial system where the push for efficiency has determined the trajectory of the AKP's amnesty policy. For this reason, I make a detailed analysis of the operational problems facing the legal system in Turkey at first. Then, I look into how the AKP has made use of the alternative options to amnesty to tackle all these problems.

3.1 A strong excuse for granting amnesty: The dysfunctional aspects of the Turkish legal system

Table 5 exposes how the average waiting time for judicial cases has gradually increased in Turkey in recent years:

Table 5. The Average Waiting Time for a Judicial Case in Turkey (day)

2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
53	77	138	283	348	339	345	390	359	399

Source: [TURKSTAT (Turkish Statistical Institute), 2015]

Furthermore, according to an official report on judicial reforms published by the Ministry of Justice, the 36 percent of the cases which had been brought to the Court of Cassation (*Yargıtay*) in 2011 were finalized, whereas 64 percent of them were postponed to the next year (2011, p. 34). Table 6 clearly shows that the cases postponed until the next year (1,042,748) exceeds the half of the cases which were adjudicated (1,743,048) in 2013:

Table 6. Cases at the Criminal Courts in Turkey

Cases from last year (Geçen yıldan devir)	New cases (Yıl içinde gelen)	Reversal by the Supreme Court (Bozularak gelen)	Cases judged (Karara bağlanan)	Postponed until next year (Gelecek yıla devir)	Total (Toplam)
1,137,714	1,553,836	94,246	1,743,048	1,042,748	2,785,796

Source: [TURKSTAT (Turkish Statistical Institute), 2015]

Moreover, the cases from last year approximate to the number of new cases. The cases which were delayed from the last year or reversed by the Supreme Court constitute a considerable portion of the current caseload in the Turkish criminal justice system. All these rates expose how the caseload of the Turkish judiciary becomes much heavier year after year.

Ertekin (2012), a well-known judge and the head of the Democratic Judiciary Association *(Demokratik Yargı Derneği)*, underlines the malfunctioning of the Turkish criminal justice system due to the interminable judicial processes (Karaca, *Bianet*). For instance, he argues that some political cases on delicate or controversial topics in Turkey such as *Balyoz* or *Ergenekon* have been designed so as not to finish like a Kafkaesque case. The legal indictments, with thousands of pages, have been issued and/or different indictments have been combined in an inextricably complex manner. The newly accused people have been constantly added to the old ones through additional indictments. In other words, he claims that these types of cases have been deliberately extended as much as possible in order them not to be completed within a normal period of time. This creates a judicial dynamism by opening constantly new areas of legal inquiry which are

seemingly without end, which has ultimately intensified the current workload problem of the Turkish judicial personnel as well.

The Turkish Economic and Social Studies Foundation (*Türkiye Ekonomik ve Sosyal Etüdler Vakfı* - TESEV) published two studies which provide a comprehensive picture of how the current legal system operates in Turkey.[33] The first research aims to examine the mindset of judges and prosecutors themselves, i.e. their own attitudes towards the judicial activity (Sancar & Atılgan, 2009), whereas the second one seeks to explore the society's perceptions on the judiciary via a map of public opinions about the Turkish legal system (Sancar & Aydın, 2009). According to their results, even the most normative bases of the legal practice such as the impartiality of the Turkish judiciary are jeopardized by the workload of the courts. Both studies agree that large caseloads of the courts constitute a major deterrent to justice. This is because the judges, working under the pressure of severe caseload, inevitably experience difficulties with producing healthy decisions. In this way, the judicial system which does not operate properly has given rise to the lack of confidence in courts (Sancar & Aydın, 2009, p. 50). Indeed, the official judicial statistics demonstrate the excessive number of cases per judge in Turkey.[34] For example, the cases brought to the courts was estimated as 4,787,047 in 2000, 5,243,991 in 2005 and 6,511,186 in 2012. In addition, a judge in the European countries is responsible for 200 cases on average per year, whereas a judge in Turkey is responsible for 1,078 cases on average per year (The Ministry of Justice, 2011, p. 22). The

[33] They were designed as parts of the project titled "Perceptions and Mentality Structures Within and About the Judiciary" in 2009.

[34] TURKSTAT (Turkish Statistical Institute), "Judicial Statistics: Number of Cases per Judge", accessed 8 March 2015, http://www.tuik.gov.tr/PreTablo.do?alt_id=1070

extraordinary caseload of the Turkish judiciary becomes an important impediment both to its functioning in a timely manner, and to the public trust in its decisions.

Apart from the workload problem, the over-capacity of the prisons and detention houses is a long-term problem facing the Turkish criminal justice system. The judicial statistics of the Turkish Statistical Institute (TURKSTAT) clearly manifest, as seen in the Table 7, the massive increase in the Turkish prison population in recent years:

Table 7. Prison Population in Turkey

1998	66,096
1999	67,676
2000	50,628
2001	55,804
2002	59,512
2003	63,796
2004	58,016
2005	55,966
2006	70,524
2007	90,732
2008	103,435
2009	115,92
2010	120,194
2011	128,253
2012	136,638
2013	144,098

Source: [TURKSTAT (Turkish Statistical Institute), 2015]

In addition to these rates, more recent statistics offered by the General Directorate of Prisons and Detention Houses reveal that the prison population reached 145.615 in 2014 (January), and 158,537 in 2015 (January).[35] The current prison population in Turkey is 179,611, and the prison population rate is 228 in 2016 (January). According to the Annual Activity Report 2013 published by the Ministry of Justice, the remarkable augmentation in prison population with the challenge of organized crime (*örgütlü suçlar*) is a significant threat towards the Turkish judicial system (p. 161). For instance, a current report prepared by the Ministry of Justice, underlines the "frightening" picture of the public order in Turkey due to the explosion of ordinary crimes from 2009 to 2013 in terms of especially murder, theft and sexual offences (Kaya, 2015). In such official rhetoric, this crime explosion has explained high incarceration rates in the Turkish criminal justice system.

In brief, there are mainly two interrelated problems in the current legal system of Turkey: high incarceration rates, and high workload of the judiciary. These two problems seem to oblige the legal and political decision-makers to introduce amnesty until the AKP period. There have been still the proponents of the idea that amnesty is a crucial problem-solving mechanism in Turkey. One of my informants from the Association for Free Opinion and Educational Rights (*Özgür-Der*) underlines that whilst he does not approve of amnesty as a judicial category in doctrine, amnesty has, when thought pragmatically, two significant functions in practice: The first one is to compensate for the unjust judicial processes in Turkey which have led a lot of people to

[35] For more recent figures, see the data offered by the General Directorate of Prisons and Detention Houses. Retrieved 8 March 2015 from http://www.cte.adalet.gov.tr/#

become victimized, while the second one is to resolve the Kurdish question through a systematic release of the Kurdish prisoners with a general amnesty law.[36] Regarding the previous historical trends in Turkey, these practical reasons are expected to necessitate an amnesty law in the AKP period, too. In pursuit of subsidizing these impediments in the Turkish judicial system, nevertheless, the AKP has not granted general amnesty yet.

3.2 Dealing with the overloaded legal system without amnesty: The use of indirect mechanisms

"Understand that this great legal system is in a state of delicate balance."

(Montellier & Mairowitz, 2009)

The mechanism of amnesty has frequently functioned, until the AKP period, as a crucial remedy for resolving the legal problems in Turkey. However, the AKP has not appealed to general amnesty yet, whereby it eliminates a prospective solution prominently used in the Turkish judicial system up until now to overcome these judicial problems which has been a relevant phenomenon in Turkey. Therefore, I address these questions: How does the AKP government organize the legal system without utilizing the mechanism of amnesty? What other options has the AKP tried to operationalize to cope with all these problems facing the Turkish criminal justice system?

I argue that the AKP has intended to alleviate the overloaded criminal justice system in an alternative way rather than directly appealing to amnesty. This suggests

[36] Based on my interview with him on October 20, 2014.

that it has aimed to resolve the ongoing legal problems so as to invalidate the need for amnesty. For instance, a new draft bill, announced in July 2015, aims to find out the ways to decrease the workload in the criminal proceedings.[37] This bill proposes the development of alternative conflict resolution methods in pursuit of ending legal disputes as soon as possible, with the minimum cost and in the most satisfactory manner. I claim that the AKP government has, on tackling the dysfunctional aspects of the Turkish legal system, used eight alternative mechanisms instead of granting general amnesty. The majority of these mechanisms have been newly operated in the AKP era, whereas the rest of them have either become intensified, or continued to be valid in this period. I regard the first four one as directly related with the issue of amnesty, i.e. as being the modes of hidden amnesty (*örtülü af*) which creates implicitly the effect of an amnesty law: (1) probation and electronic surveillance (*denetimli serbestlik ve elektronik kelepçe*), (2) prescription (*zamanaşımı*), (3) discretion used by legal authorities, especially in the form of sentence reduction (*ceza indirimi*) , and (4) pre-payment, the ombudsman institution and mediation as alternative dispute resolution methods (*alternatif uyuşmazlık çözümleri*). The other four mechanisms are not directly linked to the phenomenon of amnesty, and but they have been utilized to resolve the problems facing the Turkish judicial system via internal, systemic, organizational solutions, i.e. without amnesty, (5) improving legal infrastructure: new courthouses and increase in the capacities of prisons, (6) increasing the number of judges, prosecutors and other judicial personnel, (7) efforts at professional education for those working for the units in the

[37] Ceza Muhakemesinde İş Yükünün Azaltılması Amacıyla Bazı Kanunlarla Değişiklik Yapılmasına Dair Kanun Tasarısı, T.C. Adalet Bakanlığı Kanunlar Genel Müdürlüğü, 10 July 2015, http://www.kgm.adalet.gov.tr/DUYURULAR/ceza-alternatif%20%C3%A7%C3%B6z%C3%BCm%20y%C3%B6ntemleri.pdf

Ministry of Justice: the National Judiciary Informatics System (*Ulusal Yargı Ağı Bilişim Sistemi* - UYAP) and the Justice Academy (*Adalet Akademisi*), and (8) establishing the District Courts of Appeal (*Bölge Adliye Mahkemeleri*) to ease the burden of the Court of Cassation (*Yargıtay*).

3.2.1 The modes of hidden amnesty: "Forgiving" without the name of amnesty

3.2.1.1 Probation and electronic surveillance

Probation (*denetimli serbestlik*) refers to a judicial control mechanism as an alternative to incarceration, the execution of sentences through conditional release whereby the offenders have been monitored for a specified duration. It is a testing period for a convict, who is released from confinement, under the supervision of a probation officer. This mechanism was included the Turkish criminal justice system with the enactment of the new criminal code in 2005.[38] The Probation Department started to function, as a unit under the Ministry of Justice, with many directorates established in almost all cities of Turkey. The Ministry of Justice regards, in its Strategic Plan 2010-2014, increasing the efficiency of this system as a crucial objective, which means that the development of probation services in accordance with international standards has been officially planned in Turkey (p. 46).

In the Turkish criminal justice system, probation services are implemented when the judges defer a sentence (*hükmün açıklanmasının geri bırakılması*), and delay a punishment *(ceza erteleme)*. Özdemir (2011), a judge writing a thesis on the use of the deferment of sentences in Turkey, underlines that this phenomenon included in the

[38] For the full text of the new Criminal Code, see: http://www.ceza-bb.adalet.gov.tr/mevzuat/5237.htm

Turkish judicial system in 2005 as part of the Child Protection Law (p. 43). However, it started to encompass the petty crimes of adults who are sentenced to judicial fines (*adli para cezası*) or a maximum of one-year imprisonment by 2006. The scope of this law was extended so as to include the crimes sentenced to two-year imprisonment in 2008. Turhan (2006), a professor of law, emphasizes that the delaying of punishment has started, in accordance with the new criminal code, to be appealed to two-year prison sentences at most (p. 31). In this way, both mechanisms have constituted an alternative solution to incarceration for alleviating the problem of overloaded prisons in Turkey. This is because the adjudication processes for thousands of offenders have been, through these mechanisms, completed without prison sentences.

In his report on the structural problems and potential solutions of the penal policies in Turkey, Mandıracı (2015) also states that probation is used, as a punitive alternative to incarceration, to resolve the capacity problem of the penal institutions gradually risen in an extreme manner (pp. 16-17). Regarding a recent change in the practices of criminal execution, he argues that the release of offenders sentenced to the 18-month imprisonment at most via probation services became possible. In other words, these offenders have begun to be released automatically without entering prison at all, i.e. without fulfilling the requirement of good will (*iyi hal gösterme şartı*). This means that probation became almost a compulsory mechanism for all crimes sentenced to a maximum of 18-month imprisonment. Therefore, this change has been perceived by the convicted people as a conditional amnesty (*şartlı af*) (Mandıracı, 2015, p. 30). Both the over-capacity of prisons, and the increasing number of offenders sentenced for petty crimes to short-term imprisonment made probation nearly a requisite for the Turkish

judicial system (Yavuz, 2012, p. 339). The use of electronic surveillance, complementary to the implementation of probation services, is also intended in order to provide an efficient control of the conditionally released offenders in public. The Electronic Surveillance Directorate was, as part of the Probation Department, founded in 2012 in Turkey, but this mechanism began to be actively used in probation services starting in February 2013. In this way, the offenders on probation have started to be monitored by means of electronic devices. In this respect, as seen in the Annual Activity Report 2014 of the Ministry of Justice, 3.360 released offenders were supervised via electronic devices until the end of 2014 (p. 101). The Strategic Plan 2015-2019 reveals that the officials are intended to make this mechanism more prevalent in the Turkish criminal justice system to facilitate the proper supervision of offenders during the probationary period (p. 152).

3.2.1.2 Prescription

Prescription (*zamanaşımı*) is a procedure whereby a criminal case becomes invalid after a period of time has elapsed, whereby the state renounces its authority to judge and punish when a certain period of time has been over the criminal case. The main reason why this mechanism is operated in Turkey is the malfunctioning of the judicial system, since the most prominent topic of public debate on the problems of the Turkish judiciary is the length of criminal proceedings. The cases which are prolonged in extreme manner have been repealed due to prescription. According to the report published by the Ankara Chamber of Commerce *(Ankara Ticaret Odası*) (2006), a prescription has functioned as a hidden amnesty in Turkey. For instance, the lawyer from the Istanbul Nationalist Lawyers' Group *(Istanbul Milliyetçi Avukatlar Grubu*) that I interviewed, states that the

time of prescription was lengthened in 2005 with the new criminal code.[39] A criminal case was repealed if not completed within 20 years in accordance with the old legislation, but it is repealed after 30 years have passed today. In other words, it became much more difficult for a judicial case to be repealed via prescription, but prescription has been still a valid phenomenon in the Turkish judicial system. Indeed, a considerable number of cases have continued to be repealed by means of prescription: 7,618 cases in 2006, 9,111 in 2007, 12,354 in 2008, 14,791 in 2009 and 1,585 cases in 2010 (The Ministry of Justice, 2011, p. 34). Üçpınar and Özer indicate that human rights violations in the 1990s in Turkey started to benefit from prescription in the 2010s, since they are evaluated in accordance with the 20-year limit of the old criminal code (Tayman, 2011).

The criminal cases associated with state officials (*kamu görevlileri*) have tried to be extended, as a deliberative tactic, so as them to be repealed by being included the scope of prescription. There is a regime of impunity (*cezasızlık rejimi*) for the crimes especially committed for the sake of state, which refers to a kind of selective justice. Regarding the proceedings on public officers in charge of torture as crime against humanity, Mithat Sancar argues that the majority of these cases have been finalized with the decision of non-prosecution (*takipsizlik*) during the preliminary inquiry (Kılıç & Durmaz, 2006, p. 41). The accused officers have been mostly acquitted, or the cases have been delayed and ultimately repealed owing to prescription. In other words, those who benefit from the use of prescription at most have been generally the public authorities. The lawyer Ömer Kavili, from the Attorney Rights' Center of Istanbul Bar Association *(Istanbul Barosu Avukat Hakları Merkezi*) indicates that prescription

[39] Based on my interview with him on November 24, 2014.

becomes the rule rather than the exception in the Turkish judicial system (Tayman, 2011). The administrators have generally altered the workplace of attorneys or of the courts in which the aforementioned cases are adjudicated. In this way, the judiciary cannot judge the accused officials in its area of jurisdiction, and tries to take the testimonies via instructions (*talimatla ifade alma*). That the prosecutional authorities cannot carry out an effective investigation prevents the collection of evidences in a satisfactory way. I claim that the current caseload of the judiciary has led prescription to become a predominant phenomenon in Turkey. This is because there exists a huge amount of judicial cases expected to be finalized urgently in the Turkish criminal justice system. The number of cases per judge is extremely high, which gives rise to unreasonable periods of trial, which leads the judicial system to operate in a cumbersome manner. This has ultimately led the cases whose time is up to be repealed via prescription, which reduces large caseloads of the judicial system in return. In other words, the failure of this system becomes its remedy in a paradoxical way.

3.2.1.3 Discretion used by the legal authorities

According to my informant from the Progressive Lawyers Association *(Çağdaş Hukukçular Derneği*), both the intensification of arbitrary changes in the current laws, and enacting constantly new legislations have removed the need for general amnesty in the AKP era.[40] He argues that a legislation, which had changed in February, was restored to its former state in October in Turkey. The legal domain has been turned, herewith, into a jigsaw puzzle whose parts have been constantly changed in a flexible way during

[40] Based on my interview with him on October 27, 2014.

the AKP period. The necessary arrangements to organize the legal sphere are made by the government in a measureless way, which left no room for the requirement of amnesty. The arbitrariness and flexibility in the legislative processes, as in the case of changes in the new criminal code enacted in 2005, have been utilized to assist the current legal system indirectly. In this way, the need for general amnesty has tried to be invalidated in this era.

Sancar (2006) states that the organization of the Supreme Board of Judges and Prosecutors (*Hakimler ve Savcılar Yüksek Kurulu* - HSYK) under the Ministry of Justice is widely criticized in Turkey, since this makes judges and prosecutors vulnerable to the interventions of politicians (Kılıç & Durmaz, p. 42). This organization is expected to have an independent secretary, a separate budget and audit committee. After the referendum on constitutional changes in 2010, these objectives were fulfilled (Sezerer, 2014). However, another legislation enacted in 2014 became a step back from all these developments. For instance, the current personnel of the HSYK were discharged, and the head of the Audit Committee made responsible to the Minister of Justice who started to appoint the deputies of the General Directorate.[41] In which departments the members of the Board will work or whether they work as the main or complementary members also began to be determined by the Minister of Justice, too. To put it another way, the structure of the HSYK was, with the latest arrangement, completely changed two times within only five years. This reveals the arbitrariness in the efforts of the political authorities to change the norms and structure of the legal domain.

[41] Anadolu Ajansı, "HSYK Kanun Teklifi Kabul Edildi", 15 February 2014, accessed 10 March 2015, http://www.aa.com.tr/tr/manset/288381--hsyk-kanun-teklifi-kabul-edild

The Internal Security Package was also enacted on 27 March 2015 in Turkey, whereby a far-reaching authority will be attributed to the police officers.[42] For instance, the use of firearms will be, under certain conditions determined in an arbitrary manner, allowed to them. Through the implementation of this package, a "hidden amnesty" has become possible for the police officers charged with the use of abusive force in the Gezi Park protests (Gökdemir, 2015). The officers whose cases have still continued will have the opportunity to benefit from that legislation, whereas those whose cases were completed, however, will have the right to demand for retrial (*yeniden yargılama*). In other words, this arrangement will be utilized in favor of the public officers. This suggests that a regime of selective impunity can be made possible by the state authorities, without granting amnesty, through codifying legislations in a discretionary manner.

In their work *Adalet Biraz Es Geçiliyor*, Sancar and Atılgan (2009) also emphasize the dominant statist approach in the judiciary that creates controversy on its impartiality. Some judges and prosecutors they have interviewed have explicitly state that they protected the "interests of the state." The interviewees who rejected and criticized this attitude, however, admit that the tendency to protect the state is, according to their own experience and observations, quite widespread in the Turkish judicial system (Sancar & Atılgan, 2009, pp. 3-4). In other words, some judges and prosecutors have not hesitated to utilize their discretionary power for the sake of looking after the state's benefits. Jehle and Wade (2006) regard such discretion used by the prosecution

[42] "İç Güvenlik Paketi TBMM'de Kabul Edildi", accessed 27 March 2015, http://www.bbc.co.uk/turkce/haberler/2015/03/150327_ic_guvenlik_paketi_kabuledildi

service as a way to overcome the overloaded judicial systems. For instance, a criminal proceeding can be repealed, if the accused's guilt is of a minor nature and there is no public interest in that case (p. 6). In this respect, the prosecutor can demand, in some cases, for prescription or make a decision of non-prosecution after the preliminary investigation. I argue that both the arbitrary interventions of the AKP and the discretionary prosecutorial power have led the Turkish criminal justice system to be administrated in a flexible manner without the need for a general amnesty.

3.2.1.4 Alternative dispute resolution methods as pre-trial solutions: Pre-payment, the ombudsman institution & mediation

According to the Strategic Plan 2012-2016, published by the Supreme Board of Judges and Prosecutors, the primary reason for the high workload of the Turkish judicial system is that the legal disputes which can be resolved through pre-trial remedies are the subject of judicial cases (p. 142). The legal discrepancies or conflicts, which can be settled through alternative dispute resolution methods, have occupied the trials in a redundant manner. According to an official report on strategies of legal reform published by the Ministry of Justice (2009), unless the alternative means of settling disputes are developed, legal reforms cannot provide the expected solutions for solving the ongoing judicial problems (p. 39). Therefore, the use of restorative justice is officially intended to mitigate the heavy workload of the Turkish judiciary. According to the Strategic Plan 2010-2014, Turkey introduced a new criminal justice system in 2005 with a new criminal code where there has been a growing interest in developing the tools for judicial reconciliation (p. 91). Hence, the Ministry of Justice has planned to initiate reforms to provide the means of this reconciliation. Indeed, implementing the out-of-

court methods is presented as a strategic goal by the Ministry of Justice for resolving the judicial discrepancies among the citizens. For instance, pre-payment (*ön ödeme*) continued to be operated in the new Turkish Criminal Procedure Code. This mechanism, alternative to incarceration, prevents a public case to be prosecuted when the accused people pay a certain amount of money determined by the judges. It is applicable, however, only to petty crimes sentenced to judicial fines or three-month imprisonment at most (Kaymaz, 2005).

In their article on the ombudsman services, Efe and Demirci (2013) indicate that the judicial control mechanisms in Turkey are dysfunctional due to the large caseloads of the judiciary, and that the content of current legislations is extremely complicated for the ordinary citizens (p. 49). Therefore, the reason why the law on the Ombudsman services was enacted is that people seek for a more accessible auditing mechanism for evaluating the judicial services. The legal ombudsmen investigate the complaints of citizens about the judicial administration, and give advices to the legal authorities. In this way, they persuade these authorities to withdraw or compensate for their improper or unfair decisions. They have led the problems between the citizens and the judicial administration to be resolved without any necessity of a trial period (Efe & Demirci, 2013, p. 65). Odyakmaz (2013), the professor of law, also states that the Ombudsman Institution acts as a bridge between citizens and the administrative judiciary (p. 2). Hence, the Institution of Ombudsman has a significant impact on the resolution of disputes without being transferred to the courts. In this way, this service has contributed to alleviate the extensive workload of the current legal system in Turkey.

The Third Judicial Reform Package, including not just the legal ombudsman services but also the Draft Law on the Mediation of Civil Disputes, was introduced after being consulted in the Parliament in 2012. Consequently, as shown in the Annual Activity Report 2012, the mechanism of mediation started to be used as another alternative dispute resolution method in the Turkish justice system (p. 115). The Mediation department was established under the Ministry of Justice in 2012 with a free Mediation Helpline (*Ücretsiz Arabuluculuk Destek Hattı*) as an information and referral service. Through the Mediation Law (*Arabuluculuk Kanunu*), the criminal procedure is ceased for certain offences when the victim is reconciled with the offender with the initiation of a mediator. Dost (2014), a professor of law, emphasizes that mediation is a non-judicial and voluntary solution, since the mediator is not entitled to decide like a judge (p. 81). Rather, he/she has claimed to be only the negotiator that helps, as a neutral agent, the parties of dispute to reach a solution without going to trials. According to the Annual Activity Report 2014 prepared by the Ministry of Justice, the number of mediators which have been registered is 1555 at the end of 2014 (p. 161). In this way, some criminal cases have finalized in a quick way with minimum cost, i.e. giving a chance to the possibility of reconciliation instead of being transferred automatically to the trials. This is an alternative way to ease the burden of the courts in Turkey.

3.2.2 The indirect effect of some operational solutions: Resolving the legal complex without amnesty

In addition to the alternative mechanisms directly related with the effect of amnesty, I argue that some systemic solutions have started to be utilized in recent decades for resolving the problems facing the Turkish legal system. These developments seem to be

irrelevant to the phenomenon of amnesty, but they have ultimately led the Turkish state to handle the judicial problems without appealing to amnesty, whereby they have influenced the AKP' policies of amnesty in a subtle way.

3.2.2.1 Improving legal infrastructure: The increase in the capacities of prisons and courthouses

The Ministry of Justice has officially declared that the inadequate capacity of technical infrastructure is an important weakness of the Turkish judicial system. For instance, a sufficient number of regional penal institutions have not been established across the country yet. Furthermore, the Strategic Plan 2010-2014 reveals that the physical capacities of the current prisons and detention houses are not at a satisfactory level (p. 97). By making investments on increasing the capacities of prisons and detention houses, the AKP has tried to cope with the over-capacity of penal institutions without introducing an amnesty law. The overall prison population in Turkey was, as mentioned earlier, estimated as approximately 180 thousand offenders by January 2016. Mandıracı (2015) asserts that this population has expected to increase up to 215,000 until the end of 2017 (p. 17). This extraordinary augmentation is the reason why a significant increase in the capacity of penal institutions is a significant objective of the Ministry of Justice (The Strategic Plan 2010-2014, p. 97). The Annual Activity Report 2013 published by the Ministry of Justice, reveals that a capacity increase with 8765 people was provided with opening 10 prisons, and six additional buildings only in 2013 (p. 104). In this way, penal institutions manage to accommodate up to 154,115 prisoners by 2013, whereas 14 new prisons were constructed in 2014 (The Annual Activity Report 2014, p. 67).

Another impediment to the effective operation of legal system is the disproportionate distribution of the judicial organizations around the country. Considering the number of cases a judge manages to deal with under the burden of high workload, an increase in the number of courthouses is needed in the Turkish legal system. Apart from new prisons and detention houses, therefore, new buildings for justice services must be established to improve the working conditions of the Turkish judiciary. In addition to new courthouses which have been recently built, the Ministry of Justice has thus started to renew the existing high courts to enhance their capacities. According to the Annual Activity Report 2013, the total area covered by the existing courthouses exceeds, along with the ongoing constructions, five million square meters in Turkey (p. 5). The Ministry of Justice also asserts that ten new courthouses were built in 2014 (The Annual Activity Report 2014, p. 68). According to the Strategic Plan 2010-2014, the need for justice service buildings has not been, despite all the efforts, fulfilled altogether across the country, and thus the physical infrastructure of the Turkish judicial organization must continue to be developed (p. 120). In this way, attempts have been made to re-organize and upgrade both courthouses and penal institutions in accordance with international standards, which is conducive to increasing both the speed and efficacy of criminal proceedings in Turkey.

3.2.2.2 Resolving the problem of human resources: Increasing the number of judicial personnel

The need for human resources is also a crucial problem of the judicial services in Turkey, since large caseloads of the judiciary have not been matched with a proportionate increase in the number of judicial personnel. According to the Strategic

Plan 2010-2014 published by the Ministry of Justice, the heavy workload of the judges and prosecutors hinders their capacity to make healthy decisions, thus casts shadow on the respectability and reliability of their judgements (p. 59). The lack of expert cadres has led the judges and public prosecutors to perform many administrative duties along with their judicial tasks, which makes high workload of the courts much heavier. For this reason, the Ministry of Justice (2011) has planned to increase the number of public prosecutors and judges in tandem with international standards (p. 34). Bekir Bozdağ, the Minister of Justice, has recently declared that the recruitment of approximately five thousand judicial personnel is officially planned (Keskinkılıç, 2014).

Jehle and Wade (2006) explore how different European countries initiate reforms to cope with the overloaded character of their criminal justice system (p. 5). They underline that thee heavy workload is an important challenge facing judicial systems. The capacity of the prosecution service and court personnel must be enhanced as soon as possible to deal with the massive increase in the criminal proceedings. The Turkish judicial system is in an effort to resolve the problem of workload in accordance with that option. As shown in the Annual Activity Report 2013, the number of prosecutors and judges rose from 103,183 to 111,797 in 2013 in Turkey (p. 147). In a similar vein, the number of judges per 100,000 people was estimated as 11.61 at the end of 2013, whereas it had been 10.6 in 2010, while the number of public prosecutors per 100,000 people increased from 5.8 to 6.12 between 2010 and 2013 (pp. 80-81). According to the Strategic Plan 2015-2019, the Ministry of Justice underlines that the number of judges and prosecutors increased with 41 percent in the last five years, while other judicial personnel increased with 64 percent in the same period (p. 45). The AKP government

has aimed to take new steps to increase the number of judicial personnel for mitigating the problems of the overloaded legal system in the country.

3.2.2.3 The National Judiciary Informatics System (UYAP) and the Justice Academy

In pursuit of providing the legal system with speed, efficiency and productivity, the National Judiciary Informatics System (UYAP) project has led many judicial procedures to be carried out via an informatics system. In 2000, the UYAP was launched in two main steps.[43] Firstly, the central units of the Ministry of Justice had been automated in 2001. Secondly, the Institution of Forensic Science, prisons and detention houses were added to the automation system in 2005. The Annual Activity Report 2012 prepared by the Ministry of Justice, reveals that the UYAP is used systematically in the Turkish legal organization today (p. 149). The majority of the judicial operations have begun to be performed through this system, whereby the Ministry of Justice has aimed at contributing to effective trials.

Through this network using the state-of-the-art technologies, examining the details of case files and appending documents become possible for citizens, attorneys, institutions and corporations in Turkey. For instance, instead of going to the courthouses, citizens can get the information on the criminal cases they are involved with via Internet. The attorneys started to manage the majority of their tasks in their office. The documents necessary for legal investigation are instantly achieved by the judges and prosecutors. Providing an efficient information exchange and document transactions among the units of the Turkish judicial organization, the UYAP attempts to remove redundant procedures

[43] Ulusal Yargı Ağı Bilişim Sistemi, "Aşamalar", accessed 14 March 2015, http://www.uyap.gov.tr/Asamalar

from the judicial system. In line with the goal of accelerating case management, it aims to conduct judicial activities and other administrative processes in the legal system electronically. For example, as seen in the Strategic Plan 2010-2014 the use of e-signature in legal procedures and transactions increased, whereby the problems arising from the shortage of judicial personnel is minimized (p. 109).

According to the Strategic Plan 2012-2016 of the Supreme Board of Judges and Prosecutors (*Hakimler ve Savcılar Yüksek Kurulu* - HSYK), judges and prosecutors have expected to keep up with the legislations changing from day to day in Turkey (p. 149), whereas improving the occupational competences of them through in-service training plays a major role in increasing the productivity of the Turkish judiciary (p. 151). The judges and prosecutors have a difficulty with acquiring the current knowledge about the legal procedures of the high courts, which leads to extend the trial periods and to the increasing rates of reversing judgements. They need to be specialized in their field of study in order to make decisions rapidly with minimum judicial failures. For this reason, the law on the establishment of the Turkish Justice Academy was introduced in 2003. The training programs have been targeted, as a mission of this academy, for providing the judges and prosecutors with the ability to make fair and quick decisions.[44] In other words, as shown in the Strategic Plan 2015-2019, the Turkish Ministry of Justice tries to consolidate the principle of judicial time management (p. 91). In order to increase the number of qualified judicial personnel, there exist many objectives of this professional education center: carrying out projects, organizing conferences and seminars, as well as

[44] Türkiye Adalet Akademisi Kanunu, accessed 12 March 2015, http://www.mevzuat.gov.tr/MevzuatMetin/1.5.4954.pdf

arranging legal training courses. In other words, improving the performance of judges and prosecutors is aimed to reduce the current workload of courts.

3.2.2.4 The District Courts of Appeal

The Court of Cassation (*Yargıtay*) lies between the First Instance Courts (*İlk Derece Mahkemeleri*) and the Constitutional Court (*Anayasa Mahkemesi*) in the Turkish judicial organization, and it has functioned for finalizing the cases go for an appeal (*temyiz*). Gökçe (2012), an investigatory judge (*tetkik hakimi*), indicates that the Court of Cassation had the full responsibility for all the decisions of appeal. Thus, it had difficulty with fulfilling its primary tasks while tackling the processes of legal inquiry. According to the Strategic Plan 2012-2016, published by the Supreme Board of Judges and Prosecutors, such extensive caseload of the Court of Cassation has primarily arisen from the high rates of cassation in Turkey (p. 142). However, the District Courts of Appeal (*Bölge Adliye Mahkemeleri*) were founded as another intermediate judicial control mechanism to share the caseload of the Court of Cassation. In other words, these regional courts have the authority to examine files coming from the First Instance Courts whose decisions they may either uphold or quash (Aksel, 2013, p. 55). In this way, a majority of the cases that constitute the workload of the Court of Cassation will be mitigated via these intermediate courts, which act as a filter.

The Annual Activity Report 2013, prepared by the Ministry of Justice, declares that 15 Regional Courts of Appeal were established and 391 personnel were appointed for them (pp. 92-93). However, the establishment of these courts was delayed to 2015, although the draft law on their opening had been already approved in 2005. The primary reason of this postponement is staff shortage. In addition, the Republican People's Party

(*Cumhuriyet Halk Partisi* - CHP), as the main opposition party in Turkey, and the Association of Judges and Prosecutors (*Yargıçlar ve Savcılar Birliği* - YARSAV) have opposed these regional courts in the sense that these courts damage the unitary standardized character of the Turkish criminal justice system. The dissidents also put forward the idea that these courts disable the Court of Cassation by impairing its authority and credibility. Therefore, the exams to hire judges and prosecutors for these courts were repealed repeatedly by the Council of State (*Danıştay*).[45] Nevertheless, Bekir Bozdağ, the Turkish Minister of Justice, declares that these courts will start to operate by the end of 2015, if the assignments of necessary personnel for them are completed (Armutçu, 2014). Finally, the Minister of Justice has recently announced that these courts will start to work in 20 July 2016 across the country.[46]

To sum up, this chapter delves more deeply into the internal operations of the Turkish judicial system, i.e. the structure and organization of the current penal apparatus to examine the dynamics of the AKP's amnesty policies. As the Professor of Theology at Marmara University I interviewed with advised me to look into what is done, rather than simply into what is said, "Never mind the discourse, look at the practice!"[47] I claim that the Turkish judicial system has tried to be administrated via a means-end calculation, during the AKP period, whereby the operations of the legal machine has officially intended to be accelerated and systematized. In this way, the AKP government has made an effort to bypass the long-term necessity of amnesty to cope with the

[45] "Bu Mahkemeler Bizi Bölecek", *Taraf*, 08.01.2011, accessed 13 March 2015, http://arsiv.taraf.com.tr/haber-yazdir-63428.html

[46] T.C. Resmi Gazete, Bölge Adliye Mahkemelerinin ve Bölge İdare Mahkemelerinin Tüm Yurtta Göreve Başlayacakları Tarihe İlişkin Karar, http://www.resmigazete.gov.tr/eskiler/2015/11/20151107-3.pdf

[47] Based on my interview with him on November 25, 2014. "Boş ver sen söylemi, icraata bak!"

ongoing judicial problems in Turkey. The alternative mechanisms have thus been operationalized to increase legal effectiveness in the country without directly appealing to amnesty. First of all, in this chapter, I explored four amnesty-related mechanisms, i.e. probation and electronic surveillance, prescription, the use of legal discretion and alternative dispute resolution methods, as subtle ways to create the effect or some consequences of an amnesty law without being labelled directly as amnesty. Secondly, I interrogated four indirect legal developments or procedural remedies in Turkey, i.e. improving legal infrastructure, hiring new judicial personnel, developing an informatics system, building professional education centers and the District Courts of Appeal, which have contributed to resolve the problems facing the Turkish judicial system without amnesty. In this way, I have developed an insight into what the AKP has done in the absence of amnesty, rather than simply saying that it has not appealed to amnesty yet.

CHAPTER 4

SEEKING LEGITIMACY:

THE AKP'S ALTERNATIVE MORAL STANCE ON AMNESTY

Graybill (1998) argues in her work on the Truth and Reconciliation Commissions in South Africa that amnesty provided by these commissions for the perpetrators of human rights violations does not have just a political focus (p. 370). Rather, it is also a deeply theological and ethical initiative based on the principles of Christian mercy and forgiveness. I propose that the amnesty debate in Turkey refers to a controversial moral topic as well, since the parties involved in this debate do not have a common moral outlook on amnesty. Amnesty is not the representation of a unified, collective morality in Turkey but a mechanism which contains a kind of value pluralism. For instance, the crime victims who demand retribution have opposed amnesty, whereas the offenders' families and various human rights organizations have constantly attempted to pressure the state into expressing its mercy through granting amnesty. The experts, however, who deal with how to manage a peace-building programme to end the internal unrest in Turkey have proposed an amnesty for the Kurdish political prisoners. There is no overlap between all these public attitudes towards a prospective amnesty law, which urges the Turkish state to make a choice of legitimacy when shaping its amnesty agenda. This is because the decision to grant amnesty is based on the effort at balancing the morally ideal and the politically feasible. This chapter aims to examine not just the instrumental or political considerations, but also the moral concerns covering the amnesty debate in Turkey.

Regarding the changing terrain of the state's amnesty policies in the AKP era, I argue that the AKP's attitude towards amnesty has a distinctive moral character. Recep Tayyip Erdoğan, the Former Prime Minister and the AKP's former leader, has repeatedly indicated the government's disapproval of general amnesty by underlining the moral core of this stance (2013):[48]

> I have a different idea on amnesty. Only the victims have the right to forgive the crimes against themselves. The state has the right to grant amnesty only for crimes against itself (See Appendix, 4).

This kind of official declarations reveal that the AKP has opposed to enact general amnesty which includes the crimes against individuals, since the government has no right to do this. I claim that this is a unique moral stance in Turkey where unprecedented numbers of amnesties were granted mostly for ordinary, non-political crimes up until the AKP period. This chapter aims to explore the dynamics of this alternative discourse towards the legitimacy of amnesty in the AKP era. The moral core of amnesty lies in this key question: Which criminals deserve to be forgiven by the state? In other words, which crimes ought to be excluded from (and which ones ought to be included) the scope of amnesty laws is not just a practical question taking account of the politico-economic dynamics of the penal institutions in Turkey. Rather, to decide on who is worth benefiting from the state's amnesty apparatus is also a moral choice. I raise another important question which determines the legitimacy of an amnesty: Who has the right to grant amnesty? The public debate on amnesty has thus focused on the question of both who deserves to be forgiven, and who has the right to forgive. For instance, all

[48] "Başbakan Erdoğan'dan 'Genel Af' Açıklaması", *Radikal*, 17 August 2013, accessed 21 June 2015, http://www.radikal.com.tr/politika/basbakan_erdogandan_genel_af_aciklamasi-1146545

interviewees in my research have either problematize the scope of a prospective amnesty or criticize the unfair practice of implementing the amnesty laws by the state, rather than opposing the phenomenon of amnesty itself. I claim that the AKP government embraces a distinctive stance on a legitimate amnesty by declaring that the state has the right to grant amnesty only for the crimes against itself. Therefore, the attempt to understand the AKP's policies of amnesty requires inextricably to examine its moral perspective on this phenomenon.

I explore in this chapter the moral core of the AKP's amnesty policies via a three-fold analysis. Firstly, I engage in a theoretical discussion on the question of whether substantive considerations have been still relevant in the modern law. In taking up Habermas' argument that even if the modern law is conceived under the premises of legal formalism, it cannot be described as rational in a morally neutral sense, I argue that the mechanism of amnesty is circumscribed in Turkey by not just instrumental interests, but also moral dilemmas. In addition, the dichotomy between formal and substantive considerations in the Weberian theory of law refers to an ongoing tension between normative demands and functional requirements. I claim that the state's use of amnesty is a typical representative of this tension, since amnesty has been expected not to insult the public sensibilities when being an effective problem-solving mechanism. The AKP government has thus attempted to resolve, in its amnesty policies, the tension between two necessities of a positive law, i.e. being instrumental and legitimate at the same time. The AKP's use of alternative mechanisms, instead of general amnesty, refers to the government's attempt to meet the practical requirements of an overloaded judicial system without sacrificing its moral commitments and/or concerns for legitimacy.

Secondly, I examine how the AKP's attitude towards amnesty differs from the moral arguments which have hitherto become prevalent in Turkey to legitimize the use of amnesty. There have been two major perspectives on the legitimacy of amnesty up until the AKP period: The state's moral necessity of being merciful towards the citizens, and the human rights discourses proposing the release of offenders via amnesty. For instance, these two humanitarian motives stimulated the introduction of the Rahşan Pardon.[49] Rahşan Ecevit announced that she wanted amnesty as a humanitarian reflex in the face of a spontaneous event, i.e. a judicial case in which a 13-year child was sentenced to six years in jail for stealing *baklava* with his friends. In other words, Rahşan Ecevit's demand for an amnesty law stemmed from purely emotional motives, not from political ends (General Directorate of the Democratic Left Party, 2002, p. 44). I assert that an ethics of forgiveness was underlined in the Rahşan Pardon period, whereby the discourse of "victims of fate" (*kader kurbanları*) was utilized to propose amnesty for those pushed to crime by poverty, hunger and the unfair social order. Neither the idea that the state should act as a merciful father expected to forgive its faulty children, however, nor the human rights perspective based on penal tolerance of the state could explain the moral tenets of the AKP's amnesty policies. This does not mean that populist discourses have stopped to influence the dynamics of the amnesty debate in Turkey. Rather, I claim that the discourse of the *kader kurbanları*, which had been the case for the Rahşan Pardon, as the primary mode of legitimizing the state's amnesty policies, was

[49] The Conditional Release Law enacted in 1999 is widely known as the "Rahşan Pardon." The over-inclusive scope of this law was highly criticized in that period via a heated public debate. For a detailed analysis of this legislation, see: Timur Demirbaş, "Af Tartışmaları ve 4616 sayılı 23 Nisan 1999 Tarihine Kadar İşlenen suçlardan Dolayı Şartla Salıverilmeye, Dava ve Cezaların Ertelenmesine Dair Kanun", *Anayasa Yargısı Dergisi*, *18*, 2001.

replaced by a new populist discourse of "rightful share" (*kul hakkı*) in the AKP period. The AKP's victim-centered discourse on amnesty puts forward the idea that any kind of forgiveness or mercy cannot be granted by the state, for those committing the crimes against individuals, without the consent of the victim. Considering the AKP's discourse of the *kul hakkı* in its amnesty policies, in the third part of this chapter, I explore how the AKP's moral perspective towards amnesty is related with the tenets of Islamic criminal law in which only victims or their legal representatives have the right to forgive those committing crimes against themselves. Following these principles, the AKP government's moral stance on a legitimate amnesty is also religion-based.

4.1 The relevance of substantive considerations in modern law

Deflem (2013) states that moral argumentation still penetrates into the core of positive law, in the legal theory of Jürgen Habermas, since modern law is characterized by conditions of both legality and legitimacy:

> Habermas posits an intimate connection between law and morality on a philosophical level, whereby he maintains that law, even in highly rationalized societies, retains a critical normative dimension. Despite a trend towards technocratization on the basis of instrumental criteria of efficiency, modern law retains in a need for moral justification. (p. 81)

In a positivistic view of law, law cannot draw its legitimizing force from an alliance between law and morality regarded as something which has potentially threatened the rationality of law. However, the legitimacy of legality, in Habermas' theory of law, cannot be explained in terms of some independent rationality which inhabits the form of law in a morally neutral manner (Habermas, 1998, p. 228). Rather, legality can derive its legitimacy only from a procedural rationality with a moral impact (p. 220). This is

because legal discourses, however bound to the existing laws, cannot operate within a closed universe of the unambiguously fixed legal rules. The modes of justification institutionalized in legal processes and proceedings remain open to not just policy arguments, but also moral discourses (p. 230).

In taking up Habermas' question of how the moral considerations have still played a key role in the procedures of modern law, I analyze how amnesty, as a legal decision, is permeable both to the law-making authorities' concerns for legitimacy and to the moral assessment processes in the public. It would not be wrong to alarm that moral argumentation has always influenced the dynamics of how an amnesty law is discussed, implemented and evaluated in Turkey. Of course, amnesty is a decision of political legislature based upon a cost–benefit analysis. Considering the moral dynamics of the amnesty debate in Turkey, however, such a calculation also involves moral judgement. This is because a legitimate amnesty law is expected not to become a political mechanism serving an extra-legal end but to be compatible with dominant social values, and everyone has a different formula for a fair, reasonable and convenient amnesty law in Turkey. Hence, amnesty cannot be considered only through the instrumental or procedural necessities of the legal order. Habermas also mentions certain areas of law that are closely related to deeply held belief systems, such as criminal law (Deflem, 2013, p. 83). Amnesty, as a mechanism directly related to the dynamics of crime control strategies, is not immune but quite vulnerable to moral argumentation. The public has not been informed about the details of all legislation, which has attracted only a selective interest of specialized groups. Amnesty is a legal phenomenon which arouses strong feelings of moral condemnation.

Regarding the necessity of considering amnesty both in practical and moral terms, the Weberian ideal types of legal formality and substantive law is quite meaningful. This dichotomy refers to, in Weber's theory of law, the tension between law and justice which points to the permanent fusion of these two concepts: Legal formality denotes consistency, certainty and calculability and thus, in particular, the rational control of life, whilst substantive law incorporates fairness or justice (Cotterrell, 1983, p. 85). According to Cotterrell (1983), these formal and substantive considerations are inextricably related in all legal systems and the development of law, of whatever kind, expresses certain value orientations reflected in legal rules and principles (p. 83). Legal change is governed not simply by technical amendments, but also by fluctuating value choices. Hence, he underlines the dependency of Western law on fusion within a rational system of rules which has circumscribed values of justice and order:

> The combination of formal and substantive considerations in perpetual tension seems to be the continuing legacy of legal history for today's law. In this tension lies both stability and impetus to change in law. And because law's ideological content changes and can be changed, Weber's iron cage is less secure than he thought. Action on and through the law is one of the necessary, though not sufficient, means for breaking out of it. (Cotterrell, 1995, p. 159)

This suggests that overemphasis of the formal character of modern law should not hinder one from considering the fragile and contingent character of this rational system of regulation. I argue that such an ongoing tension between practical and moral considerations has been the case in the amnesty debate. This is because both the public concerns about common good and public conscience, and the political and legal authorities' instrumental motives have played a key role in the processes of enacting an amnesty law.

Graybill (1998) regards amnesty as the most controversial aspect of the truth commissions in South Africa, since human rights organizations in the country are disappointed with the amnesties providing the guilty state officials with impunity from prosecution (p. 395). However, the use of these amnesties is also a pragmatic experiment in dealing with the past that offers the possibility of political reconciliation. This suggests that these commissions' decision to grant amnesty refers to a compromise between the morally ideal and the politically feasible. In their work on amnesties in the age of human rights accountability, moreover, Lessa and Payne (2012) argue that amnesty is regarded as necessary evil, i.e. a necessary mechanism for governments to implement a peace-building programme during a post-conflict era, and an evil category by providing human rights abusers during the time of internal unrest or dictatorship with a chance to be forgiven. This notion of necessary evil truly demonstrates the interplay of the relations of necessity and legitimacy in an amnesty debate. In a similar vein, my informants highlight the necessity of an amnesty law's meeting functional demands and pleasing the public. In an interview conducted with the Istanbul Nationalist Lawyers' Group (*Istanbul Milliyetçi Avukatlar Grubu)*, a lawyer indicates that it is necessary, as the main precondition for an amnesty law, to make the society want amnesty.[50] Regardless of their different political and ideological backgrounds, there is a convergence in their statements on amnesty which combines what is ideal and what is supposed to happen in reality. As my informant from the Criminal Law Association *(Ceza Hukuku Derneği*) said, "There must be a balance between ideals and realities."[51]

[50] Based on my interview with him on November 24, 2014.
[51] Based on my interview with him on November 20, 2014.

Amnesty is thus explainable not simply in utilitarian terms, rather it requires taking into consideration the question of legitimacy as well. The AKP government has dealt with, therefore, the tension between the practical requirements and the moral costs of such decision. The attempt to manage this tension has led the AKP to use indirect ways of handling the problems facing the Turkish legal system. The AKP government has made use of alternative mechanisms without granting a general amnesty in order to protect its moral stance towards amnesty as well. Due to these indirect mechanisms, the AKP has stood by its moral stance on the legitimacy of amnesty while not giving up its effort to seek efficiency in the legal field. The government has tried to find out a way to reconcile instrumental ends regarding amnesty with the inner morality of its amnesty policies. Rather than assuming an exclusionary relationship between them, I have thus underlined the coexistence of substantive and practical concerns, i.e. the interplay of questions of legitimacy and instrumentality in the AKP's amnesty policies.

4.2 The AKP's moral discourse on amnesty as an alternative "just cause"

4.2.1 Beyond humanitarian motives: Neither merciful fatherhood nor penal tolerance

After admitting the relevance of substantive considerations in the amnesty debate, I examine what constitutes the moral core of amnesty during the AKP period. I raise the question of what makes the AKP's claim to legitimacy of its amnesty policies distinctive, in relation to other moral attitudes towards this phenomenon prevalent until the AKP era. There are primarily two moral stances on amnesty in Turkey from which the AKP's policies of amnesty differs. The first approach is based upon the state's moral

duty for behaving like a merciful father towards guilty citizens. Amnesty is primarily, in this view, a favor of the state, whereby the political authorities manifest its merciful and protective character by granting amnesty to faulty citizens. Cumalı (1989), a well-known literary figure who is also an attorney, wrote a book on the amnesty debate in Turkey in the 1980s in which he argued that youth charged with political crimes in the post-coup period must be forgiven immediately (p. 169). He defined the politically chaotic atmosphere just before the Turkish military coup d'état staged on 12 September 1980 as stemming from the incidents involving mainly young people. In his view, the state's primary task is to manifest its forgiveness for these people who already had paid the penalty for what they had done. Hence, he regarded general amnesty as a mandatory remedy to end this era of suffering and pain by both combining the idea of justice with the virtuous feelings of love, pity and tolerance, and using the dichotomy between a merciful father and a sinful child: "How many fathers can you show who are pleased with everything their children do?" (Cumalı, 1989, p. 171)[52]

The second approach, from which the AKP's moral stance differs, refers to the human rights perspective based on the argument that all prisoners should be released with an exhaustive amnesty law, and that alternative mechanisms other than incarceration should be used to rehabilitate them. My informant from the Human Rights Association (*İnsan Hakları Derneği*) emphasizes the necessity of general amnesty without distinction of any kind, since the criminal responsibility belongs primarily to the existing dynamics of an unequal social order rather than to the individuals themselves.[53]

[52] "Çocuğunun her yaptığından hoşnut olan kaç baba gösterebilirsiniz?"
[53] Based on my interview with her on October 27, 2014.

Similarly, a lawyer from the Libertarian Democratic Lawyers Association (*Özgürlükçü Demokrat Avukatlar Grubu*) emphasizes the requirement of protecting "the right of people to hope for attaining their freedom," embraced by the European Convention on Human Rights (ECHR).[54] This suggests that the offenders should not be urged to give up all their hopes when entering in jail.

The Women for Meeting Day in Jail (*Görüş Günü Kadınları*), a community composed of offenders' relatives, initiated a campaign for amnesty in 2014.[55] Their discourses on the necessity of amnesty are a manifestation of these two moral approaches that prevailed in Turkey until the AKP era. First of all, this community expected state officials to manifest their fatherhood by granting amnesty and utilized familial values when expressing their demands. They present themselves as the voices of women who are obliged to be the men of their houses in the absence of their fathers, husbands, and sons in jail.[56] In addition, these women wanted their children to be raised within a family environment. They underlined their wish to celebrate a double feast due to an amnesty law which they hoped would be introduced just before the religious feast. They expected Recep Tayyip Erdoğan, the Turkish Prime Minister in that era, to act as a father and to grant amnesty by underlining the importance he has given to the family institution.[57] In order to legitimate their demands for amnesty, they utilized not only familial values but also a humanitarian worldview by stating that everyone deserves a new chance, and that everyone can make mistakes:

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[54] Based on my interview with him on October 31, 2014

[55] "Görüş Günü Kadınlarından Başbakan Recep Tayyip Erdoğan'a Af Çağrısı", accessed 23 July 2015, http://www.haberler.com/gorus-gunu-kadinlarindan-basbakan-recep-tayyip-6265301-haberi/

[56] "Bizler evinin erkeği olmak zorunda kalan kadınların sesiyiz."

[57] "Aile kavramına önem veren başbakanımıza sesleniyoruz. Ondan babalık bekliyoruz."

"We are expressing their (the offenders') regret."[58]

"Don't forget, everyone is a prospective prisoner!"[59]

They indicate that prison is not the right place to rehabilitate or reintegrate the offenders who need a chance to make a fresh start for a new life. They also state that, as the families of offenders committing the non-political crimes, the ordinary prisoners deserve, first and foremost, to benefit from amnesty rather than those charged with terror crimes:

> We are here in order that the chance, which will be given to the members of the political organizations within the scope of the Kurdish peace process in Turkey, is provided for ordinary criminals as well."[60]

Not only civil society groups and citizens but also state officials embraced such a humanitarian stance in order to legitimize their act of granting amnesty until the AKP period. In the Rahşan Pardon period, to cite a recent example, the ethics of forgiveness were underlined. The state is, in this view, a kind of father that should be merciful towards his sinful children by imitating the God's forgiveness. Rahşan Ecevit indicates that, as the initiator of this amnesty law, even when God bestows a chance to human beings for repentance (*tövbe*), those who are pushed to the wrong way must be granted an opportunity to fix their mistakes:

> Even when God forgives, would not it be right for human beings or states to also forgive sometimes?[61] (General Directorate of the Democratic Left Party, 2002, p. 15)

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[58] "Bizler onların (mahkûmların) pişmanlıklarını dile getiriyoruz."

[59] "Unutma, herkes bir mahkûm adayıdır!"

[60] "Çözüm Süreci adı altında örgüt mensuplarına verilecek şansın biz adli mahkûmlara uygulanması için buradayız."

[61] "Allah bile affederken, ara sıra kulların da veya devletin de affetmesi doğru olmaz mı?"

In this regard, she utilized the concept of the victims of fate (*kader kurbanları*) to legitimize her demand for amnesty:[62]

> I do not want an amnesty for terrorists, ferocious murderers, those swindling the state or rapists! I want it for those pushed to crime by poverty, hunger and excessive unfairness in the social order, for those who commit crime unintentionally (See Appendix 5).

She engaged in a populist discourse when emphasizing her intention to, for the sake of providing their families, grant amnesty to people who were behind bars.[63] This suggests that state officials have been expected to show mercy for desperate individuals forced to commit crimes. She regarded amnesty as a second chance given to people pushed to crime by reminding us that everyone can fall into that error (General Directorate of the Democratic Left Party, 2002):

> Those opposed to amnesty may need it some day, too (p. 107). [64]
>
> (Due to the amnesty law) Those who had been getting out of hand were given a chance (p. 33). [65]

I argue that the AKP government offers an alternative morality, apart from these humanitarian approaches, on the mechanism of amnesty. Neither the idea that the state must act like a merciful father by manifesting its forgiveness to the citizens, nor the human rights perspective based upon the penal tolerance for the offenders could explain the moral tenets of the AKP's amnesty policies. The AKP has acted in a moral sense when declaring its attitude towards amnesty as well, but in its own way. I claim that a

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[62] It is worth bearing in mind that these discourses are not simply Rahşan Ecevit's opinions.
[63] "Ailesine ekmek götürebilme uğruna hapse düşmüş insanlar için af istiyorum."
[64] "Affa karşı olanlar da bir gün affa gereksinim duyabilirler."
[65] "Yoldan çıkanlara bir şans tanındı."

new populism has emerged, in terms of the moral argumentation of amnesty, during the AKP period.

4.2.2 The transition in populist discourses on amnesty: From *kader kurbanları* to *kul hakkı*

The AKP's moral perspective towards amnesty has contradicted all these humanitarian motives which motivated the introduction of the Rahşan Pardon. This is because the AKP government has disapproved of general amnesty by stating that the state has the right to forgive only crimes against its own existence. This suggests that the authority to grant amnesty, for crimes against individuals, ought to belong to the victims themselves or their inheritors. The Turkish President Recep Tayyip Erdoğan has thus indicated insistently that the AKP does not bring up general amnesty. In a national television broadcast, he revealed the moral core of this attitude:

> I have no right, as the Prime Minister, to forgive a murderer. I have never accepted the state's authority of granting amnesty for a murderer. Why not? Because the right to forgive that murderer belongs only to the inheritors of those murdered, not to the state. Only for crimes against the state can such an amnesty decision can be made. Otherwise, if I forgave a murderer within the scope of general amnesty, how would I give an account of this to the victim, the martyrs and their families? There is no way such a thing is going to happen[66] (See Appendix 6).

The phrase "giving an account of" is quite meaningful, as I mentioned earlier, in the sense that the government's moral discourse on amnesty is based upon the protection of "rightful share" (*kul hakkı*). In other words, if the state forgave a crime committed

[66] ATV & A Haber, 20 November 2013, accessed 18 March 2016, https://www.youtube.com/watch?v=wU-H-f-25TU

against an individual, in this view, it would violating the personal rights of this person. A legitimate amnesty is thus the one granted by the state only for the crimes against itself. As Mehmet Ali Cevheri, the Şanlıurfa Deputy of the AKP, underlines:

> [He complains that] we forgive, with the legislations enacted, the crimes against individuals, whereas punishing crimes against the state in the most severe manner. Even the God itself refuses to intervene with the *kul hakkı*, but we forgive the criminal by putting ourselves in place of the individual [victim]. If I am victimized, I must be the one who forgives, and no one must forgive instead of me. [In this case] What happens to my rights; who protects my rights? The penal sanctions must be made heavier. Those committing crimes must not get away with what they have done[67] (See Appendix 7).

In the criminal code, the crime of writing a check without sufficient funds (*karşılıksız çek suçu*) is not defined as a crime against the state. Those committing this crime have thus argued that a prospective general amnesty will not cover them. Even they underline the necessity of being organized for announcing that the crime they commit has nothing to do with violating the *kul hakkı*. Rather, they demand for being regarded as those committing crimes against the state so as to benefiting from a possible amnesty (Ofluoğlu, 2011).

Regarding the AKP's moral stance on amnesty, I argue that the discourse of the *kader kurbanları*, which had been the case in the Rahşan Pardon period, was replaced by a new populist discourse of *kul hakkı* in the AKP era. In other words, there has been still the moral spirit of the amnesty debate in Turkey, but with a new package. The populist discourses have not stopped to influence the dynamics of the amnesty policies in Turkey. Rather, a new kind of populism on amnesty has blossomed in the AKP era.

[67] "Ak Partili Vekilin Gizli Af İsyanı", 16 February 2016, http://www.rotahaber.com/siyaset/ak-partili-vekilin-gizli-af-isyani-h584789.html

Rahşan Ecevit did not want an amnesty covering primarily the political crimes, but the one intended for the ordinary crimes having a non-political character. Now, there is a victim-centered populist discourse in the sense that any kind of forgiveness or mercy for the offenders committing crimes against individuals cannot be granted by the state without the consent of the victim. However, an amnesty option can be valid only for crimes against the state. In other words, the amnesty policies of these two periods is based upon a different kind of populism.

During the Rahşan Pardon period, İsmail Köse from the Nationalist Movement Party (*Milliyetçi Hareket Partisi*) stated that amnesty is an issue which must be approached carefully, since it burns whoever touches it.[68] Introducing general amnesty is, for any government, a conflict-ridden choice or even a kind of tightrope. Prof. Helmut Gropengiesser, who spoke at a symposium entitled *The Problem of Amnesty in Turkish Law and Comparative Law* in 2010, also declares that only time will tell whether amnesty becomes an example of political intelligence or a gravestone in the cemetery of law (2010, p. 38).[69] The decision to grant general amnesty is evaluated retrospectively either as a strategic move or as an unfair and erroneous choice. There is no in-between or gray area in this regard. For instance, the Rahşan Pardon was highly criticized, both during and after the legislation process, due to its excessively inclusive package. This is because the scope of this amnesty had been expanded, through the interventions of other coalition partners, in such manner that it created social unrest.[70] In

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[68] Af ateşten kestanedir, iyi yaklaşmak gerekir. Kimin eli değerse onu yakar."
"ANAP ve MHP Affa Soğuk", *Milliyet*, 3 August 1999, accessed 16 July 2015, http://www.milliyet.com.tr/1999/08/03/haber/hab01.html

[69] "Bir affın politik zekâ mı yoksa hukuk mezarlığında bir mezar taşı mı olduğunu tarih ispat edecektir."

[70] For detailed information on its scope: Those given sentences of 10 years or less in jail were conditionally released. The custodial sentences of more than 10 years, such as the penalties for

addition, this amnesty was criticized especially by the lawyers in the sense that Rahşan Ecevit's emotional motives with no legal ground could not be a "just cause" (*haklı neden*) for a piece of legislation. Due to the increasing objections against the Rahşan Pardon, Rahşan Ecevit was obliged to state that the final form of this amnesty was not the law she had proposed. Rather, she argued that this amnesty had gone out of control afterwards without her intention. As a result of the negotiations and among the coalition parties, the coverage of this law was altered in such manner that it was inconsistent with her ideas and suggestions (General Directorate of the Democratic Left Party, 2002, p. 107).

Seydioğulları (2006) argues, in his survey research on amnesty made seven years after the Rahşan Pardon had been enacted, that 72.3 percent of 1,247 informants in his study are definitely opposed to amnesty (p. 14). Apart from impartial informants, the only group that approves of a possible amnesty law unconditionally is the families of those in jail. The majority of interviewees (78.2 percent) agree with the idea that amnesty erodes the principle of deterrence, since most of those who benefit from amnesty commit crimes again after their release (Seydioğulları, 2006, p. 17). I argue that the public opinion has been mostly against amnesty for ordinary crimes, partly due to the bad reputation of the Rahşan Pardon. According to Kocasakal (2010), the head of the Istanbul Bar Association, there are no sufficient statistics in Turkey which clearly show

homicide, benefited from penal discounts up to ten years. The death penalties were converted into 36-year prison sentences, whereas life sentences to 25-year imprisonment. Crimes against the state, forest crimes and terror crimes were excluded from that amnesty package. On the other hand, a plenty of ordinary crimes such as forgery and counterfeiting, child abduction, the possesion of unregistered firearms and traffic crimes were included the scope of that law. Source: *23 Nisan 1999 Tarihine Kadar İşlenen Suçlardan Dolayı Şartla Salıverilmeye, Dava ve Cezaların Ertelenmesine Dair Kanun*, accessed 12 July 2015, http://www.mevzuat.gov.tr/MevzuatMetin/1.5.4616.pdf

how many of those released through the Rahşan Pardon committed a crime again (2010, pp. 95-96). The stories of crime, nevertheless, covered the pages of daily newspapers, implying a massive increase in crime rates during the implementation of this law. According to Öztürk, a professor of law, an important reason for the increase in the cases of purse-snatching in the big cities of Turkey is that the current criminal justice system failed to deter criminals due to the introduction of the Rahşan Pardon (*Hürriyet,* 2001).[71] I admit that this claim is not verified by solid statistical data, but it clearly shows, whether it is accurate or not, the state of moral panic on crime in the public stimulated by the Rahşan Pardon.

Apart from its practical outcomes, the legitimacy of the Rahşan Pardon was also widely criticized. In other words, the extensive scope of this so-called amnesty was regarded not only as being an ineffective decision with no practical value, but also as being an unfair choice. After the law was enacted, the ideas of those displeased with its scope, especially those of victims' families, were disseminated through media channels. In the daily newspaper *Milliyet*, there was an article entitled "The Revolt of a Father" (*Bir Babanın İsyanı*) in which a father whose daughter had been killed in a car accident opposed the possibility for those responsible for traffic crimes to be covered by the Rahşan Pardon:

> The state forgives crimes against itself, it does not have the right to forgive the man who murdered my daughter.[72]

[71] "Kapkaçtaki Artışın Nedeni Af ve Kriz", *Hürriyet*, 19 May 2001, accessed 17 July 2015, http://hurarsiv.hurriyet.com.tr/goster/haber.aspx?id=-243933

[72] "Devlet kendisine karşı işlenen suçları affetsin. Kızımı öldüren adamı affetmeye hakkı yok" "ANAP ve MHP Affa Soğuk", *Milliyet*, 3 August 1999, accessed 16 July 2015, *http://www.milliyet.com.tr/1999/08/03/haber/hab01.html*

In a similar vein, a different article entitled "The Revolt of a Mother" (*Bir Annenin İsyanı*) in which a mother whose daughter had been raped and killed by a group of street children addicted to paint thinner called out to the authorities:

> Who forgives whom? If the government releases these murderers or decreases their penalties, I myself will kill them.[73]

According to Öztürk, a professor of law who had opposed to the enactment of the Rahşan Pardon, the determination of criminals as target groups in the draft version of this law was unfair (*Milliyet*, 1999):

> For example, those condemned and jailed due to their thoughts will not benefit from the penalty discount, when the ordinary criminals committing heavy crimes will benefit from it. It is impossible to accept this (scenario). If the state wants to behave in a high-minded and benevolent way, it must forgive the crimes against itself at first. The state's engagement in forgiving the crimes of citizens against citizens has led to feelings of resentment among the victims. It is incomprehensible that the state forgives the crime of murder while not even forgiving thought crimes (*düşünce suçları*) (See Appendix 8).

I claim that these criticisms directed against the scope of the Rahşan Pardon are compatible with the AKP government's stance towards amnesty. All these opinions criticizing the Rahşan Pardon agree with the AKP's idea that the state has the right to forgive only the crimes against itself, and that the victims' consent is required to grant amnesty for the crimes against individuals. I assert that the discourse of *kader kurbanları* does not worked any more in Turkey to legitimize the amnesty for those committing the ordinary crimes. Such amnesty has thus become a mechanism, in the current political climate, with a low public credibility in Turkey. The Rahşan Pardon

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[73] "Kim kimi affediyor?...Eğer hükümet getirilecek olan afla cezalarını indirir ya da serbest bırakırsa onları ben öldürürüm."
"ANAP ve MHP Affa Soğuk", *http://www.milliyet.com.tr/1999/08/03/haber/hab01.html*

was said to have been enacted without an effective impact analysis, i.e. without assessing the possible outcomes of this decision. Thus, I argue that the bad reputation of the Rahşan Pardon, as the last amnesty-related legislation in the country, has led the AKP to think twice before granting amnesty.

4.3 Back to the tenets of Islamic criminal law on amnesty

In his thesis on the victim's position under Islamic criminal law, professor of Islamic law Yerlikaya (2006) underlines that the crimes which will be the subject of amnesty are determined in Islamic jurisprudence through considering the character of rights violated by these crimes (pp. 120-121). In case rights, including *kul hakkı*, are violated, for instance, the option of amnesty is possible only with the victim's consent. These criminal cases for which the use of amnesty is feasible with the victim's decision are strictly personal. This suggests that the consequences of these cases are assumed to concern only the victims themselves, not the state. Indeed, crimes constituting the subject of amnesty in Islamic criminal law refer mostly to the violation of personal rights, i.e. the crimes against individuals. Soyaslan (2001), a professor of criminal law, also emphasizes that there is no direct correspondence between Western law and Islamic law in terms of their perspective on amnesty (p. 414). For instance, the Turkish and the Islamic criminal procedures have differed in the authority designated by the law to grant amnesty. The victim is the owner of juridical value which should be protected, first and foremost, by the norms of Islamic criminal law, whereby the victims or their representatives have the right to forgive the criminal by waiving their rights. In the Turkish criminal code, however, the legislative organ has used its own initiative to end

penal sanctions either partly or completely through an amnesty law, regardless of any intervention or consent of the victims. The formal properties of amnesty in the Turkish criminal code is not compliant with Islamic tenets, but I claim that the AKP government has remained faithful to the principles of Islamic criminal law when taking its stance on amnesty. This is a subtle moral stance which reveals itself not in a formal sense, but as a doctrinal position, i.e. in the form of substantive considerations interacted with legal procedures.

According to Ekinci (2008), a professor of law at Marmara University, what is expected from the state in modern law is to show reluctance when using its authority to grant amnesty for crimes against individuals. The perception of amnesty in Turkey, in his view, has never been compatible with this approach, since this mechanism has been widely used for political ends whereby the state forgives the crimes against persons, not those against itself (at least until now). He argues that the state must think twice, however, when introducing amnesty for crimes against individuals, since it has no right to do this. I claim that this is the position that the AKP has tried to support in its amnesty policies. More specifically, Ekinci (2008) underlines that it was forbidden to grant amnesty for crimes against the community (*had suçları*) such as fornication (*zina*), drunkenness, theft and thuggery, i.e. neither the state nor the victims could forgive these crimes in Islamic law. However, for crimes against persons, including murder, wounding, insulting, and mugging, only parties whose interests are damaged have the right to forgive. For instance, the penalty for killing someone deliberately is the death penalty due to the principle of retribution (*kısas*). Hence, criminals who commit homicide could not be forgiven even by the Sultan. Only the inheritors of the victim

could forgive the murderer by waiving their demands for retribution in exchange for a ransom. The state, in this perspective, could grant amnesty only for the crimes against itself such as rebellion, espionage and the illegal possession of firearms. In this way, according to the tenets of Islamic law, the victims' damages are compensated as much as possible to alleviate the personal sentiments for revenge and to preclude the possibility of blood revenge.

Görkem (2014) also indicates that, in her work on victims' rights in the Ottoman penal law, the offenders must take responsibility for the crimes they commit in tandem with the victims' interests under the provisions of Islamic criminal law. The right to demand a kind of retribution or ransom, as well as the right to forgive, is accorded to the victims or their families for their damages or losses to be compensated. In this law, satisfying the victims' needs has thus been prioritized, at least in principle, with the purpose of taming the criminals. In the first chapter of this thesis, I underlined the AKP's populist rhetoric on amnesty, which claims to protect victims' sensibilities, rather than responding to the interests and demands of the offenders. Indeed, the AKP's efforts to strengthen victims' rights in the Turkish criminal justice system is related to its victim-centered populism on amnesty pertaining to Islamic principles. Çalışkan (1989), a professor of theology at Ankara University, also asserts that the primary aim of Islamic criminal law is not to punish prisoners severely, but to reintegrate them into society by defending the victims' rights (p. 368). Islamic law has thus opposed, at least in principle, a state-led amnesty which releases criminals unconditionally with no concern for ensuring their rehabilitation.

As for the concept of *kul hakkı*, the AKP's moral stance on amnesty refers not only to a transition in the state's populist rhetoric on amnesty in the AKP era, but also to the links between its amnesty policies and the tenets of Islamic criminal law. I argue that the AKP's understanding of a legitimate amnesty has an implicit reference to the principles of Islamic law, which gives the authority to grant amnesty to the victims, not to the state's legislative power. Recep Tayyip Erdoğan, as the AKP's former leader, declared that general amnesty was certainly outside the political agenda of their party, and added that he did not have, as the Prime Minister in that period, the right to forgive a murderer, since only the inheritors of those murdered should have this right (Işık, 2013). In this view, when granting amnesty for the crimes against individuals, the state is involved in a decision-making process that does not concern itself at all. When forgiving a criminal, the state is thus responsible for explaining or legitimizing this act to the victims' families, i.e. the real sufferers.

The implicit link between the AKP's amnesty policies and the tenets of Islamic criminal law has also started a controversial debate in Turkey. Especially after Recep Tayyip Erdoğan declared that the right to forgive belongs to the inheritors of the victim, many politicians and lawyers criticized this statement. According to Mustafa Özyürek, the Vice President of the Republican People's Party (*Cumhuriyet Halk Partisi* – CHP) in that era, Erdoğan's statement is not compatible with the principle of secularism in which amnesty is a subject that primarily concerns the state (Armutçu, 2008). He claims that amnesty is a state-led decision in a secular legal order, and that it is only the state that can grant amnesty. Mehmet Şandır, the Deputy President of the Nationalist Movement Party (*Milliyetçi Hareket Partisi* – MHP) in that period, criticizes Erdoğan's viewpoint

in the sense that amnesty is a profane issue that should not be discussed in the framework of divine rules. Naci Ünver, the honorary head of the eighth Criminal Division in the High Court, also emphasizes that the legal system such a view proposes is currently the case in Saudi Arabia, where Shari'a law prevails. However, this idea is not appropriate for a secular country such as Turkey, where the supremacy of law is supposed to prevail. Apart from this secularist perspective, there are proponents of the AKP's moral position on amnesty. According to the lawyer from the Platform for the Supremacy of Law (*Hukukun Üstünlüğü Platformu*) I interviewed, a country's customs and traditions should be taken into account when the criminal law is enacted:

> What else can be more natural than the implementation of legal rules arranged by religion to live in peace and security?[74]

Not only the AKP's moral stance towards the phenomenon of amnesty in general, but also the alternative mechanisms the AKP has planned to develop instead of granting amnesty were criticized by the opposition parties for the same reason. In both cases, the AKP government was blamed for following or imitating the principles of Islamic law as a model when governing a secular country. In this way, these dissidents aim to eliminate the risk that the Turkish judicial system would be marked by a theological mentality. Bekir Bozdağ emphasizes that, as the Turkish Minister of Justice, some mechanisms the government had implemented to resolve the judiciary's problems were not approved by the other political parties due to these mechanisms' links to Islamic law.[75] For instance,

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[74] Based on my interview with him on December 6, 2014.
"Barış ve güvenlik içinde yaşamak için din tarafından düzenlenen hukuk kurallarının uygulanmasından daha tabii ne olabilir?" (Based on my interview with him on December 6, 2014)

[75] CNN Türk, 20 February 2015, accessed 28 July 2015.
https://www.youtube.com/watch?v=3YUVqWzgr4w)

the Mediation Law (*Arabuluculuk Kanunu*) was challenged in the sense that it had been inspired by the tenets of Islamic jurisprudence. Indeed, in the Islamic world, there has been a long tradition of adjudication via a judge (*kadı/qadi*) co-existing and intersecting with the complementary dispute resolution processes such as arbitration, negotiation and mediation (Black, Esmaeili and Hosen, 2013). In spite of these opposing views, as shown in the Annual Activity Report 2012 published by the Ministry of Justice, the Mediation Law was enacted as part of the Third Judicial Reform Package in 2012 (p. 115). In this way, the victims of some minor crimes can demand to reconcile with those committing these crimes, in case the offenders admit their criminal acts and are ready to compensate the losses of the victims to an important extent (Yerlikaya, 2006, p. 125). To put it another way, the victims or their legal representatives do not have the authority to forgive the criminals via amnesty in the Turkish judicial system. However, they have a right to make peace with the defendants under certain circumstances, which has implicit connections to the tenets of Islamic criminal law.

In brief, the legitimacy crisis in amnesty as a moral choice is like walking a tightrope for political authorities. Thus, I argue that the attempts to understand the amnesty policies in the AKP era remain inadequate unless they consider the government's question of legitimacy on amnesty, which is full of moral considerations. I have thus examined the moral core of the AKP's amnesty agenda by dividing this chapter into three basic parts. First of all, in taking up Habermas' position that substantive considerations are still relevant in modern law, I assert that the amnesty debate in Turkey has involved processes of moral argumentation. This suggests that the instrumental demands and the normative concerns about amnesty have gone hand-in-

hand with each other. The AKP's moral stance on amnesty does not mean that the government underestimates the importance of instrumental concerns in determining its amnesty policies. Of course, the AKP's use of alternative mechanisms is an instrumental policy choice to increase the efficiency and productivity of the Turkish judiciary. Nevertheless, the question of why the AKP has appealed to these indirect mechanisms instead of granting amnesty is inextricably related to its concern for legitimacy. Therefore, the AKP has preferred the use of alternative mechanisms to granting amnesty, not because it has sacrificed its push for efficiency to organize the legal domain, but because these mechanisms refer to a practical policy choice compliant with its moral commitments. For example, the responsibilizing strategy and the punitive attitude of the AKP, as I mentioned before, required an intolerance for amnesty especially for the crimes against individuals by not prioritizing the prisoners' demands over the victims' interests. Herewith, the AKP's amnesty policies refer to a typical amalgam of its neoliberal and Islamic commitments. The use of indirect mechanisms in the absence of general amnesty has thus served the AKP in providing an alternative way for resolving the tension between the questions of efficiency and legitimacy on amnesty.

Apart from admitting the moral core of the AKP's amnesty policies, I also tried to show how this stance on the legitimacy of amnesty differs from the humanitarian arguments on amnesty prevalent in Turkey up until the AKP era. Therefore, in the second part of this chapter, I claim that the AKP has improved a new populist mentality on the phenomenon of amnesty. This viewpoint contradicts the discourse of *kader kurbanları* as the main source of legitimacy for the Rahşan Pardon, by replacing it with the victim-centered discourse of *kul hakkı*. In this way, both the state's moral task of

being merciful towards its citizens and the human rights discourses on the unconditional release of prisoners are invalidated by the AKP's amnesty policies based upon a new populist stance. The AKP's moral argument that the state cannot grant any kind of forgiveness or mercy for those committing the crimes against individuals without the consent of the victim has also religious roots. I have thus analyzed, in the third part of this chapter, the links between the AKP's discourse of the *kul hakkı* in its amnesty policies and the provisions of Islamic criminal law, which entitles the right to forgive those committing crimes against themselves to the victims or their legal representatives. However, as an interviewee from the Platform for the Supremacy of Law *(Hukukun Üstünlüğü Platformu)* said, the AKP's amnesty policy refers to not an absolute, but a doctrinal approach.[76] In other words, the discussion of all these moral discourses is not an absolute recipe for uncovering the policies of amnesty in the AKP period. It is hard to detect to what extent its moral stance or claims to legitimacy on amnesty determine the AKP's amnesty agenda. Rather, I provided an insight into the AKP's moral perspective towards amnesty as a socio-legal phenomenon. The effort to balance questions of instrumentality and legitimacy is also an important framework for understanding the dilemma of state law and to explore the underlying dynamics of the AKP's amnesty policies.

[76] Based on my interview with him on December 6, 2014.

CHAPTER 5

CONCLUSION

I have examined in this thesis the policies of amnesty in the AKP era, with reference to an anomalic case in relation to historical trends in how the mechanism of amnesty has been deployed by political authorities before the AKP period. There must be compelling reasons why the AKP government has not yet appealed to general amnesty, even though the use of amnesty by the state has long been a standard solution to the long-term operational problems of the Turkish legal system. I have tried to answer this puzzling question by dividing my thesis into three basic parts. In the first chapter, I explored the neoliberal attitude in the penal discourses and practices of the AKP government which influences the AKP's perspective towards amnesty. I looked into three main premises of the neoliberal penality while considering the current amnesty debate in Turkey: punitiveness, responsibilization and managerialism. I maintain that the combination of these three crime control strategies lies in the AKP's disapproval of general amnesty. In the second chapter of my research, I examined the dynamics of the Turkish judicial system, with its dysfunctioning aspects during the AKP period. The significant increase in the number of judicial cases per judge and the over-crowding of prisons due to high incarceration rates has been regarded primarily as a strong excuse of amnesty in the pre-AKP period of Turkey. Nevertheless, I claim that the AKP government has attempted to resolve all these legal problems through the use of indirect alternative mechanisms such as conditional release, electronic surveillance, making investments in new detention houses, prescription and increasing the number of public prosecutors and judges. In this way, I argue that the AKP has tried to alleviate the problems in the functioning of the

Turkish legal system without directly appealing to amnesty. In the third chapter of my thesis, I assert that the AKP's denouncement of general amnesty has something to do with the AKP government's religion-based concern about the legitimacy of an amnesty law covering crimes against individuals. Such a moral consideration stresses the protection of rightful share (*kul hakkı*), with implicitly referring to the tenets of Islamic criminal law, which gives the authority for granting amnesty to the victims themselves rather than to a legislative power. Briefly, I have investigated to explain how the mechanism of amnesty has been circumscribed in the AKP era and the tension among various overlapping dynamics which are at the same time judicial, politico-ideological and moral.

Throughout these three chapters, I have considered amnesty not simply within the dynamics of a self-sufficient and internally coherent system of rules within the judicial domain, but by taking account of external interest claims such as judicio-political authorities' moral and ideological codes of values or public attitudes and expectations in Turkey. I maintain that there is a kind of interplay between the considerations of legitimacy and efficiency in the AKP government's amnesty policies. The AKP's use of indirect alternatives to amnesty is an instrumental policy choice to increase the productivity of the Turkish judiciary. However, this practical choice has gone hand-in-hand with the AKP's politico-ideological interests and moral concerns in terms of amnesty. For instance, the AKP's punitive attitude with a responsibilizing strategy has brought about an intolerance for amnesty, especially for crimes against individuals, through refusing to prioritize offenders' demands over the victims' interests. This also congruent with the AKP's religion-based concerns about the legitimacy of

amnesty in the sense that those who have committed crimes against a person or the community should not be forgiven by the state. I argue that the premises of the neoliberal penal mentality have thus not contradicted but complemented the AKP's moral stance on amnesty, which suggests that the government's amnesty policies relies on a typical amalgam of its neoliberal and Islamic underpinnings. The efforts to seek indirect mechanisms have thus aimed to find a convenient and useful alternative to amnesty which is congruent with this amalgam.

Krapp (2005) underlines that justice requires, in line with Derrida's formula, an impossible mediation of the urgency of judgment and the infinite demands, so it is an experience of the impossible (p. 186). There has been an ultimate insolubility of all legal problems, in his view, since the law admits neither pure solutions nor good decisions. The law cannot necessarily produce justice; rather it defers he possibility of justice. In a similar vein, I claim that the debate on the fairness of a possible amnesty law has no end in Turkey. All the professors of law, attorneys, and non-governmental organizations I interviewed were uncompromising in their position on how the mechanism of amnesty ought to be deployed by the state. There is no amnesty decision which could entirely please the public opinion. For instance, the absence of a general amnesty in the AKP era has been criticized, especially by human rights activists, members of the Kurdish movement, and prisoners' families. They regard the lack of amnesty as a result of the penal intolerance of the Turkish state, whereas they see the state's duty is to be an agency of forgiveness or an institution aimed at promoting a worthy alternative to retributive justice. In case an amnesty law were to be enacted, it would probably and necessarily cover certain categories of crime and exclude others, and such a selective process will inevitably create public unrest. If an unconditional general amnesty is

enacted, i.e. if there are no limits to the amnesty, such a decision will inevitably disturb people who support the view that only certain categories of crime warrant being forgiven by the state, and that granting amnesty for some categories of offenders is not a fair decision. Regarding all these possible scenarios, the use of amnesty by political authorities will finally turn into a controversial issue and a heated, irreconcilable debate. The considerations of the AKP government, and more generally, of the Grand National Assembly, when making that decision will not completely suit the public interests. Briefly, the amnesty decision has always been context-sensitive and risky, very similar to walking on a tightrope, for legal decision-makers, since it might be evaluated retrospectively either as necessary or an erroneous choice. Given the precedent of the Rahşan Pardon, I argue that the moral cost of an amnesty decision has led the AKP to remain cautious in its position on amnesty.

It is worth bearing in mind that heated debate on the possibility of a general amnesty law in Turkey refers is ongoing; the discussion is constantly open to new dynamics and further questions. I have thus emphasized that the AKP government's amnesty agenda is not absolute or self-consistent, but situational and contingent. There have been several tentative scenarios on which it is possible to engage in reflection via speculations as an interpretive exercise. For instance, in spite of its politico-ideological and moral underpinnings or its use of alternative mechanisms, if the AKP introduces a general amnesty law that includes crimes against individuals, this might mean that instrumental concerns in the legal domain, especially the over-crowding of prisons, have ultimately predominated over the state's other commitments or concerns. This might also suggest that the indirect mechanisms deployed in the absence of general amnesty have failed to constitute a real alternative to amnesty by becoming unproductive and

useless in their implementation, with an unattainable set of goals. The Constitutional Court extended the scope of amnesty in an extreme way in the Rahşan Pardon period, in line with the principle of equality. In case a general amnesty is enacted, therefore, the AKP government might put the responsibility for such a comprehensive amnesty law on the shoulders of the Constitutional Court. In this way, the AKP can introduce a general amnesty without contradicting its official rhetoric, which is based upon its politico-ideological and moral commitments.

The intensification of populist policies in the multi-party period, especially just before general elections, also led to the periodic use of amnesty in Turkey. In addition, political frictions among the coalition parties that had different expectations from a prospective amnesty law determined the trajectory of amnesty debate in Turkey. For instance, in the Rahşan Pardon period, the reason the scope of amnesty was extended is related to heated negotiations and disagreements within the coalition government. The book entitled *Af ve Rahşan Ecevit*, published by the Democratic Left Party (DSP) Center (2002), reveals how a controversial debate on the amnesty law was held, even at the expense of making it unworkable or even dissolving the coalition government (p. 26). This raises a new path for rethinking the question of why the AKP has not applied a general amnesty. Due to the absence of hidden risks a coalition poses, I assert that the AKP, as a single-party government, has no longer needs amnesty as a populist compromise in the field of criminal policy. Article 87 of the Turkish Constitution stipulates that the Grand National Assembly of Turkey has the authority to proclaim amnesty with a majority of three-fifths of the deputies.[77] The policy on amnesty has thus

[77] For the full text of the Turkish Constitution see: https://global.tbmm.gov.tr/docs/constitution_en.pdf

relied, first and foremost, on the composition of the Turkish Grand National Assembly, which is prone to change in line with election results. To put it another way, the shifting political relations, i.e. the possibility of a coalition government or changes in the Parliament's level of heterogeneity, have played a decisive role in the further trajectory of the AKP's amnesty policy. This suggests that state law should not be treated as something that can make everything possible. Rather than providing a definite last word or an absolute recipe for the AKP's amnesty policy, in this thesis, I have studied amnesty as a multi-layered socio-legal phenomenon circumscribed by the interplay of various dynamics and relationalities.

APPENDIX

THE ORIGINAL PASSAGES OF TRANSLATED TEXT

1) "Ben ta ne zamandan beri, 'Bizim gündemimizde genel af diye bir şey kesinlikle yoktur.' dedim. Bunu kaç kere söyledim. Ben hayallerimi anlatıyorum, siz genel aftan bahsediyorsunuz. Yok, böyle bir şey, kesinlikle yok."
2) "Şimdi birtakım suçları bizim affetmemiz doğru olmaz. Özellikle topluma ve bireye karşı işlenmiş suçları affetmeye parlamento olarak yönelemeyiz… Devlete karşı işlenmiş olan suçlarla ilgili af her zaman gündeme gelebilir."
3) "Ben bir başbakan olarak katili affedemem. Hatta ve hatta devletin katili affetmesini de doğru bulmuyorum. Ben maktule ya da maktulün ailesine nasıl hesap veririm?"
4) "Af konusunda benim farklı bir düşüncem vardır. Kişilere karşı suçlarda, kişiler af yetkisine sahiptir. Devlete karşı suçlarda devletin yetkisi vardır. Adam öldürme vs. konularda devletin yetkisi olmaz."
5) "Ben affı teröristler, azılı katiller, devleti dolandıranlar veya ırz düşmanları için istemiyorum! Yoksulluğun, açlığın, toplumun düzenindeki aşırı adaletsizliğin suça itelediği kimseler için, o arada kastı olmaksızın suç işleyenler için istiyorum."
6) "Ben bir Başbakan olarak katili affetme yetkisini kendimde göremem. Hatta ve hatta, devletin katili affetme yetkisini de asla kabul edemem. Niye? Çünkü onu af yetkisi sadece o maktulün varislerine aittir, devlete değil. Ama devlete karşı işlenen suçlarda böyle bir adım atılabilir. Bunun içinde siyasi suçlar da olabilir, daha farklı suçlar da olabilir. Orada böyle bir adım atılabilir. Ama ben kalkıp da

bir katili genel af kapsamı içerisinde nasıl affederim? Ondan sonra ben o maktule, o şehitlere bunun hesabını nasıl vereceğim? O şehitlerin ailelerine bunun hesabını nasıl vereceğim? Böyle bir şeyin olması asla mümkün değil."

7) "Biz yasalarımızla suça teşvik ediyoruz. Biz çıkardığımız yasalarla suça teşvik ediyoruz. Biz çıkardığımız yasalarla bireye olan suçları affediyor, ancak devlete olan suçları en ağır şekilde cezalandırıyoruz. Cenab-ı Allah bile ben kul hakkına karışmam diyor, ama biz tam tersine kendimizi bireyin yerine koyup, suçluyu affediyoruz. Eğer ben mağdur edilmiş isem bu durumda benim affetmem lazım, kimsenin benim yerime bir başkasını affetmemesi lazım. Benim hakkım ne olacak benim hakkımı kim koruyacak peki? Cezaların ağırlaştırılması lazım yapanın, suç işleyenin yanına kar kalmaması lazım."
8) "Örneğin düşüncesi nedeniyle sanık durumuna düşmüş veya mahkûm olmuş kimseler ceza indiriminden yararlanamazken, ağır suçlar işlemiş bulunan adi mahkûmlar indirimden yararlanmaktadır. Bunu kabul etmek mümkün değildir. "Eğer devlet alicenaplık gösterip bir himmette bulunmak istiyorsa önce kendisine yönelik suçları affetsin. Vatandaşın vatandaşa yönelik suçlarını devletin affetmeye kalkışması mağdur vatandaşlarda infiale yol açmaktadır. Devletin kendisine yönelik düşünce düzeyinde kalan suçları bile affetmezken, adam öldürme suçlarını affetmeye kalkışması anlaşılır gibi değildir."

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