The Transformations of the Regime of Intimate Violence in Turkey

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Declaration of Originality

The intellectual content of this dissertation, which has been written by me and for which I take full responsibility, is my own, original work, and it has not been previously or concurrently submitted elsewhere for any other examination or degree of higher education. The sources of all paraphrased and quoted materials, concepts, and ideas are fully cited, and the admissible contributions and assistance of others with respect to the conception of the work as well as to linguistic expression are explicitly acknowledged herein.

Abstract

The Transformations of the Regime of Intimate Violence in Turkey

Nazife Kosukoğlu Polatel, Doctoral Candidate at the Atatürk Institute for Modern Turkish History at Boğaziçi University, 2022

Associate Professor Z. Umut Türem, Dissertation Advisor

When and how do regimes of intimate violence change? What lies behind the changes in legal norms and rules concerning the regulation of male violence? How do legislators, jurists, and scholars affect the flows of law with regards to the gendered hierarchies of power? These questions lie at the crux of this study which examines the transformations of the regime of intimate violence in Turkey throughout the long twentieth century.

Analyzing the decisions of the Court of Cassation, scholarly, and parliamentary debates and legislation, this study traces the links between masculine power and state power in Turkey and presents an alternative account of modern Turkish history, revealing the extent to which state institutions have contributed to the reproduction of gendered hierarchies of power and marginalization of gendered bodily harms. This study shows that this regime of intimate violence went through various changes since the late Ottoman era and that its history followed a fluctuating course that included major masculinist restoration periods. In my analysis of these changes, I argue that major shocks that led to changes in the structure of the judico-political field or in the stance and standing of actors populating this field were crucial for the changes in rules and norms about intimate violence. This study also highlights the power of legal interpretation in leading to major changes in ground rules concerning masculine domination and underlines the importance of global legal flows in shaping such changes. It also challenges the argument that feminist activism is the more or less straightforward determinant of progressive changes in policies and legal rules concerning gender violence and

shows that -because of the intervening and constraining roles of institutions and male state elites in these institutions- such regimes may become even more tolerant of intimate violence in periods marked by the rise of mass and autonomous feminist movements.

155,550 words

Özet

Türkiye'deki Yakın Şiddeti Rejiminin Dönüşümleri

Nazife Kosukoğlu Polatel, Doktora Adayı, 2022
Boğaziçi Üniversitesi Atatürk İlkeleri ve İnkılap Tarihi Enstitüsü

Doçent Z. Umut Türem, Tez Danışmanı

Yakın şiddeti rejimleri ne zaman ve nasıl değişir? Eril şiddeti düzenleyen hukuki norm ve kuralların dönüşümünün ardında ne yatar? Yasa koyucular, hakimler ve akademisyenler, cinsiyetli iktidar hiyerarşileri açısından hukukun akışını nasıl etkilerler? Uzun yirminci yüzyıl boyunca Türkiye'deki yakın şiddeti rejiminin dönüşümlerini inceleyen bu çalışmanın merkezinde bu sorular yer alıyor.

Yargıtay kararları, akademik tartışmalar, meclis görüşmeleri ve yasa metinlerini inceleyen bu çalışma, eril tahakküm ile devlet iktidarı arasındaki ilişkinin izini sürüyor ve -devlet kurumlarının cinsiyetli iktidar hiyerarşilerinin sürdürülmesine ve cinsiyetle ilişkili bedensel hasarların marjinalleştirilmesine ne denli katkıda bulunduğunu ortaya koyarak- alternatif bir modern Türkiye tarihi anlatısı sunuyor. Bu çalışma, bu yakın şiddeti rejiminin Osmanlı'nın son yıllarından beri pek çok değişim geçirdiğini ve bu rejimin tarihinin -esaslı maskülinist restorasyon dönemlerini de kapsayan- dalgalı bir seyir izlediğini gösteriyor. Bu değişimlere dair incelememde, yargısal-siyasal alanın yapısı ya da bu alandaki aktörlerin duruş ve pozisyonlarını değiştiren büyük şokların yakın şiddetine dair norm ve kuralların değişimi açısından çok önemli olduğunu iddia ediyorum. Bu çalışma, eril tahakkümün temelini oluşturan ana kuralların dönüşümü açısından hukuki yorumun gücünü de vurguluyor ve küresel hukuki cereyanların bu değişimleri belirlemedeki öneminin de altını çiziyor. Bu çalışma aynı zamanda feminist aktivizmin toplumsal cinsiyet şiddetine dair politikaların ve hukuki kuralların progresif yönde dönüşümü için mutlak belirleyici olduğu önermesine karşı çıkıyor ve bu rejimlerin,

kitlesel ve otonom feminist hareketlerin yükseldiği dönemlerde –kurumların ve bu kurumlardaki erkek devlet elitlerinin müdahale edici ve kısıtlayıcı rolleri sebebiyle- yakın şiddetine daha da müsamahakâr hâle gelebileceğini gösteriyor.

155.550 kelime

Curriculum Vitæ

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Glossary of Non-English Terms

fetva	Islamic legal opinion
ırz	chastity
kanun	code
namus	honor
zina	adultery

Abbreviations and Acronyms

AD	Adliye Ceridesi, Adliye Dergisi, Adalet Dergisi
CCa	Court of Cassation
CC	Criminal Law Chamber
GCA	General Criminal Assembly
ICC	Italian Criminal Code
MHAD	Mukayeseli Hukuk Araştırmaları Dergisi
RKD	Resmi Kararlar Dergisi
OCC	Ottoman Criminal Code
OCCa	Ottoman Court of Cassation
TCC	Turkish Criminal Code
TCiC	Turkish Civil Code
YD	Yargıtay Dergisi
YKD	Yargıtay Kararları Dergisi

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At the second year of my PhD, I worked at the İstanbul University Center for Human Rights Law for a project of the Raoul Wallenberg Institute. I am thankful to the then-director of the center Mehmet Semih Gemalmaz. I am also thankful to İ. Mert Ertan, Ayça Küçük, Ubeydullah Türkyılmaz, and Berke Özenç, with whom I had valuable intellectual discussions during my time there.

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1

Introduction

In the early 2000s, I was a young woman living in Turkey. At that time, Turkey was undergoing a reform process. Criminal law reform and gender violence were on almost every newspaper and news channel. As many other young women around me, I was extremely hopeful. I thought that a very big transformation was happening and things would definitely change for the better. By the time I began to work on my dissertation outline, the hopes of my teenage years had been replaced by disappointment and frustration. Years had passed since the adoption of the new criminal code in the mid-2000s but gender violence was still very much on the media: Some judges were still reducing sentences for victims' transgression of gender norms and some courts were still deciding that hitting a wife was not a violent act that should have legal consequences. And I was feeling like things were actually getting worse. What is more, this feeling strengthened through time, especially after Turkey withdrew from the Istanbul Convention with a presidential decree in 2021.

Why was this still happening? And what could be done to change such judicial practices if even the adoption of a totally new criminal code called a feminist success story had not been enough? These were the initial curiosities that led me towards reading parliamentary records and reports,

decisions of the Turkish Court of Cassation (the CCa), and scholarly works on criminal law. When I started reading these texts, I was expecting to find something like a problem of implementation stemming from the stickiness of established norms and practices. I was expecting to find a masculinist regime that had not changed for decades, replaced by a new regime based on an egalitarian, if not feminist, code. The former would be haunting the latter. There would be a single transformation, located somewhere after 1980 the earliest -that is after the resurfacing of independent feminist movements in Turkey– towards the limitation of accommodations granted to intimate violence in the field of law, crowned by the adoption of the new TCC. Because I was expecting to find a single transformation, my initial research project was titled "The Transformation of the Regime of Intimate Violence in Turkey."

After a while, I found myself questioning various elements of this preliminary outline that was informed by my own experiences, beliefs, and readings on gender relations and gender violence in Turkey. The questions that lie at the crux of this study crystallized only after this process, after it became clear to me that this regime had not only changed through what I initially assumed it would have (legislative action) and when I expected it would have (after 1980 or after the rise of global feminism in the late 20th century). In this dissertation, I attempt to answer the following question: How do institutions in the politico-judicial field and actors within these institutions shape regimes of intimate violence? In other words, how do legislators, jurists, and scholars affect the flows of law in terms of the material consequences of and legal meanings attached to violent bodily interactions between intimates? This question owes its central place in this dissertation to that mismatch between my expectations and initial findings because that mismatch directed me towards taking legal interpretation more seriously.

For this exploration, I borrowed the method used by many historians of the present. That is the method of starting with a diagnosis or identification of a problem in the present and tracing it through history. For this study, I traced two elements of the contemporary regime of intimate vio-

lence in Turkey. One of them is unjust provocation mitigation (*haksız tahrik*). According to this norm, sentences of people who were unjustly provoked before committing a crime shall be mitigated. This norm is familiar to many regimes around the world but its designation in Turkey comes with a twist: Provocation or emotional distress alone is not enough for its application. There has to be an "unjust act" on the part of the victim that caused the provoked state of the perpetrator. Because of this qualifier, court decisions involving this norm almost always raise the questions of what is a just or unjust (or as I learned in this research normal or abnormal) thing to do and who has a legitimate right to be distressed in a given situation or draw on doxas, on assumptions that have acquired the power of 'going without saying.'[1]

In terms of intimate violence, adultery is accepted as an unjust act against official and unofficial husbands, fiancées, boyfriends, and sometimes ex-husbands, but adultery is not the only gender norm transgression that can be accepted as an unjust act. According to some judges, meeting with a male friend at a patisserie,[2] refusing to drink the fruit juice offered by the husband,[3] visiting places of entertainment at nighttime with "comfortable" clothing,[4] communicating with "strangers" (*yabancı*) on the phone,[5] talking with a man who is not a relative,[6] being

[1] Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field," *The Hastings Law Journal* 38 (1987): 805-853, esp. 849.

[2] CGK (Ceza Genel Kurulu, the General Assembly of the Criminal Chambers of the Court of Cassation), E. 2013/246, K. 2014/443, T. 21.10.2014, https://karararama.yargitay.gov.tr. The general rule for citing court decisions in Turkey is indicating the name of the decision-making body, followed by the record numbers and the date of the decision. In this study, I followed this general rule. In decisions given by the Court of Cassation, the specific decision-making bodies are criminal chambers (ceza dairesi, CD), civil chambers (hukuk dairesi, HD), the general assembly of criminal chambers (ceza genel kurulu, CGK), the general assembly of civil chambers (hukuk genel kurulu, HGK) and the plenary assembly (tevhidi içtihat/içtihadı birleştirme genel kurulu, TİK).

[3] 1. CD, E. 2008/9687 K. 2009/1691 T. 31.3.2009, www.kazanci.com.tr.

[4] 1. CD, E. 2017/3245, K. 2018/377, T. 07.02.2018, https://karararama.yargitay.gov.tr.

[5] 3. CD, E. 2015/6894 K. 2015/12889 T. 13.4.2015, www.kazanci.com.tr.

[6] 3. CD, E. 2014/37959, K. 2015/13857, T. 04.12.2012, https://karararama.yargitay.gov.tr.

too friendly with colleagues or family friends,[7] coming home at a late hour,[8] expressing intent to have an abortion,[9] getting in or out the personal vehicle of a male "stranger,"[10] being seen with another man in public (such as walking side by side with a man or sitting on the same bench with a man at a park),[11] ignoring family duties or refusing to do housework,[12] drinking alcoholic beverages,[13] and buying a laptop[14] or attending a wedding[15] without "notifying" the husband are also unjust acts on the part of married women, necessitating sentence reductions on the basis of unjust provocation. Accordingly, men who beat, stab or kill women upon being "offended" by such actions often benefit from sentence reductions.

Unjust provocation mitigation also features in cases concerning minors or non-marital intimate relationships like those involving fathers or brothers. According to some judges, meeting with a guy unapproved by male relatives, having extramarital sexual relations with someone or having a boyfriend are unjust act for minors.[16] If a male relative like a father

[7] CGK, E. 2014/571, K. 2015/437, T. 01.12.2015, https://karararama.yargitay.gov.tr.

[8] 4. CD, E. 2014/12559, K. 2016/14615, T. 23.11.2016, https://karararama.yargitay.gov.tr ; 4. CD, E. 2016/7076, K. 2020/4894, T. 09.03.2020, https://karararama.yargitay.gov.tr.

[9] 4. CD, E. 2012/7061, K. 2013/22558, T. 17.09.2013, https://karararama.yargitay.gov.tr.

[10] 4. CD, E. 2013/19480, K. 2015/31311, T. 16.06.2015 ; 3. CD, E. 2015/16056, K. 2015/30348, T. 28.10.2015, https://karararama.yargitay.gov.tr.

[11] 4. CD, E. 2013/10722, K. 2014/22062, T. 17.06.2014, https://karararama.yargitay.gov.tr.

[12] 1. CD, E. 2012/940, K. 2012/8526, T. 22.11.2012, https://karararama.yargitay.gov.tr.

[13] 3. CD, E. 2017/4036, K. 2017/17589, T. 26.12.2017, https://karararama.yargitay.gov.tr.

[14] 4. CD, E. 2014/17167, K. 2018/7449, T. 16.04.2018, https://karararama.yargitay.gov.tr.

[15] 4. CD, E. 2014/54343, K. 2019/6178, T. 04.04.2019, https://karararama.yargitay.gov.tr.

[16] 3. CD, E. 2015/24229, K. 2016/4661, T. 24.2.2016, www.lexpera.com.tr ; 1. CD, E. 2009/4002 K. 2010/ 1278, T. 03.03.2010, in Salih Zeki İskender, *Öğreti ve Yargısal Kararlar Işığında Töre Saikiyle İnsan Öldürmek Suçu: (Namus Cinayetleri)* (Ankara: Yetkin, 2011), 408-410; and 1. CD, E. 2006/7831, K. 2007/5686, T. 11.07.2007.

kills or physically assaults a girl after witnessing or learning such an "injustice," he may benefit from a sentence reduction on the basis of unjust provocation. Wearing clothing deemed inappropriate,[17] working without the father's permission,[18] leaving the house without permission,[19] communicating with men via phone or social media or expressing demands for autonomy or resistance by saying things such as "You have no right to meddle with my life!" may also be accepted as unjust acts.[20] This norm is also applied for crimes targeting men who transgress gender norms –for example when a convicted or alleged rapist or harasser is killed by a relative of the woman he attacked or when a man who had consensual sexual or emotional relations with a woman is assaulted or killed by the woman's relatives. In Turkey, mere words and even gestures can qualify as unjust provocation and, unlike the Anglo-American context,[21] provocation mitigation has been historically applicable to a variety of crimes rather than being limited to murder.

I chose to focus on this norm due to a number of reasons. First, it is objectively a very important element of this regime.[22] This norm and its applications produce the effects of regulating emotions, gender relations,

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[17] 4. CD, E. 2013/28957, K. 2015/38540, T. 25.11.2015, https://kararama.yargitay.gov.tr.

[18] 3. CD, E. 2016/6774, K. 2017/196, T. 18.01.2017, https://kararama.yargitay.gov.tr.

[19] In this case, a small kid who left home to play with her friends was threatened and assaulted by her father. 4. CD, E. 2012/34236, K. 2014/20443, T. 05.06.2014, https://kararama.yargitay.gov.tr

[20] Such comments are also used as grounds for the application of unjust provocation mitigation in cases of violence targeting adult or married daughters and wives. 3. CD, E. 2012/6469, K. 2013/8809, T. 05.03.2013; 4. CD, E. 2015/17536, K. 2019/16165, T. 17.10.2019; and 4. CD, E. 2016/2988, K. 2016/6005, T. 30.03.2016, https://kararama.yargitay.gov.tr.

[21] Markus Dubber and Tatjana Hörnle, *Criminal Law: A Comparative Approach* (Oxford: Oxford University Press, 2014), 562.

[22] For works which emphasize the importance of this norm in shaping legal responses to gender violence in Turkey, see Türkan Yalçın Sancar, *Türk Ceza Hukukunda Kadın* (Ankara: Seçkin, 2013); Eylem Ümit Atılgan, *Türkiye'deki İç Hukuk Kültürü Üzerine Sosyo-Hukuki Bir Araştırma* (Ankara: Turhan Kitabevi, 2016); and Ece Göztepe, "Namus Cinayetlerinin Hukuki Boyutu: Yeni Türk Ceza Kanunu'nun Bir Değerlendirmesi," *TBB Dergisi* 59 (2005): 29-48.

and gendered hierarchies of power. When deciding whether to apply it or not and the degree to which they will reduce the sentence in case they apply it, judges also decide on some very big questions: What is a just or unjust thing to do? Who (what kinds of men in what degrees of intimacy to the victim) should be legally tolerated for committing crimes upon the transgression of gender norms? What are the acceptable ways of behaving, clothing, and socialization for women? What emotions would arise in certain situations and in what intensity? In cases of intimate control murders, judgements involving unjust provocation also bring about implicit or explicit judgments on questions like these. Second, this norm and its applications have an important place in current debates concerning intimate violence in Turkey. Some feminist groups and activists and some politicians demand a change in legal interpretation or adoption of legislative steps for limiting its applicability, while others demand its abolition with the argument that there is no way of preventing its unjust applications.[23] Thus, it is also a politically important and contested norm.

The second element of the regime of intimate violence that I traced for this study is a crime, ill-treatment of family members. Unlike unjust provocation mitigation, its significance and implications have remained largely unproblematized by feminist activists and organizations.[24] It is rarely discussed by people other than law scholars. Even in this latter scholarship, it is barely significant. However, I think that it is a key element of this regime because of the function it serves. Unlike the Italian

[23] "Kadına Şiddette Yargı Kararları TCK'ya Uygun Değil," *İleri Haber*, November 25, 2015, https://ilerihaber.org/icerik/kadina-siddette-yargi-kararlari-tckya-uygun-degil-25976.html; "Bir Hakim Yeter: Kadın Cinayeti Davalarında Sanıklara, 'Haksız Tahrik' ve 'İyi Hal' İndirimi Verilmesin," *T24*, November 25, 2017, https://t24.com.tr/haber/bir-hakim-yeter-kadin-cinayeti-davalarinda-saniklara-haksiz-tahrik-ve-iyi-hal-indirimi-verilmesin,497986; and "Kadın Cinayetinde 'Tahrik ve İyi Hal İndirimi' Kaldırılsın," *Vatan*, January 28, 2008, https://www.gazetevatan.com/gundem/kadin-cinayetinde-tahrik-ve-iyi-hal-indirimi-kaldirilsin-722045

[24] The absence of any mentions to this crime in the GREVIO shadow report prepared by eight and endorsed by eighty-one NGOs can be taken as an indicator of this. See Istanbul Convention Monitoring Platform, *Shadow NGO Report on Turkey's First Report*, September 2017, https://rm.coe.int/turkey-shadow-report-2/16807441a1.

Criminal Code which also includes a similar stipulation,[25] this is one of the lightest crimes in the Turkish Criminal Code.[26]

There are scholarly disputes concerning the scope of this crime. According to some criminal law scholars, acts that fall under the scope of any other crime cannot be considered as ill-treatment of household members.[27] According to some others, various acts of violence that are considered as other crimes when committed against strangers constitute ill-treatment when committed against intimates, and these include "forcing someone to eat feces for one time,"[28] "intimidation, threat, swearing (insult), causing torment, keeping under excessive control, isolation," and causing bodily harm that can be treated with basic medical intervention.[29] The Court of Cassation is also inconsistent on this matter. According to some decisions, acts that can be considered within the scope of other crimes should not be considered as ill-treatment. According to

[25] The stipulated punishment for the basic form of this crime is three to seven years imprisonment in Italy (art. 572). The Italian Code designs this crime as a crime that can lead to serious injury, very serious injury and even death, and stipulates imprisonment between 4-9 years, 7-15 years, and 12-24 years for such aggravated cases. Codice Penale, 19 October 1930, https://www.altalex.com/documents/news/2014/11/10/dei-delitti-contro-la-famiglia.

[26] The stipulated punishment for this crime is imprisonment between two months and one year in Turkey. Turkish Criminal Code, no. 5237, September 26, 2004, art. 232/1. Even the basic form of insult is subject to a heavier imprisonment sentence (imprisonment between three months and two years) than this crime in the Turkish Code (art. 125). Basic physical assault is also subject to higher punishment (imprisonment between four months and one year) because it has a higher minimum imprisonment term (art. 86/2).

[27] Veli Özer Özbek et al., *Türk Ceza Hukuku Özel Hükümler*, 7th ed. (Ankara: Seçkin, 2010), 857-859.

[28] Öznur Şahin, "İnsan Hakları Açısından Türk Ceza Kanunu Madde 232'de Düzenlenen Kötü Muamale Suçunun İncelenmesi, Çocuk Hakları ve Kadın Hakları Bakımından Maddenin Değerlendirilmesi" (master's thesis, Başkent University, 2019), 41.

[29] Durmuş Tezcan et al., *Teorik ve Pratik Ceza Özel Hukuku*, 10th ed. (Ankara: Seçkin, 1999), 797.

some others, "constantly yelling at, insulting and wounding"[30] or harrowing[31] (*itip kakmak*) a household member, committing non-aggravated physical assault against her,[32] forcibly cutting her hair (or shaving her head?) and threatening her with tying her to the house with a chain,[33] tying her hands and feet,[34] or locking her somewhere like a balcony[35] are acts that fall under the scope of this crime.

When committed against strangers, such acts are considered within the scope of other crimes like physical assault or deprivation of liberty, which are subject to harsher punishments.[36] Thus, pushing an act into the scope of this crime rather than another creates the effect of relative under-sentencing compared to stranger violence. For example, when a case concerning a wife who had been deprived of her liberty via the use of force is pushed under the scope of this crime rather than being prosecuted as deprivation of liberty, the perpetrator benefits from a practical sentence reduction in the dramatic margin of fourteen-folds in terms of the maximum prison sentence and twenty-four-folds in terms of the minimum prison sentence.[37] Thus, the application of this stipulation creates

[30] "… sürekli olarak bağırıp hakaret etme ve yaralama…" quoted in Tezcan et al., *Teorik*, 798. Also see 8. CD, E.2012 / 8951, K. 2012/28574, T. 26.9.2012, www.lexpera.com.tr.

[31] 8. CD, E. 2017/22962, K. 2017/14291, T. 14.12.2017, https://kararara ma.yargitay.gov.tr.

[32] 8. CD, E. 2012/8951 K. 2012/28574 T. 26.9.2012, www.kazanci.com.tr.

[33] CGK, E. 2016/1412, K. 2020/8, 16.01.2020, https://kararara ma.yargitay.gov.tr.

[34] 14. CD, E. 2013/4136, K. 2014/14634, T.22.12.2014, https://kararara ma.yargitay.gov.tr.

[35] 3. CD, E. 2014/7527, K. 2014/26907, T. 11.12.2014, www.legalbank.com.tr.

[36] The Code stipulates imprisonment between 2 months and 1 year for ill-treatment of household members (TCC 232/1); imprisonment between 4 months and 1 year for basic assault (TCC 86/2); imprisonment between 6 months and 1.5 years for basic assault committed against an ascendant, descendant, spouse or sibling (TCC 86/3-a). The stipulated punishment is imprisonment between 1 and 5 years for non-aggravated deprivation of liberty (109/1) and imprisonment between 2 and 7 years if the act was accompanied by use of force, threat or trickery (TCC 109/2). The Code also stipulates the doubling of the imprisonment term if the crime is committed against a descendant, ascendant or spouse (TCC, 109/3-e).

[37] There is a 14 to 1 ratio between the maximum punishments stipulated for the crimes of aggravated deprivation of liberty and ill-treatment of family members. This ratio is 24 to 1 for the minimum prison sentences. Compare TCC art. 232/1 and TCC 109.

the effects of differentiating intimate violence and ensuring relative under-sentencing in such cases. Moreover, some court decisions indicate that when an act is thrown into this well with muddy waters, the outcome is not always tremendous relative under-sentencing. It can also be total impunity. Sometimes, courts rule that violent acts like beating fall into the scope of this crime and that there is no need for punishment (*ceza verilmesine yer olmadığına*) or acquit the perpetrator– even in the most technically solid cases where there are witnesses, uncontested medical reports, insistent complainants, and admittance of guilt in combination.[38] Thus, this crime and the judicial practice concerning it serve a very important function in terms of the accommodation of intimate violence in the field of law.

Examined together, unjust provocation and ill-treatment of family members make it possible to shed light to the operations of law with regards to intimate violence because they are key elements of this regime. How has intimate violence been regulated and distributed in Turkey? These two legal concepts are key for answering this question. Moreover, they both provide a window into the legal construction of intimacy as a category. Who is a family member? Who is a stranger? Who can be considered as intimate? Because they entail such questions, these two elements of the regime provide insights for understanding the notion of intimacy in the Turkish legal context.

For this study, I traced these two elements of the regime of intimate violence, examining parliamentary records, legislation, case-law, and elaborations of scholars and jurists throughout the 20th century in order to understand the role of institutions in the legal field in shaping this regime. I traced how these two elements of the contemporary regime of intimate violence in Turkey came out to be and when and how changes concerning them came about.

Before going into the details of my approach and sources, I want to provide a brief overview of my arguments. The main narrative of this

[38] 3. CD, E. 2014/7527, K. 2014/26907, T. 11.12.2014, www.legalbank.com.tr ; 18. CD E. 2015/32383, K. 2017/5829, T. 15.05.2017, https://karararama.yargitay.gov.tr. Also see 4. CD, E. 2008/7450, K. 2010/855, T. 28.1.2010, www.kazanci.com.tr

study is built upon the concept of change. Throughout this study, I show that the regime of intimate violence in Turkey went through various transformations. Examining these changes in detail, I argue that major shocks that brought about large-scale shifts in the structuring of the judico-political field or in the stance and standing of the actors populating this field were crucial in shaping these transformations. In other words, I show that critical junctures or major shocks such as wars, revolutions, leadership changes, or coups may have tremendous effects on the regulation of gender violence. As highlighted in the ancient Greek distinction between *chronos* (the uniform time of the cosmic system) and *kairos* (the time of opportunity, the significant moments of historical action),[39] not all moments in time are equal in terms of their potential for change and this study provides important insights for understanding which kinds of historical moments may qualify as *kairos* for the structuring of gender relations.

In this dissertation, I show that judicial interpretations of law impact the "social positioning of lived bodies in relation to one another"[40] – by defining and limiting these relations, establishing hierarchies, and instituting, abolishing, or modifying the rules through which violence and (in)violability are distributed. I argue that those interpretations can be as powerful, and in some instances, even more powerful than legislative action in shaping the regime of intimate violence in a country and its transformations.

As I show in this study, there has been significant differences of opinion among judges, prosecutors, scholars, and politicians concerning issues related to intimate violence and criminal law since the establishment of the Turkish Republic in 1923. At times, some of these disputes were temporarily settled in terms of their effects on norms in force by legislative amendments or changes in the interpretations imposed upon

[39] John E. Smith, "Time, Times, and the 'Right Time'; 'Chronos' and 'Kairos'," *Philosophy of History* 53, no. 1 (January 1969): 1-13.
[40] Iris Marion Young, "Lived Body vs. Gender: Reflections on Social Structure and Subjectivity," *Ratio* 9 (2002): 422.

lower courts, and sometimes upon its own chambers, by the Court of Cassation. Some of these settlements were later replaced by new ones – completely different from what they replaced, while others stood the test of time. Some of these changes caused uproars from the ranks of criminal law scholars, some happened in line with the pushes they created and with their personal involvement. These flows, I argue, cannot be understood unless the power of legal interpretation and of institutions where this power is concentrated is taken into consideration.

Finally, this study shows that it is not the past in whole but selected aspects of the past or selected elements within the past –like historical facts and fictions that are brought into current debates, decisions that are remembered as case-law, practices or tendencies that are sanctified or invented as essential national traits or traditions, interpretations or critiques that become settled through time- that impact the many presents along the temporal continuum. As I show in this study, legislators, scholars, and jurists occasionally bring the past to the table and such references to the past often have material effects on criminal law and intimate violence. However, they can also "forget" or choose to overlook some aspects of the past and these acts of forgetting or silencing can also have very powerful effects. On this basis, I argue that the past is indeed "very much operative in the present"[41] but not as an omnipotent or unmediated force in its own.

§ 1.1 Gender Relations and Gender Regimes

Gender violence began to receive increasing attention from the academia in recent decades. There is a vast body of research, scrutinizing issues

[41] I borrowed this phrase from Joanne Conaghan's remarks from the roundtable on the twenty years of the FLS journal and of feminist legal studies in the UK. Sarah Lamble, "Twenty Years of Feminist Legal Studies: Reflections and Future Directions," *Feminist Legal Studies* 22 (2012): 120.

such as risk factors, prevalence, attitudes, and discourses related to gender violence in different countries, including Turkey.[42] However, our knowledge of context and history concerning the regulation of gender violence is limited in general. And, beyond the confines of the global north, this knowledge is overwhelmingly scarce.

At this point, a brief examination of the disciplinary distribution of the literature on gender violence might help me describe the texture of the scholarly field and let me clarify what I mean by limitation, and overwhelming scarcity concerning the knowledge related to context and history. In order to provide a rough sketch of the field, I examined the disciplinary distribution of articles published in the period between 1980 and 2019 and included in the Social Science Citation Index. In this index, there are 17,860 articles concerning gender violence. 11,809 of these are from health-related disciplines such as medicine, psychiatry and nursing; 4,343 from women's studies or family studies; and 3,184 from law-related fields. Among all these articles, 600 are from the disciplines of anthropology, cultural studies, and multidisciplinary humanities and only 363 from a field related to history. These numbers indicate that disciplines that primarily scrutinize context and history produce only a tiny minority of the scholarly output on gender violence.

A recent development that has the potential to change this situation has been the emergence of feminist legal history as a scholarly field.[43] On the other hand, in terms of the literature available in English, the geographical focus of this developing field has largely been the global north,

[42] Ayşe Gül Altınay and Yeşim Arat, *Türkiye'de Kadına Yönelik Şiddet* (Istanbul: Metis, 2008); Pınar İlkkaracan et al. eds., *Sıcak Yuva Masalı: Aile İçi Şiddet ve Cinsel Taciz* (Istanbul: Metis, 1996); Aksu Bora and İlknur Üstün, *"Sıcak Aile Ortamı": Demokratikleşme Sürecinde Kadın ve Erkekler* (Istanbul: TESEV, 2005); Derya Güngör, "Femicide in Turkey: A Descriptive and Critical Study Based on News Texts of Femicide Incidents in 2009" (master's thesis, METU, 2012); and İlknur Yüksel Kaptanoğlu et al., *Türkiye'de Kadına Yönelik Aile İçi Şiddet Araştırması* (Ankara: Hacettepe University, 2015); KSGM, *Türkiye'de Kadına Yönelik Aile İçi Şiddet* (Ankara: KSGM, 2009).

[43] For an analysis on the development of this literature, see Maria Drakopoulou, "Feminist Historiography of Law: An Exposition and Proposition," in *The Oxford Handbook of Legal History*, ed. Markus D. Dubber and Christopher Tomlins (Oxford: Oxford University Press, 2018), 603-621.

particularly the geographical area that is called the Anglosphere. Among all history articles marked with the word "feminist legal history" in the Social Science Citation Index in the aforementioned time period, there was only one article concerning a location in Asia (China), and none about Africa or Middle East. In the academic literature in English, one can find numerous studies on formal norms and rules concerning the accommodation granted to lethal and non-lethal intimate violence in different locations in the Anglosphere that scrutinize the historical transformations of law through analysis of case-law and legal scholarship.[44] However, there is not a single empirical study scrutinizing the historical transformations of case-law and scholarship concerning gender violence in Turkey at the course of the 20th century –despite the existence of a rather rich scholarship on a variety of gender issues and despite the fact that

[44] Kristen S. Rambo, "*Trivial Complaints": The Role of Privacy in Domestic Violence Law and Activism in the US* (New York: Columbia University Press, 2008); Anna K. Clark, "Domesticity and the Problem of Wifebeating in the 19th Century Britain: Working Class Culture, Law, Politics – Gender and Class," in Everday Violence in Britain, 1850-1950: Gender and Class, ed. Shani D'Cruze and Ivor Crewe (London: Routledge, 2014), 27-40; Anna K. Clark, "Humanity or Injustice? Wifebeating and the Law in the Eighteenth and Nineteenth Centuries," in *Regulating Womanhood: Historical Essays on Marriage, Motherhood and Sexuality*, ed. Carol Smart (London: Routledge, 1992), 187-206; Maria Drakopoulou, "Feminism, Governmentality and the Politics of Legal Reform," *Griffith Law Review* 17, no. 1 (2008): 330-356; Reva B. Siegel, " 'The Rule of Love': Wife Beating as Prerogative and Privacy," *Yale Law Journal* 105 (1996): 2117-2207; Hendrik Hartog, *Man and Wife in America: A History* (Cambridge, MA: Harvard University Press, 2000); Cynthia Lee, *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom* (New York: New York University Press, 2003); and Hendrik Hartog, "Lawyering, Husbands' Rights, and 'the Unwritten Law' in Nineteenth-Century America," *The Journal of American History* 84, no: 1 (June 1997): 67-96.

there is a growing literature on the relationship between law and gender in the Ottoman Empire[45] and/or Turkey.[46]

I think this disciplinary and geographical distribution of the literature on gender violence and its regulation may bring about various problems. The rarity of studies that scrutinize context and history and the popularity of the subject in health-related disciplines can facilitate the de-socialization of gender violence, and contribute to the popularization of its portrayal as a disease or a natural outcome of human evolution[47] rather than a social phenomenon. Second, the predominant focus of feminist legal history studies available in English on the global north, on the Anglosphere to be more specific, limits our understanding of the issue, and may lead to two distinct but equally problematic outcomes.

First of all, in the absence of empirical knowledge concerning the regulation of gender violence in the global south, conclusions of studies focusing on the global north might be over-generalized and appear as

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[45] Iris Agmon, *Family and Court: Legal Culture and Modernity in Late Ottoman Palestine* (Syracuse: Syracuse University Press, 2006); Başak Tuğ, *Politics of Honor in Ottoman Anatolia: Sexual Violence and Socio-legal Surveillance in the Eighteenth Century* (Leiden: Brill, 2017); Judith E. Tucker, "Revisiting Reform: Women and the Ottoman Law of Family Rights, 1917," *The Arab Studies Journal* 4, no. 2 (1996): 4-17; Judith E. Tucker, *Women, Family and Gender in Islamic Law* (Cambridge: Cambridge University Press, 2008); Ruth A. Miller, *The Limits of Bodily Integrity: Abortion, Adultery, and Rape Legislation in Comparative Perspective* (London: Routledge, 2017); Boğaç A. Ergene, "Why did Ümmü Gülsüm Go to Court? Ottoman Legal Practice between History and Anthropology," *Islamic Law and Society* 17, no. 2 (May 2010): 215-244; and Ebru Aykut, "Toxic Murder, Female Poisoners, and the Question of Agency at the late Ottoman Law Courts, 1840-1908," *Journal of Women's Histor*y 28, no. 3 (2016): 114-137.

[46] Dicle Koğacıoğlu, "The Tradition Effect: Framing Honor Crimes in Turkey," *Differences: A Journal of Feminist Cultural Studies* 15, no. 2 (2004): 118-152; Umut Özsu, " 'Receiving' the Swiss Civil Code: Translating Authority in Early Republican Turkey," *International Journal of Law in Context* 6, no. 1 (2010): 63-89; Ayşe Parla, "The "Honor" of the State: Virginity Examinations in Turkey," *Feminist Studies* 27, no. 1 (2001): 65-88; Mehmet Semih Gemalmaz, *Osmanlı'dan Cumhuriyet'e Kadınlara, Çocuklara ve Azınlıklara Karşı Ayrımcılık, Şiddet ve Sömürü* (Istanbul: Homer, 2018); and Alev Özkazanç, *Cinsellik, Şiddet ve Hukuk: Feminist Yazılar* (Ankara: Dipnot, 2013).

[47] Matthew A. Goldstein, "The Biological Roots of Heat-of-Passion Crimes and Honor Killings," *Politics and Life Sciences* 21, no. 2 (2002): 28-37.

global facts. A well-known example of this is the public-private divide which played an important role in shaping the regime of intimate violence in the US. As underlined by various scholars, especially in the global south or in post-colonial contexts, approaching gender matters with the assumption that they are structured on the basis of this divide can lead to misconceptions and misconstructions, and to the marginalization of some forms of gender violence (such as state violence against indigenous women). [48]

The second problem that this geographical distribution can bring about is the marginalization of what appears as excess when different cases are read with frameworks derived from studies focusing on the Anglosphere. In the absence of studies conducted with historical perspectives, such phenomena in the global south can be exoticized and explained with references to timeless traditions, or unchanging cultural, or religious essences.[49] As underlined by various scholars, such framings, which are based on essentialized and de-historicized notions of culture, are not only analytically problematic but also contribute to the reproduction of global power hierarchies and there is a need for "reframing" gender violence.[50] As suggested by Dicle Koğacıoğlu, examining the historical makings of things and the institutional effects that have been created by states in the global south[51] can be especially useful for such reframing efforts because states have also been there for some time – classifying

[48] Anannya Bhattacharjee, "The Public/Private Mirage: Mapping Homes and Undomesticating Violence Work in the South Asian Immigrant Community," in *Feminist Genealogies, Colonial Legacies, Democratic Futures*, ed. M. Jacqui Alexander and Chandra Talpade Mohanty (New York: Routledge, 1997), 308–29; and Andrea Smith, *Conquest: Sexual Violence and American Indian Genocide* (Cambridge: South End Press, 2005).

[49] Koğacıoğlu, "Tradition Effect"; Lila Abu-Lughod, *Do Muslim Women Need Saving?* (Cambridge, MA: Harvard University Press, 2013).

[50] Ibid. In recent years, a group of scholars including Lila Abu-Lughod, Kaiama Glover, Jennifer Hirsch, Marianne Hirsch, Jean Howard, Anupama Rao, Kendall Thomas, and Paige West started an initiative for reframing gender violence. For the website of this project carried out within the scope of the Columbia University Global Centers, see https://www.socialdifference.columbia.edu/projects-/reframing-gendered-violence.

[51] Dicle Koğacıoğlu, "Knowledge, Practice, and Political Community: The Making of the 'Custom' in Turkey," *Differences* 22, no. 1 (2011): 172; Koğacıoğlu, "Tradition Effect," 143.

and regulating practices of violence. What have they been actually doing until recent decades? How have state institutions in the global south contributed to the emergence and reproduction of what appears as "excess"? Koğacıoğlu invited feminist scholars in the global south to think with such questions. This study follows-up on that invitation and explores the role of state institutions in Turkey in the reproduction of intimate violence as a social practice with a particular focus on the accommodation provided to the perpetrators of such acts in the field of law. Following Koğacıoğlu, I explore the particularities of this case with an anti-essentialist approach –scrutinizing the role of institutions in their historical makings.

The literature on gender regimes has been an important force shaping this study. This literature began to emerge in the 1980s and significantly flourished after the 1990s. In this period, the assumption that there is a universal patriarchy was problematized in depth. Gender regimes proved to be an effective conceptual tool for explaining historical or geographical variation in terms of the general orderings of masculine domination. Thus, this concept gained wide-spread use in the academic literature on women's movements,[52] gender violence,[53] governance,[54] women's rights,[55] and social policy[56] in recent years.

One of the scholars who contributed to the development of this concept is Sylvia Walby. In her earlier works, Walby used the term patriarchy to underline the systematic/structural character of gender inequality. She argued that six structures, which are relatively autonomous, have

[52] Ayşegül Aldıkaçtı Marshall, *Shaping Gender Policy in Turkey: Grassroots Women Activists, the European Union, and the Turkish State* (Albany: SUNY Press, 2013).
[53] Koğacıoğlu, "Tradition Effect," 127.
[54] Tammy Findlay, *Femocratic Administration: Gender, Governance, and Democracy in Ontario* (Toronto: University of Toronto Press, 2015).
[55] Georgina Waylen, *Engendering Transitions: Women's Mobilization, Institutions, and Gender Outcomes* (Oxford: Oxford University Press, 2007); and Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (London: University of Chicago Press, 2006).
[56] Julia S. O'Connor, Ann Schola Orloff, and Sheila Shaver, *States, Markets and Families: Gender, Liberalism and Social Policy in Australia, Canada, Great Britain and the United States* (Cambridge: Cambridge University Press, 1999).

causal effects on each other and she identified patriarchal production relations, patriarchal relations within paid work, the state, male violence, patriarchal relations in sexuality and patriarchal cultural institutions as the main structures of patriarchy.[57] Another scholar who contributed to the development of this concept is sociologist Raewyn Connell. Connell argued that "each empirical state has a definable 'gender regime' that is the precipitate of social struggles and is linked to - though not a simple reflection of- the wider gender order of the society."[58] Thus, she made a distinction between gender orders (of societies) and gender regimes (of organizations – including states). Connell defines gender regimes as the "overall *pattern* of gender relations within an organization." According to Connell:

> This continuing pattern provides the context for particular events, relationships, and individual practices. A local gender regime may reproduce, but in specific ways may also depart from, the wider gender order (i.e., the whole societal pattern of gender relations). A gender regime involves all the dimensions of gender relations.[59]

Connell specifies gender division of labor, gender relations of power (including authority and violence), emotions and human relations (including sexuality), and gender culture and symbolism as the main dimensions of gender regimes.

Since its development, Connell's conceptualization has been an important source for empirical research. Moreover, it has provided inspiration for further theoretical inquiries. For example, in her elaborations on the necessity of gender as a category, Iris Marion Young draws heavily on Connell's conceptualization of gender regimes. According to Young, gender "is best understood as a particular form of the social positioning of

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[57] Sylvia Walby, *Theorizing Patriarchy* (Oxford: Basil Blackwell, 1990); and Sylvia Walby, *Gender Transformations* (London: Routledge, 1997).
[58] R. W. Connell, "The State, Gender, and Sexual Politics: Theory and Appraisal," *Theory and Society* 19, no. 5 (October 1990): 507-544.
[59] R. W. Connell, "Glass Ceilings or Gendered Institutions? Mapping the Gender Regimes of Public Sector Worksites," *Public Administration Review* 66, no. 6 (2006): 837-849.

lived bodies in relation to one another within historically and socially specific institutions and processes that have material effects on the environment in which people act and reproduce relations of power and privilege among them."[60] On this basis and with reference to Connell, Young reaches to the conclusion that there are three axes of gender structures: sexual division of labor, normative heterosexuality, and gendered hierarchies of power. As Connell, Young also puts particular emphasis on violence concerning the issue of gendered hierarchies of power, noting that:

> An institutionalized valuation of particular associations of maleness or masculinity condition hierarchies of power in ways that constrain the possible actions of many people seem quite resistant to change. Positions and practices of institutionalized and organized violence are most important here – military and police forces, prison systems, etc. In general, the structuring of state institutions, corporations and other bureaucracies according to hierarchies of decision-making authority and status afford some people significant privileges and freedom, and these are usually men, at the same time that they limit, constrain and subordinate others, including most women and many men.[61]

In Young's conceptualization of the power aspect, violence is of specific importance, and its structuring and distribution plays an important role in the constitution of differences in terms of lived bodily experience. Through these processes of structuring and distribution, some groups of people are positioned in locations of authority, while some others are positioned as limited, constrained and subordinated subjects. In this study, I approach the issue of violence from the same angle and see the structuring and distribution of violence as a distinct means through which gendered hierarchies of power are reproduced.

Walby, Connell and Young all underscore that gender violence is a *distinct* component of gender regimes/orders. In her field-defining book on

[60] Young, *Lived Body vs. Gender*, 422.
[61] Ibid., 425.

this matter, Connell argued that main "structures" of gender relations (labor, power, and cathexis) are related but also substantively different because of the "basic differences in the ordering of the social relations involved."[62] In her conceptualization, there is room for "a unity in the field, an orderliness" -not in the sense of the unity of a system in the functionalist sense but in the sense of a unity of historical composition that is "always imperfect."[63] If processes of empirical unification are powerful and effective, there emerges a high degree of order or systematicity. On the other hand, if structured conflict of interests and potential for de-composition emerge in combination, this can create a crisis tendency – leading to greater incoherence and contestation. Thus, in Connell's approach, gender regimes are not clock-like mechanisms where each part moves in harmony with others. The overall picture might be characterized by disorder – especially in times of crisis. While frequently using the word 'system' to refer to the totality of structures of gender relations, and thus attributing a certain degree of systematicity or orderliness to gender regimes, Walby also underlines the distinctiveness of the structures she identifies, and notes that "the six structures have causal effects upon each other, both reinforcing and blocking, but are relatively autonomous."[64]

In this study, I focus on the social positioning of lived bodies in relation to one another through substantive criminal law. In other words, I am interested in the ways in which gendered hierarchies of power are shaped through the regulation of violence and intimacy– that is through immunity, and sentence reductions and orderings of intimate relationships through criminal law. I think it would be interesting to examine the relationship between the violence aspect of the gender regime in Turkey and other aspects. How distinct is this aspect? Does it move in tandem with other aspects of the gender regime? I think such questions can help us reach at a larger understanding of gender regimes and masculine domination but given the limited nature of this research I am not able to

[62] R. W. Connell, *Gender and Power: Society, the Person, and Sexual Politics* (Stanford: Stanford University Press, 1987), 97.
[63] Ibid., 116.
[64] Walby, *Theorizing Patriarchy*, 20.

provide definitive answers to all of these questions. However, throughout this study, I interpret the findings of my research with these questions in mind, drawing on the existing scholarship on some matters.

In this study, I use the term *regime of intimate violence* to refer to the total of norms, rules, and discourses through which intimate violence is regulated. For some time, some law and society scholars have been using the term *regime of domestic violence* to refer to a particular segment of this regime –to norms and rules concerning non-lethal violence.[65] Inspired by these studies, I propose to expand the scope slightly by using the term "intimate violence," and including the regulation of lethal violence in the scope of analysis. I also use the term *regime of gender violence* in the same sense but, since my empirical focus is on intimate violence, I use the latter term more infrequently in this study.

I think that working with the regime conceptualization[66] can be very useful in studies on gender violence for various reasons. First, this conceptualization makes it possible to reframe the matter by taking the role of the state in the reproduction of practices of gender violence into account. As noted by Willem Schinkel and Jane Kilby, the state rarely appears in academic debates on interpersonal violence which is often assumed to be a practice that concerns mainly two parties: the perpetrator and the victim.[67] On the other hand, the state plays an important role in shaping the contexts of interpersonal violence and affecting the conditions of its reproduction as a social practice. The regime approach makes it possible to bring the state into scrutiny in a more extensive way, and to examine the ways in which state authority is entangled with masculine

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[65] Keith Guzik, "The Forces of Conviction: The Power and Practice of Mandatory Prosecution upon Misdemeanor Domestic Battery Suspects," *Law & Social Inquiry* 32, no. 1 (2007): 41-74; and Sally Engle Merry, "The Global Travel of Women's Human Rights," May 11, 2017, http://as.nyu.edu/content/dam/nyu-as/asSilverDialogues/documents/S%20Merry%20Resonance%20Dilemma%20silver%20prof%20article1.pdf

[66] For a violence regime approach that emphasizes the importance of violence for the reproduction of gendered hierarchies of power see; Jeff Hearn et al., "From Gender Regimes to Violence Regimes: Re-Thinking the Position of Violence," *Social Politics* (Summer 2020): 1-24.

[67] Willem Schinkel and Jane Kilby, "Regimes of Violence and the Trias Violentiae," *European Journal of Social Theory* 16, no. 3 (2013): 310-325.

domination and reproduction of practices of intimate violence. Second, conceptualizing intimate violence as a social practice that is subject to a regime makes it possible to focus on the regulation of gender violence in a general fashion. It gives us a means of talking about a larger arrangement – instead of particular norms and rules.

In the disciplines of sociology and political science, what we may call the feminist social movement (FSM) approach is very dominant in studies that deal with legal change concerning gender violence. According to this approach, legal change concerning gender violence happens as a result of feminist campaigning mediated by the existence or absence of push factors (like changes in international context) and facilitating conditions (like existence of state agencies tasked with coordinating gender policies).[68] According to this understanding of legal change, organized feminist campaigning is the *actant* and institutions, and actors within the state are either catalyzers or reactants. Feminists demand and states resist or give-in. A recent trend in gender violence scholarship is quantifying and comparing state performance on the basis of indicators – often in line with this model of change. Such studies assess and measure either government responsiveness to violence against women[69] and, in one

[68] Some studies that adopt such an approach include; R. Amy Elman, *Sexual Subordination and State Intervention: Comparing Sweden and the United States* (Providence, RI: Berghan Books, 1996); S. Laurel Weldon, *Protest, Policy, and the Problem of Violence Against Women: A Cross-National Comparison* (Pittsburgh: University of Pittsburgh Press, 2002); and Mala Htun and S. Laurel Weldon, *The Logics of Gender Justice: State Action on Women's Rights Around the World* (Cambridge: Cambridge University Press, 2018). This approach is also dominant in studies on Turkey. For some examples, see Elif Gözdaşoğlu Küçükalioğlu, "Framing Gender-Based Violence in Turkey," *Les cahiers du CEDREF* 22 (2018): 128-157; Nur Banu Kavaklı Birdal, "The Interplay between the State and Civil Society: A Case Study of Honor Killings in Turkey" (PhD diss., University of Southern California, 2010); Aldıkaçtı Marshall, *Shaping*; Songül Sallan-Gül, "Türkiye'de Eril Refah Rejimi, Kadına Yönelik Aileiçi Şiddet ve Sığınmaevleri," in *2000'ler Türkiyesinde Sosyal Politika ve Toplumsal Cinsiyet*, ed. Adem Yavuz Elveren and Saniye Dedeoğlu (Ankara: İmge, 2015), 331-361; and Burcu Özdemir, "The Role of the EU in Turkey's Legislative Reforms for Eliminating Violence against Women: A Bottom-Up Approach," *Journal of Balkan and Near Eastern Studies* 16, no. 1 (2014): 119-136.

[69] Htun and Weldon, *Logics of Gender*.

case, changes in the *quality* of "legal protections against domestic violence" in massive-n studies – some including as many as 196 countries.[70]

As noted by Sally Merry, such indicator-based approaches that have been promoted by various international bodies like the UN require "the sacrifice of context, history, and culture."[71] What is more, the characteristics of regimes of intimate violence do not only get determined by what is understood as law-in-the-books (key pieces of legislation and constitutional court decisions) in such studies. As shown by various studies on gender related law reform, judicial practice determines the extent of transformation that legislative changes can bring about and the transformative potential of reforms is actualized at courts.[72] Plus, reform can happen through judicial decision-making itself through case law –in the absence of any legislative change– even in countries that have code-based legal regimes.[73] Such changes are virtually undetectable in studies that focus on the most apparent and available texts concerning the issue.

Moreover, there are extensive differences in the characteristics of judicial fields in different countries. For example, the organization of the judicial field is pyramidal in countries like the USA or Canada, but there are multiple highest courts in France and Turkey. Thus, even when research design is crafted to include constitutional court decisions, such indicator-based studies modelled on the US case would not be able to capture a crucial part of the judicial decision-making at the highest level in various countries.[74] In addition, given the geographical and disciplinary

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[70] David L. Richards and Jillienne Haglund, *Violence against Women and the Law* (London: Routledge, 2015).

[71] Sally Engle Merry, "Cultural Dimensions of Power/Knowledge: The Challenges of Measuring Violence against Women," *Sociologie du travail* 58, no. 4 (2016): 372.

[72] Catharine A. Mackinnon, "Disputing Male Sovereignty: On *United States v. Morrison*," *Harvard Law Review* 114, no. 1 (2000): 135-77; Rosemary Hunter, "The Implementation of Feminist Law Reforms: The Case of Post-provocation Sentencing," *Social and Legal Studies* 26, no. 2 (2017): 129-165; and Jeremy Horder and Kate-Fitz Gibbon, "When Sexual Infidelity Triggers Murder: Examining the Impact of Homicide Law Reform on Judicial Attitudes in Sentencing," *The Cambridge Law Journal* 74, no. 2 (2015): 307-328.

[73] Ute Frevert, "Honour and/or/as Passion: Historical Trajectories of Legal Defenses," *Rechtsgeschichte Legal History* 22 (2014): 245-255.

[74] For an actual study that uses such research design to measure the rest of the world, see Htun and Weldon, *The Logics of Gender Justice*.

distribution of the literature on gender violence, such studies may be testing the extent to which developments in the global south conform to frameworks developed on the basis of northern experience – because we simply lack the empirical historical data and analysis concerning the characteristics of regimes in different countries that would enable us to form a more inclusive framework to begin with. Because of these reasons, I think that it might be fruitful to de-conflate the regulation of intimate violence and to study different elements of such regimes without collapsing law into politics, and governmental action and without projecting a northern teleology to the global south.

In the disciplines of sociology of law, law and society and socio-legal studies, there is an emphasis on the role of struggle or strife among different actors, groups, life-worlds, and interests in shaping legal change.[75] According to this view, law does not exist and does not change in a space isolated from society. On the other hand, various works in this literature show that legal change cannot be explained by a single variable or a single movement because the flows of law are affected by various factors like the attitudes and activisms of a *variety* of groups and organizations including jurists and legal professionals, changes in macro-economic structures and/or shifts in governmentality and techniques of power.[76] For example, in her study on the regulation of wife-beating in Hawai'i, Sally Merry shows that legal responses to this form of violence were affected by various factors including changes in the cultural conceptions of marriage and "overarching logics of punishment."[77] In her study on the transformations of masculine domination in Western Europe, historical sociologist Pavla Miller shows that transformations of the regulation of

[75] Philip Goodman, Joshua Page, and Michelle Phelps, *Breaking the Pendulum: The Long Struggle over Criminal Justice* (Oxford: Oxford University Press, 2017); and Mathieu Deflem, "The Boundaries of Abortion Law: Systems Theory from Parsons to Luhmann and Habermas," *Social Forces* 76, no. 3 (1998): 775-818.

[76] Some examples include Goodman et al., *Breaking*; and Boaventura de Sousa Santos and Cesar A. Rodriguez-Garavito, eds., *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge: Cambridge University Press, 2005).

[77] Sally Engle Merry, "Governmentality and Gender Violence in Hawai'i in Historical Perspective," *Social and Legal Studies* 11, no. 1 (2002): 81-111.

gender violence cannot be solely explained with the rise of feminist movements.[78] These studies do not show that feminist social movements are unimportant. They just indicate that we need broader explanatory frameworks. In this study, I approach the transformations of the regime of intimate violence in Turkey from this broader angle and work with a framework that takes institutional practices and actors like scholars and judges into account.

There are various factors that make Turkey a good case for exploring legal change concerning gender relations and intimate violence. First of these is the well-known dynamism of the gender regime in Turkey in terms of the formal recognition of women's rights.[79] In the period between the mid-19th and early 20th centuries, there was a process of extensive legal reform in the Ottoman Empire and later in Turkey. In this process, the legal basis of gender relations also changed in a significant manner and women's rights in a number of areas were formally recognized.

Because of the breadth of legal changes that characterized the late-19th and early 20th centuries, Turkey has also been seen as a good case for discussing the question of whether law can bring about social change, especially for women and gender relations. According to legal anthropologist June Starr, the Turkish case proved that it could.[80] Especially after the formation of the Republic, secular elites had won the battle for the control of state and society -a battle that they had fought against Islamists. Plus, at least in a coastal town in western rural Anatolia, consciousness of peasants had been secularized and Islam was relegated to the sphere of personal ethics. Deniz Kandiyoti answered the same question

[78] Pavla Miller, *Transformations of Patriarchy in the West, 1500-1900* (Bloomington: Indiana University Press, 1998).

[79] Deniz Kandiyoti, *Cariyeler, Bacılar, Yurttaşlar: Kimlikler ve Toplumsal Dönüşümler* (Istanbul: Metis, 1996); and Yeşim Arat, *Religion, Politics and Gender Equality in Turkey: Implications of a Democratic Paradox*, Research Report prepared for the Project Religion, Politics and Gender Equality (Istanbul: UNRISD and Heinrich Böll Stiftung, 2009).

[80] June Starr, *Law as Metaphor: From Islamic Courts to the Palace of Justice* (Albany: SUNY Press, 1992).

quite differently.[81] According to her analysis, written in the same years with Starr's *Law as Metaphor* but with a larger geographical scale in mind, this case proved that everyday life and social practices could not be changed through law on massive terms. According to her, Turkish women were *emancipated* through the early Republican reforms which replaced sharia with secular laws, but they (especially rural Anatolian women) were not *liberated* because of social control over women's sexuality, socio-economic structures, cultural practices (which had a complex relationship with Islam) and the limited nature of women's political representation and movements. What did the Republican reforms really bring for women and gender relations? What is the impact of law on society and social practices? This study provides important insights for this debate on the basis of an empirical investigation focusing on intimate violence.

Another factor that makes Turkey a good case for such a study is the historically patchy but periodically strong existence of autonomous feminist movements.[82] Feminist movements that began to rise in the late-Ottoman period continued to be effective in the early years of the Republic

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[81] Deniz Kandiyoti, "Emancipated but Unliberated? Reflections on the Turkish Case," *Feminist Studies* 13, no. 2 (1987): 317-338.

[82] For the feminist movements in the late-Ottoman and early-Republican periods, see Fatmagül Berktay, "Kadının İnsan Haklarının Gelişimi ve Türkiye," *Sivil Toplum ve Demokrasi Konferans Yazıları*, no. 7 (2004), https://stk.bilgi.edu.tr/media/uploads/2015/02/01/berktay_std_7.pdf; Bahadır Türk, "Türk Modernleşmesi Üzerinden Birinci Dalga Feminizmini Okumak," in *Bülent Tanör'e Armağan*, ed. Ö. Ö. Tanör (Istanbul: Legal Yayıncılık, 2004), 690-699; Zafer Toprak, *Türkiye'de Kadın Özgürlüğü ve Feminizm: 1908-1935* (Istanbul: Tarih Vakfı Yurt Yayınları, 2014); and Yaprak Zihnioğlu, *Kadınsız İnkılap* (Istanbul: Metis, 2003). For the post-1980 period, see Şirin Tekeli, "Europe, European Feminism, and Women in Turkey," *Women's Studies International Forum* 15, no. 1 (1992): 139-143; Nükhet Sirman, "Feminism in Turkey," *New Perspectives on Turkey* 3, no. 1 (1989): 1-34; Şirin Tekeli, ed., *Kadın Bakış Açısından 1980'ler Türkiye'sinde Kadın* (Istanbul: İletişim, 1990); Aksu Bora and Asena Günal, eds., *90'larda Türkiye'de Feminizm* (Istanbul: İletişim, 2002); Aksu Bora, ed., *İradenin İyimserliği: 2000'lerde Türkiye'de Kadınlar* (Ankara: Ayizi, 2015); and Serpil Sancar, "Türkiye'de Kadın Hareketinin Politiği: Tarihsel Bağlam, Politik Gündem ve Özgünlükler," in *Birkaç Arpa Boyu- 21. Yüzyıla Girerken Türkiye'de Feminist Çalışmalar:*

and pushed for the recognition of women's rights in a number of areas. With the abolition of the Turkish Women's Association that was at the forefront of this struggle in 1934, the era of independent women's movements in the early Republican period came to an end. In the late-1940s, women started to re-organize and form associations promoting women's rights but the emphasis of this era was on maintaining the rights that were already recognized. In the 1960s, left-wing women and organizations began to problematize a number of gender related issues but it was not until the 1980s that independent feminist movements arose. Unlike some countries like Finland and similar to some others like the UK,[83] gender violence was at the core of feminist campaigning in Turkey after the 1980s and feminist movements achieved to become significant actors shaping public debates on gender violence. In both of these independent feminist movement periods, there were significant developments in terms of the formal recognition of women's rights in different areas such as education or employment.[84] This historical trajectory makes Turkey a good case for scrutinizing the relationship between the rise of feminist movements and changes in the regulation of intimate violence.

When I started this study, I was thinking along the lines of the feminist social movements approach. This is why I expected to find improvements in the regime in periods characterized by the rise of mass and autonomous feminist movements. The findings of my research falsified this expectation. In both of the breakthrough epochs of feminist activism, there were traceable expansions in the accommodation provided for intimate violence. Both in the 1910s and 1980s, law had become remarkably more tolerant of violent men. As I underline in this study, such overlaps point

Prof. Dr. Nermin Abadan Unat'a Armağan (Istanbul: Koç University Press, 2011), 53-109.

[83] For a comparison between the feminist problematizations in Finland and Britain, see Johanna Kantola, *Feminists Theorize the State* (Basingstoke: Palgrave Macmillan, 2006). For the importance of gender violence in feminist activism in Turkey in the post-1980 period, see Aldıkaçtı Marshall, *Shaping*; Bora and Günal, *90'larda Feminizm*; and Sancar, *Kadın Hareketinin Politiği*.

[84] Berktay, *Kadının İnsan Hakları*; Toprak, *Kadın Özgürlüğü*; and Yıldız Ecevit, "Women's Rights, Women's Organizations, and the State," in *Human Rights in Turkey,* ed. Zehra F. Kabasakal Arat (Philadelphia: University of Pennsylvania Press, 2007), 187-201.

out to the fallacy of the FSM approach and highlight the fact that the impact of social movements on law might be much less straightforward than it is generally assumed. I also provide an explanation for these overlaps. To put the cart before the horse, I argue that the emergence of such movements may signify acute crises in the established gender order and that regimes of intimate violence may become particularly violent in such periods because male elites may choose to ally with men in homes to discipline women during such crises.

§ 1.2 Law, Violence, and Masculine Domination

Norms, discourses, and mechanisms that play a role in the regulation of intimate violence are established, contested and transformed in multiple fields. Education and shelter policies, legislation, and judicial practice all play a role in the governance of intimate violence in a country.[85] Furthermore, it is not only state institutions that affect the transformations of these regimes. Non-state institutions like feminist organizations and transnational institutions like the EU or the UN are also actors that affect such changes.[86] In this study, I focus on substantive criminal law, which is a specific means through which intimate violence is regulated.

Several scholars from the disciplines of socio-legal studies, legal history and law-and-society underline that law has sanctioning, ordering, and disciplining effects that impact the material and symbolic conditions under which everyday interactions between people take place. As noted by Austin Sarat and Jonathan Simon:

> Most social relations are permeated with law. Long before we ever think about going to a courtroom, we encounter landlords and tenants, husbands and wives, barkeeps and hotel guests-roles that already embed a variety of juridical notions. The hypermediated quality of communities established under the conditions of late

[85] Htun and Weldon, *The Logics of Gender Justice*; and Weldon, *Protest, Policy, and the Problem of Violence Against Women.*
[86] Koğacıoğlu, "Tradition Effect," 133.

> modern life embeds law at an even more molecular level because the very flesh of those communities-the bandwidths of the broadcast world, the networks of cable and phone lines known as the internet- come to us already legally processed to a great degree.[87]

Some scholars argue that the power of law depends on its two main functions, categorized as the instrumental (regulative or distributive)[88] and symbolic functions of law.[89] Some others refer to these as "uses" rather than functions, and underline that these are analytical constructs rather than actually separable things.[90] The instrumental aspect of law refers to the direct and material ways in which law aims to affect the social world, and to change the material conditions of reproducing particular social practices. For example, a country may change the tariff legislation in order to hinder the import of commodities by increasing the cost of selling and buying goods manufactured outside. This would directly change the material conditions of engaging in such transactions. However, such a change may not always bring about the explicitly intended outcome. Companies may prefer to continue their existing ways of doing business by sacrificing from their profit margins or customers may prefer to continue buying imported goods despite the rising costs. In sum, because of its instrumental function or use, law may change the conditions of reproducing certain practices but the actual outcomes of such changes are not solely determined by law.

Law also has a symbolic function because of its effects on the designation of public norms. Joseph R. Gusfield notes that "*law is not only a means of social control but also symbolizes the public affirmation of social*

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[87] Austin Sarat and Jonathan Simon, "Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship," *Yale Journal of Law and the Humanities* 13, no. 1 (2013): 20.

[88] Kristin Anne Kelly, *Domestic Violence and the Politics of Privacy* (Ithaca: Cornell University Press, 2003), 59- 60; and Duncan Kennedy, "The Stakes of Law: Hale and Foucault," *Legal Studies Forum* 15, no. 4 (1991): 327-366.

[89] Joseph R. Gusfield, "On Legislating Morals: The Symbolic Process of Designating Deviance," *California Law Review* 56, no. 1 (1968): 54-73.

[90] Robert W. Gordon, "Critical Legal Histories," *Stanford Law Review* 36, no. 57 (1984): 112.

ideals and norms. The statement, promulgation, or announcement of law has a symbolic dimension unrelated to its function of influencing behavior through enforcement."[91] This aspect of law has also been underlined by Duncan Kennedy who states that "*the legal system creates as well as reflects consensus (…). Its institutional mechanism 'legitimates,' in the sense of exercising normative force on the citizenry."*[92]

For several reasons, both aspects of the power of law are relevant for a study which examines the relationship between law and gender violence, or any form of violence. First of all, law is the ultimate field in which what constitutes violence is determined. According to Schinkell, this is what gives law itself a violent aspect.[93] Moreover, law does not only define and categorize violence. It also distributes and regulates it. This aspect of law has been emphasized by Robert Cover who notes that:

> Legal interpretation takes place in a field of pain and death. This is true in several senses. Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur. When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence. Neither legal interpretation nor the violence it occasions may be properly understood apart from one another.[94]

By allowing a particular violent practice, legislation and judicial practice can produce the effect of rendering it as a normal, expected or even desirable thing to do. This aspect of criminal law is emphasized by Nils

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[91] Gusfield, *Legislating*, 57.
[92] Duncan Kennedy, *Sexy Dressing Etc.: Essays on the Power and Politics of Cultural Identity* (Cambridge, MA: Harvard University Press, 1993), 107.
[93] Willem Schinkel, *Aspects of Violence: A Critical Theory* (Basingstoke: Palgrave Macmillan, 2010).
[94] Robert Cover, "Violence and the Word," *The Yale Law Journal* 95 (1986): 1601.

Jareborg in his examination of justification and excuse in Swedish Criminal Law:

> When there are justifying circumstances, we do not want to suppress the otherwise criminalized behavior; the balancing of interests and values has resulted in the conclusion that we do not want to discourage people from committing such deeds; we do not want to teach them to refrain from such deeds and we do not want to express disapproval if someone commits such a deed. Instead, we might even want to encourage people to perform an otherwise criminalized act, because it is the "right thing to do." In any case the message is: this is all right, it is not wrong to do this.[95]

I think that by examining what is considered "all right" and "not wrong to do" in the field of law, we can explore what has been projected as normal, expected, and even desirable in this field. Scrutinizing this matter, we can examine the ways in which law enforces or changes the material and symbolic conditions of reproducing practices of intimate violence. Modern states *can, did,* and *do* allow people to rape,[96] imprison,[97] hit,[98] and

[95] Nils Jareborg, "Justification and Excuse in Swedish Criminal Law," *Scandinavian Studies in Law* 31 (1987): 170.

[96] For example, vaginal marital rape was not a crime in many countries like the USA or Italy until recent decades, and it is still not a crime in some countries. See Krina Patel, "The Gap in Marital Rape Law in India: Advocating for Criminalization and Social Change," *Fordham International Law Journal* 42, no. 5 (2019): 1519-1546.

[97] Until the 19th century, imprisonment of a wife by the husband was not a crime in Britain. On the Jackson case of 1891 which set a new precedent in this regard, see Teresa Sutton, "R v Jackson (1891)," in *Women's Legal Landmarks: Celebrating the History of Women and Law in the UK and Ireland*, ed. Erika Rackley and Rosemary Auchmuty (Oxford: Hart, 2019), 99-104; and Ginger Frost, "A Shock to Marriage?: The Clitheroe Case and the Victorians," in *Disorder in the Court: Trials and Sexual Conflict at the Turn of the Century*, ed. George Robb and Nancy Erber (Basingstoke: Palgrave, 1999), 100-119.

[98] In 1979, Sweden became the first country where the use of physical violence as a method of parental discipline was explicitly prohibited. As of 2019, only 12% of children in the world lived in countries where such a prohibition exists. "Progress," Global Initiative to End All Corporal Punishment, https://endcorporalpunishment.org/countdown/.

kill others.[99] Modern states *can, did* and *do* differentiate acts of violence on the basis of relationship between the target and the perpetrator.[100] By exploring to whom such allowances have been made under what conditions, we can obtain a larger understanding of the relationship between masculine domination and state authority, and of dynamics of change concerning this matter.

At first glance, this may seem like an invitation towards moving away from Max Weber's conceptualization of the relationship between violence and modern states, and even as an anti-Weberian stance, because Weber is the author who wrote this famous sentence: "A state is a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory."[101] If he had not written anything besides this single sentence, it would be fair to argue that he was wrong -because there have been many non-state actors (like self-defending individuals, disciplining husbands or parents, and private contractors who serve as mercenaries) whose "rights" to use violence have been recognized in the field of law in modern states. And this is how Weber has been criticized by some scholars working on violence.[102] However, in the same paragraph that he wrote this famous quote, Weber also wrote: "*Specifically, at the present time, the right to use physical force is ascribed to other institutions or to individuals only to the extent to which the state permits it.*"[103] So, according to Weber, what is specific to the modern state is not limiting the power to use legitimate force to state officials– the state

[99] To the best of my knowledge, there is not a single state in the world which does not recognize killing in self-defense as a crime subject to excuse or does recognize killing of combatants by soldiers in combat as a crime.

[100] On the issue of family ties and criminal law in the USA, see Dan Markel, Ethan Leib, and Jennifer M. Collins, *Privilege or Punish: Criminal Justice and the Challenge of Family Ties* (Oxford: Oxford University Press, 2009).

[101] Max Weber, "Politics as a Vocation," in *The Vocation Lectures*, ed. David Owen and Tracy B. Strong (Indianapolis: Hackett, 2004), 33.

[102] Sylvia Walby, Jude Towers, and Brian Francis, "Mainstreaming Domestic and Gender-Based Violence into Sociology and Criminology of Violence," The Sociological Review 62, no. 2 (2014): 187-214.

[103] Weber, *Politics as a Vocation*, 33.

can share this power with a number of actors including institutions or individuals who do not have to be state officials - but the *claim* of monopoly to effectively *legitimize* and *permit* violence. Thus, I do not read Weber in the same way as some other scholars working on this issue. Plus, I think that Weber's conceptualization of domination and his differentiation of two main forms of domination as *domination by authority* and *domination by constellations of interests* may be helpful for understanding the transformations of masculine domination in recent centuries.[104] In some works on the long-term transformations of masculine domination in the global north, this process is conceptualized as a shift from private to public[105] or from patriarchal to contractual[106] masculine domination. I think that it might be fruitful to scrutinize how this process unfolded in the global south and what came after the abolition or erosion of domination by authority in different countries without limiting ourselves to concepts like the private-public divide or contractual domination.

As underlined by Mindie Lazarus-Black and Susan Hirsh, law does not only "bark" and "bite" but also "nuzzles" and "reconceptualizing law in relation to power means coming closer to understanding when and why the dog sometimes nuzzles, sometimes barks, and sometimes bites."[107] In this study, I work with an inverted version of this proposition and attempt to explore what empirical historical research that traces the questions of when and why law behaves in such ways may tell us about the relationship between law, and masculine power and about the dynamics of legal change.

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[104] Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, ed. Guenther Roth and Claus Wittich (Berkeley: University of California Press, 1968), 943.

[105] Slyvia Walby, "Varieties of Gender Regimes," Social Politics: International Studies in Gender, State and Society 27, no. 3 (2020): 414-431.

[106] Carole Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988).

[107] Susan F. Hirsch and Mindie Lazarus-Black, "Introduction: Performance and Paradox: Exploring Law's Role in Hegemony and Resistance," in *Contested States: Law, Hegemony, and Resistence*, ed. Susan F. Hirsch and Mindie Lazarus-Black (New York: Routledge, 1994), 6.

Another body of scholarship that influenced my approach to gender violence is the feminist scholarship on law. There is a great variety in this body of literature. Different scholars adopt different theoretical approaches, have different primary problematics or "chief enemies" and work with different methodologies.[108] However, almost all scholars working in this field agree that law is an important force that affects the social world in gendered ways, and shapes the ground in which the reproduction and transformation of gender relations take place.

Many scholars who focus directly on the relationship between law and gender violence underline the role of law in structuring the contexts in which individual acts of interpersonal violence occur and in affecting the conditions under which such practices of violence are reproduced as means of masculine domination.[109] They underline that legislation, judicial practice, and law-enforcement produce effects that do not only impact the people directly targeted by violence in a particular case but also other people. Because the state, and more specifically state law, is the only source of legitimate physical violence, legal and judicial norms enshrined and applied in state law define the ultimate parameters or ground rules of such violent interactions.[110] By immunizing the perpetrators of a particular practice of violence, the state establishes room for the widespread reproduction of that practice. When this immunity is abolished, the material conditions of reproducing of this practice change because abolition changes the possible material outcomes of engaging in this practice. Moreover, with the abolition of immunity, the symbolic message given by law also changes because the act becomes something that is distinctively wrong to do – carrying the stamp of an illegal deed.

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[108] For an overview of this literature, see Martha Chamallas, *Introduction to Feminist Legal Theory* (New York: Aspen, 1999).

[109] Koğacıoğlu, "Tradition Effect"; Siegel, *Rule of Law*; and Elizabeth M. Schneider, *Battered Women and Feminist Lawmaking* (New Haven: Yale University Press, 2000). Critical legal studies scholar Duncan Kennedy also emphasizes the structuring power of law in his elaborations on sexual violence; Kennedy, *Sexy Dressing*, esp. 136.

[110] Katherine M. Schelong, "Domestic Violence and the State: Responses to and Rationales for Spousal Battering, Marital Rape and Stalking," *Marquette Law Review* 78, no. 1 (1994): 83.

Recent feminist studies on law and gender violence also provide insights concerning the issue of gender related criminal law reform. Such reforms are no longer seen as absolute goods. The efficacy of criminalization for the elimination of intimate violence[111] and disparate effects that such reforms can bring about (like deepening racial inequalities and deteriorating victim's autonomy)[112] have been problematized in studies that focus on the US. What these reforms entail and exclude has also been problematized. As shown by Merry et al., the voices and demands of grass-root women's organizations can be marginalized in such processes and power asymmetries among different actors and institutions may shape what will emerge as law reform at the end.[113] In sum, there has been a disenchantment with law reform, especially criminal law reform, in feminist scholarship.

In this study, I approach the issue of criminal law in Turkey from this disenchanted perspective. The extent to which this reform process actually contributed to the deepening of ethnic hierarchies and criminalization of Kurds in Turkey has been underlined in the existing scholarship.[114] However, much of the scholarship focuses on the successful aspects of this process, success defined as the adoption of the demands of feminist organizations by legislators.[115] My opinion is that what was *not* demanded in this process or what demands were not translated into legalese are as important as the question of what demands of women's rights organizations made it into law.

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[111] Elizabeth M. Schneider, "Domestic Violence Law Reform in the Twenty-First Century: Looking Back and Looking Forward," *Family Law Quarterly* 42, no. 3 (2008): 353-363.

[112] Aya Gruber, "A 'Neo-Feminist' Assessment of Rape and Domestic Violence Law Reform," *Journal of Gender, Race and Justice* 15, no. 3 (2012): 583-615; and Claire Houston, "How Feminist Theory Became (Criminal) Law: Tracing the Path to Mandatory Criminal Intervention in Domestic Violence Cases," *Michigan Journal of Gender and Law* 21, no. 2 (2014): 217-272.

[113] Sally Engle Merry et al., "Law from Below: Women's Human Rights and Social Movements in New York City," *Law and Society Review* 44, no. 1 (2010): 101-128.

[114] Koğacıoğlu, "Tradition Effect."

[115] Ayşe Günel Ayata and Fatma Tütüncü, "Critical Acts without a Critical Mass: The Substantive Representation of Women in the Turkish Parliament," *Parliamentary Affairs* 61, no. 3 (2008): 461-475; and Kavaklı Birdal, *The Interplay.*

In contemporary feminist legal studies, lethal and non-lethal violence are generally discussed under separate headings – probably because of the fact that they are subject to different norm sets. Although the mitigation provided for intimate control murders committed by husbands upon extra-marital sexual relations was also legitimized on the basis of "honor defense" in the US until the mid-20th century,[116] such murders are now called passion killings in the US and other countries in the global north – unless they are committed by people from southern backgrounds.[117] The term honor killings, on the other hand, is reserved for intimate control murders committed in the global south or for murders committed by people who are claimed to have a distinct background based in a "honor culture." As underlined by some scholars, such murders are not only framed but also regulated differently in different countries.[118] For example, the French regime stopped providing a differentiated mitigation for such murders after the 1970s but the US regime still provides mitigation on the basis of the provocation.[119] In the 2000s, legislation in many countries in the Arab Middle East still provided mitigation for intimate control murders – in some cases not just for husbands but for a large group of male relatives.[120] In this study, I am interested in the institutional and historical makings of such differences in framings and regulations. Following Koğacıoğlu, I think that we can go beyond the framework according to which such differences are logical and natural outcomes of religious or cultural differences and explore their socially and institutionally constructed nature as well as the role of law in that construction if we scrutinize the issue from this angle. In this study, I use the term intimate control murders to refer to such cases of lethal violence because the term "honor killings" was the product of historical makings itself and its meaning in the Turkish context remains contested to this day.

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116 John Kaplan, Robert Weisberg, and Guyora Binder, *Criminal Law: Cases and Materials* (New York: Wolters Kluwer, 2004), 335-336.

117 Frevert, *Honour*, 245.

118 Frevert, *Honour*; and Lama Abu-Odeh, "Comparatively Speaking: The 'Honor' of the 'East' and the 'Passion' of the 'West,'" *Utah Law Review* 287, no. 2 (1997): 287-307.

119 Frevert, *Honour*.

120 Abu-Odeh, *Comparatively Speaking*.

The questions of what has been accepted as normal, what has been allowed, and how intimate violence has been regulated and punished have been asked by various scholars studying different periods and locations, particularly the Anglosphere. These studies underscore the importance of studying judicial practice because they show that norms and doctrines that play important roles in the regulation of intimate violence in the field of law are not always written in codes.[121] Some scholars have shown that, even in countries with code-based legal regimes where the importance of judicial law-making is accepted to be limited, judicial practice can be much more accommodative of masculine violence than what might be expected on the basis of what is written in codes[122] and that courts can develop norms and accept doctrines changing the regime of intimate violence even in the absence of legislative change.[123] Some other scholars have shown that courts may resist the attempts of legislators to eliminate such norms by developing new norms to ensure the continuation of accommodation –even if they are explicitly forbidden to do this in the legislative texts that are adopted to initiate change.[124] Thus, this dissertation builds on an existing literature that highlights the role of institutions like courts in shaping and changing the rules of the game concerning intimate violence.

In their elaborations on law and legal history, Massimo Meccarelli and María Julia Solla Sastre conceptualize law as something that "flows" and argue that it is inefficient and even misleading to approach the movements of law in space with approaches that marginalize the relationship between space and law and with terms like transplantation, importation or reception.[125] These scholars, as well as various others,[126] suggest that

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121 Siegel, *Rule of Law*; Hartog, *Man and Wife*; and Rambo, *Trivial*.

122 Eliza E. Ferguson, *Gender and Justice: Violence, Intimacy, and Community in Fin-de-Siècle Paris* (Baltimore: Johns Hopkins University Press, 2010).

123 Frevert, *Honour*.

124 Horder and Fitz-Gibbon, "When Sexual Infidelity," 307-328.

125 Massimo Meccarelli and María Julia Solla Sastre, eds., "Introduction," in *Spatial and Temporal Dimensions for Legal History* (Frankfurt: Max Planck, 2016), 15.

126 Ziya Umut Türem and Andrea Ballestero, "Regulatory Translations: Expertise and Affect in Global Legal Fields (Symposium Introduction)," *Indiana Journal of Global Legal*

adopting a different terminology, for example thinking about such movements with terms like translation or spatio-temporal localizations of law, would be more appropriate. In this study, I also approach law as something that flows across time and space and as something that cannot be detached from its temporal and spatial context.

I also use the concept of translation in this study. I refer to the language spoken at the top of the legal interpretation hierarchy as high legalese. I show that shifts and settlements in ground rules concerning intimate violence happen through changes in this language. In my analysis of these changes, I also highlight the importance of vernacularization and of the translation of social demands into this language.

§ 1.3 Looking at the Peak of the State: Institutional Fields Examined in the Study

Since the 1990s, the literature on gender relations and gender regimes has developed significantly through studies focusing on the role of institutions in shaping gender relations. Scholars from a variety of disciplines have explored the ways in which different institutions shape gender policies, establish frameworks, and affect the transformations of gender relations.[127] Building upon this scholarship, I examine three institutional fields in this study.

First of these is the Turkish parliament. Several scholars working on gender regimes or governance of gender relations underline the importance of institutions of "high politics" like parliaments for setting the parameters of governance concerning gender relations because parliaments play an important role in terms of decision-making concerning the

Studies 21 (2014): 1-25; and Thomas Duve, "What is Global Legal History?," *Comparative Legal History* 8, no. 2 (2020): 73-115.

[127] O'Connor, Orloff and Shaver, *States, Markets and Families*; Kantola, *Feminists*; Waylen, *Engendering*; and Mala Htun, *Sex and the State: Abortion, Divorce, and the Family under Latin American Dictatorships and Democracies*, (Cambridge: Cambridge University Press, 2003).

establishment of other formal institutions, and development of policies on different aspects of gender relations.[128] Because of their powers in terms of finalizing state budgets, parliaments are also important forums where contestations over the allocation of state resources take place.[129] Last but not the least, parliaments are also the primary institutional settings for codification. Studying parliamentary records, one can explore the arguments behind the adoption of certain measures and the approaches of the top political elites in a country to gender relations and gender violence. Because of these reasons, I decided to include the parliament in the group of institutional fields that I study.

Parliaments are generally accepted as institutions of law-making and not as places where legal interpretation happens. In some cases, legislators interpret the law, especially when they provide justification explanations for the norms that they introduce. However, there was a much more complicated picture in Turkey until the mid-20th century. Until the 1960s, the parliament also adopted interpretation decisions (*tefsir kararı*), interpreting the norms in force. Moreover, in this earlier period, the Ministry of Justice published various circulars (*tamim*) and dicta (*mütalaa*) providing its own interpretations of the criminal code. Thus, historically speaking, formal statutory interpreters were not only judges and prosecutors in this country.[130]

The second institution that I examine is the Court of Cassation. This court is specifically important for a study focusing on a topic related to criminal law in Turkey. First of all, the CCa has binding interpretative authority. A lower court judge may take a decision deviating from the existing CCa interpretation concerning a particular matter but the CCa has the authority to reverse that decision. Thus, the CCa has an ordering power

[128] Ibid.

[129] Mary Rusimbi and Marjorie Mbilinyi, "Political and Legal Struggles over Resources and Democracy: Experiences with Gender Budgeting in Tanzania," in *Law and Globalization from Below: Towards a Cosmopolitan Legality*, ed. B. De Sousa Santos and C. Rodríguez-Garavito (Cambridge: Cambridge University Press, 2009), 283-309.

[130] This situation is not unique to Turkish history. See Lawrence M. Solan, "Jurors as Statutory Interpreters," *Chicago-Kent Law Review* 78, no. 3 (2003): 1281-1318.

over lower courts in Turkey. The interpretations of the CCa in some decisions are not legally binding for lower courts other than the one which took the overruled decision. These regular decisions are still important because they can set judicial precedents (*içtihat*).

It is generally accepted that the importance of judicial precedents is not as high as Anglo-American countries in continental Europe because judicial precedents are not formally accepted among the primary sources of law in these countries.[131] On the other hand, law scholars and practitioners underline that deviation from judicial precedents at the lower-level is not the norm but exception in Turkey.[132] An important factor promoting lower-court compliance is the measurement of lower court judges' performances on the basis of points issued by the CCa.[133] For a lower court judge, having a high number of reversed decisions means having a low performance score and this has a crucial impact on a judge's career prospects and possibilities of re-location and promotion.

Due to these factors, there is an interesting situation concerning the importance of precedents within the Turkish legal regime. On the one hand, precedents set by regular decisions have no official ordering or sanctioning power. Thus, the CCa itself is not formally bound by its former decisions. On the other hand, there are strong structural factors that promote lower-court compliance with the interpretations of the CCa. Thus, it is not the precedents themselves that are powerful but the positions taken by the CCa at given historical moments that are reflected in precedents. For contemporary judicial practice at the lower level, the

131 For a comparison of Anglo-American and Swedish systems in terms of legal reasoning and the role of rules, see Peter Wahlgren, "Legal Reasoning: A Jurisprudential Description," *Proceedings of the Conference: The Second International Conference on Artificial Intelligence and Law* (New York: Association for Computing Machinery, 1989), 147-156.

132 Fırat Gedik and Emel Koç, "Hüküm Kurma ve İçtihat," *Ankara Barosu Dergisi* 67, no. 2 (2009): 157-163.

133 Cengiz Otacı, "Adli Yargı Hakimlerinin Görevde Yükselme Şartlarının (Terfi Sisteminin) Yargı Bağımsızlığına Etkisi," in *Hukuka Felsefi ve Sosyolojik Bakışlar V*, ed. Hayrettin Ökçesiz ve Gülriz Uygur (Istanbul: Istanbul Barosu Yayınları, 2012), 156-172.

most important precedent to be taken into consideration is the one that reflects the current position of the CCa.

This situation has been severely criticized by some law scholars and judges.[134] For example, in a colloquium on criminal law reform in 1981, criminal law professor Eralp Özgen argued that the defining characteristics of a good judge were respect for law and obedience to law itself but the Turkish legal regime in which the CCa had so much power was turning judges into people whose obedience was not directed towards law but towards the CCa as an institution. According to Özgen, many judges were concerned about their evaluations and, because of such concerns, they were not applying the law but merely the CCa's interpretation of law. As a result, the system was pushing judges towards working like "automats" processing the facts of cases in line with the input provided by the CCa.[135] Özgen's comments –raised at a critical moment when the 1980 coup was imposing a new legality on Turkey- provide important insights concerning the constraints imposed on judicial decision-making at lower levels. While it is beyond the scope of this study to scrutinize the degree to which such constraints have actually affected judicial decision-making at lower levels and/or their historical evolution, it is necessary to underline that their existence and effects have already been problematized by various scholars and practitioners.

Some recent changes in the Turkish legal regime had the potential to curb the power of the CCa in terms of ordering the legal field in a discretionary manner. There were changes in the performance evaluation system and this factor that promotes lower court compliance was briefly eliminated. However, it was re-introduced after a couple of years.[136] Secondly, in 2012, the Constitutional Court began to accept the applications of individuals. Potentially, this development could pave the way for the

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134 Ibid.

135 "Tartışmalar," *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası* 45, no. 1-4 (1981): 1000.

136 HSK, "Hâkim ve Savcıların Derece Yükselmesi Esaslarına İlişkin İlke Kararı," No. 675/1, 5 April 2017, https://www.hsk.gov.tr/Eklentiler/Dosyalar/eeadf1ee-e746-44b2-8108-a1d301398144.pdf.

limitation of the discretionary powers of the CCa. On the other hand, the CCa found a way to protect its institutional power vis-à-vis the expansion of the scope of constitutional review. The post-2012 CCa accepts that decisions of the Constitutional Court are binding but argues that they are only binding for the individual case concerning the decision.[137] This leaves room for the CCa to maintain its interpretations that are found to be unconstitutional by the Constitutional Court. Thus, in the present context, a norm applied by the CCa might be unconstitutional and its unconstitutionality might be established through constitutional review but this does not mean that the CCa will abandon the application of this norm. It can and occasionally does insist on the case-specific nature of Constitutional Court decisions and continue applying such norms.[138] Thus, despite some recent developments that had the potential to curb its power, the CCa has been a historically powerful institution within the Turkish legal regime.[139]

An important element of the Turkish legal regime that is related to the powers of the CCa is the invention of an extraordinary judicial procedure through "decisions for the unification of case law" (*tevhid-i içtihat kararı* or *içtihadı birleştirme kararı*). This procedure developed out of a more limited measure intended to resolve conflicts between different

[137] Elif Biber, "Bireysel Başvuru Kararlarının Yargıtay İçtihadına Etkisi: Örnek Kararlar," 2017, https://anayasatakip.ku.edu.tr/wp-content/uploads/sites/34/2017/08/Elif-Biber-Bireysel-Başvuru-Kararlarının-Yargıtay-Içtihadına-Etkisi.pdf. For an analysis which supports the approach of the CCa, see İsmail Köküsarı, "Anayasa Mahkemesi'ne Bireysel Başvuru Yolunda İhlal Kararlarının Kesinliği, Bağlayıcılığı ve Etkisi," *EBYÜHFD* 22, no. 1-2 (2018): 1-56.

[138] For example, in 2013, the Constitutional Court decided that the decline of a married women's request to use her pre-marital family name was unconstitutional. However, in a 2014 case, the CCa insisted on the case-specific nature of the decisions of the Constitutional Court and reversed a lower-court decision according to which a similar request was accepted in line with the decision of the constitutional court. Biber, *Bireysel*, 3.

[139] In 2019, the Constitutional Court decided that unjustified deviation from a settled precedent or lack of uniformity in norms applied at the level of appeals violates the right to fair trial. This recent development may limit the discretionary power of the CCa in the years to come but its implications remain to be seen. The Case of Aşır Tunç, No. 2015/17453, 22 January 22 2019, https://kararlarbilgibankasi.anayasa.gov.tr/BB/2015/17453.

chambers of the CCa in the early Republican period. In earlier legislations concerning the operations and structure of the CCa, it was stipulated that if there was a difference between the interpretations of two CCa chambers on the same matter or a difference between two decisions of the same chamber, or if there was a need for changing a settled precedent, the matter would be resolved at a plenary meeting. Such decisions were stipulated to be taken by 2/3 majority.[140] In this second category of decisions, the court has the authority to produce binding interpretations without an actual case under examination.

In 1953, the law on the CCa was amended and these decisions were formally rendered binding for all courts in the country.[141] In 1969, this situation was taken before the Constitutional Court with the claim that these decisions gave the CCa code-making authority and was against the separation of powers protected by the Constitution. In fact, before that moment, this situation had been explicitly recognized by the CCa itself. In a decision from 1963, the General Assembly of Civil Chambers had noted that "the resolution of an issue with a decision for the unification of case law means the production of a new legislation (code) on that subject in terms of practical results."[142] On the other hand, the Constitutional Court dismissed the claim that this procedure gave the CCa code-making capacity and decided that the function and authority of the court was limited to law-finding.[143] Subsequent laws on the CCa also maintained the prin-

[140] The Law No. 1221, 11 April 1928, art. 8, *RG* 863, April 14, 1928.

[141] The Law No. 6082, 13 April 1953, *RG* 8391, April 21, 1953.

[142] "*Bir konunun içtihadı birleştirme kararıyle aydınlanması, amelî sonuç bakımından, o konuda yeni bir yasa (kanun) çıkarılması anlamına gelmektedir." CiGA,* 20.2.196 34-71 /21, *AD 5* (1963): 776-777.

[143] "İçtihadı birleştirme kararı, belli bir olay için yeni bir hukuk kuralı koymak ereği ile değil, ancak ve ancak belli bir olaya uygulanacak yasanın veya nesnel (objektif) nitelikte olan tüzük ve yönetmelik kuralları gibi öbür hukuk kurallarından hangisinin, hangi anlamda uygulanacağını saptamak için verilir." Constitutional Court, 12.6.1969-38/34, *RG* 13412, January 29, 1970, quoted in Tankut Centel, "İş ve Sosyal Güvenlik Hukukuna İlişkin Yargıtay İçtihadı Birleştirme Kararlarının Uygulamadaki Yönlendirici Etkileri," *YD* 15, no. 1-4 (1989): 361-369.

ciple according to which these decisions are binding for all courts deciding on similar matters.[144] Because of these factors, the CCa is a very powerful institution in terms of its ordering and sanctioning capacity within the Turkish legal regime.

Studying the norms imposed by the CCa and shifts in the positions taken by this institution, we can explore what has been imposed on lower-courts with some degree of constraint through history, as well as changes in the regime of intimate violence as regulated from the top of the state. Thus, exploring the judicial practice of the CCa, it is possible to go beyond analyzing legislation and scrutinize the norms that actually were or have been in-force.

The third institution that I examine in this study is law faculties. Law faculties do not have sanctioning powers. On the other hand, lawyers and judges receive their training in these institutions. What is more, studies of law professors affect legal discourse. In some decisions, the Court of Cassation directly refers to the works of law professors. This shows that law faculties have an important role in the reproduction and transformation of formal rules and norms in general[145] and formal rules and norms about gender violence in particular. Moreover, a precedent is accepted to have more normative power if it is supported by law professors.[146] Finally, law professors have taken active roles in code-making in Turkey. This also shows their power in shaping the ground rules and norms. In this study, I traced the ways in which the texts of codes and judicial precedents were discussed, examined and 'judged' by law professors to understand the scholarly debates concerning intimate violence and to examine the ways in which legislative or judicial norms were supported or contested by criminal law professors.

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144 "Yargıtay Kanunu," No. 1730, 16 May 1973, art. 20, *RG* 14546, May 26, 1973; and "Yargıtay Kanunu," No. 2797, 4 February 1983, art. 45, *RG* 17953, February 8, 1983.

145 For an examination regarding the role of law professors in legitimizing the Republican regime and the primacy of the state, see Boğaç Erozan, "Producing Obedience: Law Professors and the Turkish State" (PhD diss., University of Minnesota, 2005).

146 Fahrettin Kayhan, "Özel Hukuk Uygulamasında Yargı İçtihatlarının ve İçtihadı Birleştirme Kararlarının Normatif Gücü," *Türkiye Barolar Birliği Dergisi* 2 (1999): 341-363.

As underlined by Pierre Bourdieu, law is produced in a field and its style, contents and transformations are shaped by the characteristics of the legal field.[147] From the doctrine of stare decisis to conflicts among lower and higher judicial institutions, structural elements of the field impact the flows of law. Power relations, competitive struggles and inherent characteristics of judicial reasoning limit the realm of possibilities concerning legal change. Inspired by this approach,[148] I pay particular attention to the characteristics of the judico-political field in Turkey in this study. How did this field which can be seen as encompassing the political, scholarly and judicial fields change over time? How did these changes relate to the changes in gender debates and the regulation of intimate violence? In terms of law and gender violence, do the characteristics of and changes in this field matter? These questions have a central place in this study.

All of these institutions, the parliament, CCa and criminal law chairs - in other words the judico-political field in Turkey as such- have historically been dominated by men. Despite the recognition of women's political rights in 1934, women's parliamentary representation has been historically low in Turkey.[149] The ratio of women parliamentarians was 4.5% in 1934 and steadily declined until hitting a historic low (0.6%) in 1950. It was not until the 2007 elections that the percentage of women in the parliament exceeded the 1934 level[150] and women comprise 17.3% of all

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147 Bourdieu, "Force of Law."

148 For elaborations on and applications of this approach, see Yves Dezalay and Bryant G. Garth, eds., *Lawyers and The Rule of Law in an Era of Globalization* (Oxon: Routledge, 2011); Yves Dezalay and Bryant G. Garth, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* (Chicago: The University of Chicago Press, 2002); Yves Dezalay and Mikael Rask Madsen, "The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology on Law," *Annual Review of Law and Social Science* 8 (2012): 433-452; Yves Dezalay and Bryant G. Garth, "Lost in Translation: On the Failed Encounter Between Bourdieu and Law and Society Scholarship and their Respective Blindness," in *Critical Legal Perspectives on Global Governance: Liber Amicorum David M. Trubek*, ed. Gráinne de Búrca, Claire Kilpatrick, and Joanne Scott (Oxford: Hart, 2014), 385-405.

149 For a critical examination on this issue, see Şirin Tekeli, *Kadınlar ve Siyasal Toplumsal Hayat* (Istanbul: Birikim, 1982).

150 Semra Gökçimen et al, *Türk Parlamento Tarihinde Kadın Parlamenterler, 1935-2009* (Ankara: TBMM, 2009), 19.

parliamentarians in the present parliament.[151] Despite this recent increase, Turkey has the 132nd rank among 187 countries in the world in terms of women's parliamentary representation and this ranking is below many countries like Iraq, Pakistan and Switzerland that recognized women's political rights later than Turkey.[152]

In 2018, only 15,6% of the CCa members were women – a ratio that was below the European average by 25 points.[153] Despite the fact that the first female court of cassation judge in the world, Melahat Ruacan, was a woman from Turkey, and law has been a field of occupation attracting thousands of women[154] since the entry of the first female students to Istanbul University Law Faculty in 1920,[155] there has been a historically stark male dominance at the CCa, especially at the criminal law chambers. In late 2020, there was not a single female chamber president in the twenty criminal chambers of this institution, and there was only one female chamber president in twenty-three civil law chambers. The percentage of women who served as chamber presidents since the establishment of the Republican CCa until late 2020 is 2.2% for criminal chambers and 3.76% for civil chambers.[156]

Until the 1970s, criminal law scholarship was an exclusively male profession in Turkey. The first female research assistant working on criminal law at the Ankara University Law Faculty was accepted to her

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151 Sevil Sargın and Selin Yıldız, "Türkiye Siyasetinde Kadın Milletvekillerinin Mekansal Dağılımı ve Dağılıma Etki Eden Faktörler," *Journal of Social and Humanities Sciences Research* 5, no. 30 (2018): 4061-4075.

152 "Monthly Ranking of Women in National Parliaments," IPU Parline, May 2022, https://data.ipu.org/women-ranking?month=5&year=2022.

153 Itır Akdoğan, *Üst Düzey Karar Almada Kadın Katılımı* (Istanbul: TESEV, 2019).

154 Ayşe Öncü, "Uzman Mesleklerde Türk Kadını," in *Türk Toplumunda Kadın*, ed. Nermin Abadan Unat, Deniz Kandiyoti and Mübeccel Kıray (Ankara: TSBD, 1979), 271-286.

155 Emine Balcı, "Hukukun Öncü Kadınları: Türkiye'de Kadınların Hukuk Mesleğine Girişi Üzerine Bir İnceleme," *Fe Dergi: Feminist Eleştiri* 11, no. 1 (2019): 34-47.

156 I calculated these percentages using the data provided in the CCa website. See "Onursal Başkanlarımız," https://www.yargitay.gov.tr/kategori/65/onursal-baskanlarimiz.

post in 1972,[157] and it was not until the 1980s that one could find a scholarly book in Turkish on *any issue* related to substantive or procedural criminal law penned by a woman academic.[158] Nur Başar Centel and Füsun Sokullu Akıncı, pioneers in this area, attained professorship in the 1990s and the first feminist commentary book on Turkish criminal law written by a criminal law scholar is Türkan Yalçın Sancar's *Woman in Turkish Criminal Law* which was published in 2013.[159]

In the existing scholarship, male dominance in the parliament at the context of criminal law reform has been recognized. As noted by Ayşe Güneş Ayata and Fatma Tütüncü, the demands of women's rights organizations concerning civil and criminal law made a huge impact on the new codes despite the male dominance at the parliament. [160] I think that inverting this equation and asking the question of how male dominance in all of these institutional fields might have conditioned the changes in this regime can also be fruitful. In many of the rooms that I looked into in this research, including the rooms where CCa judges congregated to settle an issue, where parliamentarians in the justice commission came together to work on legislation, where criminal law scholars met to discuss criminal law, there was not a single woman. At different points of this study, I elaborate on the possible implications of this situation.

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[157] This research assistant was Gülseren Berki. For the list of all academics who had been employed at this faculty and their publications until 1975, see Oya Fişekçi, *Ankara Hukuk Fakültesi Öğretim Üye ve Yardımcıları Bibliyografyası, 1925-1975* (Ankara: Ankara University Press, 1977).

[158] I reached this conclusion after examining the catalogues of Ankara and Istanbul law faculties and publication lists of female criminal law scholars. According to my research, the first book that fits this description is Nur Başar Centel's work on defense council. Judge Sabiha Taşçıoğlu was the first woman to co-edit a book on substantive criminal law in Turkey. Educator and politician Tezer Taşkıran's co-authored work on child criminality seems to be a first in the field of criminology. The first dissertation that is related to criminal law and submitted to the Istanbul University in the Republican era was Hayriye Özpınar's work on the development of criminal law. Nur Centel, *Ceza Hukukunda Müdafi* (Kazancı: Istanbul, 1984); Sabiha Taşçıoğlu et al., *Ceza Hükümlerini Havi Kanun ve Nizamnameler* (Ankara: Yıldız: 1955); and Hayriye Özpınar, "İçtimai Yapılara Göre Ceza Telakkisinin Tekamülü" (bachelor's thesis, Istanbul University, 1946).

[159] Sancar, *Türk Ceza Hukukunda*.

[160] Ayata and Tütüncü, *Critical Acts*.

In the critical scholarship on Turkish legal history, high court judges and law scholars of the pre-2000 era are generally accepted as members of the Kemalist state elite. These actors are generally discussed in relation to their roles in the formation or maintenance of status quo.[161] I think studying dissenting opinions, suppressed or successful judicial activisms and conflicts over interpretation can enrich our understanding of Turkish legal history. This is not an easy thing to do because of archival limitations and the style of decision-writing in Turkey. Even when one finds a dissenting opinion in a CCa decision, it is not always possible to identify the dissenter who is often referred to as "a CCa member" or with their initials.

There is also the question of whether this is a meaningful thing to do. This type of legal history scholarship (critical legal history) that explores contingency, contestation and complexity has been heavily criticized in the USA with the claim that it does not provide much more than aesthetic pleasure.[162] Cristopher Tomlins, one of the staunchest critiques of this approach, proposes writing another sort of legal history by focusing on constellations.[163] I think that, in places beyond the Anglosphere, especially in the global south, such explorations are extremely meaningful because our legal presents rarely have critical histories, even histories that examine the transformations of black letter law. Being able to write about constellations concerning criminal law is not an easy thing to do in places like Republican Turkey because we simply lack an empirical historical

[161] Erozan, *Obedience*; Aslı Bali, "Courts and Constitutional Transition: Lessons from the Turkish Case," *International Journal of Constitutional Law* 11, no. 3 (2013): 666-701; and Ceren Belge, "Friends of the Court: The Republican Alliance and Selective Activism of the Constitutional Court of Turkey," *Law and Society Review* 40, no. 3 (2006): 653-692.

[162] For these debates, see Kunal M. Parker, "Everything is Contingent: A Comment on Bob Gordon's Taming the Past," *Stanford Law Review* 70 (2018): 1653-1658; Christopher Tomlins, "What is Left of the Law and Society Paradigm after Critique? Revisiting Gordon's 'Critical Legal Histories,' " *Law & Social Inquiry* 37, no. 1 (2012): 155-166; and Robert W. Gordon, " 'Critical Legal Histories Revisited': A Response," *Law & Social Inquiry* 37, no. 1 (2012): 200-215.

[163] Christopher Tomlins, "After Critical Legal History: Scope, Scale, Structure," *Annual Review of Law and Social Science* 8, no. 1 (2012): 31-68.

scholarship that would provide insights concerning the question of what might have been constellating with what.

This lack posed a difficulty for this research because in order to analyze the transformations of this regime, I had to investigate a number of issues in addition to the norms and rules concerning intimate violence. These include the debates in high legalese, public debates on sexuality, and intimate violence and changes in the structuring and composition of the legal field. Secondary sources were of limited help in some regards and this pursuit of constellations eventually led me towards an investigation of various primary sources.

So, what were the constellations in this case? Why were there changes in law at certain moments in certain directions? This study provides important insights for these questions related to causality and I elaborate on this issue throughout this text. To provide a gist, my examination shows that democratization, feminist activism concerning intimate violence and expansion of the recognition of women's rights in different areas like education and employment do not necessarily constellate with limitations in legal accommodations granted to intimate violence and that they can actually constellate with expansions. In this case, global historic moments and global flows of law and legal ideas were always relevant to the debates on and changes in the ground rules concerning this violence and there was a high degree of overlap between major shocks causing changes in the judico-political field and changes in the regime of intimate violence. The shifts in the regime always unfolded in an incremental fashion (through the adding up of case-law or legislation enforcing a certain direction) but each regime shift had its beginnings in a major shock or critical juncture. As I analyze throughout this study, these findings provide important insights for various issues such as legal globalization, and dynamics of legal change.

§ 1.4 Sources and Methodology

For this research, I traced the transformations of the criminal code, case-law of the CCa and scholarly debates concerning unjust provocation, ill-

treatment of family members as well as gender and family debates in high legalese. I also traced the history of extraordinary mitigation, a norm which provided an extraordinary sentence reduction for murderers and assaulters who caught their relatives committing adultery because this norm stayed in force until 2003.

I examined the parliament on a very limited basis, scrutinizing the debates that took place on certain occasions such as criminal law amendments. I also searched the database of the parliament for certain words like ill-treatment, adultery, honor killings, and custom killings and reviewed the reports of parliamentary commissions on relevant matters. My objective was not tracing how members of certain parties or political traditions discussed these crimes. I limited myself to exploring the legislators' perspectives on the issues that I examine and their roles in shaping the transformations of this regime.

In order to examine the changes in legal interpretation on the part of scholars and judges and to trace what was discussed in Turkish high legalese, I reviewed an array of sources. These include the proceedings of relevant conferences, law journals of Ankara and Istanbul University, the Journal of the Court of Cassation (*Yargıtay Dergisi*), and canonical books in criminal law scholarship. Because I thought that it would provide a source for tracing legal debates and actual reasonings of CCa judges until the 1970s when the Journal of the Court of Cassation began to be published, I also reviewed *Adliye Ceridesi (*later renamed as *Adliye Dergisi* and finally as *Adalet Dergisi)*. When I was working on reviewing this journal, the Atatürk Library only had copies published until 1965 and pre-1975 issues were not available in digital format. Thus, I photographed every article I found relevant and manually processed this information. Because of time considerations, I stopped my manual review of this journal with 1965. Later on, these earlier issues and the issues between 1965 and 1973 were made available in digital format at the website of the Ministry of Justice. I also consulted this website for this later period.

In this study, I read texts like law books and law papers as legal texts-in-action. Marcus Dubber and Angela Fernandez's edited volume on the Anglo-American legal treatise which suggests to read legal treatises as

law-books-in-action inspired my approach to these texts.[164] I do not approach these texts as sources of legal or social facts in this study. In my analysis, I explore the effects created by these texts, what they excluded or included and what their interpretations were concerning real and ideal law.

The most difficult task of this research was collecting and making sense of CCa decisions. High courts in Turkey are not very transparent institutions. Unlike the decisions of the Constitutional Court, not all decisions of the CCa are published. Even the published decisions do not provide much data in some cases because some of these decisions are extremely short and lack justification explanations (*gerekçe*). Thus, there is a technical absence of rule of law in terms of judicial decision making at the highest level. This situation makes it difficult to pinpoint the norms and norm shifts. Moreover, the archives of the Ministry of Justice are not within the state archives that are accessible for researchers. Thus, what is available are selected pieces of case law that have been published in different forums. In earlier years, these decisions were published in volumes called *Temyiz Kararları* and in the *Adliye Ceridesi*. Later on, there was a journal called the *Resmi Kararlar Dergisi*. It was followed by a special periodical, *Yargıtay Kararları Dergisi* devoted to the publication of CCa decisions. Now, there is also an electronic database which include selected decisions from the post-2000 era. For this research, I reviewed these periodicals and searched the database for selected terms like unjust provocation mitigation, ill-treatment, and custom killing. I also used the decisions reprinted or summarized in case-law compilations and criminal law books and articles to establish my data-set.

I do not see these cases as mirror-reflections of CCa practice. Probably, there were more disputes within the CCa and more inconsistency in case-law than I was able to trace. However, I think that these decisions, the decisions that entered into the flow of circulated case-law in different ways, reflect the dominant positions within the CCa because these were the decisions that were showcased or chosen to become precedents at

[164] Angela Fernandez and Markus Dubber, eds., *Law Books in Action: Essays on the Anglo-American Legal Treatise* (Oxford: Hart, 2012).

certain moments in time. In my analysis, I tried to trace what was included or excluded from the scope of ill-treatment or unjust provocation and how intimate violence and intimate relations were framed in these decisions. I assumed that the court continued to operate with the interpretation that is reflected on its last publicized decision concerning an issue until the adoption of a decision which signaled a new interpretation had become dominant at the court.

While I was working on the early Republican period and later on the 1950s, I began to think that I had to get a better understanding of the late-Ottoman period in order to make sense of the Republican regime. Thus, I also reviewed *Mukarrerat-ı Temyiziyye,* an official journal where the decisions of the Ottoman Court of Cassation were published in the 1910s, and the relevant parts of selected criminal law books, as well as the relevant parts of four *fetva* books that were among what is called "the most used and reliable six books."[165]

As noted by various scholars working on law, *legalese* is a quite specific language.[166] Acquiring the ability to understand this language took some time, not only because of the fact that I am not trained in law but also because of the many transformations of everyday language and legalese in Turkey. Before embarking on this journey, I had no idea that *fıraş* meant bed or matt in Ottoman Turkish or that a bed could be something illegitimate. Similarly, I would never think that the word *darb* (battery) could be interpreted as a term that excluded "repeatedly knocking someone to the ground" (*yerlere vurmak*). In this study, I reflect on such mismatches between common Turkish and high legalese, especially at points

[165] These books were called "kütüb-i sitte-i mutebere-i mütedavile" and included Neticetül-Fetava, Behcetül-Fetava, Fetava-yı Feyziyye, Fetava-yı Abdürrahim, Fetava-yı Ibn Nüceym and Fetava-yı Ali Efendi. I studied the first four of these books and worked with modern Turkish reprints of the first three. I read the relevant parts of Fetava-yı Abdürrahim from the original because it has not been transcribed. I wanted to include this book in my examination because its criminal law sections are more extensive than others. For a comprehensive review of the fetva literature, see Şükrü Özen, "Osmanlı Döneminde Fetva Literatürü," *Türkiye Araştırmaları Literatür Dergisi* 3, no. 5 (2005): 249-378.

[166] On the nature of this language, see Gordon, *Critical Legal Studies*; and Julia Black, "Regulatory Conversations," *Journal of Law and Society* 29, no. 1 (2009): 163-196.

where these were crucial for the transformations of this regime or when the CCa made changes in the language it was speaking.

This study follows a chronological order because I wanted to trace the flows of law through time and follow its course over the long 20th century. However, my periodization does not overlap with the timelines generally adopted in studies of modern Turkey. Before making this periodization, I examined the changes in the norms and their interpretations. I pinpointed the instances in which there were changes in the judicial interpretations concerning the norms or in which new norms were introduced. I built my periodization upon these findings. I then attempted to make sense of these shifts and explore the constellations between them and other variables such as the changes in the judico-political field or the emergence of mass and independent feminist movements.

Feminist movements were important actors in the process of criminal law reform in Turkey. In order to understand what was problematized and demanded by feminist and women's rights activists and organizations, I reviewed feminist periodicals *Feminist*, *Kaktüs* and *Pazartesi* and reports and books published by Mor Çatı (Purple Roof Women's Shelter Foundation) and Kadının İnsan Hakları Derneği (Women for Women's Human Rights). I also reviewed the proceedings and conclusion reports of the annual congress of shelters, annual reports of the women's rights section of the Turkish Bar Association (TÜBAKKOM) and the 2003 report of the Women's Platform for Turkish Criminal Law. The objective of my inquiry was determining what demands concerning intimate violence were translated into legalese and whether the stark male dominance in institutional fields like the parliament, criminal law scholarship, and the CCa and the masculinist turn that followed the 1980 Coup complicated such translations.

In order to trace the changes in the structuring of the legal field, I referred to the secondary literature. However, these sources were of limited help for making sense of the cliques in and composition of the CCa. In order to trace the extent of resignations and retirements and to follow the changes in the composition of the court, I examined various primary

sources such as the *Official Gazette* and the retirements section of the *Journal of the Court of Cassation*.

What we know about the global flows of law and legal ideas on intimate violence in the period before the 1980s is extremely limited. At the initial phases of this research, I became aware that such flows had been very effective in shaping the debates on gender, sexuality and intimate violence in Turkey. Providing a full account of these flows at the global level is beyond the scope of this study. However, I tried to trace them as much as I could, drawing on some secondary sources, as well as some primary sources such as the texts of relevant foreign codes and the UN reports on family, criminality and violence.

This dissertation grew out of a historical chapter that was intended to provide a historical background to an analysis concerning the present. I had initially planned to conduct interviews with feminists, lawyers, social workers, judges and politicians and to focus on the millennial period for the most part. According to my initial plan, this would be an anthropological inquiry. I even did some fieldwork at the Cağlayan Palace of Justice. However, after a while, I noticed that the history of this regime was much more complicated than I assumed it to be. At that point, I decided that it would be better if I were to focus on history and the dynamics of change that I was coming across. In the end, I decided to leave the post-2000 period largely out of the scope of this study because of time and space considerations. In sum, this is a historical work that took its starting points from the present but it is not a presentist work that is only concerned with the contemporary realities of Turkey and I do not claim to provide a complete account of everything between the mid-19th century and the present moment. However, I do provide an alternative account of modern Turkish history and many insights considering our present moment.

§ 1.5 Chapter Outline

In Chapter 2, I unpack the late-Ottoman regime of intimate violence with a focus on the norms and rules found at the top of the state and discuss

its characteristics and changes in a comparative light. As I show in this chapter, what was happening in the late-Ottoman Empire concerning the regulation of intimate violence had a lot to do with the global flows of law. Human nature and human psychology, free will and irresistible impulse were constitutive of the Ottoman *parole* on intimate violence in this period. The overview that I provide in this chapter also provides a basis for the arguments that I raise in subsequent chapters because the Ottoman past or certain elements of this past were directly brought to the table in discussions over sexuality, household authority and intimate control murders in later years. However, my examination in this chapter goes beyond providing a snapshot of the historical background because, in this part, I show that major shocks or critical junctures were also effective in leading to changes in the regulation of intimate violence in this period and analyze the first overlap between the expansion of accommodations granted to intimate violence and the rise of autonomous and mass feminist movements.

In Chapter 3, I focus on the early Republican era and "the law revolution" (*hukuk devrimi*). This was a process of legal change long understood as an instance of reception of Western law and *the* formative period of the Turkish legal regime concerning gender relations. In this chapter, I analyze legislation, parliamentary discourse, case-law and scholarly debates concerning intimate violence. On the basis of this examination, I argue that there were some important continuities as well as significant breaks between the late-Ottoman and early Republican periods and that this period was one round of re-structuring among many in terms of the regulation of intimate violence. Some elements of the contemporary Turkish regime are traceable to this period. However, not all early Republican developments had an impact on the then-future of this regime. This examination also highlights that there were extensive disputes among the early Republican state elite on some issues concerning intimate violence and that high court judges were crucial actors in shaping the ground-rules also in this period.

In Chapter 4, I examine a masculinist restoration that I did not expect to find. Focusing on the transformations of case-law and legislation between the late-1930s and the late 50s, I explore how judicial, scholarly and political activism brought about grand changes in the regulation of intimate violence mainly through case-law. This examination shows that this shift that largely coincided with democratization in Turkey cannot be comprehended as a return to the Ottoman era or understood in isolation from the global flows of law and legal ideas. In this chapter, I also elaborate on the convergences and divergences among the developments in the institutional fields that I examine and show that some elements of the contemporary regime of intimate violence in Turkey, such as the transformation of ill-treatment of family members to an umbrella crime or into a well with muddy waters to which various acts of non-lethal violence are thrown into, have their roots in the changes that took place in this period.

In Chapter 5, I follow the flows of law and legal debates in the years between 1960 and 1980. In this period, there were intense political conflicts in Turkey and three military coups. In this chapter, I trace how legal debates and case-law transformed under these circumstances and under the influence of a new push created by the emergence of first problematizations concerning family, gender issues and criminal law in international organizations like the International Association of Penal Law in the mid-1960s, the rise of human rights, and what has been called the sexual revolution. This examination shows that there were intense contestations within the CCa and among criminal law scholars on issues related to sexuality and intimate violence and that there were major changes in the regulation of these matters after the progressives got the upper hand in some key institutions such as the high judiciary.

In Chapter 6, I examine the masculinist restoration that followed the coup on 12 September 1980. I show how this coup changed the structuring and composition of the legal field through constitutional and legal changes and purges and brought about a new hegemonic discourse on family relations, by establishing repressive familism as state policy and

by tying the need for this repression to the objectives of maintaining order and security. In this chapter, I show that the regime of intimate violence took a violent turn in this period, despite the re-rise of mass, and autonomous feminist movements and reflect on the reasons of this overlap. In this chapter, I also elaborate on the new TCC and argue that its contents were heavily influenced by the masculinist restorations of earlier periods.

In Chapter 7, I provide a summary of the key findings of my research and a snapshot of modern Turkish history built upon it and highlight the directions for future research. In this chapter, I also elaborate on what this research tells us about the questions of how law shapes social practices and lived experience, and why and how legal change on the regulation of intimate violence happens when it does.

2

The Late Ottoman Era

For many years, the dominant state narrative regarding the status of women in the Ottoman Empire and Turkey was built upon the assumption of a clear break. In this narrative, Ottoman law, more specifically Ottoman understanding of sharia, was identified as the oppressor of women -who were supposed to be emancipated with its abrogation. This clear and positive break narrative has been challenged by various scholars in recent decades. Some scholars have shown that various gender-related legal arrangements had been transforming before the Republican era.[1] Others pointed out to the ways in which Ottoman women had been pushing for reforms in gender relations.[2] The continuities between

[1] Tucker, "Revisiting Reform," 4-17; and Başak Tuğ, "Gendered Subjects in Ottoman Constitutional Agreements, ca. 1740-1860," *European Journal of Turkish Studies* 18 (2014), https://journals.openedition.org/ejts/4860.

[2] Serpil Çakır, *Osmanlı Kadın Hareketi* (Istanbul: Metis, 1994); Elif Ekin Akşit, "Hanımlara Mahsus Milliyetçilik: Fatma Aliye ve Erken Milliyetçi Stratejiler," *Kebikeç* 39 (2010): 57-74; Fulya Osmanoğlu, ed., *Feminizm Kitabı: Osmanlı'dan 21. Yüzyıla Seçme Metinler* (Istanbul: Dipnot, 2015); Elisabeth Frierson, "Unimagined Communities: Educational Reform and Civic Identity among Late-Ottoman Women," *Critical Matrix* 9, no. 2 (1995): 57-92; Arzu Öztürkmen, "The Women's Movement under Ottoman and Republican Rule: A Historical Reappraisal," *Journal of Women's History* 25, no. 5, (2013): 255-264; Toprak, *Türkiye'de Kadın*; Yavuz Selim Karakışla, *Women, War and Work in the Ottoman Empire: Society for the Employment of Ottoman Muslim Women, 1916-1923* (Istanbul: Osmanlı Bankası Arşiv ve Araştırma Merkezi, 2005); and Efi Kanner, "Transcultural Encounters:

the Ottoman and Republican periods concerning some legal arrangements have also been noted by some scholars.[3] However, the question of whether there were changes in the regulation of intimate violence through criminal law in the late-Ottoman period has largely remained unexplored.[4]

In this chapter, I examine the legal and judicial developments of the late-Ottoman period with a specific focus on issues related to the regulation of intimate violence. My objective in doing so is tracing the trends and breaks in the flows of law concerning intimate violence. On the basis of this examination, I argue that this regime of intimate violence underwent various changes between the mid-19th century and the official collapse of the empire in 1923 and show that there was not a consistent or unilinear trend towards the recognition of women's rights to life and bodily autonomy. Analyzing the characteristics of this regime and its transformations in a comparative light, I argue that the Ottoman regime can hardly be understood in isolation from the global flows of law and legal ideas in the 19th and early 20th centuries.

In the late Ottoman period, there were massive transformations in terms of the legal field and this was a very important period in terms of modern state formation in this country. Moreover, towards end of this period, in the second constitutional era, feminism emerged as a strong ideological current that shaped public debates and mass feminist social

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Discourses on Women's Rights and Feminist Interventions in the Ottoman Empire, Greece, and Turkey from the Mid-Nineteenth Century to the Interwar Period," *Journal of Women's History* 28, no. 3 (2016): 66-92.

[3] Ruth A. Miller, "The Ottoman and Islamic Substratum of Turkey's Swiss Civil Code," *Journal of Islamic Studies* 11, no. 3 (2000): 335-361.

[4] The late-Ottoman judicial practice in shari courts have been explored in some recent works. For some examples in this regard, see Nevin Ünal Özkorkut, "İslam Hukukunda ve Osmanlı Uygulamasında Koca Şiddetine Karşı Kadının Başvurabileceği Hukuk Yolları," *AÜHFD* 65, no. 1 (2016): 231-248; Agmon, *Family and Court*; and Elyse Semerdjian, *"Off the Straight Path:" Illicit Sex, Law and Community in Ottoman Aleppo* (New York: Syracuse University Press, 2008). However, what we know about the changes in the criminal law or the judicial practice at Nizamiye Courts concerning gender-related issues is still very limited. For some works that provide insights in these regards, see Miller, *Limits of Bodily Integrity*; and Aykut, "Toxic Murder."

movements emerged. How did the regime of intimate violence transform under such circumstances? And what may this tell us about the dynamics of change concerning such transformations? These are the guiding questions of this chapter.

§ 2.1 Tanzimat Reforms and Intimate Violence

In the mid-19th century, the Ottoman state adopted the Ottoman Criminal Code (the OCC). This Code brought about various novelties in terms of criminal law and punishment.[5] The new courts called the Nizamiye courts tasked with implementing the new codes,[6] including the OCC, and the High Court of Appeals that later transformed into the Court of Cassation were also established in this period.[7] Some scholars of the history of Ottoman criminal law underline that the adoption of the OCC of 1858, which was largely inspired by the French Criminal Code of 1810 (the FCC), significantly changed Ottoman criminal law[8] and that the OCC reflected of a new conception of public criminal law. In line with this conception, the state assumed the primary role with respect to the prosecution of crimes against persons and "gained a greater monopoly over the use of force by assuming sole authority in exacting, determining, and imposing punishments."[9] On the other hand, various scholars who studied

[5] Kent Schull, "Criminal Codes, Crime, and the Transformation of Punishment in the Late Ottoman Empire," in *Law and Legality in the Ottoman Empire and Republic of Turkey*, ed. Kent F. Schull, M. Safa Saraçoğlu, and Robert Zens (Bloomington: Indiana University Press, 2016), 156-179. For an analysis that emphasizes continuity in terms of discourse, see Tobias Heinzelmann, "The Ruler's Monologue: The Rhetoric of the Ottoman Penal Code of 1858," *Die Welt des Islams* 54 (2014): 292-321.

[6] Avi Rubin, *Ottoman Nizamiye Courts: Law and Modernity* (New York: Palgrave Macmillan, 2011).

[7] This institution, established in 1868, was called Divan-ı Ahkam-ı Adliye. Its task was reviewing the decisions given by the newly established Nizamiye Courts and the decisions given by shari courts were beyond the scope of its authority. Necip Bilge, "Yargıtay Kurullarında Gelişme ve Reform Zorunluluğu," *AÜHFD* 22, no. 1 (1966): 308.

[8] Ruth A. Miller, *Legislating Authority: Sin and Crime in the Ottoman Empire and Turkey* (New York: Routledge, 2005).

[9] Schull, *Criminal Codes*, 164.

non-lethal intimate violence and *shari* courts in the post-Tanzimat period emphasize that complaints of women were either not given much attention[10] or that women faced a highly formalistic understanding of sharia in these courts.[11] My examination of the text of this Code, along with earlier *kanunname*s and *fetva* books published by the state in the 19th century indicates that this difference in scholarly conclusions concerning law and violence might be related to the heterogenous character of the developments of this era:[12] Radical changes in some elements of the regime of intimate violence were accompanied by continuities in some other elements.

One of the radical changes concerning intimate violence introduced by the OCC of 1858 was related to murders committed upon adultery. According to the *kanunname*s from the classical period and canonical fetva books, close relatives such as husbands,[13] fathers[14] or sons[15] were exempt from *kısas* (retaliation) and *diyet* (blood-money) for murders they committed upon catching a female relative having illegitimate sexual relations. Unlike the early 19th century Britain or France where this condition only mitigated the sentence – albeit greatly – rather than leading to

[10] Agmon, *Family and Court.*

[11] Özkorkut shows that even in cases where complaints of violence were taken into consideration and were decided to be of serious nature, *kadı*s did not accept requests for judicial separation unless the husband agreed to it. Özkorkut, *Koca Şiddetine Karşı*.

[12] Rubin, *Ottoman Nizamiye*.

[13] "The Criminal Code of Süleyman the Magnificent," reprinted in Uriel Heyd, *Studies in Ottoman Criminal Law* (Oxford: Oxford University Press, 1973), 59. There are also various *fetva*s about this issue. See Menteşezade Abdürrahim, *Fetava-yı Abdürrahim* (Istanbul, 1827), 331.

[14] Fathers were not specified as relatives who could benefit from this exemption in the criminal codes of Süleyman the Magnificent but some codes from the time of Bayezıd specifically mentioned them. "The Criminal Code of Bayezıd," reprinted in Heyd, *Studies in Ottoman*, 98.

[15] Ahmed Efendi and Hafız Mehmed, comps., *Neticetü'l Fetava*, ed. Süleyman Kaya et al. (Istanbul: Klasik, 2014), 409.

complete freedom from criminal sanctions,[16] such murderers could formally benefit from complete immunity in the early 19th century Ottoman Empire. However, not everyone who raised such a defense could benefit from this exemption because there were also qualifying conditions. In order to benefit from this exemption, one had to have a good reputation,[17] must have directly witnessed a situation which indicated adultery on-site (*zina alameti*),[18] and, at least according to some *kanunname*s from the classical period, must have killed or wounded two people –that is both a female relative and her paramour.[19]

With the adoption of the OCC of 1858, there was a significant change regarding this issue. The 188th article of the Code stipulated that a person who saw his wife or one of his *meharim* whilst committing illegitimate sexual relations (*fiil-i şeni*) with someone and killed both of them together (*ikisini birden*) would be excused.[20] With this regulation, the masculine prerogative to kill upon adultery ceased to be recognized as a "right" in line with which the murderer would not face any consequences because the Code stipulated that such murderers would be excused – not

[16] Sara M. Butler's examination of the records of borough courts in late medieval England suggests that husbands who killed under these circumstances were no longer accepted to have complete immunity by the 14th century because such cases had begun to be framed as self-defense by that time. Butler documents that this framing was sometimes carried out via fraud in the judicial process. If catching upon adultery (or honor defense) had been enough for complete immunity, there would be no need for the defense of self-defense. Sara M. Butler, *The Language of Abuse: Marital Violence in Later Medieval England* (Leiden: Brill, 2007). The French criminal code adopted after the revolution did not include an article about this but a mitigation clause was included in the FCC of 1810; cf. "Code Penal du 25 septembre 1791," http://ledroitcriminel.fr/la_legislation_criminelle/anciens_textes/code_penal_25_09_1791.htm; and "France: Penal Code of 1810," trans. Tom Holmberg, https://www.napoleon-series.org/research/government/france/penalcode/c_penalcode3b.html.

[17] Abdürrahim, *Fetavayı Abdürrahim*, 331.

[18] According to Abdürrahim, sitting with a stranger somewhere and having a chat were not signs of illegitimate sexual relations, but sitting on the same bed and kissing were signs of these relations. One who killed his wife under the former circumstances could be killed in retaliation. In the latter case, there could be no sanctions. Abdürrahim, 331.

[19] Heyd, *Studies*, 98.

[20] Abdullah Vehbi, *Kanun-ı Ceza Şerhi* (Baghdad: Ṣahbender Matbaası, 1327/1909), 379-380.

pardoned.[21] Thus, according to this Code, such murderers would face some sanctions, such as imprisonment for a period between 3 months and 3 years.

This article was significantly different from the relevant article of the French Criminal Code (FCC), which was one of its main sources of inspiration. The FCC of 1810 provided excuse only for husbands and only for murders committed within the marital domicile (art. 324).[22] In the OCC, the excuse was granted to a larger group of people because the article included the term *meharim*. In the *shari* discourse, the term *meharim* refers to a large group of females with whom a man can have direct social relations. These include female relatives with whom a man cannot marry (mother, daughters, sisters by blood or milk, nieces and aunts),[23] as well as wives and slaves. Thus, the extraordinary mitigation provision in the OCC covered a much larger group of intimate relations compared to the FCC.

Another difference between the FCC and the OCC is the two-victim requirement that can also be found in some *kanunname*s from the classical period. The criminal law commentary of Sami Efendi, a member of the Üsküdar Court of Appeals, provides insights concerning this requirement. According to him, the article was clear in terms of requiring double murder: One who killed only a *mahrem* woman or a *namahrem* man could not benefit from the article because, in such cases, the defense that the murder was committed upon sexual acts would always be doubted.[24] For example, one could kill a *mahrem* woman and have another man claim that he had had sexual relations with her to avoid punishment. Thus, for Sami, the rationale of this requirement was preventing the misuse of the clause.

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[21] According to the 190th article, those who were excused were to be imprisoned for a period between three months and three years and could also be kept under police surveillance for five to ten years after this prison term.

[22] "France: Penal Code of 1810," https://www.napoleon-series.org/research/government/france/penalcode/c_penalcode3b.html.

[23] Halil Cin, *İslam ve Osmanlı Hukukunda Evlenme* (Ankara: Ankara Üniversitesi Yayınları, 1974), 100-110.

[24] Sami, *Mirat-ı Kanun-ı Ceza: Kanun-ı Ceza Şerhi* (Istanbul, 1324), 290-292.

Article 188 is remarkable in various respects and its inclusion in the Code represents a very important turn in terms of the regulation of intimate violence in this country. By including such an article in the Code, the Ottoman state was claiming that these murders were within the scope of its authority and that such murders were criminal acts after all. Second, such murderers were stipulated to be punished – albeit extremely lightly compared to other murderers. This was different from the pre-Tanzimat regime in which complete immunity could be granted to the perpetrators of these crimes.

I think the adoption of such a legal norm at the context of Tanzimat points out to the relationship between changes in what Sally Merry calls overarching logics of punishment and the regulation of gender violence[25] and shows us that processes of extensive legal reform can bring about radical shifts in the regulation of intimate violence –even in the absence of organized feminist demands for legal reform concerning intimate violence- especially if these are reforms towards the monopolization of violence by the state.

The Tanzimat was a major shock for the Ottoman state. It entailed massive transformations in terms of the structuring of the legal field and of state-society relations in the Ottoman Empire. As it is examined throughout this study, many such shocks have led to changes in the regulation of intimate violence. And the fact that Tanzimat had also brought about a change in this regard points out that this regime cannot be understood in isolation from the process of modern state making in the late-Ottoman era.

After the adoption of the OCC, the state assumed the primary role in the prosecution of crimes against persons.[26] Up until this point, crimes such as physical assault were primarily seen as matters of private law. In such cases, prosecution used to depend on the victim's complaint and victims could request physical retaliation or blood-money depending on the circumstances of the case. The OCC recognized the validity of such claims but it also introduced a new framework. In this new framework, the state

[25] Sally Merry, *Hawai'i.*

[26] On the establishment of public prosecution, see Rubin, *Ottoman Nizamiye*, 133-153.

was authorized to prosecute and punish crimes such as physical assault independent from complaint.

In contrast to these significant changes, there was not an explicit change in some other issues such as the regulation of non-lethal intimate violence in post-Tanzimat criminal law.

In the early modern period, bottom-up intimate lethal violence was differentiated from other murders in many Western European countries. These murders were defined as "petty treason" and were subject to a distinctively heavy punishment.[27] In the classical Ottoman regime, there was not a similar concept. While beatings targeting parents were stipulated to be subject to a distinct punishment in some kanunnames from the classical period,[28] this differentiation seems to be limited to non-lethal violence. Plus, husbands were not among the group of subjects the inviolability of whom were enhanced via intimacy burdens because these early kanunnames only mention ascendants. In the OCC of 1858, there was not a single relationship aggravation. Unlike the FCC of 1810, neither parricide nor infanticide were stipulated to be subject to aggravated punishment in the OCC. This might be related to the complicated Ottoman legal tradition concerning this issue.

With regards to top-down non-lethal intimate violence, the post-Tanzimat regime was highly ambiguous. As noted by various contemporary scholars of Islamic law, many Muslim jurists from the classical period thought that husbands and fathers, as well as other people in positions of domination (like masters or slave-owners), had a right to punish those

[27] Marianna Muravyeva and Raisa Maria Toivo, eds., *Parricide and Violence against Parents throughout History* (London: Palgrave Macmillan, 2018); Frances E. Dolan, "The Subordinate('s) Plot: Petty Treason and the Forms of Domestic Rebellion," *Shakespeare Quarterly* 43, no. 3 (1992): 317-340; and Garthine Walker, "Imagining the Unthinkable: Parricide in Early Modern England and Wales, c. 1600-1760," *Journal of Family History* 41, no. 3 (2016): 271-293.

[28] Some versions of the criminal code of Süleyman the Magnificent stipulate that people who beat their mothers or fathers would be chastised, imprisoned and pay a 100 akçe fine. According to some other codes from the same period, there was no *kanun* on this matter and the injunctions of sharia were valid in these cases. Heyd, *Ottoman*, 110, 72.

under their authority by using violence as a means of discipline.[29] However, the extent and conditions of this prerogative, the equivalents of which are also found in different European states before the mid-19th century,[30] were contested among different scholars and schools of Islam. In contemporary scholarship, it is emphasized that all classical scholars of Islamic law saw wifely disobedience (*nushuz*) as a pre-condition.[31] Thus, similar to many European regimes, there was a distinction between violence used for marital chastisement, which was justifiable, and oppression (*zulm*), which was considered to be unjust.

In her examination of gender and Islamic law, Judith Tucker notes that scholars of Islamic law established an equilibrium between wifely and husbandly obligations.[32] Wives were obliged to obey their husbands, and husbands were obliged to provide for them and to treat them well. On the other hand, when there was wifely disobedience (*nushuz*), husbandly obligations were no longer applicable. Thus, in this equilibrium, there was *nafaka* and freedom from non-sexual violence on one side, and obedience on the other. According to the sources examined by Kecia Ali, wifely nushuz was "a wife's sexual refusal, general disobedience, her leaving the house without her husband's permission, not beautifying herself, not bathing or purifying herself," "abandoning her daily prayers, failing to submit herself to her husband, and/or struggling against him."[33]

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[29] Ayesha S. Chaudry, *Domestic Violence and the Islamic Tradition* (Oxford: Oxford University Press, 2013); Kecia Ali, " 'The Best of You will not Strike': Al-Shafi'i on Qur'an, Sunnah, and Wife-Beating," *Comparative Islamic Studies* 2, no. 2 (2006): 143-155; and Tucker, *Women, Family*.

[30] Clark, "Domesticity and the Problem"; Clark, "Humanity or Injustice?"; Drakopoulou, "Feminism, Governmentality; and Monica Burman, "Changes in the Criminal Legal Discourse on Men's Violence against Women in Heterosexual Relationships," *Scandinavian Studies in Law* 54 (2009): 29-50. Also see Elman, *Sexual Subordination*; Barbara A. Engel, *Breaking the Ties That Bound: The Politics of Marital Strife in Late Imperial Russia* (Ithaca: Cornell University Press, 2011); and Wendy Rosslyn and Alessandra Tosi, eds., *Women in Nineteenth-Century Russia: Lives and Culture* (Cambridge: Open Books, 2012).

[31] Tucker, *Women,* 52-53; Chaudry, *Domestic*; and Ali, *Best*.

[32] Tucker, *Women*, 52-53.

[33] Chaudry, *Domestic*, 101.

My examination of the aforementioned *fetva* books shows that there were strong parallels between these fetvas and the outlines of Islamic jurisprudence examined by contemporary gender scholars. In these books, the prerogative of chastisement was framed as an issue related to *tazir* (discretionary punishment) and various acts were seen as conditions that justified the use of physical violence as tazir. Acts like refusal to have sexual intercourse,[34] refusal to regularly practice the daily prayer despite the husband's orders, and going outside the house without the husband's permission were accepted as acts falling under the scope of behavior upon which husbands could use their authority of discretionary punishment.[35] These were some of the grounds that could render marital physical violence *just* in the Ottoman legal regime in the first half of the 19th century.

The framing of the marital prerogative of chastisement as tazir is interesting. Through this framing, drafters and editors of these fetva books had established a parallel between marital authority and state authority because, in Islamic legal discourse, tazir refers to the right of the ruler or qadi to issue punishments for crimes that fall beyond the scope of hadd and qısas crimes.[36] The use of this word for marital chastisement in fetva books indicates that husbands were in fact seen as governors in their own right. This parallel between patriarchal authority and state authority, which was not unique to the Ottoman empire,[37] is important because, throughout the 20th century, masculinist restorators attempting to legitimize gender inequality would often refer to such a parallel. In other words, the notion of parallel orders proved out to be a recurrent trope in the debates over family relations and intimate violence in Turkey.

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[34] *Fetava-yı Feyziye*, 116.

[35] See the "Fi el Tazir" (discretionary punishment) section of *Fetava-yı Abdürrahim*, 105.

[36] Esra Yakut, *Osmanlı Hukukunda Tazir Cezaları* (Ankara: Seçkin, 2014).

[37] For a similar framing that caused much debate in the UK, see Robert Filmer, *Patriarcha and Other Political Works*, ed. Peter Laslett (New York: Routledge, 2017).

As some other regimes of intimate violence of the early modern era,[38] the Ottoman regime also recognized the marital prerogative of restraint. Women's physical movements and social relations could be restrained by their husbands. According to the framework that can be derived from these *fetva* books,[39] women had some inalienable rights of visit. A woman's father or mother could visit her once a week. The relations between a wife and her other relatives, such as her brothers or sisters, could be more restricted but husbands could not formally forbid the annual visits of such relatives.[40] According to these rules and norms, the movements and social relations of women formally depended on the discretion of their husbands, who had an extensive authority to limit their access to other people. In case they breached such bans for going outside, women could be severely punished in line with the discretionary punishment authority invested in their husbands.[41]

Another element of the Ottoman regime of intimate violence was the paternal authority of chastisement. What gives the Ottoman regime its particular character in this regard is not the fact that it recognized the father's prerogative to use violence to discipline his children and his immunity from punishment even in cases when this resulted in death. There was a similar norm in the early modern British regime.[42] On the other

[38] In imperial Russia until the Petrine revolution, upper class women were expected to spend their life in a separate quarter called *terem* and women could be confined by men in positions of authority over them. While abolishing the first practice, Peter himself used this power and confined her half-sister Sofia to a convent. Barbara Alpern Engel, "Women, the Family and Public Life," *The Cambridge History of Imperial Russia*, vol. II, ed. Dominic Lieven (Cambridge: Cambridge University Press, 2006), 306-326. It should be noted that British husbands also had this prerogative until the late-19th century. For elaborations on the Jackson case, the land-mark case that changed the case-law regarding this matter, see Sutton, "R v Jackson," 99-105.

[39] These fetvas were largely in line with Islamic legal doctrine discussed by Tucker; see *Women*, 54.

[40] *Behcet'ül*, 87-88.

[41] *Fetava-yı Abdürrahim*, 105.

[42] According to Hale, in British law of the 17th century, if correction led to the death of the person being corrected, this was considered *per infortunium* and was excusable. Hale specifies that such corrections could be carried out by school-masters, masters in master-servant relationships, and parents and underlines that if correction was not

hand, canonical fetva books suggest that this power was more extensive in the Ottoman case. In Britain, the father had to defend himself arguing that he had used moderate violence and that he lacked the intent to kill. According to some of these fetvas, immunity was categorical in the Ottoman Empire because it was recommended to be granted even in cases where the murder was accepted to be carried out with the intent to kill (*amden katl*).[43]

The secondary literature and primary sources examined for this study do not allow me to determine the extent to which the adoption of the OCC changed the judicial practice concerning marital and parental chastisement and marital prerogative of restraint. In the OCC, non-lethal physical violence targeting family members or violence committed by people in positions of authority (such as masters, teachers, fathers, or husbands) were not organized as specific crimes. This lack of a specific clause was similar to the FCC. However, article 1 of the OCC created a rather particular situation. According to this article, the OCC could not be interpreted in ways that limited or abolished claims based on sharia. This raises the question of whether a shari defense could be or was actually raised by violent husbands or fathers with reference to article 1 because disciplinary physical violence used by such people could also be framed as a well-established claim based on sharia. Technically, a husband who used "moderate" physical violence without a weapon against a disobedient wife could resort to article 1 as a defense, argue that sharia gave him the right to do so and support his case with references to the fetva books that were published by the Ottoman state and Islamic jurisprudence. Here, the question that is not answerable on the basis of the existing secondary literature and this particular research is not the question of whether a husband could use such arguments at a shari court[44] but

moderate, the case could be ruled as murder. Sir Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown,* vol. I (Philadelphia: Robert H. Small, 1847), 473.

[43] *Fetava-yı Abdürrahim*, 326.

[44] Iris Agmon's examination shows that there were husbands who alluded to this framework in shari courts by arguing that their wives were *naşize*, and that " wives' claims

whether such a case involving "minor" violence *could* be taken to Nizamiye Courts that were authorized to implement the OCC or not, and whether Nizamiye Courts could or did apply the stipulations of the OCC to such cases without taking such claims based on the late-Ottoman interpretation of sharia into consideration.

According to Kent Schull's interpretation of the OCC, a case of non-lethal family violence, including bottom-up violence, could not make it to Nizamiye until 1911 in any way because these acts of violence fell under the jurisdiction of shari courts and were beyond the authority of Nizamiye until the 1911 amendment.[45] However, since there are no studies concerning the Nizamiye judicial practice concerning this particular issue[46] and since my primary sources concerning the judicial practice of the OCCa are from the 1910s, I find it impossible to reach a definitive conclusion regarding this matter.[47] However, as I examine later in this chapter, my examination of parliamentary debates indicates that intimate violence, including top-down intimate violence, was already considered to be within the domain of public criminal law before the 1911 amendment. In any case, there is reason to accept that the shari framework, as it was understood by Ottomans, was highly relevant for this regime until the 1910s.

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against domestic violence did not get in-court treatment as consistently as did their claims against violation of their financial rights." Agmon, *Family and Court*, 163.

[45] Kent Schull, *Prisons in the Late Ottoman Empire: Microcosms of Modernity* (Edinburgh: Edinburgh University Press, 2014), 34.

[46] Ebru Aykut's study on female poisoners shows that some forms of intimate violence were clearly considered within the jurisdiction of Nizamiye Courts. The case of non-lethal intimate violence, on the other hand, remains to be studied. Aykut, *Toxic Murder*.

[47] There is also an archival limitation at play here. As noted by Rubin, the actual protocols of these courts are by and large inaccessible to historians. Historians like Rubin have utilized selected decisions published in *Ceride-i Mehakim* (The Journal of Courts) as a resource to study the operations of these courts. Reviewing all issues of this weekly journal for clarifying this issue was a task that I was not able to undertake for this study. For Rubin's analysis on the judicial practice at Nizamiye courts, see Avi Rubin, "From Legal Representation to Advocacy: Attorneys and Clients in the Ottoman Nizamiye Courts," *International Journal of Middle Eastern Studies* 44, no. 1 (2012): 111-127.

One of the most important elements of the Republican regime of intimate violence – unjust provocation mitigation – was not among the stipulations of the OCC. However, two articles of the Code provided grounds for mitigation. According to the 189th article of the Code, acts of killing, beating, and wounding committed in reciprocation were excusable. Thus, there was a special mitigation clause but it could only be used for mitigating the punishments in murder and physical assault cases. Plus, provocation had to be physical. These were similar to the French Code (art. 321).[48] Second, the OCC left no room for judges to mitigate the punishments on the basis of criteria such as the personal characteristics of the criminal or circumstances of the crime. The 47th article of the Code stipulated that unless there was a specific order by the sultan or an explicit provision in the Code, it was unlawful to pardon a criminal or to mitigate the punishment in any way.[49]

As seen in this examination, the OCC introduced some novelties to the regime of intimate violence in the Ottoman Empire but the norms and rules it established were not totally new. This examination of the relevant articles of the Code supports the argument that the adoption of this Code cannot be seen as a matter of transplantation or reception because some of its stipulations were quite different from the French Code. Moreover, some of these particularities –such as the two-victim requirement- limited rather than expanded the applicability of articles designed to ensure the accommodation of some forms of intimate violence in the field of law. On the other hand, the OCC was a highly ambiguous document in many regards and it could easily be read as a text allowing for the continuation of existing judicial practices concerning top-down intimate violence and husband's right to use "moderate" physical violence against a disobedient wife.

[48] "France: Penal Code of 1810," https://www.napoleon-series.org/research/government/france/penalcode/c_penalcode3b.html

[49] Sarkis Karakoç, *Ceza Kanunu - Tahşiyeli* (Istanbul: Şant Matbaası, 1329/1913), 47.

§ 2.2 The Constitutional Revolution

In 1908, there was a constitutional revolution in the Ottoman Empire. The period between 1908 and 1923 was also a period of heightened feminist activism and heated public debates concerning gender relations. In this period, there were extensive debates on gender issues and many feminist activists pushed for the recognition of women's rights. Accordingly, the rise of mass feminist movements in this country can be traced back to this period. In these years, enhancement of state control over sexuality[50] was accompanied by the recognition of women's rights in some fields like education and employment.[51]

The constitutional revolution also changed the structuring and characteristics of the judico-political field. After this major shock, the parliament was re-opened and parliamentarians began to assume important roles in law-making. Standardization of legal education and practice strengthened. Moreover, the state began to send many law students to Europe for further education. In this era, a number of new codes were adopted, the legal regime was highly secularized and some of the existing codes were amended on major terms.

My examination of legal and scholarly texts as well as the decisions of the Court of Cassation indicate that there were some very significant and rather surprising changes in the regulation of intimate violence in this period. A very important element of this transformation was the amendment of the OCC. In 1909, the Italian Criminal Code of 1889 (ICC) was translated to Ottoman upon the order of the Minister of Justice, Necmeddin Molla.[52] The ICC was translated and printed but this move did not lead to the adoption of a new code. However, the OCC was amended on major terms in 1911.[53]

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[50] Çiğdem Oğuz, "Prostitution (Ottoman Empire)," *1914-1918 Online*, January 31, 2017, https://encyclopedia.1914-1918-online.net/article/prostitution_ottoman_empire.
[51] Toprak, *Kadın Özgürlüğü.*
[52] Mehmet Emin Artuk and Ali Rıza Çınar, "Yeni Bir Ceza Kanunu Arayışları ve Adalet Alt Komisyonu Tasarısı Üzerine Düşünceler," in *Türk Ceza Kanunu Reformu*, vol. II, ed. Teoman Ergül (Ankara: Türkiye Barolar Birliği, 2004), 37-85.
[53] For an examination of this major amendment, see Schull, *Prisons*, 28-35.

This amendment brought about changes in norms related to intimate violence and criminal justice. According to the repealed article 47, the power of pardoning or mitigating punishments lied solely with the sultan. The new article gave this power to judges –stating that they could mitigate the punishments within the margins detailed in the article if there were "circumstances rendering discretionary mitigation of the punishment necessary."[54] This amendment opened a formal ground for the personalization of punishments in the post-Tanzimat Ottoman Empire. In the previous period, it was not formally possible to mitigate the sentences of murderers who committed intimate control murders that were not within the scope of article 188 – e.g. when a brother killed a sister for wearing "inappropriate" clothing or talking to strangers. Now, there was a formal ground that could be used for mitigation in such cases. Second, with the 1911 amendment, family burdens for murder were introduced to the OCC. According to this new stipulation, a person who killed an ascendant would be put to death (art. 170).[55] Changing the significance attached to some lives and bodies in terms of lethal violence, this amendment introduced a novel change to the legally established hierarchies among intimates. These two changes can be seen as forerunners of legislative trends that would expand in the years to come.

A very important change introduced by the 1911 amendment was the differentiation of procedures in non-aggravated beating and wounding cases (defined as acts leading to incapacitation for less than 10 days in the Code), on the basis of the relationship between the victim and the perpetrator. According to the amended article 179, prosecution depended on complaint for all such cases. What is interesting is that the amended article made a further distinction between these crimes and differentiated crimes targeting strangers and relatives. For the former group of cases, prosecution could continue after the withdrawal of complaint. However, in cases of beating or wounding targeting relatives and relations (*akarib ve taallukat*), prosecution was strictly tied to insistent

[54] Karakoç, *Ceza Kanunu*, 47.
[55] Karakoç, *Ceza Kanunu*, 100.

complaint: The victim could withdraw her complaint at any stage and this would lead to the preclusion of public trial.[56] With this change, Ottoman law-makers made a distinction between acts of minor physical assault, renouncing the primacy of the role of the state in the prosecution of minor physical assault –especially and extraordinarily when the case concerned violence against relatives. This cannot be seen as the mere continuation of some Ottoman tradition because, embedded in the monopolization of violence by the state in the 19th century, this primacy itself was novel and Tanzimat legislators had not made such a distinction. All in all, the amended Code gave the message that interpersonal violence was something that concerned the state but that the state was not equally concerned about all forms of interpersonal violence: It could look the other way if the injuries were minor and the victim had no complaints. When, and only when, such an act was committed against a relative, the state would forgive and forget if the victim was to withdraw her complaint during the trial.

In this period, various countries were moving away from regimes of intimate violence based on the recognition of masculine prerogatives of violence towards regimes based on the doctrine of privacy.[57] In Sweden, criminal law had formally ceased to recognize the husband's right to chastisement in 1864. However, until 1943, prosecution of non-aggravated physical assault or threat with weapons depended on the complaint of the victim on condition that the crime was committed in a non-public place, like inside a home.[58] What seems to differentiate the Ottoman case in this regard is that the Ottoman legislation made a distinction based on the relationship between the perpetrator and victim rather than the characteristics of the crime scene, and it differentiated a rather large group of people on the basis of intimacy by referring to all relatives and relations rather than limiting this differentiation to violence carried

[56] Art. 179: "Akarib ve taallukat beyninde vukua gelen bu kabil darb ve cerh davalarının takibinden şikayetnamenin itasından sonra dahi müştekinin feragatı hukuk-ı umumiye davasını ıskat eder." Karakoç, *Ceza Kanunu*, 105.
[57] Siegel, *Rule of Love.*
[58] Burman, "Changes in the Criminal," 33.

out by husbands or selected family members. In other words, this legislation did not only differentiate violence within the nuclear family but violence concerning a large group of relations from violence against strangers. As examined in later chapters, this differentiation was abandoned in the early republican era but it would haunt the imaginations of many in the decades to come.

With this amendment, there was also a change in article 188. The amended article reads as in the following:

> If a person sees his wife or one of his other *meharim* whilst committing the abominable act of adultery with someone, and beats or wounds or kills one of them or both of them together he is pardoned; and if a person sees his wife or one of his *meharim* in unlawful bed with someone, and beats or wounds or kills one of them or both of them together he is excused.[59]

According to the new version, those who committed murder upon seeing the victims engaged in adulterous sexual relations would be granted pardon. They would not face any consequences in terms of criminal law. Thus, for a particular group of intimate control murders, full immunity that had been formally abolished in the Tanzimat period was re-introduced to the Ottoman regime after the constitutional revolution. This amendment did not only expand the degree of mitigation by re-introducing immunity for some forms of intimate control murders. It also expanded the applicability of this mitigation because physical assaults committed under such circumstances were also granted exemption. Moreover, the article was re-organized in a way that would allow it to be implemented in cases when only one person was killed or wounded. Thus, the two-victim requirement, which was considered to be a rational and necessary means of preventing the abuse of this stipulation by some jurists like Sami Efendi and which had a very long history reaching back

[59] "Bir kimse zevcesini veyahud diğer mehareminden birini bir şahıs ile fiil-i şeni-i zina halinde görüp de birisini veya ikisini birden darp veya cerh veya katl eylese mafüvdür, ve eğer bir kimse zevcesini veya mehareminden birini bir şahıs ile firaş-ı gayr-ı meşruda görüp de birisini veya ikisini birden darp veya cerh veyahud katl etse mazurdur." Karakoç, *Ceza Kanunu*, 110.

to the classical era, was also abandoned. In sum, this amendment brought about the expansion of the accommodation granted to lethal intimate control violence in the field of law through a legislative change.

In a criminal law commentary written by a young law scholar named Abdullah Vehbi (Yekebaş), who was a lecturer at the Baghdad Law School at the time, there are detailed elaborations on this amendment. According to Vehbi, the new article was more compatible with human condition. Vehbi argued that an act that was carried upon under the influence of a force that could not be resisted could not be a crime. In his opinion, these murderers were killing under such an irresistible influence. In contrast to Sami Efendi, who wrote before the 1911 amendment, Vehbi found the two-victim requirement that was abolished inappropriate. In his opinion, such murderers were behaving in an absolute fury and expecting them to calculate the consequences of their actions and to kill two people could invoke "more than necessary violence" (*lüzumundan fazla şiddet*).[60] Contrary to Sami, Vehbi was of the opinion that the article could also be applied when someone killed a male relative who was having illegitimate sexual relations with a namahrem woman; because, he noted, there was no difference between men and women "except for the division of their obligations" (*vazifelerinin tefrikinden başka*).[61] Another interesting aspect of Vehbi's elaborations is that he legitimized the exemption provided for such killings on the basis of human condition and collective nature of honor:

> Although the term "excused" has been changed with the amendment, it is clear that human sensibility was not taken into account in an appropriate manner with an elaborate and thoughtful analytical examination [during the law-making process]; because … although no one, including the husband, has a right to murder another because of adulterous acts, we shall not forget that groups of relatives *(beyn-el-akraba*) are assumed to have a collectivity in honor (*bir namus-ı müşterek*), and we shall take into consideration

[60] Abdullah Vehbi, *Kanun-u Ceza Şerhi*, 384.
[61] Ibid., 383.

> the non-personal aspects of illegitimate acts, which are (otherwise) quite personal. Because of this, such sexual relations also violate the honor of relatives. The expression excused was replaced with the expression pardoned on these grounds.[62]

While approving the expansion of the degree of exemption with the amendment of 1911, Vehbi was critical of the distinction between adultery and illegitimate bed. He was against the provision of different degrees of accommodation based on this distinction. According to him, this formulation attached the responsibility of judging the degree and illegitimacy of sexual acts he witnessed to the perpetrator. In his opinion, this was impossible because the murderer's judgment would be impaired because of the circumstances. What he suggested was the further expansion of this article to suit the necessities of human condition. In other words, Vehbi demanded full immunity both for murders committed upon adultery and murders committed upon catching two people in an illegitimate bed.

Vehbi's elaborations show that the idea that such murderers should be granted complete immunity was not in the monopoly of conservatives or traditionalists because it is clear that Vehbi himself was not one. He made it explicitly clear that he did not see the difference between men and women as a fundamental one. He did not base his advocacy for full and almost unconditional immunity on a shari ground and actually refuted the claim that husbands had a right to kill their adulterous wives. What he used to back his point were assumptions about human psychology, and social relations and his arguments, especially his use of the notion of irresistible impulse, were very similar to the ones used in France,

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[62] "Mazurdur' tabiri maddede tadil edilmekle beraber hissiyat-ı beşeriyyenin layıkıyla, ince, derin bir fikr-i tedkik ile muhakeme edilmediği pek ala görülüyor. Çünkü bir az evvel ihsas ettiğimiz vech üzere hiç kimsenin, velev ki zevcin, fiil-i zina bahanesiyle diğerini itlafa hakkı yoktur. Lakin bugün beyn-el-akraba bir namus-ı müşterek farz ve kabul edildiğini unutmamak ve bil-netice pek şahsi olan gayri meşru mukarenetlerin, gayri şahsi müzahirini nazar-ı dikkate almak mecburiyeti vardır ki o halde bu mücamaat diğer akrabanın da namusunu şaibedar etmiş olur. Buna mebni mazur tabiri yerine mafüv tabiri konulmuştur." Ibid., 385.

and the US in the same period for supporting similar ideas.[63] What is more, after the mid-19th century, there were also changes in the legal regimes of these countries towards the expansion of accommodation granted to intimate control murders in line with such initiatives.[64] This suggests that legal debates concerning will and criminal responsibility in cases of intimate control murders committed upon adultery in different countries were followed by Ottoman scholars who were inspired by them and that the expansion of accommodation in the Ottoman case at this point in time might be seen as a development that fits a general trend, as a development that was related to the global flows of law and legal thought in this period.

A very important development concerning the global flows of law in this period was the rise of positivist approaches to criminal law. According to the proponents of this school, what had to be taken into consideration in the judicial decision-making process was not the gravity of the crime but the characteristics or "dangerousness" of the criminal. Considered to be honorable men who were victims of fortune, "honor or passion killers" were accepted to be the least dangerous criminals by some proponents of this school like Cesare Lombroso. Lombroso argued that these people were not only "free from the egotism, insensibility, laziness, and lack of moral sense peculiar to the ordinary criminal," but were only "abnormal" due to their "excessive development of noble qualities, sensibility, altruism, integrity," and "affection."[65] According to him, sending such men to prison would not serve any end other than morally corrupting them.[66] In this book, Vehbi had not raised an argument related to dangerousness with regards to this issue. However, considering the fact that he was given the nickname "Lombroso" by his later students at the Istanbul

[63] Hartog, *The Unwritten Law*; and Ferguson, *Gender and Justice*.
[64] Hartog, *The Unwritten Law.*
[65] Gina Lombroso Ferrero and Cesare Lombroso, *Criminal Man According to the Classification of Cesare Lombroso* (New York: The Knickerbocker Press, 1911), 188.
[66] Lombroso, *Criminal Man*, 186.

University who wrote a rhyme about his admiration to the Italian criminologist to their graduation journal,[67] it is probable that his approach to this matter might have also been affected by Lombroso's ideas.

In the post-1908 era, Ottoman legislators did not designate a specific crime related to top-down intimate violence. The elaborations of an Ottoman-Armenian criminal law professor from the early 1910s show that the question of the applicability of the OCC to cases related to disciplinary authority preoccupied the minds of some law scholars of the time. In his book on criminal law, Diran Yerganyan, who taught at the Istanbul University wrote:

> One of the topics that I want to raise here is the issues of whether a parent has the right to physically assault or wound his or her child, or a husband his wife, or a teacher his student, or a master his apprentice and whether such [acts] can be considered as exceptions to the article of the law regarding physical assault and wounding that we examine here. One cannot find any kind of rule in our Code which stipulates that physical assault or wounding committed by these persons would be exempted from punishment. Moreover, when the fact that the Code is applicable to all [Ottoman subjects] … is taken into consideration, acts of physical assault and wounding committed by such persons cannot be considered beyond the scope of rules prescribed in these articles, even if they are committed with the intention of discipline and education. …[S]ome scholars argue that the father has the right to use some violent measures for the purposes of discipline (*autorite paternelle*) – and one even finds a disposition about this in the Hungarian code. On the other hand, no scholar agrees with the argument that the father has the right to wound [his child] in line with this right of discipline. In the same way, no scholar agrees

[67] "*İşte geldi Vehbi Hoca / Lombroso, Lombroso / Elde tespih çeke çeke / Lombroso, Lombroso*" (Here comes Professor Vehbi / Lombroso, Lombroso / Counting his beads in the meantime / Lombroso, Lombroso). The ryhme is quoted in Ali Y. Baltacıoğlu, "Abdullah Vehbi Yekebaş (1890-1965)," *Ankara Barosu Dergisi* 67, no. 1 (2009): 202.

> with the argument that a husband has the right to physically assault his wife (*autorite maritale*). Although our code does not provide an exception for the physical assault of a child by a father, I think if such a case and such a father are brought before a court, the court can reach a decision by taking the father's affection for the child, his morals and behavior, and the details concerning the form, timing, intent and degree of the physical assault into consideration.[68]

Yergenyan's elaborations show that the scholarly debates in European countries were closely followed by some Ottoman law scholars. They also show that the absence of an article concerning the violence of persons in positions of authority in the OCC provided a ground for those who wanted to further the argument that these people were criminally responsible for the violence they exerted on those over whom they claimed authority, regardless of the claims they could raise on the grounds of religion or tradition.

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[68] "Burada nazar-ı dikkatinize arz etmek istediğim mesailden biri de ebeveynin evladını, zevcin zevcesini bir muallimin talebesini bir ustanın çırağını darb ve cerh etmeğe hakkı olup olmadığı ve binaenaleyh bunların darb ve cerh fiilleri tedkik etdiğimiz madde-i kanuniye ahkamına karşı istisna teşkil edebilip edemeyeceği meselesidir. Bunlar tarafından ika edilen darb ve cerh fiillerin müstesna olacağı hakkında kanunumuzda bir güna kayda tesadüf olunamaz. Bilakis kanunumuzun mutlak ibaresine ve mutlakın itlakı üzerine cari olması kaide-i külliye icabından bulunmasına nazaran bunlar tarafından ika edilen darb ve cerh fiilleri, her ne kadar terbiye ve tahsili temin maksadıyla olsa bile bu maddelerin hükmünden hariç kalamaz. Vakıa bazı müellifler terbiye maksadıyla bir pederin bazı şedid tedbirlere müracaat edebilmek hakkını (*autorité paternelle*) teslim ederler hatta Macar kanununda bu babda sırahate bile tesadüf olunur, fakat hiçbir müellif hiç bu kanun-ı terbiye maksadıyla bir pederin cerhe hakkı olduğunu teslim etmez. Zevce gelince, kezalik hiçbir müellif zevcin terbiye maksadıyla zevcesini darb edebilmek hakkını (*autorité maritale*) teslim etmez. Ahkam-ı kanuniyemize nazaran bir pederin evladını darb etmesi istisna teşkil etmez ise de, böyle darb bir peder maznunan mahkeme huzuruna çıktıkda mahkeme onun evladına karşı olan muhabbetini, ahlak ve etvarını, tarz ve zaman ve maksad ve derece-yi darbı nazar-ı dikkate alarak takdir-i keyfiyet edebilir zan ederim." Diran Yerganyan, *Kanun-ı Ceza Dersleri*, vol. 1 (Istanbul: Becidyan, 1326), 44-45.

Before its adoption, the 1911 amendment was discussed at the Ottoman parliament at length. These debates provide important insights concerning this transformation. First of all, these proceedings show that the initiative towards the recognition of family burdens for ascendants was accompanied by a proposal for the inclusion of descendants within the scope of this aggravation. According to this proposal, not only mother or father killers, but also child killers would receive the death penalty. In other words, there would be a major change in terms of the bodily hierarchies established through criminal law and this would represent a break with earlier Ottoman history. Artin Boşgezenyan's proposal met with resistance from other parliamentarians with the argument that there was no *kısas* (retaliation) for such cases in shari law.[69] Although it was rejected, this proposal shows that there was a history behind the expansion of family burdens to include descendants in later years.

According to many parliamentarians, a separate clause was needed to exempt parents and teachers from punishment in cases of minor physical assault because such people were being punished in practice.[70] This challenges the claim that non-lethal family violence entered to the scope of Ottoman criminal law after this amendment. These debates suggest that it was already there. Besides, the speech of the Minister of Justice, Necmeddin Molla, indicates that what happened with this amendment was not the entry of such violent acts to the scope of criminal code but their differentiation from stranger violence and complete exclusion of minor parental violence from the scope of criminal law. According to Necmeddin, tying the prosecution to complaint in such cases would solve the problems raised by those who proposed an exemption clause. If such a measure was adopted, security forces would not have to bring a father to court for "a minor incident" in the name of public justice and spouses would not have to appear in court if they did not want to complain.[71]

[69] *Meclis-i Mebusan Zabıt Ceridesi,* period 1, vol. 5, session 79 (31 Mart 1327/13 April 1911), 276.
[70] Ibid., 289.
[71] Ibid. 291.

I think that this amendment actually rendered small children completely vulnerable against their fathers. Before this amendment, a prosecutor could press charges against a father who beat his child in a way that would not incapacitate him for a long period. After the adoption of this amendment, this was not possible. There had to be complaint. However, since small children are not criminally responsible or legally capable they could not formally submit a complaint. These debates show that this marginalization of parental violence, in other words practical de-criminalization of parental violence against minors below the age of legal capacity, was not coincidental because the speeches of these deputies, and the minister of justice show that this amendment was explicitly made to ensure this outcome.

The parliamentary debates also provide important insights concerning the issues of discretionary mitigation (art. 47) and extraordinary mitigation (art. 188). These debates show that the idea of granting a discretionary mitigation power to judges met with some degree of resistance because of concerns that it would be misused. According to Boşgezenyan, this amendment would bring about the distribution of a power that lied with the sultan to judges who were common men, to "some little sultans" (*bir takım sultan yavrularına*).[72] However, these objections were suppressed with the argument that this was a really necessary stipulation because the judges were feeling remorse especially when they had to issue harsh sentences for murderers who killed in circumstances that judges would also commit murder themselves. What could be a circumstance that would legitimize mitigating a sentence related to murder for which the code stipulated capital punishment, a circumstance which was not self-defense or a retaliation against a bodily attack? Boşgezenyan demanded an example that would convince him. The case of a man wandering in a neighborhood in the company of his *meharim* and killing someone who harassed the woman in his company. This was the only example Asım Bey could think of.[73] Thus, the notions of honor and masculine pride

[72] *Meclis-i Mebusan Zabıt Ceridesi*, period 1, vol. 4, session 67 (15 Mart 1327/28 March 1911), 417.
[73] Ibid., 420.

were used for the justification of this amendment and allocation of discretionary mitigation power to judges. In other words, the first article in modern Ottoman-Turkish history concerning discretionary mitigation, the predecessor of the Republican "good manners mitigation" (*iyi hal indirimi*), was adopted with the precise objective of mitigating the sentences of men who committed honor crimes.

In her examinations on contemporary Turkey, Deniz Kandiyoti argues that the politics of gender are "intrinsic rather than incidental" to the ruling ideology.[74] She suggests that gender relations and intimate violence are not only important for women but also for democracy and social, and political matters that are sometimes seen as isolated from gender matters. The fact that personalization of punishments, a matter that concerned the whole Ottoman population, was actually introduced to the Ottoman legal regime on the grounds of the necessity of providing accommodation for a wider array of honor killings confirms this suggestion. As seen in this instance, gender matters may not only affect women or gender-related issues as such but can lead to drastic changes in terms of the legal regime and the designation of state power.

As I noted while elaborating on Vehbi's approach to the extraordinary mitigation, supporters of total immunity in such cases were not only men who can be considered as traditionalists or people who had a shari approach to criminal law. My examination of parliamentary proceedings supports this conclusion.

The amendment of this article was brought to the parliament by the ministry with the intent of abolishing the two-victim requirement. When the parliament was discussing the issue of self-defense, Mehmet Mahir proposed to include murders committed upon witnessing adultery and illegitimate sexual relations within the scope of self-defense and totally exempting the perpetrators of such crimes from punishment. He also

[74] Deniz Kandiyoti, "Locating the Politics of Gender: Patriarchy, Neo-liberal Governance and Violence in Turkey," *Research and Policy on Turkey* 1, no. 2 (2016): 103-118.

found support from some other deputies like İsmail Mahir but the minister of justice claimed that total exemption would be "too much" (*pek fazladır*).[75]

Despite the efforts of the minister to keep this article out of amendment debates at the parliament in later months, some deputies, including non-Muslim deputies like Yanko Mamopolo, insisted on discussing this issue at the parliament.[76] Some deputies like Mehmet Tevfik proposed to grant full immunity to such murderers on shari grounds. Some others like Ali Cenani Bey framed their support for total immunity on a liberal approach to criminal law, emphasizing that such murders were committed in a state of madness (*hal-i cinnet*) and must have been exempted from punishment because of this. Artin Boşgezenyan also supported Cenani Bey on condition that this right would also be granted to women but this suggestion was opposed by Mustafa Hayri with the argument that women were fraudulent (*hilekar*) by nature.

During these debates, Abdullah Azmi's proposal to add the term finding the victims in a state of *halvet* (being in the same room with a *namahrem* person) in addition to witnessing adultery or finding the victims in an illegitimate bed (*fıraş-ı gayrimeşru*) was rejected with the argument that *halvet* was a moral and not legal issue. According to Seyyit Bey, visiting a neighbor's house was customary in villages and people only had one-room dwellings. What would happen when a neighbor visited another when he was not at home and waited for him while drinking the coffee prepared by his wife? According to Seyyit Bey, adding the term *halvet* to this article would be wrong because this would expand the extraordinary mitigation to such cases. Hasan Fehmi explicitly objected to the abolition of the two-victim requirement arguing that this would be abused and cause more crimes to be committed. Channeling the arguments found in the criminal law commentary of Sami Bey, he noted that

[75] *Meclis-i Mebusan Zabıt Ceridesi*, period 1, vol. 3, session 51 (24 Şubat 1326/9 March 1911), 573-574.
[76] *Meclis-i Mebusan Zabıt Ceridesi,* period 1, vol. 5, session 79 (31 Mart 1327/13 April 1911), 299.

a man could find a woman to trick one of his enemies and kill him after creating the conditions of this excuse.

Only Mehmet Ali Bey, a former judge and an independent deputy from Canik,[77] objected to the idea of total immunity, stating that there was nothing in sharia that required exempting these people from punishment. Against the objection that the government had no right to be involved in this matter because this was allowed by sharia, Mehmet Ali noted that such an approach was unacceptable because it would invite anarchy and chaos.[78] If people would be allowed to kill one another with impunity, what was the point of having a government? (*O halde hükümetlere ne lüzum var*?). This question was at the core of his objections.

According to the minister of justice, there was no way an honorable man (*namus sahibi adam*) could show patience and self-restraint upon witnessing an act of adultery between one of his *meharim,* and another man and there was nothing against sharia in excusing rather than pardoning crimes related to *illegitimate bed*, crimes committed upon circumstances that did not fulfill the requirements of adultery (*zina*). And the amended article 188 took its shape after these debates.

These debates show that the expansion of the scope of this mitigation in 1911 was a legislative change that happened after intense debates and disagreements. They also show that some early Republican developments -like the inclusion of women in the group of perpetrators who could benefit from this article- had not emerged out of the blue. Second, it was assumptions about human psychology and nature that provided a common ground for all people who explicitly supported this expansion. There was a great variety among the proponents of total immunity. Muslim deputies who emphasized the sanctity of sharia, non-Muslim deputies like Boşgezenyan who supported formal equality, Ali Cenani who had a classical/liberal approach emphasizing free will, and the Minister of

[77] Mehmet Ali Bey was elected as a CUP candidate but left the CUP in 1910. See Aykut Kansu, *1908 Devrimi* (Istanbul: İletişim, 1995), 398.

[78] "Öyle ise ahali kalksın. Dünyayı birbirine karıştırsın. Olur mu böyle şey? O halde Hükümetlere ne lüzum var?" *Meclis-i Mebusan Zabıt Ceridesi,* period 1, vol. 5, session 79 (31 Mart 1327/13 April 1911), 302.

Justice Necmeddin Molla had all supported the idea of full immunity. This indicates that this expansion was not a concession to traditionalists or reactionaries but a change that happened thanks to this larger support base and the rise of psychological approaches to criminality.

These debates were very much related to the monopolization of violence by the state. Did the state have a right to punish these people? Or was there another source of distributing violence that lied beyond the state? These questions were at the heart of the dispute between Mehmet Ali, the only deputy who objected to total pardon, and Mehmet Tevfik who argued that the government had no right to meddle with such cases. I think this instance shows us that monopolization of violence can be a contested process and might not be grasped in full in isolation from the issue of gender violence. As examined in other chapters, this issue would often appear in such debates over intimate violence and legal elites pushing for limiting the mitigations provided for such crimes would often refer to this matter and to the necessity of establishing a monopoly of violence.

Until the 1910s, there was not a civil code that regulated family relations in the Ottoman empire. This situation partly changed with the adoption of the Decree Law on Family (DLF) in 1917.[79] The DLF was a legislation that recognized the existence of multiple legal orders in the Ottoman Empire. It had different sections for Jews, Christians, and Muslims. The section concerning the Muslims was prepared through the hybridization of rules observed in different schools of Islam. Until 1917, it was difficult for non-Maliki Muslim women in the Ottoman Empire to get a divorce upon "unjust" beatings or anal marital rape committed by their husbands. The courts could decide that the beating, wounding or anal rape was unjust, and punish the husband but unless the husband expressed consent to divorce in some form, judges would not issue a divorce.[80] The DLF changed the rules of the game regarding divorce, because it brought

[79] For a critical examination of this law, see Tucker, "Revisiting Reform," 4-17. For the modern Turkish transcription of this legislation, see Ali Öge, ed., *Osmanlı Hukuk-ı Aile Kararnamesi* (Konya: Mehir Vakfı, 2017).
[80] Özkorkut, *Koca Şiddetine Karşı*.

about a concept of divorce that was alien to the Hanefi jurisprudence by institutionalizing the practice of divorce via the arbitration of family council, which was well-established in Maliki jurisprudence.

The DLF also brought about stipulations related to wifely disobedience. Rather than adopting a new approach, the drafters of the DLF had followed the *nafaka* and freedom-from-violence vs. disobedience equilibrium approach of the classical jurists. In article 101, it was explicitly stated that disobedient (*naşize*) wives could not claim nafaka.[81] In article 73, there was a more ambiguous formulation: "The husband is obliged to treat his wife well, the wife is obliged to obey her husband in all matters that are permitted."[82] This article could be interpreted in two ways. First, one could argue that the first and second parts of the sentence were independent and reach to the conclusion that this article obliged husbands to treat their wives well *and* wives to obey their husbands. However, one could also read this as a conditional stipulation and reach to the conclusion that this article obliged husbands to treat their wives well, *as long as* their wives obeyed them. Because the fetva books published by the Ottoman state and various classical fıqh books framed this issue along the freedom from violence vs. disobedience axis assuming a conditional relationship, it is highly probable that this textual formulation was intentional.

At this point, I want to note that while the term *nushuz* had its roots in Islamic legal discourse and while the *nafaka* and freedom from violence vs. obedience equilibrium was well-established in Ottoman law, this was not a distinctively Ottoman approach to the regulation of household relations. For example, until 1938, article 213 of the French Civil Code stipulated that "the husband owes protection to his wife; the wife owes obedience to her husband."[83] A similar framing is also found in im-

[81] Öge, *Hukuk-ı Aile Kararnamesi*, 44-45.

[82] "Zeyd zevcesine hüsn-i muaşerete, zevce dahi umur-ı mubahanede zevcine itaata mecburdur." Ibid., 37.

[83] André Tunc, "Husband and Wife under French Law: Past, Present, Future," *University of Pennsylvania Law Review* 104, no. 2 (1956): 1069.

perial Russia where woman's responsibility to obey her husband was established as a legal duty in Catherine II's Statute on Public Order of 1782 and in the 1832 Digest of Laws.[84] Thus, the Ottoman stipulations concerning wifely disobedience cannot be seen as exceptional.

§ 2.3 The OCC and the Judicial Practice at the Top

How were the relevant articles of the OCC interpreted in practice? What were the positions of jurists on intimate relations and bodily hierarchies? Were there differences between the judicial interpretations of this era and the Republican period? In order to answer these questions, I reviewed the relevant parts of the *Mecmua-i Mukarrerat-ı Temyiziye*, a periodical devoted to the decisions of the Ottoman CCa, and found various decisions concerning murders committed upon illegitimate sexual relations and non-lethal intimate violence.

As examined in the previous section, the legislators had introduced new rules in 1911, differentiating non-aggravated wounding and beating against relatives and relations from other cases and rendering public prosecution in such cases dependent on insistent complaint. The decisions of the OCCa indicate that this was interpreted as a "right to forgive" (*hakk-ı af*) by the high court judges.[85] However, this was not accepted to be an unlimited right in the OCCa practice. According to these decisions, relatives could withdraw their complaints during the trial but could not "forgive" after the finalization of the decision at the stage of appeals.[86]

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[84] Technically, the legal situation in Russia was worse because, in the Russian case, the legally required wifely obedience was stipulated to be "unlimited." In the Ottoman case, on the other hand, there was a limit and the law-makers had made it explicitly clear that wives were not obliged to obey their husbands in case the latter raised illegitimate requests. For the Russian regulations concerning the matter, see Michelle Lamarche Marrese, "Gender and the Legal Order in Imperial Russia," in Lieven, *Cambridge History of Imperial Russia*, 336-337.

[85] *Mecmua-i Mukarrerat-ı Temyiziye*, vol. 2, case no. 90 (1328/1912-1913), 158.

[86] Ibid. Also see *Mecmua-i Mukarrerat-ı Temyiziye*, vol. 2, case no. 380 (1328/1912-1913), 703.

The 1911 amendment had paved the way for the mitigation of sentences in cases that did not fulfill the requirements of extraordinary mitigation. The decisions of the OCCa show that this way was utilized in practice for ensuring accommodation for various cases of intimate control murders. The new article had given the judges the authority to mitigate the punishments when there were conditions that necessitated mitigation. However, the Code did not define what these conditions were. Thus, the legislators had left this issue to judicial interpretation. These decisions show that social relations between *namahrem* women and men, suspicion that a man and a woman were having sexual relations, or transgressions of gender norms by women (such as marrying without the permission of male relatives) were considered as conditions that necessitated mitigation by the OCCa.

In one of these cases, a man named Haydar was killed by a man named İsmail in Ankara.[87] The crime was considered as willful killing without premeditation and İsmail was sentenced to heavy labor (*kürek*) for 15 years. During the trial, İsmail raised the argument that he had committed this murder for protecting his *ırz*, because Haydar had been communicating with his wife. At the level of lower appeal (*istinaf*), his defense was not accepted and the case was transferred to the OCCa. The OCCa reversed this decision, underlining that article 188 could not be applied to this case but that the situation required mitigation on the basis of article 47.

In another case, a man named Mehmed had killed his wife, Elif, and a man named Ali.[88] He argued that he had committed these murders due to his suspicion that his victims had committed adultery (*fiil-i şeni-i zinada bulundukları zehabına mebni*) but his defense was not accepted by the lower court and Mehmed was sentenced to heavy labor for 15 years. The decision was reversed by the OCCa on two grounds. First, Mehmed had killed two people and his sentence must have been aggravated because of this. Second, his sentence had not been mitigated by the lower

[87] *Mecmua-i Mukarrerat-ı Temyiziye*, vol. 4, case no. 170 (1330/1914-1915), 290-291.
[88] *Mecmua-i Mukarrerat-ı Temyiziye*, vol. 4, case no. 488 (1330/1914-1915), 850-851.

court, and the OCCa decided that suspicion of a sexual affair should be considered as a mitigating circumstance.

In another case, a man named Eyüp had wounded his sister Zeynep, and Zeynep's brother-in-law Mehmet with the intent to kill.[89] Zeynep had married without Eyüp's permission and Eyüp was accepted to be "offended" (*münfail olarak*) by this transgression. The local court had applied article 188 which stipulated extraordinary mitigation to this case, sentencing Eyüp to heavy labor for four years. The OCCa reversed this decision, underlining that this case could be mitigated on the basis of article 47 but not on the basis of article 188.

As seen in these cases, the legal space that was opened in 1911 for mitigating the punishments of those who killed in circumstances that were not within the scope of article 188 was utilized for the accommodation of masculine violence in the field of law. In other words, this means of personalizing punishments, which was accepted in the parliament with references to honor and masculine pride, was indeed used for the provision of accommodations for a wider array of intimate control murders.

Some of the cases published in this periodical were related to the application of the 188th article and they show that the OCC had a very limitative interpretation concerning this exemption. In fact, there was not a single case in which the OCCa approved the use of the extraordinary mitigation article. Every such decision was reversed.

In one of these cases, a man named Dimitri had killed a man, Nikola, whom he suspected to have sexual relations with his mother.[90] The Selanik court had sentenced Dimitri to imprisonment for a year, applying the 188th article. After this imprisonment term, he would be released but kept under surveillance for another five years. In the OCCa decision, it was underlined that Dimitri had committed the murder under the influence of gossips that his mother and Nikola were having sexual relations. In the day of the murder, Nikola had not found his mother at home but he had found Nikola around his mother's house and killed him with an axe.

[89] *Mecmua-i Mukarrerat-ı Temyiziye*, vol. 1, case no. 320 (1327/1911-1912), 598.
[90] *Mecmua-i Mukarrerat-ı Temyiziye*, vol. 1, case no. 24 (1327/1911-1912), 40-42.

It was noted that Nikola's pants were untied when Dimitri found him. The prosecutor objected to this decision, arguing that there was no proof that the murder was committed upon witnessing illegitimate sexual relations and demanded a re-trial. As the court overruled this objection and insisted on its former decision, the case was appealed by the prosecutor. The OCCa reversed the decision of the Selanik court, underlining that article 188 could only be applied if two people were caught whilst they were having sexual relations. According to the OCCa, gossips and catching a man around a house –even if his pants were untied– were not enough to benefit from this article.

In a similar case, a man named Hamid was killed by a group of relatives.[91] In the decision of the lower court, it was noted that Hamid had an affair with Külfe, who was married to one of the attackers. Two of the attackers were sentenced to one year in prison due to the application of the 188th article, while the others were acquitted for lack of evidence. In its reversal decision, the Court of Cassation emphasized that the murder was committed in front of the house rather than inside the house and that the murderers had not directly witnessed sexual intercourse between Hamid and Külfe. According to the OCCa, the 188th article was not applicable to the case. On the other hand, the court underscored that the murder was related to the violation of *ırz*, which required some mitigation, noting that the sentence should be mitigated in line with the 47th article of the Code.

In another case, a woman named Leyla was killed by a group of men led by his husband Hafir.[92] In the OCCa decision, it was noted that Leyla was known to prostitute herself. In the night of the murder, Leyla was found in a carriage in the company of *namahrem* men by his husband and his friends, who attacked her. She had given an official statement before her death due to her injuries. The local court of Kerbela had classified this case as a case of physical assault rather than murder and sentenced Hafir to imprisonment for six months, applying article 188. The rest were acquitted due to insufficiency of evidence. The OCCa overruled this decision. According to the OCCa, being found in the same carriage with

[91] *Mecmua-i Mukarrerat-ı Temyiziye*, vol. 3, case no. 271 (1329/1913-1914), 496-498.
[92] *Mecmua-i Mukarrerat-ı Temyiziye*, vol. 3, case no. 59 (1329/1913-1914), 111-112.

namahrem men could not be considered as 'being found in illegitimate bed', and article 188 could not be applied to the case. In this case, the claim that Leyla was prostituting herself was accepted as a fact by the high court but this was not seen as something that necessitated the implementation of article 188.

In another case reversed by the Court of Cassation, a woman named Ayşe was killed by a group of men, led by her brother Ahmed.[93] In the decision, it was noted that Ayşe had illegitimate sexual relations with a man named Durmuş for some time and that she had been divorced by her husband because of this affair. She had continued her relations with Durmuş after the divorce. On the night of the murder, Durmuş had come to the house where she had been dwelling. Durmuş's visit had been followed by an attack carried out by a group of men led by Ayşe's brother. This group had held the house under gunfire and also attacked Ayşe and Durmuş with other weapons. Ayşe was killed as a result of this attack. The local court had pardoned Ayşe's brother Ahmed in line with the 188th article, while acquitting the others. In its reversal decision, the Court of Cassation emphasized that Ayşe was living in a house separate from his brother, that the attack was carried out at nighttime with weaponry and in a way that should be considered as a violation of the inviolability of domicile. The Court also emphasized that Ahmed and other attackers had not informed the village headman about the situation. Another detail emphasized in the decision was the fact that Ayşe's body was reported to be fully clothed in the autopsy report. Moreover, the lower court had not investigated whether Ahmed's roof allowed one to see whether someone entered Ayşe's house.

These decisions are very important because they indicate that the approach of the OCCa to such intimate control murders was different from the approach of the Republican CCa in some very significant respects. In these decisions, there were some limitative conditions the lack of which rendered the extraordinary mitigation inapplicable.

An important limitative condition that is found in the case of Ayşe's murder concerns the interpretation of the word *mahrem*. In this decision,

[93] *Mecmua-i Mukarrerat-ı Temyiziye*, vol. 2, case no. 257 (1328/1912-1913), 464-466.

the word *mahrem* was not interpreted in its larger meaning of shari kinship but as a word that defines women who live in one's household, as women under one's *manus* or dominion. In this case, it was not disputed that Ayşe was Ahmed's sister, this was accepted as a fact. Thus, she was Ahmed's *mahrem* in terms of kinship but the decision indicates that she was not accepted as his *mahrem* in terms of the applicability of this article because she had her own household and was not living under his roof. And this was presented as one of the grounds for the non-application of the 188th article. Such a limitative condition was not an element of the judicial decision-making practice of the Republican CCa. In this latter period, being a brother was accepted to be enough and the Republican CCa did not make a distinction between women who had their own households and women who cohabited with their attackers in its implementation of the extraordinary mitigation article.

Another important element of the OCCa practice is the direct witnessing requirement. According to the OCCa, one had to see two people having sexual relations to benefit from this exemption. For example, in the decisions concerning the murders of Hamid and Nikola, catching a stranger around a house was accepted to be insufficient for the application of this exemption. In the latter case, it was established that Nikola's pants were untied at the time of the murder, that there were gossips and rumors, and that he was found around Dimitri's mother's house. For the OCCa, these were not enough for the implementation of article 188. Dimitri had not seen his mother and Nikola while they were having physical sexual relations. Thus, he could not benefit from this mitigation. This direct witnessing requirement had some pre-19th century predecessors because there are *fetva*s included in the *fetva* books published by the state which accept that catching two *namahrem* people talking or sitting somewhere together without an explicit sign of adultery would not be enough to benefit from exemption from punishment. Moreover, some *kanunname*s from the classical period also frame this extraordinary exemption as dependent on catching two people upon the act.[94] Thus, this limitative norm seems to have long history. As it is examined in later chapters, the

[94] Heyd, *Studies*, 98.

direct witnessing requirement was shelved after the late-1930s. There are decisions given by the Republican CCa, in which finding a man in the garden of a house, finding two people walking in opposite directions in a rural place, or claiming that an unidentified person was seen exiting the domicile were accepted to be enough for the implementation of the extraordinary mitigation. These decisions from the late-Ottoman period show that this wide interpretation that I found in later periods was not a remnant of the past because, considering the late-Ottoman judicial practice, there was a quite different past than what might be imagined on the basis of this later judicial practice.

Finally, according to the OCCa, prostitution was not a ground for the implementation of article 188. In the decision concerning Leyla's murder, it was not disputed that Leyla was prostituting herself. The court accepted this to be a fact. However, this was not considered to be enough for the application of the extraordinary mitigation because her husband had not caught her having coitus with another man. He had found her in the same carriage with *namahrem* men. Thus, the direct witnessing requirement was not fulfilled in this case. According to the OCCa, even if it was established as a fact that Leyla was prostituting herself, extraordinary mitigation could not be applied in the absence of direct witnessing to sexual acts. As it is examined in Chapter 4, in the late-1930s, the approach of the Republican CCa to the matter was different from the OCCa. In this later period, the claim of prostitution was considered to be enough for the implementation of extraordinary mitigation.

§ 2.4 Conclusion

In the late-Ottoman regime of intimate violence, there were various norms and rules that provided accommodation for intimate violence in the field of law but there were also limitations. There were many differences between the Ottoman regime and the regimes in some Western European countries but there were also similarities in some regards and not all norms that seem to be particular to the Ottoman case created the effect of ensuring immunity or under-sentencing.

There were various changes in the outlines of this regime after the mid-19th[h] century. In terms of legislation, there was an important degree of dynamism. In this process, the ground on which intimate control murders were justified began to shift towards psychology and human nature. Bottom-up lethal intimate violence began to be differentiated and punished more heavily than murders targeting strangers. Thus, family burdens made their entry to the post-Tanzimat regime of intimate violence. These developments became even more pronounced in later years, and this suggests that there was not a clean break between the late-Ottoman and early Republican periods.

In terms of non-lethal intimate violence committed by people like husbands and fathers, there was a serious degree of ambiguity in the late-Ottoman regime. On the one hand, there were some law scholars like Diran Yergenyan who implied that, in terms of the applicability of the OCC, there was no difference between the case of a husband who beat his wife and a stranger who beat another stranger. On the other hand, there were legislators who squeezed the *nafaka* and freedom from violence vs. obedience equilibrium into the Decree Law on Family. Moreover, the 1911 amendment had established minor physical assault against relatives as a crime subject to rules different than stranger violence and practically de-criminalized non-aggravated forms of parental violence committed against small children. As examined in the next chapter, the Republican legislators would adopt a different approach to this matter and introduce specific stipulations concerning such forms of violence.

The 1911 amendment changed the designation of bodily hierarchies among intimates. In various regards, the amendment expanded the accommodation that would be provided for different forms of intimate violence. Extraordinary mitigation became applicable to more cases and complete immunity was re-introduced to the Ottoman regime. A particular form of non-lethal intimate violence, parental violence against small children, was practically and intentionally decriminalized. These changes do not fit well into the existing accounts of this era because this was an era in which women's rights in different fields like education and employment were recognized, a period when women's activism was paramount.

I think this misfit shows that the regulation of intimate violence may change in surprising and unexpected ways and times and that there does not have to be a match between developments in different aspects of gender regimes. Second, the Ottoman-Turkish case is not the only case where recognition of women's rights in some areas and heightened women's rights activism was accompanied by changes ensuring greater accommodations to intimate violence. In his examination of the emergence of the unwritten law defense in the USA, Hartog highlights a similar overlap in the US case and interprets the expansion of the accommodation granted to these murders as a *response* to the recognition of women's rights in different fields.[95] I think a similar dynamic might have been at play in the Ottoman context.

As examined in Chapter 6, the re-rise of mass and autonomous feminist movements in the 1980s was also met with an expansion of accommodation provided for intimate violence. The fact that there was such an overlap in both of these breakthrough epochs in terms of feminist movements indicate that crisis in the established gender order may be met with the expansion of leeway granted to male violence.

Both the Tanzimat and the Constitutional Revolution of 1908 were major shocks for the Ottoman Empire. What is more, both of these shocks entailed major transformations in terms of the structuring of the judico-political field. The fact that there was a temporal overlap between these structurings and major changes in the regime of intimate violence highlights the potential of such major events for leading to dramatic changes in terms of the regulation of male violence.

In Chapter 4, I show how direct and indirect references to the late-Ottoman period, along with various other arguments, were used for the transformation of the regime of intimate violence towards the expansion of accommodation granted to masculine violence in the field of law after the mid-1930s. In that period, the rules that were remembered and brought to the table as the Ottoman legacy that should be followed were exclusively those which ensured such accommodations. On the other

[95] Hartog, *The Unwritten Law*.

hand, limitative norms in the Ottoman regime, some of which were seemingly followed for centuries, were soon "forgotten" by everyone: As far as I was able to trace, not a single criminal law scholar, jurist or politician would object to these expansions by bringing up the Ottoman legacy.

Finally, this examination shows that the OCCa was pretty limitative in its approach to intimate control murders. The decisions of the OCCa from the 1910s show that the court interpreted the discretionary mitigation power given to judges in 1911 as a power that should be used for granting sentence reductions for a variety of crimes related to honor, sexuality and masculine control. However, the court was not attentive to the pleas of murderous men who wanted to benefit from the exceptional mitigation article. Moreover, what produced the effect of limiting the applicability of this article was not the text of the OCC. By 1911, the OCC was astonishingly accommodative. It was the approach of the OCCa and the norms and rules, some of which seem to have roots in the pre-Tanzimat era, the court insisted on applying that limited the legal accommodation granted to intimate control murders. Thus, in terms of the judicial decision-making at the highest level, the Ottoman regime was quite different from what might be imagined on the basis of later judicial practice, and the text of the OCC itself. This shows that legal interpretation and judicial-decision making were very important in shaping the regime of intimate violence in the country -also in the late-Ottoman era.

3

So Familiar, So Strange: The Regime of Intimate Violence in the Early Republican Era

After the First World War, the Ottoman Empire collapsed. The Turkish Republic was one of the successor states of this empire. The political elite of the new regime initiated an extensive reform program, adopting various new legal measures, including the Turkish Civil Code (the TCiC) and Turkish Criminal Code (the TCC), which both stayed in force until the 2000s. In the years between the establishment of the Republic and the mid-1930s, in other words in the early Republican era, almost every aspect of life began to be regulated through new norms and measures: There were changes in the legally standardized units used for measuring time and weights, Turkish language began to be written with a new script, women's political rights were recognized and family relations started to be regulated through a code for the first time. Thus, much changed in a relatively short period of time in terms of legislation.

Since the 1980s, there has been debates over the characteristics and legacy of this period with regards to gender relations in Turkey. At first, there were challenges to the official discourse according to which "the woman question" (*kadın sorunu*) had been resolved in Turkey with the abolition of *sharia* and reception of Western laws. In one of these initial challenges, Deniz Kandiyoti underlined that despite the recognition of women's rights in a number of areas, early Republican reforms had not

brought about the liberation of women because there were scant changes that would undermine the material basis of patriarchy.[1] Yeşim Arat suggested that the failure of Kemalism in bringing about all-encompassing changes in gender relations could not be explained with the formal nature of these reforms and social resistance to them, and that the internal contradictions of the Kemalist project had to be taken into account. According to Arat, this period was marked with two contradictory trends promoted by state institutions: On the one hand, women were encouraged to participate in public life; on the other hand, private life was organized in a hierarchical manner and "primordial male-female relations and the moralities that regulated gender relations could continue with little interference from the state."[2] A similar point is highlighted by Ayşe Kadıoğlu who notes that Republican women were expected to become both symbols of modernity and guardians of tradition and to find a middle way between being traditional (or *allaturca*) and excessively modern like Western women who declared that they were entitled to sexual freedoms.[3] According to Serpil Sancar, sexuality was denied to Republican women because "sexual puritanism," which is found in various literary products of this era, formed the backbone of the norms of sexual morality, and modernity and this emerged as the main semantic difference between Turkey and the West.[4]

Another early criticism of the official discourse was raised by Şirin Tekeli in the 1980s. Tekeli highlighted the instrumental function of the gender-related early Republican reforms and noted that these reforms

[1] Kandiyoti, *Cariyeler, Bacılar,* 192.

[2] Yeşim Arat, "The Project of Modernity and Women in Turkey," in *Rethinking Modernity and National Identity in Turkey*, ed. Sibel Bozdoğan and Reşat Kasaba (Seattle: University of Washington Press, 1997), 105.

[3] Ayşe Kadıoğlu, "Cinselliğin İnkarı: Büyük Toplumsal Dönüşümlerin Nesnesi Olarak Türk Kadınları," in *75 Yılda Kadınlar ve Erkekler*, ed. Ayşe Berktay Hacımirzaoğlu (Istanbul: Tarih Vakfı, 1998), 96.

[4] Serpil Sancar, *Türk Modernleşmesinin Cinsiyeti: Erkekler Devlet Kadınlar Aile Kurar* (Istanbul: İletişim, 2012), 207.

functioned as a means of portraying new Turkey as a Western style liberal country.[5] According to the official discourse, there was a women's revolution (*kadın devrimi*) in this period. In contemporary gender scholarship, this term often appears in quotation marks.[6]

The idea that this period strongly impacted the future of gender relations in Turkey has been very prevalent in Turkish academia. As noted by Ayşe Gül Altınay, "the Turkish Republic was founded in 1923 and the rest of the 1920s, together with the early 1930s, are seen by many as the formative years of Turkey."[7] Analyzing the relations between gender, nation-building, and militarism in Turkey, Altınay suggests that it might be fruitful to analyze nation-building and state formation in Turkey as a process that went through 'rounds of restructuring' rather than focusing on one critical period of formation on an exclusive basis.

In this chapter, I analyze the transformation of the regime of intimate violence in this period by focusing on legal and judicial changes and discourse, and trace how this process of radical legal reforms affected the positioning of intimate bodies in relation to one another. I show that the reforms of this period actually challenged the fundamentals of "dominant gender values,"[8] included an actual sexual liberation aspect, and brought about radical transformations in the regulation of intimacy, intimate relations, and violence. From a feminist perspective, the early republican regime was deeply problematic in many regards and some of the most important norms and discourses that shaped the transformations of this regime in later decades emerged in this period. However, I show that the developments of this period had not overdetermined what was to come.

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[5] Tekeli, *Kadınlar*.

[6] Sancar, *Türk Modernleşmesinin Cinsiyeti*, 13.

[7] Ayşe Gül Altınay, *The Myth of the Military Nation: Militarism, Gender, and Education in Turkey* (New York: Palgrave Macmillan, 2004), 52.

[8] Ayşe Saktanber, "Kemalist Kadın Hakları Söylemi," *Modern Türkiye'de Siyasi Düşünce: Kemalizm*, ed. Tanıl Bora and Murat Gültekingil (Istanbul: İletişim, 2009), 326.

§ 3.1 Institutional Changes

The war, the collapse of the empire and the establishment of the Republic were all major shocks for the Turkish state and this was clearly a critical juncture for Turkey. In this process, there were also changes in the institutional fields examined for this study. After the rise of the nationalist movement, an alternative parliament was established in Ankara and an alternative Court of Cassation was established in Sivas.[9] Thus, after 1920, there were two competing governments and two competing high courts. This duality disappeared after the recognition of the Ankara government as the sole legitimate government in the international arena.

Many members of the initial Sivas court, including its president, were jurists from appeals courts around Anatolia. However, there were changes in this make-up in later years. After 1922, some members of the OCCa also joined the Sivas CCa. These include Ömer Lüftü (Salman), the former president of the civil law chambers of the OCCa, İhsan (Ezgü/İzgü), a former OCCa judge, and Yusuf Nihat (Perker/Berker), a former OCCa prosecutor.[10] Despite debates and criticisms concerning their appointments, Perker and Ezgü quickly acquired very high-ranking positions in the Republican CCa and stayed in their new posts for record times: Ezgü is the longest serving president of the Republican CCa (1925-1943), and Perker is the longest serving chief prosecutor (1923-43). There were also CUP affiliated politicians among the members of the new court. For example, Fuat Hulusi (Demirelli) was appointed as a CCa judge

[9] Osman Köksal, "Sivas Tarihine Derkenar: Yeni Türkiye'nin İlk Yüksek Mahkemesi Sivas Muvakkat Temyiz Heyeti," *Sivas Cumhuriyet Üniversitesi Edebiyat Fakültesi Sosyal Bilimler Dergisi* 2, no. 2 (2019): 151-174.

[10] The appointments of Yusuf Nihat (Perker) and İhsan (Ezgü) to the Republican CCa caused some uproar in the parliament because a parliamentarian, Mazhar Müfit (Kansu), claimed that the former was a prosecutor in a trial where Mustafa Kemal was sentenced to death for treason and the latter had taken an active role for the prosecution of high-ranking CUP members involved in crimes committed against Armenians during the war. *TBMM Zabıt Ceridesi* period 2, vol. 3, session 52 (12 Teşrinisani 1339/12 November 1923), 365-366.

in the 1920s.[11] He was a long-time CUP parliamentarian,[12] a member of the OCC amendment commission of 1911, and a member of the drafting commissions that prepared early Republican reform codes including the TCC and the TCiC. Tevfik Nazif (Arıcan) a former judge, CUP deputy and ministry of justice investigator was also among the members of the early Republican CCa.[13] It should also be noted that, among the judges of the new CCa, there were also jurists trained solely on Islamic law and served in *shari* courts in different capacities.[14] Thus, the early Republican CCa was not a homogenous place in terms of the educational backgrounds or former affiliations of its members.

In this period, there were also changes in the scholarly field. Two professors of substantive criminal law, Diran Yerganyan and Krikor Zohrab, were Ottoman Armenians. They were both deported and died in this period.[15] In the 1910s, Tahir (Taner)[16] and Baha (Kantar) [17] were Ministry of Justice bureaucrats. They were among the first group of law students sent to Europe for further education upon graduating from the law school

[11] Necati Tonga, "Fuat Hulusi Demirelli," in *Türk Edebiyatı İsimler Sözlüğü*, http://teis.yesevi.edu.tr/madde-detay/demirelli-fuat-hulusi.

[12] Kansu, *1908 Devrimi*, 340.

[13] In 1931, Tevfik Nazif was transferred from the CCa to the ministry as the undersecretary of the MJ. Başkanlık Cumhuriyet Arşivi (Republican Archive of the Presidency, BCA): 30.11.1/67.35.12, "Kararname," 12 December 1931.

[14] An example of these is Ali Himmet (Berki). A graduate of the Mekteb-i Kuzat, Berki served as a kadı for some time before being appointed to the CCa. He served as the president of the 2nd Civil Law Chamber for two decades. İsmail Doğanay, "Kaybettiğimiz Büyük Hukukçu Ali Himmet Berki'nin Ardından," *Yargıtay Dergisi* 2, no. 2 (February 1976): 149.

[15] Zohrab was assassinated, Yergenyan died in destitute. Teodik (Teotoros Labdjindjian), *11 Nisan Anıtı*, ed. Dora Sakayan (Istanbul: Belge, 2010).

[16] Tahir (Taner) was the general director of criminal affairs at the Ministry of Justice between 1913 and 1918 when he was appointed to the law school. Sulhi Dönmezer, "Önsöz," in *Tahir Taner'e Armağan* (Istanbul: Istanbul Üniversitesi Hukuk Fakültesi Yayınları, 1956), VII-VIII.

[17] Baha (Kantar) was the director of legal affairs at the General Directorate of Security. Faruk Erem, "Ord. Prof. Baha Kantar," *Ulus*, December 8, 1955, 1. http://dergiler.ankara.edu.tr/dergiler/38/330/3326.pdf

after the constitutional revolution.[18] As many other students from this initial group of twenty, which included Mustafa Reşid (Belgesay), Samim (Gönensay), Feyzi (Daim), Mehmed Kazım (Berker), both Kantar and Taner became very influential actors in the field of law in the Republican era. Towards the end of the war, Kantar and Taner were appointed to the Istanbul law school by the ministry. Taner became the chair of criminal law at this institution and Kantar played an important role in the establishment of the Ankara Law School and served as the chair of criminal law at this institution for many years. During the war, Abdullah Vehbi (Yekebaş), whose elaborations on extraordinary mitigation was examined in the previous chapter, was sent to Switzerland for further education by the Ministry.[19] In 1926, he was appointed as a lecturer of criminal law to the Istanbul University. He was removed from his post in the university purge of 1933 but, a couple of years later, he was appointed to the CCa as a judge, along with some other purged professors.[20]

In the mid-1920s, the TGNA adopted major reform legislations. Many members of this exclusively Muslim parliament were members of the Ottoman juridico-political elite. For example, Necmettin Molla (Kocataş), who was the minister of justice during the 1911 amendment, was a deputy and a member of the justice commission in this period. Ali Cenani and Seyyit Bey, who were active in the 1911 parliamentary debates over extraordinary mitigation, were also members of this parliament. Hasan Fehmi (Tümerkan), who was the only deputy who explicitly objected to the abolition of the two-victim requirement in the 1910s, was also a deputy during this period and he was a member of the justice commission that gave the TCC its final shape. However, there were also many new faces among the group of people who prepared the early republican

[18] For the full list of scholars in this group, see Mehmet Salih Erkek, "II. Meşrutiyet Dönemi'nde Avrupa'ya Gönderilen Osmanlı Talebeleri," *XVI. Türk Tarih Kongresi, 20-24 Eylül 2010 Ankara, Kongreye Sunulan Bildiriler,* vol. IV, part II. (Ankara, Türk Tarih Kurumu Basımevi, 2015), 799-800.

[19] Baltacıoğlu, "Abdullah Vehbi," 197-214.

[20] Yekebaş served as a chamber president at the 1st and 4th chambers at this institution, and was among the high-court judges who were retired during the judiciary purge in 1954. Ibid., 210.

codes. Among them were Europe educated scholars and politicians, such as Ali Nazmi (Özügür), as well as jurists who had risen at the context of the national movement such as Necip Ali (Küçüka).

§ 3.2 The New Codes, Intimate Relations and Violence

One of the most important legal developments of this era was the adoption of the Turkish Civil Code (TCiC),[21] which was largely inspired by the Swiss Civil Code (SCiC)[22]. The TCiC was adopted after much debate and after various initiatives for adopting a *sharia*-based code similar to the Decree Law on Family (DLF).[23] The Code was significantly different from the DLF in that it brought about a uniform family law that was to be applied to all citizens. Recognition of mother's guardianship rights and abolition of the legal recognition of polygamy, establishment of the minimum age for marriage as 17 for girls and 18 for boys were some other novelties introduced by the TCiC. A very important novelty was the abolition of the legal basis of paternal control over marriage. According to the DLF, fathers had a right to demand the dissolution of otherwise legal marriages on the grounds of lack of equivalence (*küfv*) between their daughters and the men they married in terms of wealth and occupation (art. 47). According to the TCiC, marriage was a contract between two individuals and could not be declared void in line with father's discretion.

Many articles of the SCiC ensured unequal gender relations and these also found a place in the TCiC. For example, according to the Code, the husband was the head of conjugal union (art. 152). Husbands had the right to choose the marital domicile and the responsibility to provide for the family. Taking care of the household was specified as a wifely responsibility (art. 153) and, except for extraordinary circumstances, women

[21] *Türk Kanunu Medenisi*, No. 743, 17 February 1926, *RG* 339, April 4, 1926.
[22] Eugen Huber, Alfred Siegwart, and Gordon E. Sherman, ed., *The Swiss Civil Code of December 10, 1907*, trans. Robert P. Shick (Boston: The Boston Book Company, 1915).
[23] For the commissions that were formed in this process of contestation and the debates of this era, see Elif Dursunüst, "Kabul Edilme Sürecinde Türk Kanun-ı Medenisi," *Usul İslam Araştırmaları* 12, no. 12 (2009): 159-170.

were obliged to receive the consent of their husbands in order to be employed (art. 159). Similar to the SCiC (art. 138) and differently than the DLF, the TCiC established aggravated ill-treatment and attempted murder as a ground for divorce for all citizens (art. 130).[24] Similar to the SCiC (art. 278), the TCiC included a specific stipulation (art. 267) concerning parental authority, granting mothers and fathers the right to chastise their children (*tedip hakkı*).[25] The Code also established a position called "*ev reisi*" (head of household). *Ev reisi* was stipulated to be responsible for protecting the properties of household members and they were liable for the damages caused by household members (art. 318-320). According to the Code, wives could also dwell at a place other than the marital domicile if they filed for divorce or separation or if cohabiting with their spouse would endanger their health, reputation or business (art. 162).

In their examinations of the Turkish Civil Code, several authors have noted that the Code was significantly different from the Swiss Code at some points and that it included some stipulations that were parallel to Ottoman norms in terms of details, such as *iddet müddeti* (the period that a woman had to wait after divorce before getting married for a second time).[26] According to Özsu, such differences were concessions to the masses and were selected to prevent social backlash.[27] I find the continuities that have been highlighted by these authors important but I also

[24] An important difference between the two codes is that the SCiC also specified gross insult (*schwere Ehrenkränkung*) as a ground for divorce within the scope of this clause. This part was not included in the text of the TCiC. For the Swiss Code, see Huber et al., *Swiss Civil Code*, 29; Michael Humphrey, *Die Weimarer Reformdiskussion über das Ehescheidungsrecht und das Zerrüttungsprinzip* (Göttingen: Cuvillier Verlag, 2006), 334.

[25] However, there was a small difference between the two codes. In the Swiss Code, there was a qualifying condition; parents were empowered to apply the means of correction necessary for the proper education of children. In the Turkish Code, there was a much briefer stipulation which just noted that mothers and fathers had the right of chastisement (*tedip hakkı*).

[26] Miller, "Ottoman and Islamic," 335–361 and Seval Yıldırım, "Aftermath of a Revolution: A Case Study of Turkish Family Law," *Pace International Law Review* 17, no. 2 (2005): 347-371.

[27] Özsu, " 'Receiving' the Swiss," 63-89.

think that the novelties that this Code brought about should not be overlooked. Most importantly, Republican legislators had not added a stipulation to the Code recognizing marital authority of chastisement. They also had not added a specific clause to the Code that established obedience to the husband as a formal obligation on the part of the wife. These absences might seem trivial but such additions would not be completely unthinkable considering the state of law in force in some European countries like France at the time.[28] Given this situation, it would not be very difficult for Republican legislators to legitimize adding a similar stipulation to the Turkish Code but they had not taken this road. This indicates that there was some degree of political commitment to the idea of less hierarchical marital relations.

This Code did not establish husbandhood as a position of substantive domination giving men the right to use force over their wives or obliged women to obey them. Thus, its adoption changed the *substance* of marriage in many ways and re-organized the characteristics of marital relationships. This change did not bring about gender equality in marriage. It actually solidified sexual division of labor within marriage by establishing caring for the house as a wifely duty. However, it undermined the legal basis of husband's authority over the wife on major terms.

The Turkish Criminal Code (TCC)[29] was also adopted in this period. The task of preparing this code was first given to a committee of scholars and bureaucrats, including Baha (Kantar), Tahir (Taner) and Hulusi (Demirelli). However, this task was later taken from them with the claim that they were too slow.[30] Then, a committee of CCa members, headed by the CCa president İhsan (Ezgü), began to work on preparing a draft.[31]

[28] Until 1938, wifely obedience was a legal duty according to the French Civil Code. Tunc, *Husband and Wife*, 1069.

[29] "Türk Ceza Kanunu," No. 765, 1 March 1926, *RG* 320, March 13, 1926.

[30] Artuk and Çınar, "Yeni Bir Ceza," 41.

[31] The members of this commission included the following CCa judges and prosecutors; Mehmet İhsan (Ezgü), Semih, (Mustafa) Nazmi (Aklan), Mecdi, Fahrettin (Karaoğlan), Kazım (Berker?), Ali Rıza, Yusuf Cemal, Yusuf Nihat (Perker), Emin. Report of the Justice Commission, no. 80, 29 Kanunuevvel 1341, p. 63. The report is enclosed in the parliamentary folder on the TCC, No. 765, https://www.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d02/c023/tbmm02023064ss0080.pdf.

This commission is called the Eskişehir Commission due to the fact that the CCa had been moved to this city in the meantime. In six months, the commission finished the task of preparing the new code and submitted it to the Justice Commission. Thus, CCa judges were actively involved in the preparation of the new criminal code.

The TCC that was prepared in an all too brief six months remained in force in Turkey until the 2000s. Thus, it was the legislative basis of the regime of intimate violence in this country until very recent decades. Because of this, I want to elaborate on its relevant stipulations in detail.

As noted in the previous chapter, the ICC or Zanardelli Code of 1889 had already entered into the agenda of legislators as a draft in 1909. When they were working on the TCC, the drafters had worked with the Ottoman translation of this text from this earlier period.[32]

The Turkish Criminal Code was largely inspired by the ICC but this code was not its only source of inspiration. Strikingly, Republican legislators had almost completely deviated from the ICC framework in terms of sexual crimes and opted for preparing a text that was strikingly similar to the OCC in this particular regard. As a result, acts like prostitution or same-sex intercourse were not criminalized in the TCC.[33] However, not all sexuality related stipulations of the TCC were similar to the OCC. For example, female adultery was a crime that could only be committed by married women in the TCC (art. 440). This was different from the OCC framework according to which illegitimate sexual relations by unmarried women were also adultery (art. 201). Thus, by limiting the scope of this crime, Republican legislators had decriminalized extramarital sexual relations among unmarried people. The recognition of unmarried people's right to have sex without fearing criminal sanctions was a novelty and this can be seen as a step that actually challenged the existing order in the country.

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[32] Faruk Erem, "Yasaların Dili," *Cumhuriyet*, May 5, 1981.

[33] This deviation has already been noted in Turkish criminal law scholarship. Duygun Yarsuvat, "Umumi Adap Aleyhinde İşlenen Cürümler," in *Değişen Toplum ve Ceza Hukuku Karşısında Türk Ceza Kanunu'nun 50 Yılı ve Geleceği Sempozyumu*, 22-26 March 1976 (Istanbul: İÜHFY, 1977), 647-684 (hereafter cited as *50. Yıl Sempozyumu*).

In the original text of the TCC, it was accepted that minors between the ages of 15 and 18 were capable of consenting to sexual relations and consensual sexual relations (including sexual intercourse) between or with these minors were not designated as criminal acts (art. 416). The adoption of this stipulation, which was abolished in the 1950s, also indicates that the Republican legislators had a rather liberal approach to sexual relations.

In terms of intimate violence, there were novel changes. However, the beginnings of some of these can also be traced to the late-Ottoman era. As examined in the previous chapter, in 1911, the late-Ottoman legislators had taken a step towards the recognition of family burdens by establishing murder committed against ascendants as aggravated murder subject to capital punishment. The Republican legislators considerably expanded the scope of family burdens. Similar to the ICC (art. 365 and 367)[34], the TCC introduced a two-layered aggravation. In the first group, there were spouses, siblings, adoptive or step parents, fathers-in-law, mothers-in-law, daughters-in-law and sons-in-law. For murders targeting such relatives, the Code stipulated heavy imprisonment for at least 18 years (art. 449). The other group of relatives specified in the TCC included mothers, fathers, and other ascendants (art. 450). The code stipulated capital punishment for murders targeting such relatives.

The TCC was quite different from both the OCC and the ICC in some important respects. First, the inclusion of spouses or siblings in the family burdens stipulation was a novelty of the Republican regime because this aggravation was limited to ascendants in the late-Ottoman period. The relevant articles of the TCC were also not a simple replication of the ICC. In the ICC, the prioritized aggravation group also included descendants (art. 366). This was curiously absent from the initial text of the TCC. Considering the fact that this was actually proposed and rejected on shari grounds in the late-Ottoman era, I think that this was an intentional omission resulting from the settled understandings of (in)violability and intimate hierarchies. Second, in the ICC, the family burdens aggravation was

[34] University of Brescia Faculty of Law, *Codice Penale per il Regno d'Italia, 1889* (Rome: Stamperia Reale, 1889), 128.

also applicable to cases of physical assault targeting people in the prioritized aggravation group. In other words, acts like beating or wounding committed against ascendants or descendants were subject to codified aggravation in Italy (art. 373/2).[35] The case was different in the TCC. According to this Code, family burdens were not applicable to 'effective deeds' (physical assault, art. 457). In other words, according to the TCC, in a case of beating or stabbing in which the perpetrator and the target were family members, the punishment would not be aggravated because of the familial ties between them. However, there would be aggravation on this basis if the case concerned murder rather than physical assault. Finally, as examined in the previous chapter, after the 1911 amendment, there was a striking differentiation of violence committed against relatives, and relations from violence committed against strangers in the OCC. In cases of minor injury, victims of the former were granted the right to forgive at any point of the trial process. This distinction was abolished in the TCC (art. 456).

Another novelty of the TCC was the concept of unjust provocation. As noted in the previous chapter, there was a trend towards the personalization of punishments on the basis of elements such as the circumstances of the crime in the late-Ottoman period. The 1911 amendment had introduced a new stipulation facilitating this (art. 47) and granted the judges the power to mitigate the punishments in line with their discretion. However, the introduction of the term 'unjust provocation' to the text of the criminal code happened with the adoption of the TCC. This new stipulation provided a much larger margin of mitigation than discretionary mitigation which also found a place in the new regime. Unjust provocation mitigation is called legal mitigation (*kanuni indirim*) and the successor of article 47 of the OCC after the 1911 amendment is called discretionary mitigation (*takdiri indirim*) in Turkish high legalese.[36]

[35] University of Brescia, *Codice Penale*, 131.

[36] In what might be called vulgar legalese, the legalese that the high courts do not speak, discretionary mitigation is also called the good manners mitigation (*iyi hal indirimi*) or neck-tie mitigation (*kravat indirimi*). See the TCC, No. 765, art. 59 and TCC, No. 5237, art. 62.

This Code stipulated that if a crime was committed under the influence of fury or strong sorrow caused by an unjust provocation, the punishment would be reduced (art. 51). In cases of light unjust provocation, capital punishment or heavy imprisonment for life would be converted to heavy imprisonment for at least 12 years. In other cases, the punishment would be reduced by a margin that could be up to the half of stipulated punishment. In cases of heavy unjust provocation, capital punishment or life-term imprisonment would be converted into imprisonment between 7 and 12 years. Other punishments would be reduced by a margin between the ½ and the ¾ of the prescribed punishment. The TCC was also different from the ICC in this regard because the lower limits were much higher in the Italian Code.[37]

The TCC also included a specific article concerning murders targeting relatives who were found whilst committing adultery. The 462nd article of the TCC stipulated an enormous mitigation for murder and 'effective deeds' committed upon immediate discovery of adultery: If a person had found a spouse, sister, or an ascendant committing adultery or in a situation which indicated beyond doubt that they had just committed or were about to commit adultery and attacked the person in question or his or her partner, or both of them, the punishment would be reduced by up to the 7/8 of the original punishment and heavy imprisonment would be converted into imprisonment. In such cases, capital punishment would be converted to imprisonment between 2 and 5 years.

This article was also different from both the OCC and the ICC. First, with this stipulation, complete immunity that was re-introduced to the Ottoman regime in 1911 was abolished. The punishments could be reduced in a great extent, but, similar to the original text of the OCC of 1858, the law stipulated *some* punishment for all of these cases. Theoretically, a judge could prefer to apply this mitigation and reduce the sentence only

[37] According to article 51 of the Zanardelli Code, light unjust provocation would lead to the conversion of life imprisonment into imprisonment for at least 20 years, and the reduction of other punishments by a margin up to 1/3. In cases of heavy unjust provocation, life-term imprisonment would be converted into imprisonment between 10 and 20 years, and other punishments would be reduced by a margin between ½ and 2/3. University of Brescia, *Codice Penale*, 21.

by a margin like 3/8 rather than 7/8. Thus, the original text of the TCC did not fix the margin of mitigation. Second, the two-tier treatment established with the 1911 amendment (pardon/total immunity for adultery, extraordinary mitigation for illegitimate bed) was abolished in the TCC.

As noted in the previous chapter, this article was organized around the term *mahrems* in the OCC and this was criticized by some law scholars like Vehbi. There were also calls from scholars and politicians for the extension of this mitigation to female perpetrators. In the TCC, there was a different phrasing than the OCC. The new article explicitly specified that female relatives such as wives could also benefit from this stipulation. Moreover, the new text did not explicitly limit this mitigation to murders targeting female descendants or siblings.

Another important change was the exclusion of murders targeting mothers and/or their partners from the scope of extraordinary mitigation. The TCC was similar to the ICC, and significantly different from the OCC in this regard. In the feminist scholarship on the early republican era, it is underlined that motherhood was emphasized as an important social role for women in this period.[38] This change indicates that motherhood was not only symbolically sanctified because, with this change, mothers (along with fathers who were always beyond the scope of this mitigation) were differentiated from other relatives and positioned beyond the group of relatives who could be killed for sexual control with extraordinary legal tolerance.

In the TCC, the circumstances of this mitigation were not limited to catching the people committing adultery or illegitimate bed. There was a very detailed phrasing. It was explicitly stated that murders committed after witnessing to a circumstance indicating beyond doubt that adultery was being committed, was just committed or was about to be committed

[38] Şirin Tekeli, "The Meaning and Limits of Feminist Ideology in Turkey," in *Women, Family and Social Change in Turkey*, ed. Ferhunde Özbay (Bangkok: UNESCO, 1990), 145–65; and Tuba Demirci Yılmaz, "Osmanlı ve Erken Cumhuriyet Dönemi Türkiye Modernleşmesinde Annelik Kurguları (1840-1950)," *Cogito* 5 (2015): 66-90.

were all within the scope of this mitigation. This novelty and intricate design indicate that there was a legislative initiative to prevent the CCa from continuing its late-Ottoman practice that rendered the application of this article almost impossible. However, it is not clear whether it was the CCa judges themselves or the justice commission that finalized the draft that introduced this new designation.

The new article made it clear that witnessing intercourse itself was not required for the application of this article but it did not answer a number of major questions. What sort of circumstances would be taken as undisputable proof that an act of adultery was committed or was about to be committed? Would catching two people in *halvet* be enough? Would judges look for '*zina alameti*' (signs of adultery) as discussed in *fetva* books? The Code did not provide answers to such questions.

It should also be noted that there were also some important differences between the ICC and TCC concerning this matter. In the ICC (art.377),[39] there was a qualifying condition – catching two people in a state of 'surprise.' In the TCC, being surprised at the moment of witnessing adultery was not explicitly stated as a requirement. Moreover, according to the ICC, not only adultery but also illegitimate sexual relations would be considered within the scope of this article. On the other hand, such a term was absent from the Turkish article which limited this disposition to cases committed upon adultery (*zina*). The margins of mitigation stipulated by the two codes were also different.[40]

By including such a stipulation in the new code, the Republican lawmakers had ensured that people who committed murder or physical assault under such circumstances would be granted sentence reductions. All other conditions being equal, there could be a 1 to 8 ratio between the imprisonment term of a murderer who killed under these circumstances

[39] University of Brescia, *Codice Penale*, 133.

[40] The Italian code stipulated the reduction of imprisonment punishments to up to the 5/6 of the original punishment, and the conversion of life-imprisonment into imprisonment between 1 and 5 years. Thus, the margin of reduction was higher in the TCC in one regard, and lower on the other.

and of another who did not benefit from this article. However, this stipulation of the TCC was neither a reproduction of the late-Ottoman law nor a translation of the Italian Code. It is remarkable that, unlike the ICC and the OCC, the scope of this mitigation was limited to adultery in the TCC. According to the TCC, such murders were to be extraordinarily tolerated only when there was a marriage that was jeopardized by the affair. On the other hand, if two unmarried people were found while they were having sex, relatives who attacked them would not be able to benefit from this extraordinary mitigation.

This distinction reflects a new approach to sexual liberties. Limiting this article to cases related to adultery, the Republican legislators had established a novel hierarchy among these murders. While perpetrators of crimes targeting their relatives who were committing adultery would benefit from extraordinary mitigation, the sentences of people who killed or assaulted others upon witnessing extramarital sexual relations could only be mitigated on the basis of other articles which provided relatively smaller margins. This suggests that unmarried people were accepted to be entitled to some degree of sexual freedom compared to married people also in terms of the protection granted to them vis-à-vis the violence of their immediate relatives. With the change in the designation of adultery, legislators had abolished the criminal sanctions for sexual relations among unmarried people. The limitation in the scope of the extraordinary mitigation was parallel to that change. As it is examined in subsequent chapters, in the 1950s, the legislators abolished this marital status distinction among such murders but this differentiation would continue to be influential in scholarly debates and judicial practice.

As examined in the previous chapter, the OCC did not include a specific stipulation concerning acts of violence committed by people who were accepted to be in positions of domination. The early Republican law-makers adopted a different approach to this matter and introduced two new crimes to the regime: abuse of the means of discipline and control (*terbiye ve inzibat vasıtalarını suistimal*) and ill-treatment of family members (*aile efradına karşı fena muamele*).

These crimes were not Turkish inventions because they were also included in the Zanardelli Code (ICC, art. 390, 391). The corresponding article of the TCC concerning the former crime was similar to the ICC (TCC, art. 477). As examined in the previous chapter, with the adoption of the principle according to which the prosecution of minor physical assault against relatives depended on complaint, small children were rendered totally vulnerable against their parent's violence in the 1910s. The adoption of this norm and criminalization of the abuse of disciplinary authority changed this situation because the TCC stipulated prosecution without complaint for this crime.

According to the ICC, anyone who committed ill-treatment against a family member in a way that would not fall under the scope of abuse of disciplinary authority would be punished with imprisonment for a period up to 30 months (art. 391). If this crime was committed against people like ascendants or descendants, the penalty would be imprisonment between 1 and 5 years. The prosecution of this crime depended on the complaint of the victim if the crime was committed by a spouse against the other. In case the victim-spouse was a minor, people who were her guardians before marriage could initiate the prosecution. In the TCC, the stipulated punishments were different. In case of ill-treatment against ascendants or descendants the penalty would be imprisonment between 3 months and 3 years. Thus, in this specific regard, the TCC was less punitive than the ICC. In other cases, penalty was imprisonment between 1 and 30 months. Prosecution of spousal ill-treatment was also tied to complaint in the TCC, which also gave the right to complain to guardians for cases involving minor spouse-victims. Finally, similar to the ICC of 1889, this crime was placed under the heading of crimes against persons in the TCC.

What differentiates the TCC from the ICC concerning this crime on major grounds is that it included an addition. According to the text of the ICC, all sorts of ill-treatment were criminal acts. In the TCC, on the other hand, what was criminalized were ill-treatments that were "incompatible with mercy and compassion" (*rahmü şefkatle kabili telif olmayacak*

surette fena muamele). This qualifying condition was an invention of Republican legislators. According to this designation, not all ill-treatments would be considered criminal. Unless this phrase was to be interpreted as an ornamentation,[41] such acts would be assessed against a benchmark – incompatibility of mercy and compassion – in the process of judicial decision-making.

As examined in the previous chapter, marital violence was also a crime according to the Ottoman conception of sharia. In case it was applied without disobedience on the part of the wife or in case more than an 'acceptable' amount of violence was used, such cases were considered as *zulüm* or as unjust (*bi gayrı hakkın*) acts. By introducing such a criterion that was different from the ICC, the Republican legislators had brought about a distinction that could easily serve the end of continuing this pre-Republican differentiation of just and unjust marital violence. However, this effect could only be generated if the crime of ill-treatment was interpreted as a crime covering acts of direct bodily violence like hitting someone. As I examine later in this chapter, there was no agreement among the juridico-political elite concerning this issue and an alternative reading of this article – a reading according to which what was criminalized in this article were acts that were not covered in other articles of the code- found support among the CCa judges and characterized the CCa practice in the 1930s.

It is also important to note that these two articles of the Code were different from the draft prepared by CCa judges.[42] The ill-treatment article of their draft (art. 523) did not include an incompatibility with mercy and compassion criterion. This suggests that this was an invention of the parliamentary commission which gave the text its final shape. Moreover, the extraordinary mitigation article in the draft of the Eskişehir Commission was also different from the one in the Code in that it stipulated pardon rather than mitigation for such crimes (art. 507). According to the

[41] In this period, some terms in the code were read as ornamentations by jurists. However, such an interpretation concerning this particular article did not appear until the 2000s.

[42] *Türk Ceza Kanunu Layihası* (Ankara: Adliye Vekaleti, 1925).

article, this pardon would be granted to those who committed murder or physical assault after finding their meharim together with another man in a bed or in a naked state within the bedroom. It seems that the judges had wanted to continue their former judicial practice by introducing these limitative conditions to the text of the code. The extraordinary mitigation article of the TCC was applicable to more cases because it stipulated mitigation for a much wider variety of circumstances but it provided only mitigation and not pardon. Moreover, it did not include the word meharim, also provided this mitigation for women offenders and limited this mitigation to cases related to adultery. These differences indicate that these articles were finalized after some debates and disagreements among the state elite. It seems that with regards to some issues such as intimate violence, such differences were resolved in line with the preferences of parliamentarians and politicians rather than the proposals of judges who were given the task of drafting the new code.

My examination of parliamentary debates shows that many of these articles were not discussed in the parliament during the adoption of the TCC. The procedure adopted in this process might have hindered such debates because the articles of the code were not opened to debate on an individual basis. However, law professor and politician Yusuf Kemal (Tengirşenk), the author of the Justice Commission report on the TCC, brought up the crime of ill-treatment of family members in his introduction of the TCC to the parliament. In his introduction, Yusuf Kemal Bey said:

> We [the drafters] also took the necessities of the country into consideration with regards to some issues. For example, although the Italian Criminal Law criminalizes all sorts of ill-treatment towards family members, we drafted the article in a way to address ill-treatment that is not compatible with mercy and compassion.[43]

[43] Yusuf Kemal Bey said "Yalnız bir takım noktalarda memleketin ihtiyacını da nazarı itibara aldık. Meselâ İtalyan Ceza Kanununda efradı aile arasında fena muamele sureti mutlakada memnu olduğu halde biz oraya rahmü şefkatla kabili telif olmayan sui muamele diye aldık." *TBMM Zabıt Ceridesi*, period 2, vol. 23, session 64 (1 March 1926), 7.

Yusuf Kemal Bey's words indicate that the introduction of the incompatibility with mercy and compassion criterion that was reminiscent of the Ottoman limits put to marital violence on the basis of *zulüm* was intentional and that it was legitimized on the basis of the "necessities of the country."

The only parliamentarian who criticized the stipulations of the new code in these parliamentary debates was Feridun Fikri (Düşünsel) who raised several objections concerning a number of issues, including the death penalty.[44] Feridun Fikri, a lawyer with a doctoral degree from France, also objected to the formulation of unjust provocation. He was not principally against this mitigation. According to him, in the absence of a jury system, granting a larger margin of discretion to judges was appropriate. While approving this new stipulation in principle, Feridun Fikri was concerned that it would cause problems and pave the way for baseless defenses at the level of judicial practice, noting that the term "under the influence of strong grief" was vague. Besides, even unjust acts that had taken place long before the moment of crime could be taken as a ground for mitigation according to this stipulation.[45] On this basis, Fikri proposed adding the term "immediately" to this article.[46]

Yusuf Kemal Bey objected to this proposal and claimed that the objective of the article was providing mitigation to those who committed crimes under the influence of grief. Introducing such a temporal limitation as proposed by Feridun Fikri would be against the objective of the article according to Yusuf Kemal.

Feridun Fikri did not raise any objections to the 462nd article but his objections to legal sentence reductions for infanticide targeting illegitimate children and for abortions committed to save honor led to discussions about human nature, honor, and criminal law. Feridun Fikri did not

[44] There was no death penalty in the ICC of 1889 but various articles of the new Turkish Code stipulated death penalty.

[45] *TBMM Zabıt Ceridesi*, 1 March 1926, 10.

[46] Düşünsel's objections and proposal were stirikingly similar to the arguements and proposals raised by the proponents of the classical school at the context of codification in Italy. For the debates in Italy, see Luigi Majno, *Ceza Kanunu Şerhi – Türk ve İtalyan Ceza Kanunları*, vol. I (Ankara: Yargıtay Yayınları, 1977), 227-232.

totally reject the idea that the code should provide legal mitigations for some honor crimes. Noting that "some noble feelings stemming from human nature" could lead one to commit some crimes such as abandoning illegitimate children, he approved the designation of honor-defense as a mitigating circumstance for abandonment. On the other hand, he was against such designations for abortion and infanticide.

Yusuf Kemal Bey responded to these objections by inviting the parliamentarians to envisage the degree of grief that would be experienced by people who "accidentally" found themselves in these circumstances and the nature of forces that affected them. According to Yusuf Kemal, legislators had to take the objective or philosophy of criminal law (*hikmet-i cezaiye*) and human frailty (*insanların zaafı*) into consideration while designing the criminal law.[47] According to him, it was necessary to provide a margin for judges to take the frailty of humans and the influence of strong relations between them into account.[48]

Feridun Fikri's objections and proposals were not accepted. Thus, they did not make an impact on the norms in force. However, I think that these debates are important because they provide an exceptional window into the approaches of legislators to honor defenses. For both Feridun Fikri and Yusuf Kemal, it was *natural* for people to commit some crimes in order to save their honor. Thus, they agreed that some honor related crimes should be accommodated through sentence reductions. This indicates that honor crimes were associated with human nature by politicians in this period. However, there was no consensus regarding the types of crimes that should be mitigated on the basis of honor-defenses.

Another important issue revealed by these debates is the use of appeals to masculine imagination as a tactic for legitimizing the accommodation provided for honor crimes. While raising his objections to the criticisms of Feridun Fikri, Yusuf Kemal underlined that everyone could accidentally (*kazaen*) find himself in such a situation and invited the parliamentarians to envisage the degree of grief that would affect one under these circumstances. With this appeal to masculine imagination, Yusuf

[47] *TBMM Zabıt Ceridesi*, 1 March 1926, 16.
[48] Ibid., 16-17.

Kemal invited parliamentarians to put themselves in the shoes of people who committed such crimes. Thus, it was not only assumptions about human psychology that were used for this legitimization. Yusuf Kemal's performance also included elements that could trigger certain emotions like fear and anxiety on the part of an all-male audience. In *The Cultural Politics of Emotion,* Sara Ahmed shows "how emotions work to shape 'surfaces' of individual and collective bodies.[49] I think this specific performance at the Turkish parliament can be seen as an instance where emotions were called in to shape the legal basis of relationships among different bodies and the degrees of (in)violability that would be provided for them. As I explore in subsequent chapters, the Turkish parliament would host many such instances in the years to come.

Another important matter is the striking resemblance of Yusuf Kemal's discourse to Abdullah Vehbi's discourse that I examined in the previous chapter and to the arguments of some proponents of full immunity for murders committed upon adultery at the Ottoman parliament (especially to those of Ali Cenani). Vehbi had built his legitimization of the extraordinary mitigation article on a particular understanding of human condition and "human sensibility," according to which one could not be considered criminally responsible upon witnessing illegitimate sexual relations committed by a close relative, and on a particular understanding of intimacy, according to which close relatives had a collectivity in honor. It is striking that Yusuf Kemal brought up the very same notions by emphasizing the "frailty of humans" and the power of strong relations between them. Thus, psychological framings of honor defenses and legitimization of such mitigations with references to natural law and universal human traits were also effective in the early Republican era.

After its initial adoption, the TCC went through various changes. Some of these changes were made in the 1930s. As noted by various scholars of Turkish criminal law, a major source of inspiration for these was the

[49] Sara Ahmed, *The Cultural Politics of Emotion* (Edinburgh: Edinburgh University Press, 2004), 1.

new and fascist Italian Criminal Code of 1930 (Rocco Code, RC).[50] My examination indicates that, in terms of the specific issue of substantive criminal law and intimate violence, the Rocco approach did not find so many devout supporters among the Republican legislators in the early 1930s.

With the adoption of the RC, the crime of ill-treatment was removed from the heading of crimes against persons and placed under the heading of crimes against family in Italy. Turkish legislators did not make a similar change in the TCC (until 2004). Second, the RC increased the punishments for this crime (art. 572), and explicitly included grave and even lethal violence within the scope of ill-treatment.[51] It also abolished the differentiation of stipulated punishments in layered groups according to the relationship between the victim and perpetrator. These novelties were not transposed to the TCC by Republican legislators.

According to the Rocco Code, one did not have to witness illegitimate sexual relations to benefit from the extraordinary mitigation (art. 587),[52] 'finding out' such a relationship in any way was enough for benefiting from this mitigation. On the basis of this new phrasing, Italian courts began to apply this mitigation to a wider array of cases, for example to mur-

[50] Türkiye Barolar Birliği, *Ceza Yasası Öntasarısı Paneli* (Ankara: TBB, 1987), 24, 37, 39, 56; Çetin Özek, "Türk Ceza Kanunu'nun 50 Yılında Devlete Karşı Suçlar," in *Değişen Toplum ve Ceza Hukuku*, 510-552; Rahime Erbaş, "Türk Ceza Hukuku Açısından Kısırlaştırma (TCK md. 101)," *İÜHFM* 73:1, 2015, pp. 91-128.

[51] "Regio Decreto 19 Ottobre 1930," n. 1398., https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=1930-10-%2026&atto.codiceRedazionale=030U1398&tipoDettaglio=originario&qId=&tabID=0.3350389804018914&title=Atto%20originario&bloccoAggiornamentoBreadCrumb=true

[52] In this code, the minimum punishment for this crime was established as imprisonment between 1 and 5 years. The imprisonment window was established as 4 to 8 years for ill-treatments that caused physical injury, 7-15 years for those that resulted in very serious injury, and 12-20 years for ill-treatments leading to the death of the victim. In the old ICC, it was specified that one had to find two people committing adultery or illegitimate sexual relations "on the act." This qualifying condition was absent from the new code.

ders and assaults committed by people who had discovered such relationships "by opening a letter or listening to a telephone conversation."[53] Moreover, the Rocco Code introduced the term 'family honor' to this article of the code, accepting that women's illegitimate sexual relations would violate this notion. These changes were not transposed to article 462 of the TCC by Republican legislators.

The Rocco Code continued the Zanardelli tradition in one respect: Except for wives killing or physically assaulting their husbands or their partners, this extraordinary mitigation could only be used for crimes committed against female relatives and their partners. In 1936, Republican legislators introduced a similar limitation, specifying that only female descendants were covered in the article but this was abolished in 1938.[54] Similar to the Zanardelli Code, the Rocco Code did not limit this mitigation to cases related to adultery and included crimes committed upon the discovery of illegitimate sexual relations. This larger definition was not transposed to the TCC.

Thus, while making a number of changes in the TCC along with the legal developments in fascist Italy, Republican legislators had not simply imitated every change in Italian legislation. For the most part, they had not followed the Italians in terms of the organization of extraordinary mitigation and ill-treatment of family members. However, this does not mean that the TCC was static with regards to these issues in this period. On contrary, every relevant article of the TCC was amended in these years.

An important development in this regard was the expansion of family burdens. In 1933, descendants were added to the prioritized family burdens group (TCC, art. 450).[55] Thus, family burdens expanded to include children at this point in time. This can be seen as an important development in terms of the legal organization of hierarchies between intimate

[53] Eva Cantarella, "Homicides of Honor: The Development of Italian Adultery Law over Two Millenia," in *The Family in Italy from Antiquity to the Present*, ed. David I. Kertzer and Richard P. Seller (New Haven: Yale University Press, 1991), 243.
[54] See The Law No. 3038, 11 June 1936, *RG* 3337, June 23, 1936; and The Law No. 3531, 29 June 1938, *RG* 3961, July 16, 1938.
[55] The Law No. 2275, 8 June 1933, *RG* 2432, June 20, 1933.

bodies. With this amendment, the protection granted to the bodies and lives of people along the ascendants-descendants axis was explicitly equalized for the first time. Murdering a parent was one of the gravest crimes in the code since the late-Ottoman period. Now, murdering an issue was established as an equally grave crime.

In the 1920s, the new TCC was criticized by criminal law professor Tahir (Taner) because it lacked a stipulation that ensured the aggravation of punishments for effective deeds committed against ascendants.[56] With the 1933 amendment, family burdens for the prioritized relations group (ascendants and descendants) were extended to the crime of 'effective deeds.' In 1936, the scope of family burdens for 'effective deeds' was expanded further.[57] Although the degree of aggravation was not as high as the first group, punishments that would be given to effective deeds committed against relatives like spouses and siblings were also stipulated to be aggravated after this amendment.

In this period, the unjust provocation article was also amended. According to the law-makers who proposed this amendment, the existing reduction margins were rather excessive and the proposed amendment was prepared on the basis of the old Italian criminal code.[58]

Article 478 (ill-treatment of family members) was amended in 1933. This is one of the few articles of the TCC that remained untouched after the early Republican era. The legislators made a very slight but important change to the text in 1933. They just abolished the minimum stipulated punishment.

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[56] Taner underlined that there was such a stipulation in the ICC, and argued that the lack of such an aggravation clause created an enormous defect. According to Taner, jurists should apply their powers of discretionary aggravation for overcoming this "gap" in law. Tahir Taner, *Hukuk-ı Ceza* (Istanbul: Darülfünun Matbaası, 1928), 214.

[57] The Law No. 3038, 11 June 1936, *RG* 3337, June 23, 1936.

[58] TGNA Justice Commission, "The Report of the Justice Commission," decision no. 51, document no. 1/204, 1/195, 31. The report is enclosed in the parliamentary folder on the Law No. 3038, 11 June 1936, *RG* 3337, June 23, 1936.
https://www5.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d05/c012/tbmm05012078ss0250.pdf.

An important aspect of this amendment is that it brought about a justification explanation for this crime. What was stated in this document is important because, since the TCC itself did not have article-specific justification explanations, this is the only official text that provides insights concerning the legislators' perspective regarding this crime. According to the justification explanation, what was meant by ill-treatment in this article were acts that could not be considered as '*darb*' (beating).[59] Thus, '*darb*' was not within the scope of this crime. According to the 456th article of the Code, an effective deed causing 'minor injury' – for example battery resulting in incapacitation for less than 10 days – would be punished with either imprisonment between 1 and 3 months or a fine between 25 and 500 liras. For the legislators who wrote the justification explanation, introducing a minimum 1-month imprisonment punishment for a crime that did not include '*darb*', which was implied to be something more serious, was disproportional. Thus, the minimum limit was removed altogether as it was in the 'original' (*aslında olduğu gibi*), the Zanardelli Code of 1889. However, this move towards the 'original' had its limits in that the incompatibility with mercy and compassion criterion, which was different from the original, was maintained in the text of the TCC.

This justification explanation, which was the only justification explanation provided by the legislators for this crime for the whole 20th century, is important in two regards. First, the legislators had chosen a very particular term, *darb*, to justify this amendment. Tahir Taner's elaborations on this matter suggest that the whole reasoning behind the move from the '*darb ve cerh*' (beating and wounding) formulation of the OCC of 1858 towards the rather odd 'effective deeds' (*müessir fiil*) formulation of the TCC was that there were physical assaults that were difficult to be considered as darb and cerh -such as pushing or pinching someone.[60] I think the designation of crimes against physical integrity as 'effective

[59] Prime Minister İsmet (İnönü), "Türk Ceza Kanununun bazı maddelerinin değiştirilmesi hakkında 1/645 numaralı kanun layihası," document no. 6/1245, 27 April 1933, 9. Enclosed in the parliamentary folder on the Law No. 2275, 8 June 1933, *RG* 2432, June 20, 1933. https://www5.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d04/c016/tbmm04016066ss0262.pdf.
[60] Tahir, *Hukuk-ı Ceza*, 199.

deeds' implied that other deeds such as insult or threat were either not 'effective' (*müessir*) or maybe as not as effective as physical deeds, but it also provided a means of covering a wider array of violations against bodily integrity within the scope of this crime compared to "darb and cerh." In the text of the TCC of 1926, the term "darb" only appears two times, exclusively as a specific type of 'effective deed' and never as a synonym for it.[61]

The inclusion of darb instead of effective deed in the justification explanation is important because many Turkish scholars and practitioners would associate darb with repeated hitting (*dövmek*) in the years to come. On this basis, the Court of Cassation would push various acts of physical violence to the scope of ill-treatment. It can be argued that if the Commission had used the more comprehensive 'effective deeds' term in defining what was excluded from the scope of this crime, it would formally be more difficult to interpret this article in such expansionary ways. Second, this one and only justification explanation for this crime makes it clear that darb was considered to be outside the scope of this crime by the legislators in 1933. This is important because, in the 1950s, the question of whether *dövmek* - that is beating or hitting multiple times – could be considered within the scope of this crime would cause disputes among the CCa members. Moreover, in the post-1980 period, the Court of Cassation would argue that there was no reason to exclude '*dövmek*' from the scope of this crime – despite this one and only justification explanation.

This examination of the relevant articles of the TCC shows that what was accepted at the Turkish parliament in 1926 was not the ICC of 1889. It was a text inspired by a translation of it. Moreover, this text was also

[61] The first of these is article 245 concerning abuse of authority by officials. In this clause, officials who commit ill-treatment, who dare to cause material pain (*cismen eza verecek hale cüret eder*), or commit beating or wounding against people are stipulated to be punished. In this article, it is clear that *darb* and *cerh* are specific forms of causing material/physical pain or injury. This term also appears in article 472 which is related to the crime of causing loss of life without intent to kill. Here, the legislators used the phrase "loss of life due to battery (*darb*), wounding (*cerh*) or 'effective deed' without the intent to kill." This choice of words also makes it clear that effective deeds were not thought to be limited to *darb* and *cerh*.

inspired by the OCC. Later on, there was some inspiration taken from the RC. On this basis, I think that we can see the TCC as a dish prepared with reference to multiple recipes, as a dish customized in line with a multitude of variables and cooked by many people. I tried to deconstruct this process by examining the dish itself. In the absence of the records of commission proceedings, article-specific justification explanations and detailed parliamentary debates from the time of its adoption, it is impossible to know the specifics of this cooking process on absolute terms. However, my examination shows that it might be fruitful to see the adoption of this code and its amendments as a process that involved a considerable degree of drafting initiative rather than as an instance of reception, transplantation, or importation of law. As seen in this examination, the adoption and amendments of the Turkish Criminal Code were influenced by multiple flows of law and legal ideas. Spatial flows (as seen in the inspirations taken from the ICC and RC) as well as temporal flows (as seen in the impact of the late-Ottoman law on the TCC) had both informed this process of code-making.

§ 3.3 Legal Discourse and the Early-Republican Regime of Intimate Violence in Practice

Between 1928 and 1935, *Adliye Ceridesi* published pieces by academics, bureaucrats and jurists, as well as texts of speeches given by prominent politicians, some parliamentary debates, dicta (*mütalea*) and orders (*tamim*) issued by the Ministry of Justice, and texts of codes and amendments. It also distributed books as addenda. Until the re-organization of its format in 1935, this was not a very lively forum because opinion pieces and articles were not very frequently published. However, also in this period, there was a gender discourse promoted in this forum.

This discourse was quite different than later years in some regards. In this period, the claims that women and men were equal and that they had to have equal rights were not ridiculed in *Adliye Dergisi*. This is interesting because such denials and ridicules became very prevalent in the same forum after the second half of the 1930s. In this earlier period, this

journal promoted a rather liberal approach to gender relations, according to which there were some crucial differences between men and women, resulting from their ways of upbringing. However, when they were mentioned, the trends towards the recognition of women's rights and autonomy in different countries were mentioned as positive or inevitable developments.[62] According to one author, the Soviets were a bit too progressive. They were ahead of what was to come or what was generally seen as appropriate in the present moment even by "acceptable feminists" (*makul feministler*).[63] However, the changes introduced to the Russian family law by communists were not labeled as principally wrong – as in the case of their insistence on the domination of proletariat. In other words, it was implied that, with regards to women's and children's rights, the Soviets were not necessarily going in the wrong direction but that they were going too fast.

As far as I was able to trace, in this earlier period, no author who wrote in this journal argued that husbands had something like sovereign power over their wives due to their position as the heads of the marital union or of household. In an extensive report published in this journal, there were elaborations on what was achieved in the first ten years of the Republic. In this report, it was underlined that the TCiC had brought men's despotism and oppression (*erkeğin istibdat ve esareti*) to an end.[64] The same report also brought up the issue of Turkish customs and traditions – not for legitimizing or justifying masculine power or intimate control murders– but for underlining that the Republican reforms concerning marriage had a cultural basis. In the early Republican period, education and official employment of women was promoted. So was the

[62] For example, *Adliye Ceridesi* distributed a Turkish translation of Gaston May's *Introduction a la science du droit* (Introduction to the Science of Law / *Hukuk İlmine Methal*) as an addendum of *Adliye Ceridesi* in 1931. In this book, May discusses the trend in France towards the abolition of "ancient relations of subordination" as a novel and positive development, and elaborates on the legal changes affected by this trend. Gaston May, "Hukuk İlmine Methal," trans. Kemal Galip, *AD* 106 (1931): 437/43.

[63] Mazhar Nedim (Göknil), "İleri Hukuk," *AD* 11 (1934): 27.

[64] "Türkiye Cumhuriyetinin On Senelik Adliye Faaliyeti," *AD* 10 (1933): 53.

entry of women to exclusively male occupied professions such as the judiciary. By 1933, there were 13 female judges and dozens of female law students in Turkey. According to the 1933 Report, this was a significant development – an achievement to be celebrated.[65]

The questions of how different provisions of the Civil Code were interpreted by scholars, and by the CCa and how these interpretations shaped gender relations in this period are beyond the scope of this study. However, I want to note one particular issue. In the first decade after the adoption of the TCiC, there was only one academic commentary book which provided an interpretation of its family law provisions.[66] Thus, for some time, there was only a single domestic academic commentary in the canon.[67] In this book, Mustafa Reşit (Belgesay), who was a civil law professor at the Istanbul University and a member of drafting commissions that prepared some early Republican codes, interpreted the concept of the head of conjugal union. According to this interpretation, being the head did not give husbands "the right to rule over (or dominate) their wives" (*karısına hakim olmak hakkını vermez*) but only the right to have the final say in cases of spousal disputes concerning issues related to the common interests of the spousal union.[68] Belgesay also noted that wives were legally obliged to live in the house chosen by their husbands as long as the chosen domicile fulfilled the legally required criteria but he argued that husbands could not coerce their wives to live with them or use force for achieving this end. This legal obligation for wives only gave husbands the upper hand in divorce proceedings in case their wives did not want to live with them. In other words, in Belgesay's interpretation of the TCiC,

[65] Ibid.

[66] I reached this conclusion on the basis of my examination of the catalogues of Istanbul University, National Library and Atatürk Library. According to my search, this work by Belgesay was the only domestic commentary written by a professor until the mid-1930s.

[67] Other texts in the canon in the period between the mid-20s and 30s include Eugene Curti-Forrer's commentary on the SCiC which was translated by the Minisry of Justice and distributed to judges, and lecture notes of other civil law professors like Samim Gönensay. Eugene Curti-Forrer, *Kanunu Medeni Şerhi* (Istanbul: Adliye Vekaleti, 1930).

[68] Mustafa Reşid (Belgesay), *Türk Kanun-ı Medenisi Şerhi – Aile Hukuku*, vol. II. (Istanbul: Evkaf-ı İslamiye Matbaası, 1926), 86.

which can be considered as an extremely important interpretation, husbands were not kings or sovereigns (*hükümdar*) and husbandhood was not a position of substantive domination in line with which men could control the physical movements and behavior of their wives and use force to achieve their ends. As examined in the next chapter, this interpretation was openly and strongly challenged in later years, and these challenges had enormous implications for the regulation of intimate violence, and legal orderings of bodily hierarchies.

In this early period, scholarly works on substantive criminal law were also scant. Among the available scholarly texts were lecture notes of criminal law professors such as Tahir Taner, and a commentary on the general part written by Mustafa Nazmi (Aklan), a judge at the first criminal law chamber of the CCa and a member of the commission that drafted the TCC, and a translation of Italian positivist and socialist lawyer, scholar and politician Luigi Majno's[69] commentary on the ICC that was translated and published by the Ministry of Justice. Thus, the early Republican reformers had not only worked with a translation of the neo-classical Italian Code. They had also translated a positivist-socialist interpretation of it. What is remarkable is that this was the only commentary on the ICC that was translated into Turkish in this period and it was the only commentary published by the Ministry of Justice. In other words, Majno's commentary was the *official* commentary of this period.

Majno's approach to unjust provocation and extraordinary mitigation was positivist. He claimed that any act, including acts that were not criminal, could be accepted as unjust acts. Plus, putative or mistaken provocation could also be accepted as a ground for mitigation. Thus, one who believed or thought that an unjust act was committed should also benefit from this article because the ground for mitigation should be found in the perpetrator's mindset instead of the objective material facts (*eşyanın objektif hakikati*).[70] In Italy, proponents of the classical school had insisted

[69] For Majno's personal and political life, and his relationship with his wife Ersilia Bronzini who was a feminist-socialist activist, see Claudia Gori, "The Boundaries of Unitarian Italy: Gender and Class between Personal and Public Sources: Four Intellectual Couples Compared," *Bulletin of Italian Politics* 3, no. 2 (2011): 247-262.
[70] Majno, *Şerh*, vol. I, 230.

on limiting the applicability of unjust provocation to crimes that were committed immediately after unjust acts. According to Majno, such a limitation was not appropriate and positivists who proposed measuring the dangerousness of the perpetrator by assessing his motives had a better approach to this issue than the proponents of the classical school.

As examined in subsequent chapters, this article works as a means of differentiating normal and abnormal behavior and people in the legal field. It also creates the effect of disciplining society. This characteristic of unjust provocation is visible in Majno's elaborations because he discussed this issue with reference to the idea of differentiating criminals on the basis of their dangerousness.

This aspect of unjust provocation was also explicitly recognized in Aklan's commentary. According to Aklan, who was a drafter, implementor, and interpreter of the TCC, the code had invited everyone to "justice and discipline" by limiting this mitigation to unjust provocations. He wrote: "Those who insult or violate others, those who do not recognize the rights of others or injure their souls by bad manners and barbarity must know that they will face such violent retaliations."[71] Thus, the instrumental role of this article in the distribution of violence and its disciplinary effects were already recognized by people who had drafted, implemented and interpreted the TCC in the 1920s.

As I noted, ill-treatment and abuse of disciplinary authority were new crimes introduced to the Turkish regime by early Republican legislators. Majno was of the opinion that use of violence as a means of parental or educational discipline was outdated. Children should not be beaten but even this was not enough. They should never be put in a situation they would "tremble."[72] Taner had a more reserved approach and considered bodily chastisement within the scope of the parent's right of discipline but he also argued that improper use of this power was a crime.[73]

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[71] "Şeref kıran, gayre tecavüz eden, gayrın hakkını tanımayan, terbiyesizlik, barbarlık ile gayrın ruhunu yaralayan böyle şedit mukabeleler göreceğini bilmelidir." Mustafa Nazmi (Aklan), *Yeni Türk Ceza Kanunu Şerhi* (Eskişehir: İstikamet, 1926), 166.

[72] Majno, *Şerh*, vol. III, 326.

[73] Taner, *Hukuk-ı Ceza*, 256-257.

In Majno's commentary, there was a limitative interpretation of the ill-treatment clause. According to him, this crime did not cover physical assault regardless of the degree of harm it caused.[74] Thus, even assaults of minor degree had to be considered within the scope of physical assault. There is a similar but less explicit framing of the issue in Taner's lecture notes. According to Taner, this crime was related to acts like making someone carry out demeaning tasks.[75] As I examine later in this chapter, this approach to ill-treatment was dominant in judicial interpretation in the 1930s.

According to Majno, there were some conditions which were necessary to rule a case as deprivation of liberty. In case children were deprived of their liberty by their parents or in case wives were imprisoned by their husbands who wanted to prevent them from engaging in unacceptable behavior, there was no crime.[76] This approach to deprivation of liberty was not adopted by the CCa in the 1930s but, as I examine in the next chapter, Majno's own words later became legally binding for all courts in Turkey and remained so until the 2000s.

In her examination on honor crimes, Koğacıoğlu notes that "the republican public remained silent about honor crimes" until the 1980s.[77] My examination of parliamentary records and scholarly publications indicate that there was never a time when there was silence about this matter. These sources show that, in the early 1930s, as well as in later decades, there were extensive elaborations on and competing approaches towards crimes related to honor. For example, differences of opinion among the Republican elite concerning honor defenses and other gender-related issues became overtly explicit during the parliamentary debates over the criminal law amendment in 1933. The parliament itself is a public space but these debates were communicated to an even broader public because, unlike countless others, these proceedings were printed

[74] Majno, *Şerh*, vol. III, 331.
[75] Taner, *Hukuk-ı Ceza*, 259.
[76] Majno, *Şerh*, vol. II, 102-103.
[77] Koğacıoğlu, "Knowledge, Practice," 177.

in *Adliye Ceridesi*. In these proceedings, emotions and appeals to masculine imagination were also at work -to the extent that the author of the amendment proposed by the Justice Commission, Salah(addin) (Yargı), felt the need to calm things down by suggesting that criminal law stipulations, especially those related to family, must have been decided upon in a state of complete isolation from the domain of feelings (*tamamiyle hissi sahadan tecerrüt ederek*).[78]

Some of the most interesting discussions that took place during these debates were related to honor. During the 1933 amendment, the Justice Commission had proposed to change article 453, which provided reduced sentences for selected relatives who killed a new-born born out of wedlock to save their honor.[79] In the first version of the Code, this article was applicable to murders committed within five days after birth or before the child was registered to the population registry. The Commission proposed to limit the applicability of this clause to murders committed during or immediately after birth and added this to the amendment proposal submitted by the government.[80] In the same proposal, descendants were also included in the prioritized family burdens group, together with ascendants. The amendment stipulated that anyone who willfully killed a descendant would be sentenced to capital punishment. The government legitimized this amendment with the argument that there was a gap in law and this gap was fulfilled with this change (*kanunun boşluğu doldurulmuş*), and this was accepted by the commission.[81]

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[78] *TBMM Zabıt Ceridesi*, period 4, vol. 16, session 66 (5 June 1933), 57.

[79] In the first version of the Code, this article was applicable to murders committed within five days after birth or before the registration of the child to the population registry. The Commission wanted to limit the applicability of this clause by limiting the murders falling under its scope to murders committed during or immediately after birth.

[80] Report of the Justice Commission, E. 1/561, 645, K. 32, 31 May 1933. Enclosed in the parliamentary folder on the Law No. 2275.

[81] See the justification explanation for the amendment concerning article 450. The Draft Law, No. 1/645, doc. no. 6/1245, 27 April 1933, 9. Enclosed in the parliamentary folder on the Law No. 2275.

This combination –the expansion of family burdens to include descendants and limitation of the scope of article 453 - generated considerable disputes among legislators. According to Sait Azmi (Feyzioğlu), murderers who killed such newborns sometime after birth should be given an imprisonment sentence but they should not be executed as in the case of mother or father killers. It can be said that he was not against punishing these people but to equating mothers and fathers with illegitimate children in terms of the sacredness attached to their life by the first-tier family burdens clause stipulating capital punishment. In his objections, there were some psychological elements, used as facilitating devices rather than arguments in themselves, but his justification was primarily based on culture rather than on assumptions about human psychology and human relations in the universal scale. Azmi also played on to the imaginations of his fellow law-makers by bringing up hypothetical scenarios but his framing was different from Tengirşenk's who had placed an emphasis on human psychology and frailty without any references to culture in his speech in 1926. Sait Azmi said:

> For example, (let us say that) a man wakes up in the morning, works on his occupation until the evening, and, when he returns home in the evening, sees that his sister or daughter gave birth to an illegitimate child 7-8 hours ago. A bastard is crying loudly. He grabs the child from his/her leg, and crashes him/her to the woman's head, and the child dies because of this. We will hang a man who does this to save his dignity and honor… I will not talk about Italian morality here, but it can be said that, in the Turkic world, the honor concern (*namus kaygusu*) is placed at a higher level than the society of the Western world. Probably, there are very few people who would commit murder for their honor in the West. However, the number of such people among us is so high that it cannot be counted.[82]

[82] "Mesela, bir adam sabahleyin kalkmış, akşama kadar işi ile meşgul olmuş, akşam üzeri evine gittiği zaman hemşiresinin veya kızının nameşru bir çocuk doğurduğunu 7,8 saat

His speech was received with applauds from the crowd. However, Salah(attin) (Yargı), representing the Justice Commission, objected to this argument, underlining that the most distinct character of civilization was the monopolization of violence by the state.[83] According to him, no one was allowed to pursue a personal vendetta or had a right to kill another except for situations like self-defense recognized by law. Salahattin noted that, during the negotiations at the commission level, books on criminal law theory were examined[84] and someone had explained to the commission that no one had a right to kill another but the sentence could be mitigated if the killer was the woman who gave birth and if she had committed this crime with the necessity of saving *her* honor.[85] Thus, according to Salahattin, the proposal of the commission was in line with scientific

sonra görmüş. Bir piç viyak viyak ağlıyor. Çocuğun bacağından tutuyor ve anasının kafasına indiriyor, bu suretle çocuk ölüyor… Haysiyet ve namusunu kurtarmak için bunu yapan bir adamı idam edeceğiz… İtalyan ahlakının ne olduğu hakkında bir şey arzetmeyeceğim, fakat namus kaygusu Türk camiasında her halde Garp Devletleri camiasından daha yüksek telakki edilmiştir. Garpta her halde namus için katil ika edecek insanlar çok azdır. Fakar bizde sayılamayacak kadar çoktur." *TBMM Zabıt Ceridesi*, 5 June 1933, 60.

[83] "Medeniyetin en büyük farikası fert intikam hissile hareket ederek kendinin duçar olacağı herhangi bir haksızlık ve mağduriyet üzerine kendi kendine hesabını görmesi salâhiyetini haiz değildir. Bu salâhiyet Devlet teşkilâtına verilmiştir. Bu itibarla hiçbir şahsın her ne sebeple olursa olsun müdafaai nefiste ve kanunun kabul ettiği beraet sebeplerinden gayri bir şekilde başkasını öldürmeğe salâhiyeti yoktur." Ibid.

[84] Salahaddin did not specify a name but referred to this person as 'a friend' who was present in the commission meetings. I think this person was Tevfik Nazif Arıcan because, in the Justice Commission report, it is stated that the general director of criminal affairs had attended the deliberations at the commission level and the report suggests that the director was the only non-parliamentarian present at that stage. Report of the Justice Commission, E. 1/561, 645, K.32, 31 May 1933.

[85] These elaborations show that even a more limitative clause confined to the mother was discussed at this earlier stage. The explanation summarized by Salahattin is strikingly similar to Kant's moral framework in which Kant makes a very similar exception for such murders, establishing them and duel as the only exceptions to his ideal legal framework according to which murder should be punished by capital punishment. On this basis, it can be said that although the intellectual sources of what was understood as "the laws of civilization" remain unclear, they were somewhat Kantian in sprit. Immanuel Kant, *The Metaphysics of Morals*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1991), 144.

principles and Sait Azmi's approach was incompatible with "the laws of civilization."[86] In the end, the parliament accepted Sait Azmi's position and the article was amended in the direction he suggested and in a way "incompatible with the laws of civilization" according to Salahattin.

I think this debate provides important insights for understanding the regime of intimate violence in Turkey and its transformations. It shows that there were clear disagreements among legislators concerning such articles of the code, even in 1933 when there was a single party regime. They also indicate that the discourses that would impact the transformations of this regime in later years had predecessors in this era. In later years, requirements of civilization, state monopoly of violence, and abolition of the rights to kill during the establishment of this monopoly would become important elements of legal discourse, and would be used to justify demands for the abolition or limitation of existing mitigations provided for intimate control murders by judges, scholars, and politicians. The reasoning that is found in Azmi's objection also did not disappear. In this period, intimate control murders targeting adults were not explicitly discussed in line with Azmi's reasoning in the scholarly or judicial discourse at the top. In the journals and books that I reviewed, no criminal law scholar associated them with Turkish culture and argued that they needed to be accommodated on this basis until the 1950s. However, later on, this association and justification began to be raised by various scholars and judges and formed the backbone of scholarly and judicial resistance to demands for the abolition of sentence reductions on the basis of honor.

A decision taken by the CCa in 1932[87] shows that there were also disagreements among the Republican elite concerning the scope of ill-treatment. In this case, a man named Kazım had beaten his wife – an act that was considered as an "effective deed" (physical assault) by the court. As the wife had not attended the trial despite a written notification, which

[86] "Böyle bir düşünce medeniyet kanunlarile de kabili telif değildir. Bütün teklifatımız ilmi esasata müstenittir." *TBMM Zabıt Ceridesi*, period 4, vol. 16, session 66 (5 June 1933), 60-61.
[87] CGK, E. 206, K. 202, T. 5.12.1932, *AD* 129 (1933): 6.

meant the withdrawal of lawsuit according to the Code on Criminal Procedure (CCP, art. 361), the case was dismissed by the local court. Upon this dismissal, the Ministry of Justice sent a written order to the 2nd Criminal Chamber of the CCa for the reversal of this dismissal decision. Thus, it was the Ministry itself that brought this case to the CCa. The Ministry requested the continuation of trial which could only happen if this beating was considered not as an effective deed but as ill-treatment.

The 2nd Criminal Chamber of the CCa declined this reversal request, underlining that this act could not be considered within the scope of ill-treatment. Upon this, the head prosecutor objected to the decision of the chamber and took the case to the general criminal assembly (GCA) of the CCa. According to the head prosecutor, the act was ill-treatment, and, because ill-treatment was not one of the crimes specified in article 344 of the CCP, which was about the right to personal trial (*şahsi dava hakkı*), withdrawal of the lawsuit would not necessarily lead to preclusion of public trial in this case. The GCA dismissed the arguments of the prosecutor with a single sentence: The contents of the objection were not considered acceptable given the characteristics of the act and the procedure that was followed. Moreover, the decision was not taken by majority but by unanimity. According to the unified stance of CCa judges, *dövmek* (beating) could not be considered as ill-treatment and wife beating was subject to the same procedures and rules with beatings committed against strangers.

This case is very important for a number of reasons. First, it shows that there was no consensus among the politico-judicial elite concerning this crime. The Ministry had officially pushed for the inclusion of beating within the scope of ill-treatment, and the chief prosecutor had allied with the Ministry. However, the CCa judges had resisted this push with consensus. Their reasoning and motives remain unclear but their insistence clearly shows that they were behaving in an autonomous way because they had rejected the request of the Ministry. This shows that the CCa judges of this era were not mere clerks applying orders – at least not in all matters or at all times– and that there was at times disharmony between the Ministry and the CCa.

If they wanted, the Ministry could continue this push by leading an amendment initiative. They could, for example, propose an amendment and explicitly include beating within the scope of this crime by changing the text of the code. However, quite the opposite happened in the following months. Some bureaucrats at the Ministry adopted the CCa position, the article was amended and, in the justification explanation written for the amendment, it was explicitly stated that *darb* could not be considered within the scope of this crime. I was not able to find any clues regarding the question of whether the CCa judges had lobbied for this amendment or not but the end result was in line with the unanimous position they took in this decision, and different from the 1932 position of the Ministry. The minister of justice, Yusuf Kemal Tengirşenk had resigned shortly after this decision on grounds of health but it was rumored that the real reason behind his resignation was the failure of his initiatives for moving of the CCa to Ankara which would enhance his ability to affect the court.[88] It is difficult, if not impossible, to determine the extent to which the 1932 decision had affected this process but it might have been a factor because, with this decision, the CCa judges had unanimously stood against the wishes of the Ministry and showed that they could act in an independent fashion. This might have contributed to Tengirşenk's resignation.

Around a year after the 1932 decision, *Teftiş Heyeti* (Investigation Commission) sent its own evaluations concerning this crime to the Ministry of Justice and demanded the evaluation of the Ministry.[89] At this point, Minister of Justice, Yusuf Kemal (Tengirşenk), was already replaced by Şükrü Saraçoğlu. The text of this reply shows that the Ministry had changed its position after 1932.

In this reply signed by T. Nazif (Arıcan), the Ministry provided an explanation concerning the crimes of 'effective deed' (art. 456), abuse of the means of discipline (art. 477), and ill-treatment of family members (art. 478). According to this explanation, article 456 was general, and disciplinary or familial relations between the perpetrator and victim, or their

[88] "Adliye Vekili Kemal B.in İstifası Tahakkuk Etti," *Milliyet*, Mayıs 23, 1933.

[89] T. Nazif, "Türk Ceza Kanununun 456, 477 ve 478inci Maddeleri Hakkında [Cezai Mütelaa]," 27 November 1933, *AD* 137 (1933): 51-52.

lack thereof was irrelevant in terms of its applicability. There had to be intent to cause physical harm for the occurrence of this crime. The application of article 477, on the other hand, required the existence of a special relationship between the perpetrator and victim. The perpetrator could not be anyone but had to be a person who had the right to discipline and the authority of making the victim obey them (*terbiye hakkını ve itaat ettirmek salahiyetini haiz*). If such persons were to abuse their authority without the intent to wound, beat or cause harm, and if the victim's health was jeopardized as a result of such acts or if the latter faced any sort of endangerment as a result, the act would be considered as abuse of the means of discipline. According to the Ministry, ill-treatment of family members was a crime which would occur when the act could not be considered within the scope of former crimes. Acts that caused any sort of health problem or endangerment of victim in any way could not be considered as ill-treatment (*şahsın sıhhatini ihlal veya bir tehlikeye maruz kalmasını intaç etmemesi iktiza eder)*. If there were such consequences, the act had to be considered within the scope of former crimes. Finally, according to the Ministry, intent was not a pre-requisite for this crime. Thus, ill-treatment could also be committed without intent. On the basis of this cross-examination, the Ministry noted that these articles were completely independent from one another and stipulated different sanctions arranged in proportion to the characteristics of the acts involved.

In 1936, Fahrettin Karaoğlan, who was the president of the 3rd Criminal Chamber of the CCa at the time, wrote a commentary focusing on the transformations of the TCC after its adoption. In this book that was published by the Ministry, Karaoğlan also argued that acts that led to personal injury or endangerment of the victim could not be considered within the scope of ill-treatment.[90] Moreover, according to Karaoğlan, material and direct acts that caused bodily effects (*beden üzerinde tesir yapan maddi ve fiili hareketler*) could not be considered within the scope of this crime. At the first glance, it is not clear what is meant by these words. However, when we examine what Karaoğlan thought to fall under

[90] Fahreddin Karaoğlan, *Tadillerinden Sonra Ceza Kanunumuz Üzerinde Bir İnceleme* (Ankara: Adliye Vekaleti, 1936), 92.

the scope of ill-treatment, it becomes clear that what he meant by this phrase were acts of direct and bodily physical violence – like hitting, beating, pushing or pinching someone. All his examples – leaving someone outside at cold weather, depriving someone of food or water, making someone carry out hard tasks incompatible with her capacity, or standing passive when a family member is being 'harrowed' by another- are acts that do not involve direct bodily interaction (touching of one body or a tool used by one body to the other) but can produce bodily effects. His choice of this phrase rather than "*darb*" suggests that he wanted to provide an even more limited definition for this crime than the legislators who penned the justification explanation of 1933. Because they produced bodily effects, the acts that he gave as examples could also be considered as 'effective deeds' according to Karaoğlan. And if both ill-treatment and 'effective deed' articles were applicable to the case; the one to be applied was whichever that would lead to heavier punishment.[91]

These texts show that the CCa judges and the post-1932 Turkish Ministry of Justice understood this crime quite differently than the Italian legislators of the time because, in the new ICC, it was stipulated that this crime could lead to bodily injury and even death. For Arıcan and Karağolan, acts that led to such consequences or even any sort of endangerment would not fall within the scope of this crime. This shows that Turkish bureaucrats and jurists were much more limitative than Italian legislators of the fascist period in their interpretation of what this crime was and what kind of acts it covered. Second, this definition of ill-treatment as a group of acts that exclude those leading to bodily injury or endangerment of the victim contradicts the text-book definition of this crime that is found in criminal law commentaries from the second half of the twentieth century. In this later period, there were disagreements among commentary writers but there was consensus on one issue: All of them defined ill-treatment as "acts that cause bodily or mental harm or

[91] Ibid., 93.

endangerment."[92] In other words, despite the fact that not even a single letter of this article was changed after 1933, what was explicitly *excluded* from the scope of this crime in the most authoritative interpretations of this stipulation in the early Republican period had become the *definition* of this crime in later periods. This stark contrast shows us that these later interpretations of this crime cannot be seen as remnants of the early Republican era and that there can be radical differences among the interpretations of the same text through time.

The decisions given by the CCa in the 1930s also support the argument that the crime of ill-treatment was interpreted in narrow fashion in this period compared to later periods when various sorts of violent acts were considered as ill-treatment. Because I could not find a single decision in which the CCa ruled the case as ill-treatment from this period, I am not able to determine what was actually considered as ill-treatment by the CCa in practice. However, I found numerous decisions which show what was *not* considered as ill-treatment. For example, there are numerous CCa decisions from the 1930s where acts like verbal insult, threat, or beating were considered as separate crimes and not as ill-treatment.[93] This is important because, in the CCa practice of the early 2000s, all of these acts could be considered to fall under the scope of ill-treatment when they were committed against household members.

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[92] Faruk Erem, *Türk Ceza Hukuku: Hususi Hükümler*, vol. II, 1st ed. (Ankara: Ankara Üniversitesi Hukuk Fakültesi Yayınları, 1962), 900; Sulhi Dönmezer, *Ceza Hukuku Hususi Kısım: Şahıslara Karşı ve Mal Aleyhinde Cürümler*, 5th ed. (Istanbul: İstanbul Üniversitesi Hukuk Fakültesi Yayınları, 1963), 142; Abdullah Pulat Gözübüyük, "Terbiye ve İnzibat Vasıtalarının Kötüye Kullanılması ve Aile Fertlerine Karşı Kötü Muamele," in *Onar Armağanı* (Istanbul: İstanbul Üniversitesi Hukuk Fakültesi Yayınları, 1977), 360; Nejat Özütürk, *Türk Ceza Kanunu Şerhi ve Tatbikatı*, vol. III (Ankara: Balkanoğlu Matbaacılık, 1966), 17; Selami Akdağ, *Türk Ceza Kanunu Şerhi* (Ankara: Olgaç Matbaası, 1976), 749; Abdullah Pulat Gözübüyük, *Alman, Fransız, İsviçre ve İtalyan Ceza Kanunlarile Mukayeseli Türk Ceza Kanunu Açıklaması*, vol. IV (Ankara: Sevinç Matbaası, 1961?), 360.

[93] For some examples, see 2. C.D., E. 2271, K. 3103, T. 11.03.1936, *Temyiz Kararları 1936* (Ankara: The Ministry of Justice, 1937), 338; 2. C.D. E. 11044, K. 12335, T. 6.11.1936, *Temyiz Kararları 1936*, 336; 2. C.D., E. 760, K. 1213 T. 27.01.1937, *Temyiz Kararları* 1937 (Ankara: The Ministry of Justice, 1938), 318-319; and CUH E.16, K.14, T. 1.02.1937, *Temyiz Kararları 1937*, 37-38.

According to a decision taken by the CCa in 1935, the crime of deprivation of liberty, which was subject to a particularly harsh punishment (heavy imprisonment between 5 and 15 years, art.180), could be committed by a husband who forcefully brought his wife with whom he was living separately to the domicile by using physical violence. In this case, the husband was claimed to bring his wife to the domicile by using force (*zorla*) in order 'to make her obey the law of marriage' (*hukuku zevciyete riayet ettirmek*) and to live together with his wife by the lower court. The local court had sentenced him to imprisonment for one month and a 1 lira fine, punishing this act as 'vigilantism' (unlawful enforcement of one's right, *ihkak-ı hak*, art. 308). The case was taken to the CCa by the local prosecutor. In this majority decision, the 2nd Criminal Chamber underlined that the articles of the Civil Code concerning the marital union were beyond the scope of article 308 of the TCC concerning vigilantism. In such cases, there was no vigilantism but deprivation of liberty according to the CCa which reversed the decision of the lower court on this basis. The decision of the high court was in line with Belgesay's interpretation of the TCiC according to which husbands could only divorce their wives for their refusal to live with them. As examined in the next chapter, such acts would also be pushed under the scope of ill-treatment by the CCa in later decades.

One of the most interesting and even shocking CCa decisions that I came across at the course of this research is a decision concerning marital rape. I was not able to find the original text of this decision or even its number and date, but it was discussed at length in an article on sexual assault written by Prof. Dr. Fahri (Ecevit).[94] In this case, the Izmir Assize Court had considered anal rape committed by a husband against a wife as ill-treatment. The local prosecutor's office had objected to this decision, arguing that this was more than a simple act that was incompatible

[94] Fahri's surname was not specified in the article. However, considering the frequent use of medical terminology in the article and similarities of style between this article and articles published in the same journal in earlier and later years by Prof. Dr. Fahri Ecevit, I think that this was the legal medical science (adli tıp) expert Prof. Ecevit, who was the father of Turkish politician Bülent Ecevit. Fahri (Ecevit), "Türk Ceza Kanunu Üzerine İncelemeler," *AD* 11 (1935): 629.

with mercy and compassion and that it should be considered and punished as sexual assault (*ırza geçme*). The prosecutor's office at the CCa agreed with the local court but the members of the Criminal Chamber and of the General Criminal Assembly agreed with the local prosecutor. Thus, the case was first reversed by the special chamber and then by the GCA with the argument that the case should be considered and punished as sexual assault.

This decision shows that there was a time in the early Republican era when the majority of judges at the CCa were of the opinion that at least some forms of marital rape should be punished as sexual assault and that they had actually rendered such acts of violence subject to the same provisions that were applicable to cases of rape committed against strangers. In other words, sexual assault was a crime that could be committed by husbands in the early Republican era. In later years, anal marital rape would be considered as ill-treatment by the CCa, and this decision would not be remembered even when some judges at the CCa wanted to push for the punishment of such acts as sexual assault in the 1990s.

This decision highlights that there were significant differences between the early Republican regime and the norms and rules that were applied in later decades. When we take this decision into consideration, it becomes impossible to see the exclusion of marital rape from the scope of sexual assault by judges in later periods as a remnant of history because it is clear that there was a different history than what can be imagined on the basis of discourses produced and norms and rules applied in later periods.

The final issue that I want to elaborate on is the judicial practice concerning the extraordinary mitigation and unjust provocation mitigation. Despite digging various sources, I was not able to find a large group of decisions that would allow me to understand what was considered as unjust provocation by the CCa or how heavy and light provocation were distinguished in practice in this period. Later on, I noticed that this was partially related to the approach of the CCa to this norm and to the limits of

its own authority. In later years, the CCa would consider itself to be authorized to assess the appropriateness of lower court decisions in terms of their applications of this norm. It would frequently reverse the decisions of lower courts with the claim that heavy rather than light unjust provocation should be applied to the case, or with the claim that a larger reduction within the margins of heavy or light provocation should be made. Some decisions from this earlier period indicate that this tendency was not there in the early-1930s. A General Criminal Chamber decision from the mid-1930s shows that the majority of CCa judges thought that judges at the local level had discretionary power in deciding how much they would reduce the punishments while applying this mitigation.[95] As it is examined in subsequent chapters, this began to change in the late-1930s, and the CCa became more explicitly involved in this issue in the decades that followed.

An important document that provides insights concerning unjust provocation is a brief (*tamim*) issued by the Ministry of Justice on 31 May 1934.[96] According to this brief, unjust provocation could not be accepted in cases of suspicion and presumption. Thus, there had to be a real act or omission for the application of this mitigation, and perpetrator's suspicion that an unjust act might have been committed was not enough for him to benefit from this article. This was a departure from Majno's interpretation of criminal law and, through the publication of this brief, legal practitioners were directed towards acting differently than Majno's views on this particular issue.

This distinction between reality and belief is important, not because it became a consistent characteristic of the regime but because it was not applied for the most part of the 20th century. For a short period between

[95] CGK, E. 138 K. 135, T. 28.10.1935, quoted in Abdullah Pulat Gözübüyük, *Alman, Fransız, İsviçre ve İtalyan Ceza Kanunlarile Mukayeseli Türk Ceza Kanunu Açıklaması*, vol. I (Ankara: Sevinç Matbaası, 1961?), 204; and Sadık Perinçek and Cahit Özden, *Türk Ceza Kanunu ve Buna Ait Seçilmiş Temyiz Mahkemesi Kararları*, 3rd ed. (Istanbul: Güven Basımevi, 1959), 85.

[96] The Ministry of Justice, Brief no. 2090, 31 May 1934, quoted in Faruk Erem, "Adalet Psikolojisi Bakımından Heyecanlar ve İhtiraslar," *AÜHFD* 2, no. 4 (1945): 50-79.

the 1970s and 1990s, the CCa insisted on applying this distinction. However, other than this interval, suspicion was accepted to be enough by the CCa for the application of unjust provocation mitigation.

Another group of texts which provide insights concerning this issue are parliamentary documents concerning a capital punishment approval. In this case, a man named Hüseyin Fevzi had killed his wife Sabiha in "a state of anger" resulting from the facts that Sabiha had left the marital domicile, returned to her father's home, opened a lawsuit for divorce, and rejected his peace offers.[97] The case was ruled as murder with malice aforethought by the local court which decided that there were no mitigating circumstances. Thus, Fevzi was sentenced to capital punishment and this decision was approved by the CCa. The justice commission, led by Salah(attin) Yargı, also approved the decision, noting that there were no mitigating circumstances – such as a ground for the application of unjust provocation or even discretionary mitigation- and Fevzi was executed in the end. This decision, which reveals the extent to which legal interpretation entails the distribution of violence, shows that leaving the marital domicile was not accepted as a ground for the application of unjust provocation mitigation in this period. Three cassatory decisions from the same era show that this was not an irregular decision, that it reflects a general trend because in these decisions too leaving the domicile or refusing to return to the domicile were not considered as unjust provocation.[98] This is important because, as I examine in the next chapter, in the post-1938 period, this interpretation was replaced by a new interpretation according to which such leaves were unjust acts necessitating sentence reductions.

[97] The JC, "The JC Report," no. 3/68-12, 17 April 1935; The Prime Ministry, "Prime Ministry Notice," no. 4/1241, 27 March 1935, both in *TBMM Zabıt Ceridesi*, period 5, vol. 2, session 17 (20 April 1935). For the final decision, see The TGNA Decision, no. 860, 20 April 1955, "Halebin Abraç Mahallesinden Abidin Oğlu Hüseyin Fevzinin Ölüm Cezasına Çarpılması Hakkında," *RG* 2986, April 25, 1935.

[98] CGK, K. 11, T. 20 January 1930, *Temyiz Kararları 1930* (Ankara: The Ministry of Justice, 1931), 109-111; CGK, K. 44, T. 17 March 1930, *Temyiz Kararları 1930*, 124-126; 1. CD, K. 45, T. 17 February 1930, *Temyiz Kararları 1930,* 317-318.

Despite examining numerous commentaries, law books and various primary sources, I was able to find only a few decisions concerning the extraordinary mitigation (art. 462) from the period between the mid-1920s and the mid-1930s, and they hardly provide a clue regarding the interpretation of the CCa concerning the conditions of this extraordinary mitigation. However, one of these decisions shows that there was one important continuity between the early Republican regime and the regimes that followed in terms of the CCa's approach to this article. According to this decision, which was taken in 1932, the extraordinary mitigation that was provided for attackers who caught their relatives committing adultery could not be combined with unjust provocation mitigation.[99] As far as I was able to trace, throughout the 20th century, the CCa decided in line with the precedent established in 1932 in this specific regard.

§ 3.4 Assessing the Early Republican Period

This examination raises multiple question marks concerning the characteristics of Republican reforms as discussed in the existing scholarship. Republican legislation and the CCa practice show that private life or domestic relations were not simply left untouched in this process. It is true that there was *some* hierarchical ordering but Republican family relations were legally designed in a much less hierarchical manner than late-Ottoman family relations in various respects. On the one hand, husbands were recognized as heads of households and wives were required to take their permission for working outside. On the other hand, women were granted unprecedented protections in terms of their rights to autonomy, life and bodily integrity. Marital imprisonment and abduction were accepted to be grave crimes and punished as deprivation of liberty. Chastisement of disobedient wives was not recognized as a husbandly right. Wifely obedience was not recognized as a wifely duty. At least some forms of marital rape were punished as sexual assault –decades earlier than some countries in the global north. Unmarried women were accepted to

[99] 1. C.D., E. 5552, K. 3104 T. 25.10.1932, in Mahmut Alicanoğlu, *Türk Ceza Kanunu ve Yargıtay İçtihatları*, vol. II (Istanbul: Halk Basımevi, 1952), 360.

have a right to have a sexual life free from criminal sanctions and free from the fear of being killed with complete immunity. Some forms of violence like murder or physical assault against selected relatives –not only against those who were historically considered inviolable (like mothers or fathers) but also against those who were placed at the lower ranks of the family hierarchy (like children)- were legally designed as crimes that were graver than those committed against strangers. All of these were novelties of the early Republican era. These changes in the regime of intimate violence suggest that in times of extensive reforms accompanied by strong feminist movements, there might be drastic changes in the bodily hierarchies established through law and in the regulation of bodily interactions among intimates.

This was a period of intense feminist activism in Turkey. Women had organized to establish a political party but were initially denied the permission to do so by the male political elite. They had pushed for the recognition of their rights to be employed in the public sector and finally gained the rights to be elected to office and vote at all political levels in the early 1930s. Despite this well-documented activism, I was not able to find a source which indicates that the changes that I examined in this chapter were directly demanded by feminist intellectuals or organizations.[100] Their voices or explicit reflections on their voices were absent from the journal of the law faculty and *Adliye Ceridesi.* However, the pushes created for the recognition of women's rights in different areas by this movement might have created a spill-over effect or might have hindered the rise or at least expression of explicitly misogynist discourses in institutions like the parliament, high courts, or universities. This seems important to me because, as I examine in the next chapter, there was a stark change in this discourse just after the suppression of feminist movements following the full recognition of women's political rights in 1934.

[100] Zihnioğlu, *Kadınsız İnkılap*; Kathryn Libal, "Staging Turkish Women's Emancipation: Istanbul, 1935," *Journal of Middle East Women's Studies* 4, no. 1 (2008): 31-55; and Ayşe Durakbaşa, *Halide Edip: Türk Modernleşmesi ve Feminizm* (Istanbul: İletişim, 2000).

In this period, there was a single party regime led by a single man, Mustafa Kemal Atatürk. Because of the dominant roles of a single party and its leader in politics, state policies and legal reforms of this period are defined as the Kemalist modernization project.[101] My examination of legal discourse and judicial and legal developments shows that there were strong disagreements among the people who can be defined as the Kemalist elite - concerning both *lex lata* (law as it is) and *lex referanda* (law as it should be). The disagreement between the CCa and the Ministry concerning the scope of ill-treatment is a strike example of the former, and the parliamentary debates in which Azmi and Salahattin disputed over what would be the ideal infanticide stipulation for Turkey can be seen as an example of the latter. I think such instances and the discrepancies between the ICC and the TCC show that the early republican regime of intimate violence was not a transplant from Europe or a perfectly coherent and pre-determined project unanimously agreed upon by all members of the state elite but a web of norms, rules, and definitions which were negotiated and contested at multiple institutional settings.

This examination that focuses on substantive criminal law presents a much different picture of the early Republican period than works focusing on cultural or pedagogical representations of gender relations. According to the latter scholarship, sexuality was left beyond the scope of Republican reforms and this era was characterized by sexual puritanism.[102] My examination indicates that this was not the case in terms of the regulation of sexuality and intimate violence through criminal law. The early Republican era was the only period in the 20th century in which consensual sexual intercourse between minors in their late teens was not designated as a crime.[103] Moreover, with the adoption of the TCC, extra-

[101] Arat, "The Project of Modernity."

[102] Kadıoğlu, *Cinselliğin İnkarı*; and Sancar, *Türk Modernleşmesinin*.

[103] Such sexual relations, along with sexual relations involving adults and minors over the age of 15 were criminalized in 1953 through an legislative amendment. Even today – that is more than a decade after the adoption of the new criminal law, the CCa accepts

marital sexual relations among unmarried adults had ceased to be designated as a crime. In a similar vein, unmarried women were excluded from the scope of extraordinary mitigation for the first time. For a limited period of time and only in this period of time in the twentieth century, relatives of unmarried women were not legally allowed to kill them upon finding them having sex with practical impunity. For married people, there was a much different regime in place. In case they were found by their relatives while having sex with someone, people who attacked them could benefit from extraordinary mitigation and receive a light sentence. However, even in terms of attacks targeting married women, there were some limitations in terms of this accommodation compared to the late-Ottoman era. The specified perpetrators group was limited to a closer group of relatives and complete immunity was abolished. What is more, unlike the late Ottoman period, extraordinary mitigation was not confined to crimes targeting female relatives. Finally, unlike the rest of the 20th century, the margin of mitigation was not fixed as 7/8 and judges were left free to reduce the sentence by smaller margins (such as 3/8). Taking all these into consideration, it is difficult to see this period as a period of sexual puritanism – at least not in all dimensions of the gender regime.

Sexual norms enforced by the early Republican state were not completely egalitarian. However, they were neither simple replications of Ottoman norms nor reflections of a sexual puritanism that denied women's sexuality. In other words, the reforms of this era also included an important and radical but not all-inclusive sexual liberation dimension that has not been recognized in the existing scholarship. I think the mismatch

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that such consensual sexual relations between minors should be considered and punished as a crime (within the scope of the TCC art. 104) and forces the local courts to punish male children involved in these acts by assuming that only males are the active participants of sexual intercourse. For the 1953 amendment, see The Law No. 6123, 9 July 1953, *RG* 8458, August 15, 1953. For recent case-law, see 14. CD, E. 2018/4515, K. 277572020, T. 29.06.200; and 14. CD, E. 2018/5583, K. 2020/2635, T. 24.06.2020, www.karararama.yargitay.gov.tr. It should also be noted that there is no consensus regarding this issue among contemporary scholars of criminal law. For these debates, see Özbek et al., *Özel Hükümler*, 362.

between my findings and the findings of scholars focusing on cultural or literary representations of gender relations in the early republican era support the argument that legal change may not fit with the characteristics of and trends in other fields like art and culture. In almost every canonical novel from this period, the only fate that awaited women who had extramarital sexual relations was death in some way or another.[104] On the other hand, my research shows that, with the Republican reforms, there were significant changes in the legally structured fate awaiting such murderers: A regime that legally stipulated complete immunity for some of these killers had been replaced by another that ensured *some* punishment for all such cases and changed the material basis of reproducing such practices of intimate sexual control by excluding cases involving unmarried people from the scope of extraordinary mitigation.

The sexual liberation brought about by the early Republican reforms was not something explicitly demanded by women's rights groups like the Turkish Women's Association. Unlike the adoption of the Civil Code or the recognition of women's political rights, steps taken in this direction were not 'advertised' in the official discourse. For the most part, this was an actual but rather silent liberation that had its own limits. This brings about the question of why such a change had taken place. One factor might be the rise of love as the primary emotion through which "the nation-state sought to regulate sexuality."[105] As noted by Nükhet Sirman, individuals within the Republican family were expected to be "bound to one another by no other tie but love, a relationship they would enter into out of their own volition."[106] The sexual liberation brought about by the Criminal Code was primarily related to the lives of single people and the changes that happened in this regard all facilitated the formation of love-based relationships among them. Thus, these changes seem to be related

[104] Sancar, *Türk Modernleşmesinin*, 136.
[105] Nükhet Sirman, "Kinship, Politics and Love: Honour in Post-Colonial Contexts – The Case of Turkey," in *Violence in the Name of Honour Theoretical and Political Challenges*, ed. Shahrazad Mojab and Nahla Abdo (Istanbul: Bilgi University Press, 2004), 48.
[106] Ibid., 49.

to a shift in the conceptions and designations of family and intimacy. Second, personal understandings and ideas of the political elite might have played a role in this change. Although there is nothing which indicates that Atatürk himself was involved in the designation of these particular stipulations, they were perfectly in line with his personal opinions as reflected in his *Karlsbad Memoirs* from 1918.[107] In other words, Atatürk's own understanding of ideal sexual relations, according to which sexuality among spouses had to be exclusive and unmarried women, as well as unmarried men, should be free to transgress "the rules of morality" in their engagements with the opposite sex, might have facilitated the adoption of these changes.

The fact that the early republican reforms actually included a sexual liberation aspect invites a new understanding of post-1935 public debates concerning gender, modernity, and the early Republican era. For example, Tanıl Bora underlines that between the mid-1930s and 1970, various authors and thinkers, who can be seen as the representatives of the conservative tradition in Turkey, considered modernization to be a pro-

[107] In these memoirs, Atatürk noted that feelings and affection that were directed to other people by a spouse needed to be "suffocated." There was no such problem for wives because they were already "arrested" by the requirements of covering, isolation from men, and public life but unless women were allowed to participate in social life in a greater extent it would not be possible to keep their husbands in check. Atatürk's elaborations on pre-marital sexual relations are also interesting and important. He noted that there were some acts and behaviors that violated the rules of morality carried out by men beginning with their teenage years and that these were accepted as sources of experience for men because only such men could claim to know women and how to please and be pleased with a woman (*bir kadını mesut etmek, bir kadınla mesut olmak yollarını en iyi bilebileceği*). Then, he asked, "How can it be accepted that a woman who lacks such experience … can perfectly satisfy psychological, emotional and material needs of her husband?" and concluded his elaborations by stating that "We should be courageous concerning the issue of women" and leave (our) anxieties aside. In these elaborations, there is a male-centric approach to female sexuality because repression of female sexuality emerges as a problem in so far as it constitutes a problem for men. On the other hand, this is one of the few personal elaborations on sexuality by Atatürk himself and it clearly shows that he had a favorable attitude towards the matter of sexual liberation for non-married women. Afet İnan, *M. Kemal Atatürk'ün Karlsbad Hatıraları* (Ankara: Türk Tarih Kurumu Yayınları, 1983), 44-45.

cess that transformed women into prostitutes, sometimes directly blaming the early Republican reformers for paving the way for the corruption of sexual morals.[108] The findings of this study suggest that these men were not fighting against wind-mills or ascribing a purely fictional sexual liberation aspect to this era. Republican reforms had really shrunk the legal space that formed the material basis of violent and penal control of sexuality *both* by the state and by intimate relatives in various respects. This suggests that such conservative charges concerning the characteristics of the early Republican era were not rhetorical constructions but reactions to actual retrenchments in the legal basis of masculine control over sexuality.

According some scholars, Republican reforms had brought about a shift towards conjugal family accompanied by the adoption of an "every man is the king of its castle" approach to domestic relations. For example, Sirman notes that "in its haste to rewrite social relations in accordance with its imaginary of modernity, Turkish law chose to disregard the multitude of ties that bind persons to kin outside the immediate family, instead defining it simply as being composed of the father, the mother, and the children"[109] and that, during the process of Republican reforms, "state sovereignty was delegated to the heads of families" on condition of loyalty to the state.[110] My examination shows that this was not the case in terms of the regulation of intimate violence. Rather than recognizing household sovereignty, the Republican juridico-political elite had undermined the legal basis of such claims by abolishing the recognition of wifely obedience as a marital duty, by designing chastisement as a parental rather than parental *and* husbandly right, and by abolishing the total immunity reserved for people who killed their female relatives upon

[108] For example, Bora notes that, according to Osman Yüksel Serdengeçti, pro-Western modernists had saved women from the cages at homes only to "cage" them on streets, and that Necip Fazıl Kısakürek, along with many others, equated modernization with the transformation of women into prostitutes (*orospulaşma istidadı*). Tanıl Bora, "Analar, Bacılar, Orospular: Türk Milliyetçi-Muhafazakâr Söyleminde Kadın," *Toplumsal Tarih* 129 (September 2004): 100-103.
[109] Sirman, *Kinship*, 55.
[110] Ibid. 52.

catching them committing adultery. Legally speaking, early Republican husbands were many things – they were the legally assigned bread-winners, final decision makers in family disputes, people who were financially liable for damages caused by their children – but they lacked "sovereign power" – or to use Belgesay's words *hakim olmak hakkı* (the right to rule over)- over their wives, or even over their children.

In terms of the regulation of intimate violence, Republican reforms did not entail a clear shift from extended family to conjugal family. With the establishment of the Republic, there was an intensification and limitation of familial relations in terms of the regulation of intimate violence in some respects. For example, while the late-Ottoman law provided legislatively ensured pardon or extraordinary mitigation for a much larger group of male relatives (including uncles or sons), the TCC limited this extraordinary mitigation to a smaller group of perpetrators comprised of spouses, siblings, or ascendants. However, it is difficult to define this as a shift towards the conjugal family because the designated perpetrators of the new clause included people from the extended family and, unlike the late Ottoman law, sons were excluded from this group. In terms of non-lethal violence, there was a much clearer intensification and limitation. While the late Ottoman law differentiated non-aggravated physical violence against strangers and non-aggravated physical violence against *all* sorts of relatives and relations, the Republican law differentiated physical violence against a selected group of relatives. However, there was not a clear shift towards the conjugal family in this respect. This is so because the prioritized aggravation group included ascendants and descendants but excluded spouses. Moreover, there was in fact a clear expansion rather than limitation in the designation of family burdens: Family burdens had not "shrunk" in this period because siblings, descendants, and spouses had entered into its scope for the first time in the early Republican era. Taking all this into consideration, I think that this era was a period that brought about a complex re-ordering of bodily hierarchies among intimates rather than a period that brought about the replacement of extended family with conjugal family or a period in which the existing hierarchies were left untouched.

Finally, there is the question how much formative power the early republican era had. Ayşe Gül Altınay's analysis on gender, militarism, and nationalism point out that we should doubt explanatory frameworks that ascribe an absolute determinative power to this period. My examination that focuses on a different subject highlights the same point: There was a mismatch between the developments of the early republican era and their later representations. Various characteristic elements of the regime of intimate violence in Turkey in the early 2000s – such as the denial of the recognition of marital rape as sexual assault, functioning of the crime of ill-treatment as an exceptional umbrella crime that ensures impunity or relative under sentencing for non-lethal intimate violence, extraordinary mitigations for murders committed by relatives upon discovery of illegitimate sexual relations in addition to adultery, sentence reductions on the basis of unjust provocation for the mere suspicion of transgression of gender norms- were not elements of the early republican regime of intimate violence. On the other hand, some key elements of this regime, like the concepts of unjust provocation and ill-treatment, which were introduced to the Turkish regime by Republican legislators, continue to impact the contemporary orderings of intimate violence in Turkey - despite the temporal fluctuations concerning their interpretations. On this basis, I argue that it was not the past in itself but selected aspects of the past that shaped the future of the regime of intimate violence in Turkey.

Despite a period of extensive legal reforms, women in Turkey continued to face various problems and limitations. As underlined by scholars such as Kandiyoti and Arat, various factors such as social resistance to reforms, impossibility of changing the fabric of everyday life through legal reforms on absolute terms, and the contradictions of the Kemalist modernization project itself might have impacted this outcome. This study shows that there was an additional factor that has remained almost unidentified in this scholarship: Some of the most progressive aspects of this legal regime were actually undone in a period of masculinist restoration that followed the early republican era. In the next chapter, I examine this restoration and the role of institutions in shaping its unfolding.

4

"Let's Tie Our Women to Home as Much as Possible": The Masculinist Restoration and Intimate Violence (1937-1960)

Beginning with the late 1930s, Turkish law scholars, politicians, and jurists suddenly began to talk about a "family crisis." Participating in this crisis debate, a lower court judge and later politician Müfit Erkuyumcu[1] wrote: "Now, the majority of our women claim to be equal to their husbands. Such groundless claims of our women and their lack of obedience are the primary sources of disputes." Erkuyumcu also had a solution: "Let's tie our women to home as much as possible. Let's raise our daughters as housewives before anything else."[2]

[1] In the journal, the author is noted to be a judge at the Izmir Asliye Hukuk Mahkemesi and his name is specified as Müfit Erkoyuncu. However, there was not such a judge at İzmir according to my review of the promotion lists of the time but there was a Müfit Erkuyumcu who had the noted judgeship at this point in time. Thus, the author's last name seems to be misprinted in this article (and in another article in the same journal attributed to Müfit Erkuyuncu) and this author seems to be Müfit Erkuyumcu, who later became a prominent DP politician and parliamentarian.

[2] "Şimdi ekser kadınlarımız kocaları ile müsavat iddia ediyorlar. Kadınlarımızın bu yersiz iddiaları ve itaat hislerinin noksanlığı geçimsizliğin başlıca sebeplerinden oluyor... Kadınlarımızı imkân nispetinde eve bağlayalım. Kızlarımızı her şeyden evvel ev kadını olarak yetiştirelim." Müfit Erkoyuncu, "Boşanmalar Neden Artıyor?," *AD* 8 (1942): 946-956.

Erkuyumcu's words would hardly come as a surprise for a reader of the feminist scholarship in Turkey. As documented by scholars examining gender roles promoted in textbooks, in the mid-1940s, there was a shift towards a stricter gendered division of labor in these books –women had begun to be represented solely as homemakers.[3] The fact that women's claims concerning equality were declared void and identified as the source of this crisis by a judge writing in one of the few official forums of official legalese is rather dark and Erkuyumcu's designation of housewifery as the primary role for women –even without mentioning motherhood- suggests that jurists were also involved in shaping this shift. But, as I examine in this chapter, there is an even darker side to this story. Due to the masculinist restoration that took place in this era, literally tying a wife to home would no longer be necessarily a crime in this period.

As noted by scholars examining newspapers and textbooks, women were sent back to home in the 1940s.[4] In this chapter, I show that this return was facilitated by the state not only on the basis of representations of ideal gender roles. Many women were beaten back to home, some were literally tied to it, some others were killed for leaving; and the penal consequences of all these violent practices were either abolished or reduced by a grand transformation in the regime of intimate violence that enhanced masculine control over women's bodies and choices.

§ 4.1 International and Domestic Context and Changes in the Judico-Political Field

Turkish politics went through various changes in this period. In 1937, Atatürk's health began to deteriorate.[5] He was officially diagnosed with cirrhosis in early 1938, and died at the end of that year. Because he had a

[3] Firdevs Gümüşoğlu, "Cumhuriyet Döneminde Ders Kitaplarında Cinsiyet Rolleri (1928-1998)," in Hacımirzaoğlu, *75 Yılda*, 101-128; and Füsun Üstel, *"Makbul Vatandaş"ın Peşinde: II. Meşrutiyet'ten Bugüne Vatandaşlık Eğitimi* (Istanbul: İletişim, 2005).

[4] Ibid. For a study focusing on newspapers, see Sancar, *Türk Modernleşmesinin*.

[5] Mithat Aydın, "Atatürk'ün Son Hastalığı," *Belgi* 12, no. 2 (2016): 176-201.

central place in the Republican political regime dominated by a single party, his illness and death had a significant impact on politics.

After Atatürk's death, İsmet İnönü, who had been politically marginalized in recent years, returned to the top echelons of political power and became the president. In this process, there was a re-shuffling in the scene of politics. While marginalizing many of his opponents, İnönü started a policy of peace targeting politicians and intellectuals who had been marginalized in earlier years.[6] There was also a limited and gradual political opening. While the multiparty era officially started in the mid-1940s, İnönü had already declared that the demands of masses would be taken into consideration in a greater extent in his initial speeches as the national leader.[7] In this period, legal rules concerning marriage and divorce began to be discussed at length in official forums. This development, which actually started before the outbreak of the war,[8] seems to be facilitated by this opening towards the demands of masses as they were understood by the state elite because these issues were raised as problems that needed to be addressed in formal wishes submitted by people to the party and were considered in the RPP Congress of 1939.[9]

Turkey remained out of the Second World War but it was deeply affected by it. As underlined by Murat Metinsoy, general mobilization and widespread conscription led to significant changes in social life. During

[6] Cemil Koçak, *Türkiye'de Milli Şef Dönemi (1938-1945)*, vol. 2 (Istanbul: İletişim, 2007), 35-46.

[7] Ibid., 27-28.

[8] In his examination of family policies and debates in the war period, Murat Metinsoy argues that the family crisis of this era resulted from the changes that the war brought about. On the other hand, it seems to me that the war and the changes it led to can not be seen as the causal factors behind the emergence of the "family crisis" because the so-called crisis and public debates over the appropriateness of the dispositions of the civil code concerning marriage and divorce in official forums had actually started before the outbreak of the war. Murat Metinsoy, *İkinci Dünya Savaşı'nda Türkiye: Savaş ve Gündelik Yaşam* (Istanbul: Homer, 2007), 391-423. For a pre-war article concerning this issue, see Fuat Hulusi Demirelli, "Bir Mütalea," *AD* 28, no. 12 (1937): 1103- 1197.

[9] For the wish system and wishes submitted to this congress, see Sevda Mutlu, "Tek Parti Döneminde Parti Devlet Bütünleşmesine Bir Örnek: 'Dilek Sistemi,' " *Atatürk Araştırma Merkezi Dergisi* 29, no. 86 (2013): 53-102.

the war, there was an increase in the numbers of homeless children, divorce rates, and divorces issued on the grounds of adultery.[10] Turkey declared war against Germany at the end of the war and became a part of the Western block that emerged after it. In this process, the US began to slowly replace Europe as the source of state-making expertise.[11] In 1946, a group of politicians formerly active in the RPP established the Democrat Party (DP), which won the 1950 elections. Until the coup on 27 May 1960, the country was ruled by the DP.

In this period, conservatism acquired a novel dominance in politics and political debates. In the 40s, in other words before the DP rose to power, the RPP made various changes in its approach to religion. Some measures reflecting the militant laicism approach were taken back and conservative figures such as Şemsettin Günaltay were brought to critical positions.[12] In other words, there was a general political shift towards conservatism.

Upon coming to power, DP leader Adnan Menderes declared that the early Republican reforms that were embraced by the nation would be maintained in the new era, implying that the reforms which were not accepted by the masses would not be maintained.[13] In the early 1950s, there were intense contestations within the DP concerning the question of which reforms would not be maintained. Polygamy and religious marriage, women's clothing (especially *çarşaf* worn by conservative women

[10] Metinsoy, *İkinci Dünya Savaşı'nda*.

[11] Ziya Umut Türem, "Competition Law Reform in Turkey: Actors, Networks, Translations," *Indiana Journal of Global Legal Studies* 21, no. 1 (2014): 159-193.

[12] Murat Akan, *The Politics of Secularism: Religion, Diversity, and Institutional Change in France and Turkey*, (e-book version) (New York: Columbia University Press, 2017), 45.

[13] "*Millete mal olmuş inkılaplarımızı mahfuz tutacağız*." İrfan Neziroğlu and Tuncer Yılmaz, eds., *Hükümetler, Programları ve Genel Kurul Görüşmeleri*, vol. 2 (Ankara: TBMM Basımevi, 2013), 757.

and shorts worn by girls in school-age in public parades), and female employment (especially in the public sector) became much discussed issues.[14]

The existing scholarship on this era endorses a narrative according to which there was not a change in the outlines of the legal regime concerning gender relations in these years. However, as I show in this chapter, there were actual and very extensive changes and it seems impossible to me to make sense of these changes by using fault lines like Kemalists vs. traditionalists, secularists vs. Islamists, or elites vs. fringes of the DP that are generally employed in this literature.[15]

In the 1950s, there were also changes in the institutions examined for this study. University purges continued to be a technique used by the government.[16] The purges of the 1950s were facilitated by legislative measures that expanded the powers of the government in retirement affairs concerning professors and high court judges.[17]

In this period, one generation of criminal law scholars was replaced by a new generation. Four members of this generation,[18] Faruk Erem,

[14] Canan Tatlı, "Demokrat Döneminde Toplumsal ve Siyasal Hayatta Kadın" (master's thesis, Istanbul University, 2008); Ezgi Sarıtaş and Yelda Şahin, "Ellili Yıllarda Kadın Hareketi," in *Türkiye'nin 50'li Yılları*, ed. Mete Kaan Kaynar (Istanbul: İletişim, 2015), 627-667; and Eser Köker, "Türkiye'de Kadın, Eğitim ve Siyaset: Yüksek Öğrenim Kurumlarında Kadının Durumu Üzerine Bir İnceleme" (PhD diss., Ankara University, 1988).

[15] Tatlı, *Demokrat*; and Yüksel Taşkın, "Türkiye'de Sağcılık," in *Dönemler ve Zihniyetler*, ed. Ömer Laçiner (Istanbul: İletişim, 2009), 451-460.

[16] Ali Arslan, "Çok Partili Döneme Geçişten 27 Mayıs'a Türkiye'de Siyaset ve Üniversite," *Yakın Dönem Türkiye Araştırmaları* 2 (2013): 41-83.

[17] Arslan, *Üniversite*; and Gökhan Atılgan et al., *Osmanlı'dan Günümüze Türkiye'de Siyasal Hayat* (Istanbul: Yordam, 2016): 465-466.

[18] Other important figures of this generation of criminal law scholars were Burhan Köni from the political science department of Ankara University and Naci Şensoy from Istanbul Law. Şensoy died in his 50s in 1965 and Köni, who was also actively involved in politics, was employed in the Faculty of Political Science (Mülkiye) of the Ankara University rather than the law school.

Sulhi Dönmezer, Nurullah Kunter, and Sahir Erman,[19] are accepted as "the most important figures in the development of criminal law" in Turkey by the Turkish Criminal Law Association.[20] All members of this generation were born in the 1910s and all became professors between the late 1940s and 1960. While Erem, Kunter, and Erman were all educated in Europe, Dönmezer was sent to the US (Illinois) to study American positivism just after the war.[21]

American criminology also bodily came to Turkey in this period. In the mid-1950s, criminology professor Donald R. Taft, a proponent of the culturalist approach to crime and Dönmezer's supervisor in Illinois,[22] spent a year at the Istanbul University and taught criminology. Taft had a role in enhancing the notion that an exceptionally high regard for honor and chastity was a characteristic element of Turkish culture. In his lectures on criminology, he placed this at the top of his list concerning the characteristics of Turkish society, noting that such emotions existed in all human communities but in different degrees.[23] Taft's culturalist approach seems to have impacted Dönmezer greatly and via him the transformations of the regime of intimate violence in Turkey because Dönmezer became a very powerful actor in Turkish criminal law and

[19] In Ankara law faculty, Baha Kantar retired in 1953 and Faruk Erem became the sole professor of criminal law at the Ankara Law Faculty at the rather young age of 40. Nurullah Kunter became the criminal law chair in Istanbul in 1954, a year before the retirement of Tahir Taner.

[20] The website of the Turkish Criminal Law Association (TCLA) has a special section titled "Unforgetables" (Unutulmayanlar) devoted to these four scholars. See "Unutulmayanlar," https://www.tchd.org.tr/

[21] Dönmezer notes that he had started to work on criminal responsibility with neo-classical beliefs but became more and more conflicted about this issue through time, especially after his visit to the US. *Cezai Mesuliyetin Esası* (Istanbul: İstanbul Üniversitesi Yayınları, 1949), III. Different elements of the criminological debates in the US, like the dispute between Sutherland and the Gluecks, entered Turkish academia after Dönmezer's US trip. Dönmezer, who was personally in touch with the Gluecks, favored their multi-variable approach over the sociological approach of Sutherland. See Sulhi Dönmezer, *Kriminoloji,* 2nd ed. (Istanbul: Istanbul University Press, 1962), 76-77.

[22] "Ord. Prof. Sulhi Dönmezer Köşesi," TCLA, https://www.tchd.org.tr/service/donmezer-kosesi/.

[23] "Profesör Taft'ın Kriminoloji Ders Notları," quoted in Dönmezer, *Kriminoloji*, 233.

requirements of culture and cultural/national specificity became the basis of Dönmezer's resistances against initiatives for egalitarian changes in the directly gender-related dispositions of the criminal code[24] and his support for changes that brought about stricter controls over sexuality.[25]

In this period, there were also changes in the make-up of the CCa. In 1954, four CCa judges, including Abdullah Vehbi Yekebaş, were forced to retire by the Ministry of Justice before reaching the legal retirement age. This first wave of purges was later followed by discretionary retirements. Between 1954 and 1956, the president, vice-president, and head prosecutor of the CCa, along with many other CCa members, were all retired by the government.[26] Among those was Melahat Ruacan, who had entered the CCa as a rapporteur-judge in the mid-1940s and became the first woman to be appointed as a CCa judge in the world in 1954. Thus, in the last years of this masculinist revival, the CCa was operating under intense pressure from the government.[27]

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[24] These issues include de-criminalization of adultery, abolition of unjust provocation defense for intimate control murders, legal differentiation of rapes leading to loss of virginity from others and impunity for rapists who marry their victims. See Sulhi Dönmezer, "Zina Cürmü," *AD* 7 (1950): 859-872. Dönmezer changed his positions on some matters through time but he fought against the legal criminalization of marital rape, abolition of the differentiation of rapes leading to loss of virginity from other rapes and abolition of the norm according to which rapists who married their victims would not be prosecuted or punished. He was also against the abolition of sentence reductions in murders related to adultery. He grounded all of these positions on Turkish culture, also in this later period. For a summary of his later stance, see "Tecavüzcüyle Evlenme Fuhuşu Önler," *Milliyet*, November 20, 2003.

[25] With the 1953 amendment, the punishments for sexual crimes like adultery were increased and consensual sexual relations among minors were criminalized. This amendment was praised by Dönmezer who claimed that these changes had given the law a national and local character in line with the social realities of the country. Sulhi Dönmezer, *Ceza Hukuku Özel Kısım: Genel Adap ve Aile Düzenine Karşı Cürümler*, 4th ed. (Istanbul: İHFY, 1975), 36-37.

[26] For these purges, see Baltacıoğlu, "Abdullah Vehbi," 194-214.

[27] This has also been noted by retired CCa members. For an example, see the reflections of former CCa judge Kahraman Koç, who was appointed to this institution by the DP; Kahraman Koç, "Yargıtay'dan Anılar," *YD* 7 (1982), 241-269.

In the last years of the interwar era and the war period, there were some significant changes in law and gender relations in various countries. On the one hand, there was a shift towards more egalitarian marital relations in some countries. For example, wifely obedience ceased to be designated as a legal duty in France in 1938. On the other hand, gender regimes in some countries such as the USSR or Germany began to change in new ways in the mid-1930s. For example, legislative and judicial changes in Nazi Germany did not only bring about racist and eugenic marriage regulations but also the marginalization of marital violence in the field of law.[28] After the mid-1930s, the Soviet gender regime took a sharp turn. Initially, the Bolshevik Revolution had brought about a radically new gender regime largely based on the recognition of sexual autonomy.[29] Marriages could be officiated and dissolved without judicial procedures, registered and unofficial marriages were equated, concept of illegitimacy was abolished and children born out of wedlock were equated with official children. In the mid-1930s, there was a return to family –divorce regulations were rendered more difficult, unmarried couples lost the recognition they once had, abortion was re-criminalized.[30] Reforms in countries like France largely remained out of Turkish

[28] Before 1938, attempted murder and cruelty or ill-treatment were absolute grounds for divorce in German civil law. In case a woman proved that her husband had attempted to kill her or mistreated her, judges were legally required to issue a divorce and they could not deny such divorce requests by arguing that the marriage was not permanently disrupted by this act. The 1938 Marriage Law changed this situation. According to this law, cruelty or even attempted murder were not among the absolute grounds for divorce like adultery or refusal to procreate. For a detailed analysis of the changes in German legislation, see Mariken Lenaerts, *National Socialist Family Law: The Influence of National Socialism on Marriage and Divorce Law in Germany and the Netherlands* (Leiden: Brill, 2014), esp. 54-157.

[29] Lauren Kaminsky, " 'No Rituals and Formalities!' Free Love, Unregistered Marriage and Alimony in Early Soviet Law and Family Life," *Gender and History* 29, no. 3 (2017): 716-731.

[30] Ekaterina Mishina, "Soviet Family Law: Women and Child Care – From 1917 to the 1940s," *Russian Law Journal* 10, no. 4 (2017): 69-92.

debates until the end of the war but changes in Nazi Germany were scrutinized in outmost detail[31] and the family turn in the Soviets was directly brought into domestic debates in order to undermine proposals for easing divorce regulations.[32]

After the war, concepts like human rights and equality gained a new significance in the international arena. Although it was not until the 1960s that international organizations like the International Association of Penal Law (AIDP) became more involved in issues related to women's rights or sexual freedoms, the preamble of the UN Charter of 1945 declared that the peoples of the United Nations were determined "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."[33]

The International Federation of Women Lawyers (FIDA), a UN-affiliated NGO which held its first convention in 1945, became an international forum for women's rights advocacy in this period.[34] The 1952 FIDA Convention took place in Istanbul[35] and Süreyya Ağaoğlu, the first female lawyer in Turkey, was elected as the FIDA president. The FIDA adopted a number of resolutions concerning legal arrangements about family and gender equality at this meeting.[36] It was shortly after this

[31] Georges Barbay, "Alman Hukukunda Boşanma," trans. Salih Engin, *AD* 5 (1940): 440-455.

[32] Hıfzı Veldet Velidedeoğlu, "Boşanma Sebeplerinin Hukuk Tarihi, Kilise Hukuku ve Hukuk Politikası Bakımından Umumi Surette Tetkiki," in *Cemil Bilsel'e Armağan* (Istanbul: İstanbul Üniversitesi Hukuk Fakültesi Yayınları, 1939), 667-695.

[33] The Charter of the United Nations, https://www.un.org/en/sections/un-charter/preamble/index.html

[34] What is known about FIDA's early years is very limited since its archives were lost. https://fidafederation.org/en/about-us/history/.

[35] "Istanbul, Turkey, Headquarters, Seventh Conference, International Federation of Women Lawyers, July 5 to 10, 1952," *Women Lawyers Journal* 38, no. 2 (1952): 27-38.

[36] According to FIDA, divorce by trial should be the only procedure for divorce, equal divorce and guardianship rights should be recognized, the requirement of husband's permission for women's employment and differentiatial inheritance stipulations for illegitimate children should be abolished, spouses should be given the opportunity to de-

event that the acting president of the CCa explicitly declared that the planned civil code revision would not entail changes in revolutionary measures.[37]

Although the specifics of these interactions remain to be studied, it seems that the post-war global context and resistance of women's rights activists and organizations limited the possibilities of action for the political elite who were trying to secure a place for Turkey in the Western alliance. These factors, rather than the ideological commitment of the state elite to "unquestionable" elements of the Kemalist gender regime, seem to lie behind the absence of changes in the text of the Civil Code because, as I show in this chapter, almost everything was questionable and actually questioned in this period and there were enormous changes. Abolition of the legal basis of men's control over women's movements expressed with the rather orientalist slogan of "liberation of women from harems," facilitation of women's participation in public life, and of social relations between men and women were primary elements of early Republican reforms. In this era, on the other hand, "frequently leaving the house to walk in the streets" (*sık sık evden çıkıp sokaklarda dolaşmak*),[38] or exchanging greetings with stranger men (*yabancı erkeklerle selamlaşmak*)[39] were accepted as faulty behavior for married women in divorce proceedings. As examined in this chapter, religious marriages and polygamous unions were also recognized in a very gendered way.

termine their family name and to have women's family name as an option, and all stipulations threatening women's political and civil rights should be abolished in every country. Tatlı, "Demokrat Parti Döneminde," 115-116.

[37] For this declaration, see Tatlı, 135-136.

[38] 2. HD, E. 7894, K. 445, T. 1.2.1949, in Naim Tezmen, *Aile Hukuku ile İlgili Ceza ve Hukuk Davaları* (Istanbul: Varol, 1952), 48.

[39] The General Assembly of Civil Law, E: 2.68.11, K. 14, T. 11.2.1948, in Tezmen, *Aile*, 69.

§ 4.2 Crisis Narratives and Calls for a Masculinist Restoration

One of the important elements of the legal discourse of this period was the so-called 'family crisis'. In the late-1930s, a large group of people, including bureaucrats, scholars, and judges suddenly began to talk about a crisis that needed to be solved. In the words of constitutional law professor Bülent Nuri Esen, the society was sick and it could only heal with the return of women to home (cemiyetin iyileşmes*i kadının eve dönmesi ile mümkündür*).[40] The fact that this sentence was written by Esen himself indicates that such demands towards a masculinist restoration were not only raised by conservative politicians or intellectuals but also by scholars who were deeply committed to the Kemalist project of top-down modernization.[41] Many of the people involved in these debates, which were directly promoted by the Ministry of Justice, agreed that there was a need for change for the solution of this alleged crisis but there was no consensus about the specifics and there was a great variety among the proposed solutions:[42] Official recognition of polygamy, criminalization of polygamous living, criminalization of extra-marital cohabitation of men and women, forceful separation of polygamous unions through legally enforced return of childless women to their natal homes, criminalization of alcohol consumption, adoption of looser/stricter divorce regulations,

[40] Bülent Nuri Esen, "Untitled Opinion Piece on Extralegal Unions and İllegitimate Children Report)," *AD* 12 (1942): 1452.

[41] For example, in the same report, Esen argued that the Republican ideals that were materialized by the legal reforms of the early Republican era could never be sacrificed, opposed the calls for re-recognition of polygamy in Turkish law, and proposed the legally enforced separation of polygamous couples. Ibid., 1450.

[42] The issue of family law was already on the agenda of scholars and jurists since the late 1930s. In the early 1940s, these debates acquired a new character because the Ministry of Justice formally asked bureaucrats, scholars and jurists their opinions and observations concerning the issue of extra-legal unions (partnerships officiated by religious ceremonies) and illegitimate children. The Ministry wrote a report about this issue after collecting feedback from local authorities and opened this report to discussion by requesting the feedback of scholars and jurists. For the report and initial debates that followed see the special issue of *Adliye Dergisi*. *AD* 12 (1942).

recognition of religious marriages as official marriages, land reform, education campaigns to enlighten the masses were all brought to the table. Leaving the changes that might have happened through case-law aside,[43] there was not a major revision in the text of the Civil Code - with the exception of a major change in the minimum age requirements for marriage that was made in 1938 with the argument that there was a pressure in this direction from the masses.[44] What is important is the fact that recognition of polygamy or religious marriages were actually discussed as viable solutions to this crisis in the official journal of the Ministry of Justice in the early 1940s and this shows us the extent to which "unquestionable" elements of the early-Republican gender regime were actually open for questioning well before the establishment of the DP.

Another crisis of the period was related to child criminality, which was defined as a social disease (*sosyal hastalık*) in the first half of the 1930s.[45] Beginning with the late 1930s, there was a significant increase in scholarly discourse production concerning this issue.[46] While this crisis discourse did not start with the war, the wartime increases in the

[43] Fikret Arık's elaborations from the 1950s indicate that there were also significant changes in this regard but their scope remains to be studied. K. (Fikret) Arık, "The Principal Differences Between Swiss Practice in Interpreting the Civil Code," *Annales de la Faculté de Droit d'Istanbul* 5, no. 6 (1956): 144-149.

[44] For an elaboration on the impact of this change on women's lives, see Yılmaz, "Osmanlı ve Erken Cumhuriyet," 66-90. For the parliamentary debates and the Justice Commission Report concerning this amendment, see *TBMM Zabıt Ceridesi*, period 5, vol. 26, session 76 (15 June 1938), 170-175; and The JC, "Türk Kanunu Medenisinin 88inci Maddesinin Değiştirilmesine Dair Kanun Layihası ve Adliye Encümeni Mazbatası," no. 260, 31 May 1938. Enclosed in the parliamentary folder on the Law No. 3453, 15 June 1938, *RG* 3945, June 28, 1938, https://www5.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d05/c026/tbmm05026076ss0260.pdf.

[45] Hüseyin Kenan Tunakan, *Suçlu Çocuklar* (Istanbul: Kader, 1936), 3.

[46] An initial study penned by Hilmi A. Malik, a Columbia educated child psychiatrist, was followed by various monographs and papers. The burgeoning of these works was also promoted by the ministry of justice which allocated funds for research on child criminality. Hilmi A. Malik, *İçtimai Dertlerimiz: Türkiye'de Suçlu Çocuk* (Ankara: Hakimiyeti Milliye, 1931); Tezer Taşkıran and Samet Ağaoğlu, *Suçlu Çocuklarımız: Ankara Çocuk Islahevinde Bir Araştırma* (Ankara: Titaş, 1943); Mehmet Ali Sebük, *Memleket Kriminolojisi* (Ordu: Gürses Basımevi, 1944), 6-14; Sulhi Dönmezer, "Çocuk Suçluluğu, Nev'i, Sebep ve Saikleri," *SBF Dergisi* 1, no. 2 (1943): 227-244; Naci Şensoy, "Çocuk Suçluluğu

numbers of homeless children and what Dönmezer called "abnormal families"[47] -families larger or smaller than "normal families" composed of a husband, a wife and children- might have contributed to its escalation. In the first work on criminology published by the Ministry of Justice, a Turkish translation of positivist criminologist Lois Vervaeck's *Criminal Anthropology*, it was argued that women's entry to the workforce was a factor contributing to child criminality.[48] In time, this became a commonplace assumption emphasized in Turkish criminology books.[49]

As examined in the previous chapter, family burdens aggravation was explicitly expanded to include descendants in the 1930s. In this period, some authors indirectly problematized such legislative initiatives which undermined the legal basis of impunity for top-down intimate violence. In one of the first criminological monographs written by a Turkish scholar, prosecutor Mehmet Ali Sebük claimed that Turkish fathers did not actually have the right to chastise their children for discipline. If a father were to slap a child, he would immediately become a defendant at a court of peace and sentenced to imprisonment for at least three days and a one lira fine.[50] According to Sebük, the increase in child criminality was linked to this situation and to the disappearance of the old notion of family authority. On the basis of this research, I am not able to determine how widespread such trials were in practice. However, Sebük's words indicate that such trials were not unheard of and that judicial and legal changes that facilitated the criminalization of child-beating were identi-

-Küçüklük- Çocuk Mahkemeleri ve İnfaz Müesseseleri," *İÜHFD* 15, no. 2-3 (1949): 569-633; and Naci Şensoy, "Çocuk Suçluluğunun Aktüel Durumu ve Çocuklar Tarafından Kesretle İşlenen Suçlar," *İÜHFD* 13, no. 3 (1947): 867-892.

[47] According to Dönmezer, families that included members from the extended kin group (like grandparents) or families lacking one of the parents were abnormal families, and the majority of child criminals came from such abnormal families. Dönmezer, *Kriminoloji*, 212-214.

[48] Vervaeck, *Cinai İlmibeşer Dersleri (Anthropologie Criminelle)* (Ankara: Adliye Vekaleti, 1938), 57.

[49] Sebük, *Memleket*, 7; Dönmezer, *Kriminoloji*, 219.

[50] Sebük, *Memleket*, 10.

fied as a problem by some jurists in this period. Another important element of this crisis discourse was the association of child criminality with same-sex sexual tendencies.[51] All in all, the alleged crisis of child criminality functioned as a means of legitimizing a variety of moral and disciplinary positions –for undermining women's right to be employed outside home, problematizing the deterioration of the legal basis of impunity for top-down intimate violence, praising the notions of family discipline and household authority, as well as legitimizing a presumed need for heteronormative sexual discipline.

The final crisis of this period began to take shape after the war. This was the criminality outbreak of the post-war era which coincided with the start of the multi-party period. In this period, there were increases in the numbers of reported crimes, including murder, physical assault, and sexual crimes.[52] Elaborating on the impact of war on criminality, Dönmezer argued that "the entry of women to public life, loosening of social control over women, and the difficulty they experience in returning to their old conditions after getting used to a *free life*" were all causes of criminality (*suçluluk sebebi*).[53] On the other hand, these changes were not specific to the war era in Turkey. As examined in the previous chapter, the facilitation of women's participation in public life, and formal employment and deterioration of the legal basis of masculine control over women's sexuality were actual components of early Republican reforms. Dönmezer explicitly recognized this fact and did not shy away from identifying the early Republican reforms themselves as factors contributing

[51] Taşkıran and Ağaoğlu, *Çocuk*, 44; Şensoy, *Aktüel*, 384; and Dönmezer, *Kriminoloji*, 126.
[52] The number of murders and physical assaults committed with weapons and sharp objects reveal the extent of this spike. The number of such murders was 549 in 1947, 422 in 1948 and 1,388 in 1950. The number of such physical assaults was 3,847 in 1947, 3,410 in 1948 and 8,349 in 1950. Thus, the number of such crimes had increased almost three-fold in the years between 1947 and 1950. These numbers were used for the legitimization of the law on firearms. See the justification explanation of this law for the numbers. "Ateşli Silahlar ve Bıçaklar Hakkında Kanun Layihası ve İçişleri ve Geçici Adalet Komisyonları Raporları," No. 1/264, 27 November 1951, 1. Enclosed in the parliamentary folder on the Law No. 2463, 10 July 1953, *RG* 8458, July 15, 1953. For the increases in the numbers of sexual crimes, see Dönmezer, *Genel Adap*, 3-5.
[53] Dönmezer, *Kriminoloji*, 249 (emphasis mine).

to criminality in Turkey. Applying Taft's cultural framework to this case, he claimed that, since it was a tradition for Eastern countries to exclude women from public life, women's entry to workforce was nothing short of a revolution in the traditions of the society. This, he argued, was a major cultural change; and cultural changes were causes of crime. He concluded his elaborations on this topic with this statement: "*We like our reforms and will do whatever is necessary to protect them. But we must also know that these reforms have caused some crimes to be committed*"[54] - without specifying which crimes he was writing about. As examined in the next section, this post-war crisis concerning bodily crimes was utilized for legitimizing legislative initiatives ensuring tighter controls over sexuality, increasing punishments for consensual transgressions of gender norms, and expanding accommodations granted to intimate violence.

As noted by Sara Ahmed, crisis narratives that are related to real events are often used for justifying "a 'return' to values and traditions that are perceived to be under threat"[55] and fears and anxieties are not simple reactions to the existence of a crisis because the affective aspect of this relationship is more complex. As facts, figures, and events began to be read within a crisis narrative and transform into fetish objects, they can "become the grounds for declarations of war against that which is read as the source of the threat."[56] Thus, it is the transformation of an issue into a crisis and subsequent declarations of war that are crucial for the affective qualities of responses to crisis. In this case, the recognition of women's rights in different areas or erosion of family discipline and morality were marked as the sources of threat in all three crisis discourses. This is why I do not think that the masculinist revival of this period can be understood in isolation from these crises and their production.

As seen in the debates over informal marriages, policies targeting peasants were also linked to gender debates and policies. Asım

[54] Ibid., 263.
[55] Ahmed, *Cultural Politics*, 76.
[56] Ibid., 77.

Karaömerlioğlu underlines that a state-backed peasantist (köycü) discourse made a peak after 1937[57] and that the state elite had a consensus over the need for preventing the dissolution of the existing social order in rural regions.[58] In later years, especially after the 1950s, urbanization and migration contributed to this dissolution and gendered control and masculine authority became means of preserving the existing social order despite the dissolution of peasantry and migration to cities.

In the mid-1930s, independent feminist movements had been dispersed. After the recognition of women's political rights in 1934, the Turkish Women's Association that was at the forefront of this struggle was dissolved upon various sorts of pressures coming from the state.[59] It seems that the suppression of feminist movements paved the way for the emergence of a more masculinist discourse in official forums. A paper titled "Women Jurists", published in *Adliye Ceridesi* in 1935 provides insights concerning this discursive shift.[60]

This was the translation of a paper written by Mariano d'Amelio, the president of the 1st Chamber of the Italian Court of Cassation. Its topic was an international congress organized by female lawyers in Naples. According to the author, this congress was different from the earlier ones and it was very remarkable because, in earlier scholarly meetings, all women did was feminism ("*feministlikten başka bir şey yapmıyorlardı"*). They were demanding the recognition of their rights, abolition of the requirement of husband's permission for women's legal actions, marital equality in issues like guardianship rights over children, recognition of their rights to enter all professions and public offices, and political rights. On the Naples Congress, on the other hand, all these issues were dropped off. Women had only discussed two things: The property regime to be applied for international couples and general principles of modern family law. According to d'Amelio, this was very appropriate because these were

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[57] Asım Karaömerlioğlu, "Türkiye'de Köycülük," *Modern Türkiye'de Siyasi Düşünce: Kemalizm*, ed. Ahmet İnsel (Istanbul: İletişim, 2001), 295.

[58] Ibid, 297.

[59] Zihniooğlu, *Kadınsız İnkılap*, 258.

[60] Mariano d'Amelio, "Kadın Hukukçular," *AD* 1 (1935): 37-41.

the issues where female lawyers could be of use thanks to their womanly experiences and feelings.

Why was such a paper, the intended audience of which was definitely not the Turkish people or Turkish feminists, published in *Adalet Dergisi*, the official forum of the Ministry? I think the rationale behind this was giving a message to domestic audiences from the pen of a European authority. The message was very clear: The age of "doing feminism" was over, now it was time for family.

In articles published in *Adliye Ceridesi* in the period between the mid-1930s and 50s, phrases declaring commitment to formal equality between men and women were not absent. What was new was the intensification of some voices - voices ridiculing the notion of equality, sanctifying the family or channeling Ottoman conceptions of household authority and marriage. Remarks and assumptions like "This trend towards formal equality is a modern-day manifestation of plague,"[61] 'Woman get married to be subjected to sexual treatment… (and) husbands own 'the body' of their wives,"[62] "When the issue is the family union, the happiness of the individual is the last thing to be considered,"[63] "Is not the greatest crime committed by women cheating men everyday with various evasions and sometimes by shedding tears?,"[64] "The relationship between the head of the household and those under his domination can be termed as a relationship of sovereignty."[65] were commonplace. As seen in these excerpts, there were very masculinist assumptions and remarks in the legal discourse that was circulated by the Ministry in this period and, as I examined in the previous chapter, many elements of this new discourse were

[61] This was a quote from Werner Sombart whose book was presented to the Turkish reader by a future minister of justice who played an important role in the transformation of the regime of intimate violence in Turkey. Hüseyin Avni (Göktürk), "Bir Şerh Tercemesi Münasebetiyle: Berlin Üniversitesi Profesörlerinden Sonbard'ın Yeni Bir Kitabı: "Deutescheer sojiaelisemues – Alman Sosyalizmi," *AD* 7 (1935): 431.

[62] Ecevit, "Türk Ceza Kanunu, 629.

[63] Esen, *Opinion Piece on Extralegal Unions*, 1444.

[64] Hüseyin R. Evirgen, "Kadın Psikolojisi ve Suçluluğu," *AD* 12 (1949): 1709. In the same piece, Evirgen also argued that women were more cruel and egoistical than men.

[65] Tahir Kanık, "Başkasının Fiilinden Mesuliyet," *AD* 10 (1957): 869-886.

absent from the discourse circulated through the same forum in the earlier years of the republic.

In 1947, Dönmezer wrote a paper about the protection of family through criminal law.[66] As far as I was able to trace, this was the first scholarly paper on this particular issue. Channeling Jhering's remarks on Roman law and his association of the power of Rome with the strict organization of patriarchal family,[67] Dönmezer wrote that the Roman Empire was able to become such a grand state thanks to the power and discipline of Roman families.

According to Dönmezer, there were two kinds of family responsibilities. First of these were related to the formation of families and fidelity requirement on the part of spouses. He noted that criminal law should not intervene in moral issues unless social interests required criminalization, and punishment and some of these acts (such as adultery) had been punished because of this since ancient times. Dönmezer also argued that the deterioration of family discipline and morality (through adultery and violation of some principles concerning the formation of families) was a factor that contributed to criminality and produced outcomes contrary to the demographic objectives of the state. It seems to me that the principles he was referring to were moral or customary rather than legal principles concerning the formation of families. In other words, I think that he was pointing out to marriages initiated without the father's consent through elopement and to murders that were committed upon such acts. In any case, there was a covert recognition of the problem of murders related to transgressions of gender norms in this paper. Dönmezer had problematized these murders not for their own sake but for their negative impact on demographic objectives. Since these murders were problematized in relation to the deterioration of family discipline and morality, this paper could be read as an invitation to enhance family discipline and morality to solve this problem.

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[66] Sulhi Dönmezer, "Ailenin Ceza Hükümleriyle Himayesi ve Aile Hukukunda Münbais Mükellefiyetlerin Tecrimi," *İstanbul Barosu Mecmuası* 16, no. 1 (1942): 20-37.
[67] İhering (Rudolph von Jhering), "Roma Hukukunun Tekâmül Tarihi," *AD* 4 (1935): 222-243.

According to Dönmezer, the second group of family responsibilities were specific to the 20th century. These were responsibilities such as providing for family members. Dönmezer noted that he was against the criminalization of some forms of "moral abandonment" -like refraining from sexual intercourse- as suggested by French criminal law scholar Marc Ancel. However, he absolutely agreed with the idea that material abandonment should be a crime.

What is missing from this first paper on the relationship between family and criminal law is also interesting. Another contemporary trend, the abolition of marital and patriarchal prerogatives of violence in many parts of the world, including early Republican Turkey, and the issue of non-lethal intimate violence were completely absent from Dönmezer's discussion of the relationship between family and criminal law.

In sum, there were multiple crisis narratives and conservative discourses that shaped the high legalese parole of this era. A variety of gender-related issues (including gender equality) were problematized and presented as the sources of social evils. Such problematizations, crisis narratives and calls for a return to family lied at the basis of a grand masculinist restoration in the ordering of intimate relations and intimate violence.

§ 4.3 Specific Pushes for Changes in the Norms related to Intimate Violence

In this period, there were also specific claims and arguments concerning law, familial relations, and intimate violence that can be interpreted as explicit pushes towards changes in the existing regime of intimate violence. I do not read these papers merely as reflections of factual or legal realities but as interpretative initiatives towards shaping these realities, in other words as law-papers in action.[68] And, as I show later in this chapter, these initiatives led to major changes in terms of the organization of intimate violence.

[68] For this approach, see Fernandez and Dubber, *Law Books in Action*.

Beginning with the mid-1930s, some authors whose papers were published in *Adliye Ceridesi* began to argue that "the head of household" (*ev reisi*) was like a governor, and that his authority should be understood in line with pre-Republican conceptions of household authority. Such arguments were sometimes justified on the basis of the notion of parallel orders: In every human community, there had to be a distinction between the governed and governors (*idare edenler ve idare edilenler*), otherwise chaos would ensue and this was why there was a concept like "ev reisi." [69]

Unlike the Swiss Civil Code, which used the term "*Hausgewalt*" (household power/violence) (art. 331, 332, 333), the words used in the Turkish Code did not necessarily imply that household heads had *Gewalt*, power/violence that mimicked the sovereign power/violence of the state.[70] On the other hand, this was accepted to be the case by some authors who argued that the relationship between the head and others was like a relationship of sovereignty.[71] In other words, husbandhood and household headship began to be discussed as positions of substantive domination. Thus, there was a challenge to Belgesay's early republican interpretation of the TCiC that I examined in the previous chapter because, according to that earlier interpretation, husbands were not accepted to have such a positon.

One of these authors who proposed such a new and masculinist interpretation was Hüseyin Avni Göktürk. According to Göktürk, a jurist-scholar who had just returned from Nazi Germany where he received his

[69] Akil Önder, "Usul ve Furu ve Kardeş Nafakası ve Ev Reisliği," *AD* 8 (1943): 625-637.
[70] Compare, Huber et al., *Swiss Civil Code*, 74-75; "Schweizerisches Zivilgesetzbuch vom 10. Dezember 1907," *Schweizerisches Bundesblatt* no. 54, 21 December 1907, 675-676 https://www.amtsdruckschriften.bar.admin.ch/viewOrigDoc.do?id=10022714; and TCiC, Law No. 743, art. 318-321. In everyday Turkish, *reis* is someone in a leadership role but not necessarily a suzerain who has sovereign power. Mayors, who lack this power, the power to order or use violence, were called "belediye reisi" until recent times.
[71] For example, Kanık noted that the relationship between the household head and "those under his dominion" was like a relationship of sovereignty ("*Ev reisi ile hakimiyeti altındaki şahıs arasındaki münasebet, bir tabiiyet münasebeti olarak tavsif olunabilir*."). Kanık, *Başkasının Fiilinden*, 869-886.

PhD degree and who would later become the Minister of Justice, it was unfortunate that the Swiss legislators had sacrificed many stipulations concerning the control and discipline of the house that were included in the first drafts.[72] According to him, these sacrificed stipulations were seemingly harsh at first glance, but they were actually very appropriate because they would enhance the spiritual and moral basis of the institution of family. Göktürk did not provide references to particular articles but it is clear that he was referring to the *Hausgewalt* (household power/violence) clauses that did not make it into the SCiC because his topic was household headship.

My cross-examination of the 1904 Draft of the SCiC (art. 338-344)[73] and the text of the SCiC adopted in 1907 (art. 331-334)[74] shows that the head of the household was much more powerful in the 1904 Draft. All members of the household were explicitly accepted to be under his dominion regardless of their age. He was to determine the rules of the household and all household members were legally obliged to obey the rules he established. He could also punish those who broke these rules and could behave "in the way allowed for parents" against some of them. His authority was legally accepted to be valid until the dissolution of the tie that gave him this power. These stipulations of the 1904 Draft were excluded from the SCiC of 1907 and this was a mistake in the eyes of the future minister of justice.

According to Göktürk, the concept of household headship was not alien to the Turkish context: While it was never included in the codified parts of Ottoman law, it was a part of Turkish customs according to which household headship was not only natural but also indispensable. In this part of his elaborations, Göktürk also underlined that this position did

[72] Hüseyin Avni Göktürk, "Evreisliği," *AD* 19, no. 7 (1936): 1334-1345.
[73] For the 1904 Draft, see "Botschaft des Bundesrates an die Bundesversammlung, zu einem Gesetzesentwurf enthaltend das Schweizerische Zivilgesetzbuch," *Schweizerisches Bundesblatt* no. 24, 15 June 1904. For the Hausgewalt clauses, see art. 338-344, 185-187, https://www.amtsdruckschriften.bar.admin.ch/viewOrigDoc/10021022.pdf?id=10021022&action=open.
[74] "Schweizerisches Zivilgesetzbuch vom 10. Dezember 1907," 675-676.

not grant the household head the authority to oppress (*zulmedebilmek*).[75] Göktürk's emphasis on the pre-Republican conceptions of household and his channeling of the *zulüm* versus good governance distinction can be read as an invitation for adopting of a more masculinist and hierarchical approach to family, for interpreting the existing legal texts with a perspective that recognizes the sovereign power of the head of household on the basis of Turkish customs and traditions. As it is examined in the next section, Göktürk's invitations took a more material form in the 1950s. After he became the Minister of Justice, the Ministry sent a request to the CCa to take a decision for the unification of case law concerning the question of husband's authority over the body of the wife and the CCa decided that the powers of husbands over their wives were similar to the powers of parents over their children.

Another push that was generated by some scholars and practitioners concerns the application of family burdens. In the first half of the 1930s, family burdens clauses in the code had been temporarily stabilized. Murder and effective deed committed against relatives specified in the Code (including wives and descendants) were subject to codified aggravation, and prosecution of effective deeds carried out by weaponry was not dependent on complaint. According to the case-law of the CCa, if the crime of effective deed was committed with a weapon, the relationship aggravation would be applied even if the victim had withdrawn her complaint or had not issued a complaint in the first place. Thus, in such cases, there would be two aggravations – one for the use of weaponry, another for the relationship between the victim and perpetrator.[76]

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[75] Ibid., 1341.

[76] CGK, E. 204, K. 689, T. 11.11.1940, in Alicanoğlu, *Ceza Kanunu*, vol. II, 334; 4. C.D., E. 43, K. 1254, T. 15.02.1940, in *Temyiz Kararları* 19*39-1940* (Ankara: The Ministry of Justice, 1941), 235; CGK, E. 238, K. 231, T. 12.7.1937, in Alicanoğlu, *Ceza Kanunu*, vol. II, 332; CGK, E. 2/38, K. 40, T. 25.5.1942, in Alicanoğlu, *Ceza Kanunu*, vol. II, 335; 2. C.D., E. 8477, K. 8889, T. 30.11.1944, in Alicanoğlu, *Ceza Kanunu*, vol. II, 334; 4. CD, E. 176, T. 31.1.1946, Alicanoğlu, *Ceza Kanunu*, vol. II, 334; and 4 CD, E. 13529, K. 14449, T. 31.01.1946, in M. Muhtar Çağlayan, *Türk Ceza Kanunu*, vol. II (Ankara: Ayyıldız Matbaası, 1962), 368.

Beginning with the 1940s, some authors began to push for a change in this regard. For example, in an article published in *Adliye Dergisi* in 1944, a young prosecutor named Cevdet Menteş, another future minister of justice, claimed that in cases of effective deeds committed by a spouse against a spouse with weaponry and resulted in incapacitation for less than 10 days, prosecution should be dependent on complaint.[77] In other words, if someone had stabbed or shot a stranger and this attack had led to incapacitation for 9 days, the case would be prosecuted regardless of the victim's complaint or its lack. However, according to Menteş, this rule should not be applied to the same deed if the perpetrator was a spouse. Comparing excerpts from two CCa decisions, Menteş argued that there was a problem that needed to be solved and invited the CCa to solve this matter by taking a decision for the unification of case law.[78]

Menteş did not explicitly state that the CCa had interpreted the same articles of the Code in two different ways in these decisions. This was strongly implied because these decisions were quoted one after the other in a paper calling for the unification of case-law but inconsistency in case-law was not his explicit argument. According to him, because such an aggravation for relatives like spouses was not included in the ICC of 1889

[77] Cevdet Menteş, "Karı-Koca Arasında İşlenen Hafif Müessir Fiillerde Şikâyetten Vazgeçme," *AD* 7 (1944): 598-601.

[78] Menteş did not explicitly state that the case law was inconsistent. In fact, it is clear from these decisions that there was not an inconsistency. This might be why he did not explicitly claim that such an inconsistency existed. In the first decision he referred to, the 2nd Criminal Chamber had overruled the decision because the local court had aggravated the punishment only for the use of weaponry but not a second time for the identity of the victim who was the perpetrators wife. The phrasing of the second decision he referred to, which was quoted in part by several authors in this period, was rather odd. According to this decision, the prosecution of cases that were committed with the means specified in article 457 did not depend on complaint. The prosecution of cases concerning the last clause of article 456, however, did depend on complaint. Thus, in the case under review, the spousal relationship between the victim and the perpetrator would not prevent the dismissal of the case upon the withdrawal of complaint. The text makes it clear that the spousal relationship had no impact on the prosecution of the case. Whether the perpetrator and the victim were spouses was an irrelevant factor for the procedure to be followed – which depended on a completely independent issue (use of weaponry).

and because this aggravation was added to the TCC by Turkish legislators with the concern that such acts would harm the feelings of mutual respect and mercy and compassion among family members, the CCa's interpretation of the code was in contradiction with the spirit and objectives of the law and requirements of justice. Thus, in cases of effective deeds committed against spouses by weaponry and led to incapacitation for less than 10 days, charges should be dropped if the complaint was withdrawn. In cases where there were more serious health consequences, family burdens aggravation should not be applied if the complaint was withdrawn. And Menteş was hopeful that the CCa would solve this issue by taking a decision for the unification of case law in a way that would satisfy "everyone."

Cevdet Menteş's call for a decision for the unification of case law is interesting because, as far as I was able to trace in this research, such explicit calls coming from judges and prosecutors at lower levels were not very common. The fact that this particular call was considered to be worthy of publication suggests that Menteş's arguments were not found as irrelevant by the editorial board. Another important aspect of this paper is the sub-text. Cevdet did not directly accuse the CCa of undermining the institution of family by interpreting the Code in the way that it did but this was an audible subtext running through the paper. Despite the fact that it was the legislators themselves who had changed the code and expanded the scope of family burdens to spouses, Menteş avoided from targeting them. In his account, Turkish legislators had wanted to protect the family and feelings of respect, mercy, and compassion among family members. The approach of the CCa, on the other hand, was against the spirit and objectives of the law and requirements of justice. The conclusion was left to the reader to make but it was presumed that the application of criminal sanctions to some cases of intimate violence, including acts like stabbing or shooting someone, was against the objective of protecting the family.

I think that Menteş's paper can be seen as a forerunner of the approach according to which there is a mutually exclusive relationship between the protection of family and application of criminal sanctions to

some forms of intimate violence in Turkish legalese. As it is examined in subsequent chapters, this approach has been promoted by various actors and institutions (especially after the 12 September 1980 Coup, which brought Menteş to the Ministry of Justice), and it is one of the main elements of contemporary parliamentary discourse on intimate violence in Turkey.[79]

Finally, what is missing from this paper is also interesting. Menteş had discussed the issue solely with reference to the secondary tier of family aggravations and with a particular emphasis on spouses. He did not explicitly demand the application of same principles to effective deeds targeting ascendants for example. This suggests that his opposition to the application of family burdens and prosecution independent from complaint was selective. In Menteş's framing, prosecution and aggravated punishment for crimes targeting ascendants was not a problem that needed to be discussed. This suggests that the expansion of family burdens to include spouses – in other words, the designation of family burdens in a way that ensured aggravated punishment for wife beaters, shooters or stabbers and in a way that was different from the ICC of 1889 by the early Republican legislators, met with some degree of resistance, compared to family burdens concerning bottom-up violence against parents that had some historical precedents.

Around a year after the publication of Menteş's paper, there appeared a response in the same journal. According to judge Hasan Tarhan, the

[79] This approach is clearly visible in the post-2010 parliamentary reports on gender violence. For example, the 2011 report states: "The dissolution and weakening of the 'INSTITUTION OF FAMILY' which constitutes the basis of the society will cause social dissolution. Although the issue of violence against women and family violence is an important social problem that needs to be solved, the most important matter that should be taken into consideration in this regard should be the 'protection of the Institution of Family.' It will be beneficial to avoid from measures which will alienate family members …. from each other and which will push men and women away from the family, and which will eventually destroy the family structure and condemn family members into loneliness." TBMM İnsan Haklarını İnceleme Komisyonu, Kadına ve Aile Bireylerine Yönelik Şiddet İnceleme Raporu, 2011, 53 (emphasis original).

Code was crystal clear in its stipulations concerning this issue and since there was not a contradiction between the decisions examined by Menteş and since these decisions were perfectly in line with the Code, there was no need for a decision for the unification of case law.[80] On its part, the CCa took various decisions concerning this issue, making it clear that it was determined to uphold the principles it was applying in this particular regard.[81] However, towards the end of the 1950s, criminal law professor Faruk Erem brought this issue back to the table. Citing Menteş's paper, Erem argued that these stipulations of the Code were not well-established and were causing doubts in practice - particularly in cases of husbands committing effective deeds against their wives with weaponry.[82] Again, what was specified as a problem was legislation and case law concerning spousal physical assault involving weaponry rather than the issue of prosecutorial discretion in all cases involving weaponry or family burdens concerning all people including ascendants: Seemingly such doubts were only arising when men shot or stabbed their wives. From Erem's perspective, it was "impossible" to think that the family burdens aggravation could be applied after the withdrawal of complaint in such cases. On the other hand, he noted, there were decisions which showed that the position of the CCa was different. Thus, he implied that the CCa was doing something unacceptable by giving such decisions.

This debate gained a new quality when Menteş was appointed to the CCa as a judge in 1958.[83] Menteş had failed to find an inconsistency in the case-law of the CCa in the early 1940s but he was then in a position to

[80] Hasan Tarhan, "Ceza Kanununun 456/4 ve 457inci Maddeleri Üzerinde Bir Düşünce," *AD* 6 (1945): 585-589.

[81] 2. CD, E. 8477, K. 8889, T. 30.11.1944, in Alicanoğlu, *Ceza Kanunu*, vol. II., 334; 4. CD, E. 13529, K. 14449, T. 31.1.1944, in Çağlayan, *Ceza Kanunu*, vol. II, 368; 2 CD, E. 9137, K. 9541, T. 19.10.1948, in Alicanoğlu, *Ceza Kanunu*, vol. II, 335; 4. CD, E. 11154, K. 11976, T. 18.11.1948, in Alicanoğlu, *Ceza Kanunu*, vol. II, 333; 2. CD, E. 3145 K. 3079, T. 29.3.1949, in Çağlayan, *Ceza Kanunu*, vol. II, 367; and 4. CD, E. 653, K. 653, T. 2.2.1951, in Çağlayan, *Ceza Kanunu*, vol. II, 366.

[82] Faruk Erem, "Müessir Fiilde Cezayı Artıran Sebepler," *AD* 2 (1957): 171-172.

[83] "Onursal Birinci Başkanlarımız – Cevdet Menteş," The CCa, https://www.yargitay.gov.tr/icerik/38/onursal-birinci-baskanlarimiz.

generate one. And it seems that he did. After his appointment, the 7th Criminal Chamber to which he was assigned began to deviate from established case-law, arguing that prosecution must have been dropped in such cases upon the withdrawal of complaint and that family burdens aggravation could not be applied under these circumstances.[84] Menteş's calls for the adoption of a decision for the unification of case-law concerning the matter had remained unanswered in the 1940s. However, in 1965, the 7th Criminal Chamber, where he was a judge, formally applied for the adoption of such a decision arguing that there was an inconsistency between their case-law and those of other chambers.[85] The majority of CCa judges refused this proposal. Thus, the pushes in this specific regard did not lead to visible and long-term changes in the norms consistently applied by the CCa but these debates might have affected judicial and prosecutorial practice at lower levels because they generated the effect of establishing the prosecution of such cases and aggravation of punishments for spousal intimacy as problematic matters - without explicitly specifying why these issues were problematic only in cases of spousal violence.

Another push was related to husband's power over wife's body in terms of sexual violence and bodily autonomy. These pushes were successful in bringing about long-term changes in the CCa practice. The first of these is found in Fahri (Ecevit)'s opposition to existing case law.[86] According to Fahri, who was a forensic medicine professor, a husband could commit many crimes against his wife but sexual assault was not one of them because he "owned" the body of his wife. This ownership had its limits but since there was a relationship of ownership, there could not be sexual assault. Thus, the CCa should change its recent case law according to which anal marital rape was sexual assault. Such acts could be punished under the scope of some other crime like sexual harassment or ill-treatment but not as sexual assault. According to Ecevit, not only anal

[84] The Plenary Assembly for the Unification of Case Law, E. 1965/4, K. 1966/1, T. 14.3.1966, in *İçtihadı Birleştirme Kararları*, vol. III (3 vols., Ankara: Yargıtay Yayınları, 1984), 796-797.
[85] Ibid.
[86] Ecevit, "Türk Ceza Kanunu," 623-638.

marital rape but anal rape of any kind could not be considered as sexual assault – because, while they were morally wrong, anal rapes were not attacks against "the hearth of the society, its most sensitive and crucial part" (*fakat nihayet sosyete tam kalbinden, en nazik ve hayati yerinden vurulmuş değildir)* which he implied to be the vagina.[87] As it is examined in the next section, this push was successful because the CCa began to push anal marital rape to the scope of ill-treatment in later years and punishment of anal marital rape as ill-treatment became a characteristic of the Turkish regime of intimate violence until the adoption of the new TCC in the 2000s.

Another aspect of this push was related to women's bodily autonomy. The Republican legislators had opened the way for the application of the deprivation of liberty article to cases in which a woman was imprisoned or forcibly moved in place by her husband because the TCC stipulated that the punishment for this crime would be aggravated if it was committed by a spouse (TCC, art. 180). Thus, it was clear that this crime could be committed by husbands and, as examined in the previous chapter, the CCa had closed the door for the application of the vigilantism article (unlawful enforcement of a right, *ihkak-ı hak*) to such cases in the mid-1930s.[88] According to the court, such acts had to be considered as deprivation of liberty because the rights the unlawful enforcement of which fell under the scope of vigilantism did not include the rights arising from family law.

In the 1950s, there were intense contestations within the CCa concerning this matter. While some judges were of the opinion that these cases must have been punished as deprivation of liberty, some others

[87] For an earlier and different conception of sexual assault that does not exclude anal rape from the scope of this crime, see Hayrullah (Diker), "Hukuk-ı Ceza ve İlmi Tıp," addendum to the *AD* 88 (1929), 193.

[88] 2. CD, E. 8213 K. 12018, T. 5 December 1935, in *AD* 12 (1935): 62-63.

pushed for a change in case-law, accepting that this crime would not occur in the absence of specific intent.[89] In this period, criminal law professor Faruk Erem pushed for affecting this process in various ways. First, he used his scholarly authority and interpretative power as a scholar. In an article published in 1954, Erem examined the crime of vigilantism and argued that the term "right" in the definition of this crime was used in a general sense. Thus, any right could be unlawfully enforced. According to him, political rights and rights arising from family law also fell under the scope of this crime. After this statement, Erem casually noted: "For example, the use of force by someone on his wife to coerce her into cohabiting with him."[90] In this paper, Erem was actually raising some controversial arguments. However, his narration was as if he was simply summarizing undisputed facts. In fact, he was challenging the established case-law by arguing that this crime covered all rights and by suggesting that the use of force on a wife for coercing her into cohabitation was an example of this crime, because there were various CCa decisions, which he excluded from his analysis, which underlined that such an act was not vigilantism but deprivation of liberty.

Erem had written this piece when there were intense contestations at the CCa and his intervention can be interpreted as an initiative to find a middle ground between the two conflicting interpretations found at the high court in this period - as an initiative which attempted to ensure that

[89] According to the decision for the unification of case law on this matter, there was an inconsistency in case law because the recent case law of the 1st CC was at odds with the earlier case law according to which such cases would be punished as deprivation of liberty. Earlier case-law cited in this decision were 1 CD, E. 2625, K. 2244, T. 27.9.1947 and 4 CD, E. 14764, K. 13182, T. 11.12.1953. The decision noted that the 1st CC recently changed its approach and began to decide that deprivation of liberty would not occur in such cases because they lacked the material element of this crime, citing 1 CD, E. 913, K. 775, T. 3.3.1953 and 1 CD, E. 2540, K. 2277, T. 30.6.1953. See the PA for the Unification of Case Law, K. 1954/5, K. 1956/12, T. 11.6.1956, in *İçtihadı Birleştirme Kararları,* vol. II, 673-676. According to my examination, there was also a decision in-between which indicates that the 1st CC had changed its position again in early 1954, unanimously deciding that a husband's abduction would constitute deprivation of liberty. 1 CD, E. 4357, K. 361, T. 27.1.1954, in *AD* 3 (1955): 277-278.

[90] Faruk Erem, "Kendiliğinden Hak Alma," *AD* 8 (1954): 951.

such acts would remain within the universe of criminally punished behavior (albeit becoming subject to lighter sanctions). As examined in the next section, Erem was also involved in the transformation of case-law in this matter in his capacity as a lawyer appearing before the CCa and the pushes for a change concerning this issue, which also included a rather hard push by the Göktürk's ministry of justice, led to radical changes in case-law the long-term effects of which continue to be experienced in contemporary Turkey.

Another important novelty that is found in papers published in this period is the argument that extraordinary mitigation (art. 462) was applicable even in cases where the perpetrator had not immediately and directly witnessed a situation which showed that the victims were committing, had just committed or were about to commit adultery. This was a new approach to extraordinary mitigation and it was at odds with the Ottoman interpretations of criminal law (at least with the interpretations found at the top of the late-Ottoman legal regime) because it entailed the abolition of the age-old direct witnessing requirement.

As examined in the previous chapter, the Italian regime had explicitly expanded the applicability of this mitigation by allowing the perpetrators who had discovered such relations in any way to benefit from this article and an amendment to this effect was not made to the TCC at any point. However, despite the absence of such a change in the text of the code, some authors like Hamdi Öner, a judge who later became an RPP parliamentarian, argued that immediate witnessing was not required for the application of this extraordinary mitigation and that this mitigation could also be applied in cases of indirect discovery.[91] Öner argued that if a soldier returned home after completing his service, found his wife pregnant and committed a crime under 'fury', his sentence could be reduced in line with article 462 – even if the act of adultery was committed at a much earlier date than his return. In other words, according to him, a larger group of people, probably including those who killed female rape victims after discovering their pregnancy, should be given the opportunity to benefit from the extraordinary mitigation article.

[91] Hamdi Öner, "Ceza Hukukunda Mesuliyet (1)," *AD* 7 (1944): 564.

Öner's interpretation was parallel to that of Majno[92] but this approach was not accepted among all Turkish authors who wrote about this issue. For example, according to Sadık Okay, a criminal law assistant at Ankara University, and Bedri Aslan, the extraordinary mitigation could not be applied if a husband who learned that his wife had committed adultery yesterday through conversing with her and killed her upon learning this because "witnessing" such an act was a pre-condition of this mitigation.[93] They also underlined that the term adultery had to be understood in the legal sense. In other words, this mitigation did not cover murders committed upon catching two unmarried people having sex. As seen in these two examples, there were different interpretations of this article in this period. However, as it is examined in the next section, an important group of people, the majority of CCa judges, generally seemed to agree with Öner on this matter, because, in the period between the late-1930s and late-1950s, they occasionally decided that there was no need to apply strict criteria for the application of extraordinary mitigation.

Until the early 1950s, murders committed by husbands who directly witnessed adultery were discussed as natural phenomena linked to universal human psychology and human frailty in the scholarly discourse. Just as water would boil at 100 Celsius, *any* man would lose himself under the impact of such an experience. According to all authors who elaborated on this issue in the sources examined in this study, such a man would have an outbreak. According to Taner, such a scene would impact his will or capacity of volition and this was why his sentence was reduced.[94] In this period, there were also scholars like Nurullah Kunter who pushed for the replacement of moral responsibility (*manevi mesuliyet*) with social responsibility (*içtimai mesuliyet*), arguing that free will was

[92] Majno, *Şerh*, vol. III, 282.
[93] Sadık Okay and Bedri Aslan, "Adam Öldürme Suçunun Cezasını İndiren Sebepler (1)," *AD* 1 (1950): 71.
[94] Tahir Taner, *Ceza Hukuku: Umumi Kısım*, 3rd ed. (Istanbul: İsmail Akgün, 1953), 448.

nothing more than a useless and harmful tale.[95] On the other hand, controversies on this topic did not extend to the issue of intimate control murders. These murders continued to be discussed with reference to the impact of witnessing such acts on human psychology or sometimes more explicitly on free will –even by authors like Öner who advocated for the replacement of moral responsibility with social responsibility.[96]

In this period, the naturalist approach to intimate control murders was so widespread that these acts of violence were sometimes discussed as instances illuminating the continuities between animal "families" and human families. According to sociology professor Ziyaeddin Fındıkoğlu, even groups of strokes lynched female strokes whose eggs were replaced by eggs of different species and such instances could be seen as proof that biology lied at the basis of customs on family morality among humans with regards to some matters.[97] As I examined in the previous chapter, cultural framings of the issue were visible in the political discourse in the 1930s but they were absent from the discourses of criminal law scholars until the 1950s.

In the early 1950s, the scholarly consensus according to which this particular form of intimate murders was discussed in line with natural law or universal human psychology disappeared. The former approach did not vanish but these framings began to be accompanied by cultural framings. The sudden appearance of cultural framings in scholarship might have been affected by the intensification of debates about extraordinary mitigation in Italy after the war.[98] If European countries such as Italy or France were to abolish their extraordinary mitigation clauses, only a cultural framing of the issue could effectively be used for legitimizing its maintenance in the Turkish regime without denouncing the claim that Turkey was a member of the civilized world. The introduction of the

[95] Nurullah Kunter, "Ceza Kanunun Projesi Hakkında Düşündüklerim I," *AD* 2 (1942): 145-161.

[96] Compare Öner, "Ceza Hukukunda Mesuliyet (1)," 549-568; and Hamdi Öner, "Ceza Hukukunda Ehliyet ve Mesuliyet," *AD* 11 (1943): 954-972.

[97] Ziyaeddin Fahri, "Aile İçtimaiyatı," *İÜHFD* 4, no. 14 (1938): 299.

[98] For the developments in Italy, see Welchman, *Honor*.

culturalist criminology of Taft to Turkey and Dönmezer's personal cultural turn might have also facilitated this development. Another factor might be the shift in the dominant political paradigm. As noted by various scholars, there was a conservative revival in the general political discourse in the 40s and 50s.[99] This larger shift might have also played a role in this development.

An early work reflecting this shift towards a cultural framing is Nurullah Kunter's report on the social causes of crime in Turkey.[100] In this report, Kunter drew on the findings of various quantitative and qualitative studies, especially the 1947 murder study of the Istanbul University Center for Criminology. According to Kunter, migration, break up of families, lack of education, practice of informal marriage, and traditions, and customs were significant factors shaping criminality in Turkey. In the 1947 study, 6,386 inmates who were in prison for murder were given a questionnaire concerning their motives. Only the motives of 5,451 could be determined. The study found that 1,203 of these murderers had killed due to "motives related to women" (*kadına taalluk eden sebeplerle*) but it is not clear what was meant by this phrase. 262 murders were related to abduction of women and elopement. According to Kunter, this number also included murders committed to clean stains of honor caused by abduction. 419 people had killed to protect their own chastity (*ırz*). Thus, people who killed men who were attempting to rape them in self-defense were also accepted as honor-killers in this period. Kunter noted that there were also many murderers who acted with a stringent notion of honor among the 270 people who killed others upon quarrels (*kavga*) and among the 1,203 people whose motive was related to women.

The categories and criteria adopted in this study are not very clear and given the greatly accommodative regime which provided significant sentence reductions for honor defenses, the ratio of honor-defenders to

[99] Tanıl Bora, *Cereyanlar: Türkiye'de Siyasi İdeolojiler* (Istanbul: İletişim, 2017), esp. pp. 341-415.

[100] Nurullah Kunter, "Türkiye'de Suçluluğun İçtimai Amilleri, *AÜHFD* 8, no. 3 (1951): 98-121.

all killers in prison would not proportionally reflect the actual distribution of these cases among all murders. Plus, honor-defense was one of the most beneficial defenses in the Turkish regime. Thus, it was beneficial for inmates to frame their cases as a case related to honor. However, one thing was clearly shown by this study. Almost half of the murder convicts in prison whose motives could be determined (1,884 of 5,451) framed their cases as a sex or honor related matter. Thus, the study had found that the much discussed "criminality outbreak" of this period had a lot to do with sexuality and gender relations.

The findings of the 1947 study could be used for generating various narratives. In Kunter's narrative, honor-related murders were established as a grave problem but he discussed this issue solely as a cultural problem, marking the factors that led to the widespread reproduction of these practices of violence as the continuance of informal marriages, feelings of rowdiness (*kabadayılık*) and, most importantly, honor conceptions of masses, especially of masses in rural areas. Without lacking any data concerning this particular issue, Kunter argued that the majority of Turkish people had a wide and stringent conception of honor, accepted demeaning words targeting female relatives as attacks on their own honor and believed that stains of honor could only be cleaned by blood.[101] In other words, as problematic as their consequences were, honor crimes were elements of Turkish culture and national particularities. The role of law in the reproduction of these practices was not problematized by Kunter - despite the fact that the regime had transformed to grant an unprecedented degree of accommodation for these crimes in these years.

This paper can be seen as a forerunner of the culturalist approach to honor killings in Turkish high legalese, as one of the precursors of the tradition effect that was identified by Koğacıoğlu.[102] However, I think that the effects created by this paper were not limited to saving state institutions and law from responsibility concerning the reproduction of these practices and labeling a particular group of people, in this case rural

[101] Ibid., 119.
[102] Koğacıoğlu, "Tradition Effect."

masses, as the source of this problem. In other words, I think that the tradition effect and culturalist framings also have another function: The tradition effect can also legitimize existing accommodations to such crimes or their expansion because such framings portray these crimes as cultural practices embedded in the characteristics of a given society. This report was one of the few scholarly papers written by a criminal law scholar on the issue of what was considered normal and what was not by the masses or how honor was understood by the people with a scholarly claim to truth. Moreover, it was written in a period of intense debates over criminal and civil law reform underpinned by debates over national particularities (*milli hususiyetler*). Whether this was an intended or not, it created the effect of establishing extensive mitigations for such cases and harsher controls over sexuality as measures that were in line with the beliefs and wishes of masses.

§ 4.4 The Masculinist Turn and the Expansion of Extraordinary Mitigation

In this period, there was a grand masculinist restoration that led to major changes in the norms and rules concerning gender. Some legal norms and rules concerning intimacy, gender relations and transgression of gender norms that are still applied by Turkish courts have their roots in the late 1930s and they actually became elements of this regime after lengthy disputes. For example, since the 1990s, adultery has not been a crime in Turkey. However, in case cheated husbands issue complaints, men who enter the marital domicile upon being invited by women are punished for the crime of violating the sanctity of domicile because the CCa accepts that knowledge and consent of a spouse is not enough for justifying such entries.[103] In practice, this interpretation of the code not only criminalizes adultery in an indirect way but also restricts social relations between *namahrem* or *yabancı* women and men. For example, according to a CCa decision from 2020, if a wife invites a stranger man to her house to have

[103] Durmuş Tezcan, Mustafa Ruhan Erdem, and R. Murat Önok, *Teorik ve Pratik Ceza Özel Hukuku*, 10th ed. (Ankara: Seçkin, 1999), 465; and Özbek et al., *Özel Hükümler*, 432.

coffee and if they are "caught" while having coffee by the woman's husband, the woman's guest should be punished for the crime of violating the inviolability of domicile (*mesken dokunulmazlığını ihlal*, art. 116) because consent to such entries does not render them legal.[104] This norm was actually established in the early 1940s, after lengthy disputes. In 1937, the majority of judges at the CCa were of the opinion that a wife's consent was enough to legitimize such entries, even if it was proved that the man had entered the house with the objective of having sexual intercourse, and they rejected the chief prosecutor's argument that women had no right to make such invitations.[105] The approach to the contrary became case-law five years later, and even then, there was no consensus.[106]

The same is true for the norm according to which saying or implying that a close female relative of someone lacks "honor" constitutes a crime against her male relatives. This norm continues to be applied by Turkish courts.[107] As I examined in Chapter 2, the idea that relative groups had a common honor that could be stained by the actions of or against one of its members was not absent from the legal discourse in the country in the 1910s. However, the collectivity in honor norm in the prosecution and punishment of insult did not become established as case-law until the early 1940s. According to a CCa decision from 1937, claiming that a woman had sexual relations with someone other than her husband was not a violation of honor for her husband.[108] According to this interpretation, such comments and claims would violate the wife's honor but not that of her husband. Thus, the marital union was not accepted to have a collectivity in honor in terms of the prosecution of insult. A year later, the GCA changed its position on this matter and accepted that husbands had

[104] 18. CD, E. 2018/578, K. 2020/363, T. 9 July 2020, www.karararama.yargitay.gov.tr.
[105] CGK, E. 99 K. 94 T. 14.6.1937, *Temyiz Kararları 1937-1938* (Ankara: The Ministry of Justice, 1939), 81-82.
[106] The Plenary Assembly took this decision with majority, E. 21, K. 4, 18.02.1942, *Temyiz Kararları 1941-1942* (Ankara: The Ministry of Justice, 1943), 21.
[107] Özbek et al., *Özel Hükümler*, 488.
[108] CGK, E. 217, K. 246 T. 27.09.1937 *Temyiz Kararları 1937* (Ankara: The Ministry of Justice, 1938), 106-107.

the responsibility to protect the collective "dignity" of family (*ailenin müşterek vakarı*) and that such words about their wives were also violations for them.[109] In this respect, case-law became settled only after some time and some scholarly backing.[110] Thus, various norms and rules concerning gender relations or transgressions of gender norms that appear timeless or uncontested when one focuses on the present were actually open for debate and settled in this period.

Beginning with the late 1930s, there were enormous changes in the accommodation of intimate violence in the field of law and the expansion of the extraordinary mitigation was one of the most important elements of this transformation.

In 1936, the scope of the extraordinary mitigation article was changed in a way that was more similar to the ICCs which limited the application of this article to females in terms of descendants.[111] Thus, a mother or a father who had assaulted or murdered a son whom s/he found committing adultery would no longer benefit from this mitigation. However, if the victim was a female relative, the sentence could be reduced in a great extent.

With the 1938 amendment, this new formal distinction between descendants was removed from the article,[112] but this amendment brought about something much more than the abolition of a newly introduced limitation. According to the earlier texts of the Code, the application of this extraordinary mitigation would result in a reduction by up to the 7/8th of the original punishment (*1/8'e kadar indirilir*) for crimes other than those requiring capital punishment, which would be reduced to imprisonment between 2 and 5 years. With this amendment, the margin of reduction was fixed as 7/8 because the new text stipulated that the sentences of such people would be reduced *to* the 1/8 of the punishment

[109] CGK, E. 447/91 K. 147 T. 28.03.1938, *Temyiz Kararları 1938* (Ankara: The Ministry of Justice, 1939), 39.40.
[110] 4. CD, E. 12541 K. 1382 T. 4.12.1945, *Temyiz Kararları 1946* (Ankara: The Ministry of Justice, 1947), 31. Vasfi Raşit Sevig, "Şeref ve Haysiyetin Kanuni Himayesi ve İstisnaları," *Adalet Dergisi* 1 (1939): 5-17.
[111] The Law No. 3038, 11 June 1936, *RG* 3337, June 23, 1936.
[112] The Law No. 3531, 29 June 1938, *RG* 3961, July 16, 1938.

normally stipulated by law (*sekizde bire indirilir*). Up until this point, judges had the discretion to reduce the sentence by 1/8, 3/8, or 7/8 while applying this article. With this amendment, this judicial discretion was abolished. If the article was applicable, the sentence would be reduced by 7/8. Thus, with this amendment, the legislators had ensured that all eligible perpetrators would be given the maximum reduction possible. Unlike the former clause, the real-life impact of which depended more on judicial practice, the new clause stipulated practical impunity for such crimes. This norm shift is important because this part of the article remained intact until its abolition in 2003. Thus, this amendment made a very-long term impact on the regime of intimate violence in the country.

On the same day with this amendment, the CCa took a very important and interesting decision concerning the application of this article. This decision was about the murder of a woman named Hatice by his brother, X.[113] Hatice had moved into the house of another woman, Hamide, who was noted to have a bad reputation. While accepting that Hatice was prostituting herself, the local court had decided that there were no grounds to apply extraordinary mitigation (art. 462) or unjust provocation mitigation (art. 51) and sentenced X to 30 years of heavy imprisonment, applying only discretionary mitigation (art. 59). Marital status of Hatice was not mentioned in the decision and this indicates that she was single.[114] The fact that the local court had not applied any sort of legal mitigation suggests that Hatice was accepted to exercise her right to sexual liberty which was not accepted to be an unjust act. The CCa overruled this decision, claiming that since "prostitution was constant adultery," article 462 had to be applied to the case. Thus, X must have benefited from the extraordinary mitigation according to the CCa.

This decision is important in various respects. First, it indicates that, in some cases, the term adultery was interpreted in an extra-legal fashion by the Republican CCa. According to the TCC, adultery was a specific form

[113] 1. C.D., E. 1938/38-1722, K. 1938/2611, T. 29.6.1938, in Perinçek and Özden, *Türk Ceza Kanunu*, 785.

[114] In this period, married women were referred to in relation to their husbands, as "Y, the wife of X," in the decisions of the Court, even if this detail was not important for the case itself.

of illegitimate sexual relation and sex among unmarried people was not adultery. Moreover, according to the TCC, sexual intercourse between an unmarried woman and a married man was not adultery as long as the man did not bring the woman into the marital domicile or cohabitated with her in an open manner. Thus, according to the adultery framework of the TCC, prostitution was not adultery for unmarried woman.[115] However, this decision of the CCa indicates that, in the late-1930s, the Court did not hesitate to step outside the adultery framework established by the text of the TCC in order to ensure the application of extraordinary mitigation in some cases.

Second, this decision shows that, in some periods, the Republican Court of Cassation was more accommodative towards intimate control murders than its Ottoman predecessor because, as I examined in the case of Leyla's murder from the 1910s in Chapter 2, the OCCa did not accept prostitution – even if it was established as a fact – as a ground for the application of extraordinary mitigation.

The Republican legislators had not transposed some characteristics of the ICC to the TCC through legislation in the 1920s or 1930s. They had not made an amendment for expanding the article to include all sorts of illegitimate sexual relations. They also had not transposed the novel norm introduced to the Italian code by the RC. According to this norm, directly witnessing sexual acts was no longer a requirement for the application of this mitigation and discovering such relations in any way (through hearsay, confessions, by opening a letter, etc.) was enough. However, with this decision, the CCa was transposing both of these norms to the Turkish regime through case-law in the absence of a legislative change.

Another important decision which highlights the same point was taken in 1952. In this case, which was also not related to adultery as defined by the TCC, a daughter was killed by her father. In this case, the

[115] According to the CCa, sexual intercourse in a brothel was not adultery. 5. C.D., E. 1970/2431, K. 1970/2406, T. 8.7.1970, in *RKD* 12 (1971), 81. For an overview of legislation and case-law concerning adultery, see Zeki Hafızoğulları, *Zina Cürümleri* (Istanbul: Kazancı, 1983).

daughter, who was 13 years old, had run away with a shepherd.[116] Upon her father's complaint, security forces had searched for the daughter, found her, and brought her to an unspecified location. When the security forces wanted to hand the daughter over to her father, the girl resisted and said that she did not want to go with him and that she and the shepherd had been loving each other (*seviştiklerini*)[117] for three months. Upon this resistance, the girl was not handed over to his father but to the village headman's wife. While the girl and her custodian were leaving the scene, the father killed the girl. The local court did not apply article 462 to this case and the CCa reversed this decision because of this.

In this case, the father had not witnessed any sort of sexual interaction between the shepherd and the girl but had learnt that they were having some sort of relation after the girl was found, by hearing what she said. In an earlier decision from 1949, the CCa had decided that article 462 could only be applied if the parties were found *in flagrante delicto* (red-handed, *meşhuden yakalanan*).[118] Thus, the application of article 462 to this case also contradicted with an earlier decision of the CCa, but was in line with the 1938 decision concerning Hatice's murder.

In this case, the CCa explicitly accepted indirect discovery to be enough for the application of this mitigation. Learning about sexual relations through conversation or guessing that there were such relations without personally witnessing some sort of physical interaction or a situation that qualified as suspicious enough for the Court on the site of murder were enough for practical impunity in this period. This highlights the distinctiveness of this era and shows that changes in the interpretation of the CCa led to differential outcomes in the absence of any change

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[116] 1. C.D., E. 1952/2244, K. 1952/2020, T. 14.11.1952, in Nazmi Baytok et al., *Türk Ceza Kanunu* (Ankara: Işık Matbaacılık, 1958), 428-429.

[117] In the Turkish high legalese of this period, "sevişmek" meant having romantic relations that do not involve intercourse. In 1960, the CCa noted that hickeys and bite-marks on a woman's body could have been caused by *sevişmek* (making love) alone and were not necessarily signs of adultery (*zina fiili icra edilmeksizin sadece sevişmek esnasında da meydana gelebilir*). 1. C.D. E. 681 K. 1015 T. 13.4.1960, Çağlayan, *Ceza Kanunu*, vol. II, 389-390.

[118] 4 CD, E. 10564, K. 11963, T. 20.09.1949, in Alicanoğlu, *Ceza Kanunu*, vol. II., 360 and in Perinçek and Özden, *Türk Ceza Kanunu*, 785.

in the text of the code. Strikingly, both of these decisions also contradicted the Ottoman legal tradition that I examined in Chapter 2. According to the fetvas and OCCa decisions that I examined, directly witnessing some sort of bodily interaction was a pre-requisite for the application of the exceptional mitigation/pardon. Thus, what was happening in this era cannot be seen as a mere return to the Ottoman period. By giving such decisions, the CCa was actually breaking a legal tradition.

Second, similar to the case of Hatice's murder, adultery requirement of article 462 was overlooked by the CCa in this case because a 13-year-old girl could not have been married and could not have committed adultery. These two decisions show that despite the lack of legislative changes to this effect, the Court was casually deciding as if the Criminal Code in force in Turkey was the Rocco Code rather than the TCC. The Turkish Code, which did not include illegitimate sexual relations and indirect discovery in the scope of extraordinary mitigation, was apparently too narrow in the eyes of some CCa judges.

These decisions were not explicitly criticized in the journals and books that I examined but they might have generated some debates and criticisms because, a couple of months after the 1952 case, a former CCa judge, Rifat Alabay, who was then a parliamentarian, proposed an amendment that would provide a legislative basis for the CCa's inclusion of murders committed upon illegitimate sexual relations in the scope of this extraordinary mitigation. With this amendment, existing judicial practice of the CCa concerning this particular issue was given a solid basis. Thus, one of the most important elements of the early Republican regime concerning the sexual liberation of unmarried women was abolished in a process that started at the CCa and "fixed" at the parliament through a legislative amendment. As a result of this process, illegitimate sexual relations were included within the scope of extraordinary mitigation that ensured practical impunity until the 2000s.

The judicially induced changes in the regime of intimate violence in this period were not confined to the extraordinary mitigation. There were also very important changes concerning unjust provocation and ill-treatment and these changes did not start in 1950. However, I think that

this is a good point to elaborate on this legislative amendment before continuing with these changes that happened through case-law.

The issue of extensive criminal law reform was a matter that had begun to be discussed in the early 1940s. During the war, a commission was tasked with drafting a new criminal code, and some parts of this draft were published and discussed.[119] This initiative did not produce a radical change and a new code was not adopted but some additions and changes were made to particular articles, especially to those related to political crimes. With the beginning of the DP rule, this issue entered the agenda of the parliament once again. In the early 1950s, numerous parliamentarians proposed amendments to the TCC. The Justice Commission assessed these proposals, prepared an amendment bill, and submitted this bill to the parliament in 1953.[120] The establishment of congruity between the text of the code and Turkish society's conception of morality, and Turkish traditions and customs was a necessity underlined in some of these amendment requests.[121] Another underlined theme was the necessity of protecting family homes (*aile ocağı*) and metabolism of family (*aile bünyesi*).[122] Criminality outbreak of the post-war era was also used as a means of legitimizing the increases in punishments.[123]

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[119] For this draft, see "Türk Ceza Kanunu," *AD* 2 (1942): 113-145; and "Türk Ceza Kanunu Layihası," *AD* 9 (1941): 633-669. This draft was extensively discussed in this journal during these years.

[120] For the report of the Justice Commission and its amendment bill, see *TBMM Adalet Komisyonu Raporu* (hereafter cited as *The 1953 Report*), E. 2/219, 235, 250, 269, 272, 334, 344, 350, 372, 392, 427, 438, 458, 464, 476, 480, K. 32, 22 February 1953. Enclosed in the parliamentary file on the Law No. 6123, 9 July 1953, *RG* 8458, July 15, 1953, https://www5.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d09/c022/tbmm09022089ss0163.pdf.

[121] "Tokad Mebusu Ahmet Gürkan'ın, Türk Ceza Kanununun 163, 421, 440, 441 ve 442nci Maddelerinin Değiştirilmesi Hakkında Kanun Teklifi," no. 2/344, 4 February 1952, addendum to *The 1953 Report*, 10-11.

[122] "Burdur Mebusu Mehmet Özbey'in, Türk Ceza Kanunu'nun 567 ve 568nci Maddelerinin Değiştirilmesi Hakkında Kanun Teklifi," no. 2/235, date not specified, addendum to *The 1953 Report*, 2.

[123] "Çorum Mebusu Ahmet Başıbüyük'ün, Türk Ceza Kanunu'nun Bazı Maddelerinin Değiştirilmesi ve Bazı Maddelerinin Kaldırılması Hakkında Kanun Teklifi," no. 2/438, 5 December 1952 addendum to *The 1953 Report*, 26-29.

The Justice Commission's amendment bill proposed changes in a number of gender related issues including the criminalization of incest,[124] and consensual sexual intercourse between and with minors between the ages of 15 and 18. The bill would also bring about harsher punishments for adultery and other sexual crimes. These changes, except for the criminalization of incest, were accepted by the parliament. There was also a minor revision in the margins provided for mitigation on the basis of unjust provocation. All in all, this amendment brought about stricter controls over sexuality and increased the punitiveness for consensual transgressions of gender norms. An extensive analysis of these changes and performances of parliamentarians is beyond the scope of this study. However, I will elaborate on the debates over the extraordinary mitigation article because they provide an exceptional opportunity to understand the transformations of this regime and the ways in which the past can affect the future in terms of the regulation of intimate violence.

The amendment of article 462 was brought to the table by DP parliamentarian A. Fahri Ağaoğlu. Ağaoğlu proposed the abolition of symbolic punishment stipulated by this article and the designation of this article in a way to ensure total immunity. According to Ağaoğlu, such an amendment was necessary because pardoning such perpetrators was more appropriate given the characteristics of human soul and disposition (*insan ruhu ve yaradılışı*).[125] Ağaoğlu also claimed that this article would serve

[124] This proposal was submitted by İzzet Akçal and 53 other DP parliamentarians and was accepted by the commission but the parliament rejected this amendment. There were public debates on this issue since the 1940s and several influential scholars had published papers for the criminalization of incest in law journals. For example, sociology professor Ziyaeddin Fahri Fındıkoğlu, published a series of articles concerning the issue of exogamy. In one of these, he explicitly underlined his support for the criminalization of incest. Ziyaeddin Fındıkoğlu, "Eksogami Meselesi Etrafında Umumi Sosyolojik Neticeler," *İÜHFM* 16, no. 1-2 (1950): 301-319. Also see Halid Kemal Elbir, "Evlenmesi Memnu Akrabaların Evlenmelerinin ve Cinsi Münasebetlerinin Ceza Müeyyidesi ile Tahdidi Meselesi Karşısında Türk Hukuku," *İÜHFM* 12, no. 2-3 (1946): 653-680.

[125] "Konya Mebusu Abdürrahman Fahri Ağaoğlu'nun, Türk Ceza Kanununun Bazı Maddelerinin Değiştirilmesi ve Bazı Maddelerinin Kaldırılması Hakkında Kanun Teklifi," no. 2/464, 15 July 1952, addendum to *The 1953 Report*, 39-46.

the goal of preventing adultery in a more effective way if it ensured pardon. Thus, a particular understanding of human sensibility and general prevention of transgression of gender norms rather than direct references to *sharia* were at the basis of Ağaoğlu's arguments. This proposal was rejected by the Justice Commission with the argument that such an amendment would lead to several "unnatural incidents" (*gayri tabii hadise*) and that there would be no means of preventing set-ups.[126] The Commission rejected Ağaoğlu's proposal but the amendment proposal included a change in this article. According to this proposal, the margins and minimum punishments stipulated by article 462 would be adjusted in line with the increases in other punishments.[127]

While the parliament was debating and voting the amendment bill, three DP parliamentarians brought up their own proposals concerning this article. According to Hayri Tosunoğlu's proposal, life-time imprisonment would be converted to 4 years of imprisonment instead of imprisonment between 4 and 8 years and capital punishment would be converted to 5 years imprisonment instead of imprisonment between 5 and 10 years.[128] Other punishments would continue to be reduced by 7/8. Lawyer and DP parliamentarian İzzet Akçal, who was also a member of the Justice Commission, objected to this proposal, noting that the margins and minimums were adjusted in line with the proposed changes concerning other articles of the code. [129]

DP parliamentarian and a former CCa judge, Rifat Alabay, proposed to redesign the article in a way to ensure its application in cases of murder and assault committed against specified relatives and/or their partners caught in illegitimate sexual relations (in addition to adultery). According

[126] *The 1953 Report*, 68.
[127] According to the draft law, the application of article 462 would reduce punishments by 1/8, convert heavy imprisonment to imprisonment, reduce life-time heavy imprisonment to imprisonment between 4 and 8 years, and capital punishment to imprisonment between 5 and 10 years. *The 1953 Report*, 90. The draft law stipulated the reduction of sentences by 1/8 rather than 7/8. This typo mistake was later corrected. *TBMM Zabıt Ceridesi*, period 9, vol. 23, session 97 (26 June 1953), 240.
[128] Ibid., 240-241.
[129] Ibid., 241.

to Alabay, the term "illegitimate sexual relations" which was included in this article of the ICC was excluded from the Turkish stipulation and it would be better if the article was amended in line with the original. Akçal raised his objections to this proposal, noting that the inclusion of crimes committed upon illegitimate sexual relations within the scope of this mitigation would lead to numerous set-ups and lies and to the expansion of defenses that could be used for avoiding punishment.[130]

Another DP parliamentarian, Rifat Sivişoğlu, who was also a lawyer, proposed to ensure total immunity for such cases. In order to legitimize his proposal, Sivişoğlu argued that such murders and assaults were totally free from criminal sanctions in "our old law." Similar to Yusuf Kemal (Tengirşenk) and Azmi (Feyzioğlu) who had appealed to the imaginations of parliamentarians while advocating for honor defense mitigations in the 1920s and 1930s, Sivişoğlu invited the parliamentarians to imagine the situation in which such crimes were committed and the mental state of perpetrators, declaring:

> Dear friends, imagine a person who finds his wife, sister or another one of his meharim in the arms of another man or in the same bed or in a state of adultery or sees them in a situation close to adultery. Let's think about the condition in which that person is at that moment. Without doubt, that person is in a state of lack of consciousness at that moment. There is a difference between the murder committed by such a person against the adulterer, and the adulteress and the murder committed by a conscious person. … A person will see one of his own *meharim* in such an immoral situation and will keep a blind eye on it! If he does not keep a blind eye and commits murder, he will go to prison. Shall he sit back and watch in order to avoid imprisonment? How can this happen?

[130] Ibid., 241-242.

> How can a person see his wife, daughter or another one of her meharim in a state of adultery or in an illegitimate situation and bear with it? Nobody can put up with this.[131]

Before these proposals were put to vote, DP parliamentarian and justice commissioner Vacid Asena, who was also a lawyer, declared the position of the commission on these proposals. He noted that the commission was against all of them. Asena did not elaborate on the proposals of Tosunoğlu and Sivişoğlu but scrutinized Alabay's proposal in detail. Asena underlined that re-formulating the article in a way to include illegitimate sexual relations would be dangerous. He also said: "*After reaching adulthood, a person acquires all liberties. Because of that, the law does not let any kind of direct intervention to the acts and conduct of adults*."[132] According to Asena, illegitimate sexual relations involving minors were already criminalized in this amendment process and, except for cases of adultery, such relations among adults were within the scope of personal liberties.

Faced with such objections, Alabay spoke once again. According to him, the existing legislation excluded fathers who killed their unmarried daughters from the scope of this mitigation and this was against the spirit of the code. He claimed that the term illegitimate sexual relations was "forgotten" by the Republican legislators during the adoption of the TCC (*unutulmuştur*).[133] It is highly improbable that this term was simply forgotten by the legislators because this article was significantly different from the ICC. In other words, the text of this stipulation itself indicates

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[131] "Muhterem arkadaşlar; bir insan tasavvur buyurulsun ki karısını, kız kardeşini ve sair mehariminden birini bir erkeğin kolları arasında veya fıraşında zina halinde müşahade ediyor veya zinaya mukarin bir vaziyette gösrüyor. O anda o insanın halini düşünelim. Şüphesiz o insan şuurunu o anda kaybetmiş vaziyettedir. Böyle bir insanın zani ve zaniyeyi öldürmesi ile şuurlu insanın öldürmesi arasında fark vardır. (…) Bir insan bizzat mehariminden birini o vaziyeti şeniada görecek de göz yumacak! Yummaz da öldürürse hapse girecek. Hapse girmemek için seyirci mi kalmalıdır? Nasıl olur bir insan, karısını, kızını ve sair mahremini birisiyle zina halinde gayrimeşru bir vaziyette görür de sabreder? Kimse buna tahammül edemez." Ibid., 242.

[132] "… Şahıs rüşdünü iktisap ettikten sonra her türlü serbestiyi de iktisap etmektedir. Bu itibarla kanun reşit olanların efal ve harekâtına doğrudan doğruya müdahaleyi kabul etmemektedir." Ibid., 242.

[133] Ibid.

that it was a product of drafting initiative. Plus, this article was amended various times in the 1930s. If such an important phrase was simply forgotten, it could easily be included during one of these amendments but it was not.

After Alabay's proposal was formulated as an amendment by the commission and before this final proposal was put to vote, Akçal spoke once again and raised strong objections to this proposal. Akçal requested the commission to examine this proposal in detail rather than confining itself to redacting it. He also opposed Alabay's argument that the exclusion of illegitimate sexual relations from the scope of this article was coincidental, that the existing legislation had taken its current form because of forgetfulness. Akçal underlined that, during the preparation of the TCC, the legislators had long discussions over this article and purposefully designed this article in a way to exclude illegitimate sexual relations after these deliberations.[134] In other words, this deviation from the ICC was intentional. Not a single person objected to Akçal's claim of intentionality but, in the end, the efforts of Asena and Akçal were not enough to stop Alabay's proposal, and the article was amended in a way to include illegitimate sexual relations.

These debates and the amendment itself provide important insights regarding the history and transformations of the regime of intimate violence in Turkey. First, these debates show that the technique of appealing to the imaginations and feelings of a male-dominated assembly continued to be used by politicians in their advocacy of honor-defenses. Second, these debates indicate that murders committed upon adultery continued to be associated with human nature by politicians. This association lied at the heart of proposals that aimed to ensure total pardon for these crimes. Not sharia or *fıqh* books but natural law, human psychology, and the objective of general prevention (of adultery) were brought to the table to legitimize full immunity. On the other hand, it was not only the proponents of full immunity who associated these crimes with natural law. The language used by the Justice Commission for refuting the demand for total immunity suggests that the proponents of the reduced punishment

[134] Ibid., 250.

approach also associated such crimes with human nature because the commission underlined that the expansion of the article in a way to grant total pardon would lead to "unnatural incidents." This choice of words suggests that they saw at least some forms of these murders as natural incidents. On this basis, it can be argued that what lied at the basis of differences of opinion among politicians concerning this issue was not the naturality that they attributed to such crimes but the degree of accommodation that should be provided for them. Even if they agreed with Sivişoğlu's assumption that such crimes were a result of human nature, the majority of deputies refused his proposal for total immunity.

Third, even if limited to crimes committed upon illegitimate sexual relations rather than all such murders, a liberties-based opposition to article 462 was raised in this period. The majority of parliamentarians did not agree with Vacid Asena who raised this argument while speaking on behalf of the Justice Commission. However, the fact that such an objection was raised shows that the association of legal accommodation provided for these murders with the breach of personal liberties and rights has a history that dates back at least to the 1950s.

Finally, the past was very much operative in the then-present moment of 26 June 1953. The past was utilized by parliamentarians for different ends in these debates which entailed contestations over history. Sivişoğlu brought the pre-Republican and even pre-Tanzimat past to the room. Total immunity for all these cases was not an actual part of Ottoman legislation after 1858, and, as I examined in Chapter 2, the Ottoman CCa had rendered the application of this article almost impossible, reversing every single decision in which it was applied. Although his proposal failed, Sivişoğlu's performance might have moved the parliamentarians by its affective qualities and also by its representation of impunity for such murders as a norm embedded in Turkish history.

The past also featured prominently in the Alabay-Akçal debate. Alabay linked the exclusion of illegitimate sexual relations from the scope of this article to the forgetfulness of early Republican legislators. This portrayal of the past enabled him to present his proposal as a technical cor-

rection rather than as a call for deviating from the early Republican orderings of law, sexuality, and intimate violence. In his objection, Akçal underscored the intentional nature of this exclusion. In his portrayal, this was not only a norm arrived after long deliberations but also an element of the early Republican reforms that should not have been abolished. Thus, the past was very much operative at this instance of criminal law reform - not as an unmediated force in itself but as a source of legitimization for different points and arguments, as a contested ground filled with facts and fictions selectively brought into the present.

Thanks to its amendments in the post-1937 era, the extraordinary mitigation article gained a very wide scope and provided a very enormous sentence reduction for murders committed upon adultery and illegitimate sexual relations. In later years, there would be contestations over its interpretation but the text of this article remained untouched until its abolition in the 2000s. Thus, the process through which the scope of this mitigation was expanded, the process which started at the CCa and finalized by the fixing of this expansionist position at the parliament, had very long-term consequences for the regime of intimate violence in modern Turkey.

§ 4.5 Unjust Provocation and Ill-Treatment during the Masculinist Restoration

During this masculinist restoration, there were changes in almost every norm concerning intimate violence. There were also extensive changes concerning unjust provocation mitigation. Beginning with the late 1930s, the CCa began to overrule local court decisions for improper application of this mitigation, expanding the scope of its overview authority.[135] At first, the CCa was indirect in its formulations concerning this issue, which

[135] The GCA, E. 936/1787 K. 175, T. 19.1.1937, in *Temyiz Kararları 1937*, 161-162.

were criticized by some criminal law scholars who saw this as a transgression of authority,[136] but scholarly criticism did not stop this new tendency in the CCa practice. While internal disputes within the CCa seemed to be formally resolved with the adoption of the idea that the high court had no authority to reverse the decisions of lower courts for improper application of this mitigation in the early 50s,[137] the court continued to reverse such cases in later years.[138]

My examination shows that honor defenses were generally accepted by the CCa in this period. Not only immediate relatives specified in article 462 (such as husbands, fathers, or brothers) but also distant relatives such as uncles, brothers-in-law, and sons of brothers-in-law were accepted to have the right to benefit from unjust mitigation for crimes committed upon transgression of gender norms like adultery.

In this period, not only members of extended families and relatives but also unofficial husbands and their relatives were able to benefit from unjust provocation on the basis of honor defenses. For the CCa, marriages officiated by religious ceremonies were generally worthless in terms of their legal consequences. They did not entitle women to inheritance for example. They were also worthless in terms of the application of family burdens.[139] In other words, when one of these partners shot, killed, or assaulted the other, he was to be punished as if he had committed this violence against a stranger. However, in terms of the application of unjust provocation mitigation for intimate control murders, such mar-

[136] Faruk Erem, "Haksız Tahrik," *AD* 7 (1946): 637-654. This approach also contradicted Taner's approach to unjust provocation. Taner, *Umumi Hükümler*, 447.

[137] The GCA, E. 1/55, K. 44, T. 12.6.1950, in Cemal Köseoğlu, *Haşiyeli Türk Ceza Kanunu ve Özel Bölüm*, 9th ed. (Istanbul: İsmail Akgün Matbaası, 1968), 77; and 4. CD, E. 9338, K. 9338, T. 7.12.1951, in Perinçek and Özden, *Türk Ceza Kanunu*, 88. Even in this period there were decisions reversed on these grounds. For one of these, see 4. CD, E. 9057, K. 9057, T. 28.11.1951, in Perinçek and Özden, *Türk Ceza Kanunu*, 89.

[138] The GCA, E. 1/24, K. 22, T. 8.4.1957, in Sulhi Dönmezer and Naci Şensoy, *Ceza Hukukunda İçtihatlar, Kararlar ve Meseleler* (Istanbul: Sulhi Garan Matbaası, 1969), 72-73; and The GCA, E. 2/73, K. 73, T. 26.10.1959, in Köseoğlu, *Haşiyeli*, 77.

[139] 2. CD, E. 14675, K. 16209, T. 30.12.1937, in Alicanoğlu, *Ceza Kanunu*, vol. II, 334.

riages were considered to have legal consequences. Thus, unofficial husbands and their relatives[140] were allowed to benefit from unjust provocation mitigation when they raised honor defenses. For example, if a woman was to leave such an unofficial partner and begin to live with another man, her former partner could get a sentence reduction for killing the woman or her new partner.[141] I was not able to find a case in which an unofficial husband was allowed to benefit from the extraordinary mitigation (article 462) by the CCa in this period. However, a case from 1963 shows that there were local courts which granted this mitigation to unofficial husbands.[142] Although such a decision approved by the CCa was not circulated, the messaging of the court was not explicitly dismissive of such a wide interpretation of article 462 until the 1960s.

In this period, leaving the marital domicile or encouraging a wife to do so were also accepted as unjust provocation. This was remarkably different from the earlier case law of the CCa because, in the former era, leaving the domicile or returning to the natal home were not accepted as unjust acts by the court. A CCa case from 1949 shows that benefiting from mitigation on this ground was not a privilege reserved for "good family fathers" (*iyi aile babası*), who have been the most favored perpetrators in the CCa practice. In this case, a man named Ömer had killed a woman named Sıddıka.[143] Both of them were married to other people but Ömer had brought Sıddıka to his house as *kuma* (second-wife). After some time, Ömer was imprisoned for an unspecified reason and Sıddıka had left him around this time. The local court had ruled that Sıddıka was ill-treated by Ömer and left him because of this. However, the CCa claimed that Sıddıka was a morally corrupt person who had willingly had relations with Ömer and abruptly ceased these relations "in the absence of proof that she was ill-treated," that Ömer had a house built for her, and that there were gossips that she had relations with another man. The insistence decision of

[140] E. 1981 K. 1916 T. 11.07.1942, *Temyiz Kararları 1941-1942*, 341-342.
[141] CGK, E. 42 K. 41 T. 14.12.1959, in Köseoğlu, *Haşiyeli,* 76; and 1. C.D. 15.05.1941, *Temyiz Kararları 1941-1942*, 260-261.
[142] 1. CD, E. 2395, K. 2802, T. 14.11.1962, in Ayhan Önder, *Şahıslara ve Mala Karşı Cürümler ve Bilişim Alanında Suçlar* (Istanbul: Filiz Kitabevi, 1994), 144.
[143] CGK 216/8-4 K. 55 21.02.1949, in Alicanoğlu, *Ceza Kanunu*, vol. II, 205-209.

the local court, which had not mitigated Ömer's sentence on any grounds, was reversed on various grounds, including these factors which necessitated the mitigation of his punishment according to the GCA. Ömer was clearly not a good family father in the Republican sense: He was polygamous and, even more, he had taken another man's wife as *kuma*.

As seen in this case, in this period, the CCa granted sentence reductions to a very wide group of men, including those who were vilified as enemies of the Republic by some civil law scholars. For some law scholars, leaving a polygamous marriage was the right thing to do for women, and the state should enforce such leaves by adopting laws to this effect – for example by criminalizing extramarital cohabitation[144] or by forcefully separating such unions, sending childless wives to their natal homes, and taking others into its own custody.[145] For the CCa, the very same act, leaving a polygamous union, could be accepted as a ground for mitigation.

As examined in the previous chapter, the Ministry of Justice had issued a *tamim* (order), specifying that unjust provocation mitigation could not be applied for unreal provocations resulting from perpetrator's suspicion or presumption. Thus, according to the Ministry, there had to be a real unjust act for the application of this mitigation. This interpretation was also supported by criminal law scholars such as Tahir Taner.[146] There are multiple decisions which show that this reality requirement was later abandoned. The earliest decision related to this shift is from 1938.[147] After this decision, hearsay and gossips (*şayia ve dedikodular*) implying that two people had a romantic relationship or presumption that someone

[144] This idea was supported by Velidedeoğlu. Hıfzı Veldet Velidedeoğlu, "Evlenme ve Boşanma Hukukumuzda Medeni ve Cezai Bakımdan Ne Gibi Tadilata İhtiyaç Vardır?," *AD* 1 (1944): 71-125.

[145] Esen, *Untitled Opinion Piece*.

[146] Taner, *Umumi Hükümler*, 445.

[147] In this case, the decision was reversed because presumption of adultery was accepted as the ground for the application of heavy unjust provocation mitigation. 1. CD, E. 1348, K. 307, T. 26.1.1938, in Köseoğlu, *Haşiyeli,* 73-74.

had sexually assaulted a female relative began to be accepted as grounds for the application of unjust provocation mitigation.[148]

In the early 1950s, there was a real inconsistency in case-law concerning one issue. Could forceful abduction of a wife by her husband be considered as deprivation of liberty? In the early 1950s, the 1st CC started to accept that such acts would not lead to the occurrence of this crime because they lacked the moral element (*manevi unsur*).[149] This was a deviation from established case-law.[150] My examination shows that the 1st CC changed its position once again in the first month of 1954. In this decision, it was underlined that neither a husband nor a wife could coerce the other into living together if she or he wanted to leave the family union for a just or unjust reason.[151] It seems that the Ministry of Justice, which was now occupied by Hüseyin Avni Göktürk, whose masculinist approach to the position of household authority was examined in this chapter, saw this as a move that had to be stopped immediately. Within two weeks after this decision, the Ministry submitted a request to the CCa, demanding a decision for the unification of case law concerning this matter.

In this period, some requests for the unification of case law were shelved by the CCa, while some others were decided very quickly.[152] This request was also shelved for some time. In the meantime, the GCA con-

[148] 1. CD, E. 25 K. 245, T. 17.1.1953; and 1. CD. E. 1373, K. 2132, T. 18.6.1953, both in Baytok et al., *Türk Ceza,* 60.

[149] According to the PA decision, the new approach was adopted in 1 CD, E. 913, K. 775, T. 3.3.1953; and 1 CD, E. 2540, K. 2277, T. 30.6.1953. The PA for the Unification of Case Law, K. 1954/5, K. 1956/12, T. 11.6.1956, in *İçtihadı Birleştirme Kararları*, vol. II, 673-676.

[150] Earlier case law included 2. CD, E. 8213 K. 12018, T. 12.5.1935, in *AD* 12 (1935); and 1 CD, E. 2625, K. 2244, T. 27.9.1947 and 4 CD, E. 14764, K. 13182, T. 11.12.1953 which were cited in the decision for the unification of case-law on this matter. The PA for the Unification of Case Law, K. 1954/5, K. 1956/12, T. 11.6.1956, in *İçtihadı Birleştirme Kararları*, vol. II, 673-676.

[151] 1 CD, E. 4357, K. 361, T. 27.1.1954, in *AD* 3 (1955): 277-278.

[152] For example, E. 1950/12, K. 1950/11, T. 11.12.1950 was requested on 3 November 1950. Thus, it was decided within two months. *İçtihadı Birleştirme Kararları,* vol. II, 493.

tinued the new practice of excluding these acts from the scope of deprivation of liberty,[153] some judges or bureaucrats resisted these pushes by publishing the 1954 decision which underlined the bodily autonomy of wives in *Adalet Dergisi* in March 1955,[154] Erem began to push for the application of the vigilantism article to these cases in his capacities as a scholar and lawyer, and the 1st CC changed its position once again in August 1955 while deciding on a case defended by Erem.[155] This was a case the CCa gave special importance. The names of the defense council, prosecutor and rapporteur, and the arguments of the first two were specified in the text of the decision and this was not standard decision-publication practice.[156]

In this case, there was a man who had migrated to a city from his village with his wife of more than 20 years. After living in the city for more than a year, he had decided to return to his village because of financial difficulties. His wife had initially accepted this suggestion but later changed her mind. Upon this, the husband was claimed to become furious and have an outbreak. "Under the influence of this outbreak," he had applied force that could be considered within the scope of ill-treatment or effective deed to his wife, attempting to carry her to the village by force by pushing her into an automobile. The local court had sentenced him to imprisonment for 4 years and 2 months for deprivation of liberty.

In his defense of the husband, Erem brought up the arguments that are found in his paper. He claimed that the case could not be considered as deprivation of liberty and would fall under the scope of vigilantism. The text of the decision suggests that Erem had not raised a lack of specific intent defense that would fit with the recent case-law of the CCa and would have more favorable consequences for his client. If this case was to be ruled as vigilantism, the defendant would face criminal sanctions. If a lack of specific intent defense was raised, the court could decide that there was no crime. It was also noted that the assessment of the assistant

[153] The GCA, E. 346, K. 357, T. 6.12.1954, in Çağlayan, *Ceza Kanunu*, vol. II, 348-349.
[154] 1 CD, E. 4357, K. 361, T. 27.1.1954, in *AD* 3 (1955): 277-278.
[155] 1. CD., E. 1062, K. 2609, T. 23.09.1955, *AD* 6 (1956): 675-676.
[156] Maybe this decision was not exceptional and there were other decisions like this but this was the only decision that I noticed to have all of these details.

head prosecutor, Altay Egesel, was in concurrence with the defense raised by Erem. It seems that Fazlı Öztan, a rapporteur judge at the CCa who had submitted an evaluation report for this ruling, was the one to raise the lack of specific intent argument at the court because Erem and Egesel were noted to concur and this leaves Öztan as the only person in a position to raise this issue.

Erem's argument that this was an act of vigilantism was dismissed by the 1st Chamber with consensus. However, the CCa gave an even more favorable decision for Erem's client, reversing the decision on two grounds. First, according to the CCa, the local court had not examined and discussed the evidence which showed that the husband had the "specific intent" of depriving the wife of her liberty. This was one of the grounds for reversal and it was preceded by a lengthy and emotional introduction inviting the reader to have sympathy towards the husband. Thus, if the local court was to insist on punishing this man who was portrayed as a good family father, it was to find and discuss evidence that he had committed these acts with "the specific intent" of causing deprivation of liberty, in addition to general intent understood as willful commission of acts leading to deprivation. Otherwise, there would be no penal sanctions against him. Second, according to the CCa, the TCiC had given the right to choose the marital domicile to the husband, and refusing to go to the place of his choosing without an acceptable reason was "clearly" an unjust act against the husband, necessitating the application of unjust provocation mitigation.

In this decision, the CCa explicitly accepted "specific intent" as a necessary component of the moral element for the crime of deprivation of liberty and publicized this view as case-law. For both Erem and Egesel, husbands had a right to control the movements of their wives and their unlawful exercise of this right could be considered as vigilantism. Erem's defense and Egesel's concurrence can be seen as initiatives to find a middle ground that would ensure the maintenance of such acts within the universe of criminally punished behavior, as initiatives against their complete judicial de-criminalization via the settlement of recent case-law requiring specific intent while excluding them from the scope of the crime

of deprivation of liberty that was subject to very harsh sanctions. If their arguments were accepted, established case-law would change in a way unfavorable for women and gender equality but this change would not bring about complete marginalization of the wife's right to bodily autonomy in the field of law. However, this does not change the fact that their interpretation of existing legislation was built upon the assumption that husbands had a right to control the movements of their wives. For both, husbandhood was a position of substantive domination because their stance was built upon the assumption that husbands had such a right. Fazıl Öztan seems to have adopted a different approach than Erem and Egesel and to have provided support for the settlement of this dispute in line with the recent case law ensuring complete marginalization of intimate violence.

Later on, Egesel would raise to national fame due to his position as the head prosecutor[157] of Yassıada trials that took place after the 27 May 1960 Coup. In these trials, DP politicians were sentenced for various crimes and three of them, including the prime minister of this period, Adnan Menderes, were executed. Fazlı Öztan was the head of the investigation commission that interrogated the DP parliamentarians in these trials.[158] Arguably, Egesel and Öztan were among the last people in the country who can be considered as traditionalists, reactionaries or DP sympathizers. This is what makes their positions in this case interesting because this supports the thesis that members of the state elite who were not affiliated with the DP had taken active roles in this process of masculinist revival.

In the very same years that he was involved in this transformation and was declaring support for Menteş's arguments concerning family burdens and prosecution in cases of spousal abuse, Erem was also pushing for the complete abolition of the extraordinary mitigation clause (art. 462). This shows that the law-people of this period and their positions

[157] Kerem Yavaşça, "Ada'da Bir Müsamere: Düşükler Yassıada'da," in *Türkiye'nin 1960'lı Yılları*, ed. Mete Kaan Kaynar (Istanbul: İletişim, 2017), 122.

[158] Ali Çakırbaş, "Demokrat Partili Milletvekili Aleksandros Hacopulos'un Anayasayı İhlal Davasında Yargılanması," *Nevşehir Hacı Bektaş Veli Üniversitesi SBE Dergisi* 9, no. 1 (2019): 183.

and approaches cannot be understood with a framework placing progressive reformists to one camp and masculinist restorators to the other. As it is clear in the example of Erem, these two were sometimes the very same people.

Sometime after the 1955 case defended by Erem, the CCa took the decision for the unification of case-law concerning this issue. This decision from 1956 is important for a number of reasons. First, this was a generally binding decision. In 1953, article 8 of the law on the organization of the CCa was amended. According to the amended article, decisions for the unification of case law were not only binding for the CCa itself but for all courts.[159] Thus, these decisions were elevated to the status of codes in the legal hierarchy. According to Ali Elifoğlu, who found his amendment unacceptable -especially for criminal law cases, it was now possible to criminally prosecute a judge for deviating from a norm established in a decision for the unification of case law.[160] Second, this decision set a very strong precedent and had a major impact on the regime of intimate violence, and even on the regime of violence in general.

As noted, the decision was taken upon the request of Göktürk's ministry of justice and its contents indicate that Göktürk's ideas concerning household relations were largely shared by the majority of the CCa members. The decision stated:

> According to the stipulations of the 152nd and 154th articles of the Civil Law, the husband is the head of the marital union. He has the right to choose the marital domicile. He represents the (marital) union.
> A husband whose wife left the marital domicile may want to bring her back on this capacity (as the head of the marital union). (In this case), his motive and aim are preventing the dissolution of the union, (and) breaking up of the home. (…)

[159] The Law No. 6082, 13 April 1953, *RG* 8391, April 21, 1953.
[160] Ali Elifoğlu, "Bizde Tevhidi İçtihat Müessesesi," *AD* 8 (1955): 795-806.

> According to the 162th article of the Civil Law – under conditions that are specified in this article – the wife can have a separate domicile and has the right to live separately from her husband. On the other hand, the issue should not be approached and examined from this perspective, but from the perspective that focuses on the intent of the culprit. (...)[161]

Thus, according to this decision, what was meant by "specific intent" was motive rather than intent. If the perpetrator's motive was preventing the dissolution of marital union, or something other than depriving the victim of her or his liberty, this crime would not occur. This new criterion introduced to the moral component of this crime almost transformed deprivation of liberty into an impossible crime.

In every possible scenario where one person imprisons or forcibly moves another person, it can be argued that the motive was something other than depriving the victim of her liberty. For example, defendants in a criminal trial may abduct a witness to pressure him into withdrawing his testimony or to punish him for his testimony and raise the defense that their motive was not depriving the witness of his liberty but avenging themselves or affecting the trial process. This might sound like an absurd scenario but this event actually happened in 1980 and the CCa decided that these people could not be punished for deprivation of liberty because they lacked the specific intent required by this generally binding precedent.[162] Thus, this decision did not only affect the judicial practice

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[161] The PA for the Unification of Case Law, K. 1954/5, K. 1956/12, T. 11.6.1956, in *İçtihadı Birleştirme Kararları*, vol. II, 673-676.

[162] In this case, a group of people had forcefully abducted another who was a witness against them in a criminal trial by a car, beaten and stabbed him, and later dumped him back to the place they had taken him. While committing this crime, they had made it clear that they were doing this for his witnessing, by asking him why he had testified in their case. In this case, the perpetrators could argue that their motive was punishing the victim for his testimony or to make him withdraw his testimony rather than depriving him of his liberty, and that they had lacked specific intent. And this was precisely why the decision of the lower court and its insistence on ist former decision at the face of an overruling decision by the CCa were both overruled by the GCA of the CCa which insisted that the perpetrators lacked the specific intent which was a requirement of this crime

concerning intimate violence but also completely non-gender related cases and led to a transformation in the regime of violence in the country as a whole. Of course, it was not this precedent that led to the political kidnappings of later decades but it became one of the main sources of impunity granted to such crimes related to deprivation of liberty. In sum, this decision proved to be extremely consequential for the regime of violence in Turkey.

In terms of intimate violence, this decision brought about two important novelties. First, after this generally binding precedent, the CCa began to accept that cases in which women were forcibly taken from one place to another or were forcefully imprisoned within the house by their relatives fell beyond the scope of this crime. In the 1956 decision, the CCa had underlined that, these acts could be considered as effective deeds or ill-treatment depending on the acts involved. Such cases were generally pushed into the scope of ill-treatment in later years and the contemporary CCa still adopts this approach in some cases. Second, in the text of this decision, the CCa did not limit itself to the issue of abduction but also elaborated on imprisonment. In the 1930s, Göktürk had raised his pity for the sacrifice of discipline and punishment related *Hausgewalt* clauses in the process of the adoption of the Swiss Civil Code. In this decision taken upon the request of his Ministry, the CCa accepted that husbands, who were the heads of marital union, had a power/violence over their wives similar to the one the parents had over their children, noting that:

> In cases where there is a just cause for imprisoning a person against his/her will, there is no crime. For example, imprisonment of a child by their mother, father or a person responsible for their discipline with the intention of correction or with the intention of preventing harm; or *the imprisonment of a woman by her husband with the intention of preventing her from engaging in inappropriate behavior* (*bazı usulsüz hareketlerini menetmek için*) under certain circumstances are this sort of acts.

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because of the 1956 decision for the unification of case law. CGK, E. 1980/8-385 K. 1981/44 T. 16.2.1981, *YKD* 9 (September 1981): 1187-1190.

> In these cases, although the acts of parents and husbands resemble the crime of deprivation of liberty; there is no crime due to the absence of intent.[163]

In the TCiC, there were no stipulations according to which husbands were like parents. The latter had the legally recognized right of chastisement, which was not granted to the former. There was nothing in the text of the Code, which suggested that husbands had the right to control the movements of their wives, let alone imprison them. Thus, with this binding precedent that was as powerful as the text of the code in terms of its effects, the CCa had also recognized the discretionary power of husbands in terms of controlling the movements of their wives and brought about a new approach to intimate relations and hierarchies.

With this decision, the outlines of which contradicted with Belgesay's early Republican interpretation of the TCiC that I examined in Chapter 3, husbandhood was clearly established as a position of substantive domination. While the text of the decision did not explicitly state that husbands had a right to use physical violence against their wives –like the parents had over their children, it could be read in this way because of the parallel it established. And some judges actually read it in this way because this generally binding precedent was later used by the 7th Criminal Chamber to justify its deviating position according to which prosecution of effective deeds among spouses committed with weapons could not be continued after the withdrawal of complaint and sentences could not be aggravated on the basis of family burdens in such cases.[164]

A striking aspect of this decision is that the paragraph that I quoted above is almost a direct quote from Majno's commentary on the ICC.[165]

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[163] The PA for the Unification of Case Law, K. 1954/5, K. 1956/12, T. 11.6.1956, in *İçtihadı Birleştirme Kararları*, vol. II, 673-676 (emphasis mine).

[164] The Plenary Assembly for the Unification of Case Law, E. 1965/4, K. 1966/1, T. 14.3.1966, in *İçtihadı Birleştirme Kararları*, vol. II, 796-797.

[165] Compare "Diğer bir tabirle, bir şahsı rızası hilafına hapsetmek için haklı bir sebep mevcut olduğu hallerde suç yoktur. Mesela "Carrara"nın mutedil tedbirler diye tasvif ettiği ebeveyni veya terbiyesine mazeret etmekle mükellef bir kimse tarafından ıslah veya bir zararın husülüne mani olmak maksadıyle bir çocuğun veya kadının bazı usulsüz

While making very minor changes of editorial nature and not citing Majno in any way, the CCa judges had used his text to establish a parallel between parental and marital authority and to recognize the rights of men to restrict the bodily autonomy of their wives. This instance shows that the transformation of the regime of intimate violence in Turkey was very much connected to the global flows of law and legal ideas. Words written by an Italian socialist at a very different cultural and political context had travelled far after his death, were first translated into a foreign language, and then became legally binding for all courts in this foreign country which was at the height of its fight against socialism.

Maybe even this explicitly masculinist decision that established husbandhood as a position of substantive domination was found too soft by the Ministry -because the husband's right of chastisement was not explicitly recognized in the text of this decision. Maybe the Ministry was disturbed by the fact that a great number of CCa judges had voted against this decision and worried about the possibility that one or some of them could write a scandalous dissenting opinion. Maybe it was all a coincidence. However, one thing is certain: The greatest CCa purge of this period, the purge that led to the forced retirement of the president and second president of the CCa, the chief prosecutor, and some other members including Melahat Ruacan, the first female CCa judge in the world, took place on the day that followed this decision.[166] These maybes can only be clarified through further research and after the archives of the Ministry are fully opened to researchers but it seems to me that there was a relationship between these two events.

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hareketini men etmek için kocası tarafından makul bazı şartlar altında hapsedilmesi bu kabildendir." Majno, *Şerh*, vol. II, pp. 102-103; and "Bir şahsı arzusu hilafına hapsetmek için muhik bir sebep mevcut olduğu hallerde suç olmamak icap eder. Mesela, Ana, Baba veya terbiyesine nezaret etmekle mükellef bir kimse tarafından ıslah veya bir zararın husulün mani olmak maksadıyle bir çocuğun veya kadının bazı usulsüz hareketlerini menetmek için kocası tarafından makul bazı şeriat altında habsedilmeleri bu kabildendir." The PA for the Unification of Case Law, K. 1954/5, K. 1956/12, T. 11.6.1956, in *İçtihadı Birleştirme Kararları*, vol. II, 673-676.

[166] For the date of this purge and the names of purged judges, see Baltacıoğlu, "Abdullah Vehbi, 197-214.

One of the most important developments of this period was the transformation of ill-treatment against family members into an umbrella crime, into a well with muddy waters where acts of violence that constitute other crimes when committed against strangers are assessed against the backdrop of completely different criteria and can be left completely unpunished. This was a very important development that had very long-term effects. Even in contemporary Turkey, the ill-treatment article is casually used for this purpose and its application creates the same effect: Impunity or relative under-sentencing for intimate violence even if there is a victim insistent on her complaint, reports detailing the injuries, witnesses who saw the event, and admittance of guilt by the perpetrator.

What rendered this article so useful for reaching such outcomes was the partial or conditional criminalization of acts falling under its scope. As examined in the previous chapter, the Republican legislators had invented a criterion –incompatibility of mercy and compassion– and organized this article differently than the ICCs which lacked such a qualifier. However, the approaches of the early Republican state elite to this crime were quite different than the approaches scholars and judges in later periods. After a lengthy dispute between the Ministry and the CCa in 1932, ministry bureaucrats and CCa judges had begun to share the opinion that an effective deed or any other act that led to bodily harm or endangerment would fall beyond the scope of this crime and would be considered as another crime. Some forms of marital sexual violence like anal marital rape were also not considered as ill-treatment but as sexual assault by the CCa in this earlier period.

This situation began to change in the mid-1940s. In 1945, the 4th Chamber decided on a case concerning an unofficial couple. In this case, a man named Gülter had beaten a woman named Ergüne "without a cause" (*bila sebep*), starved her, and left her outside at a time of sickness.[167] The acquittal decision of the local court was overruled by the CCa which underlined that these "ill-treatments" would constitute the crime of abuse of disciplinary authority. At first glance, this might seem like a decision in which the Court was pushing for ensuring that there would

[167] 4. CD, E. 4929, K. 4574, T. 17.9.1944, *AD* 10 (1945): 155-156.

be sanctions for intimate violence and this is partially true because there would be no sanctions against Gülter if not for the decision of the CCa. However, there was more to this decision. This was not the only possible way for the Court to ensure sanctions against Gülter. According to Karaoğlan's book, for example, the act of beating could be considered as an effective deed and causing starvation and leaving the victim outside at a time of sickness could be considered as ill-treatment. By considering all of these acts as abuse of disciplinary authority, the Court was accepting that Gülter had a disciplinary authority over Ergüne because one cannot abuse a right or authority that he does not have. This can be seen as an initiative towards the recognition of household headship as a position of substantive domination. Second, the Court had noted that Gülter had beaten Ergüne without a cause, signaling that lack of a reason for beating was something legally significant. This was strongly reminiscent of the Ottoman distinction between just and unjust beatings, which were differentiated on the basis of the existence or lack of a just cause.

In this decision, the acts were defined but not punished as ill-treatment. This situation changed in the 50s and the Court began to push acts like these to the scope of ill-treatment. The justification explanation of 1933 which excluded *darb* from the scope of this crime was accepted to be binding but it was interpreted in a very peculiar way. On the one hand, the Court interpreted *darb* as beating (*dövmek*). On the other hand, it redefined *dövmek* and *müessir fiil* (effective deed) in a way very different from lay Turkish, making a novel change in Turkish high legalese.

In 1954, one of the CCa chambers had overruled a decision, claiming that beating would also fall into the scope of ill-treatment. In this case, there was a husband who had beaten his wife and imprisoned her in a room. The local court had decided that there were two crimes in this case. The beating was considered as an effective deed and imprisonment was considered as ill-treatment. According to the CCa, there was no need to issue an additional punishment for the crime of effective deed since such acts were already within the scope of ill-treatment. The office of the head prosecutor objected to this reversal decision and brought the case to the GCA, arguing that:

> If we are to accept that these two acts combined can be considered within the scope of article 478 (ill-treatment), husbands would be punished with harsher sentences for committing only effective deeds which are acts of lesser gravity compared to these acts.[168]

Thus, the prosecutor's office, which was now led by former CCa judge and DP parliamentarian Alabay, who had proposed the inclusion of illegitimate sexual relations within the scope of the extraordinary mitigation in the parliament, was aware that pushing such acts to the scope of ill-treatment created the result of relative under-sentencing compared to their punishment as effective deeds. What the prosecutor problematized was not the rights of women or differentiation of intimate violence from violence against strangers in this way but the disproportionality such a push would cause among the sentences that would be given to violent husbands. If such an approach was to become established case-law, a husband who had just beaten his wife could receive a harsher sentence than another who had beaten *and* imprisoned his wife. It was this disproportionality that lied at the basis of this objection, which was accepted by the majority of GCA judges who reversed the decision of the special chamber.

This decision is remarkable in various respects. It shows that, even at the peak of this masculinist revival, the CCa did not take a settled position on pushing acts defined as beating into the scope of ill-treatment. This is remarkable because this became established case-law after the 1980 Coup and acts defined as beating were considered within the scope of ill-treatment in a number of decisions taken in the 2000s. This suggests that these developments which I examine in subsequent chapters cannot be seen as unavoidable continuations of a legal tradition that started in the 50s.

While the idea of expanding the scope of ill-treatment to include acts defined as beating was not adopted by the majority of judges at the CCa,

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[168] "Bu iki fiili kül halinde 478. maddeye temas eden bir suç olarak kabul edersek bu takdirde bu fiillerden daha hafif olması lazım gelen ve münferiden karıya karşı işlenen müessir fiilden dolayı kocaya daha ağır ceza verilmesi icap edecektir." CGK E. 346, K. 357, T. 6.12.1954, in Çağlayan, *Ceza Kanunu*, vol. II, 348-349.

some CCa judges found a way to push intentional and bodily physical violence into the scope of this crime without breaching the majority opinion that beatings or effective deeds did not fall into the scope of this crime and without contradicting the justification explanation which excluded *darb* from the scope of ill-treatment. This was using the power of interpretation and framing. In 1956, the 4th Criminal Chamber reversed a lower court decision according to which a father, Hasan, was sentenced to imprisonment for 2 months and 20 days for ill-treatment.[169] Hasan's daughter Fatma was noted to be abducted (*kaçırılan*) by someone but it seems that she had eloped because she had resisted her father who was trying to take her back to her natal home. The local court had pushed this case to the scope of ill-treatment. According to the CCa, this was appropriate, because although effective deeds were not within the scope of this crime, Hasan had not *beaten* her daughter but "repeatedly hit her to the ground" and "swept her" by force in his capacity as the head of the family in order to protect the honor and reputation of his family. Such acts were not effective deeds according to the court. According to this decision, the ground for reversal was absence of the elements of the crime of ill-treatment. It seems that the motive of protecting honor had rendered these acts compatible with mercy and compassion. Thus, there would be no sanctions for Hasan according to the decision of the CCa.

The fact that Hasan's acts were defined in a way to denote repeated movement (*yerlere vurmak* rather than *ittirmek* or *yere düşürmek*) suggests that the act involved was more than a single push to the ground. In other words, Hasan had not simply carried her daughter away. As a native Turkish speaker, I do not think that one can repeatedly hit someone to the ground without committing *darb* - even if *darb* is defined as something more than a single act, as an act that requires repetition. However, as underlined by various scholars, such mismatches between the language used in legal texts and everyday language are what make the former legalese.[170] In legalese, some words acquire new meanings that can also contradict their everyday usages in ways that can produce material

[169] 4. CD, E. 2417, K. 2019, T. 22.2.1956, *AD* 7 (1956): 790-791.
[170] Gordon, *Critical Legal History*, 121; Black, *Regulatory Conversations*, 176.

and legally enforced outcomes. Thus, such mismatches are not specific to the Turkish legal field, and the definition of repeatedly hitting someone to the ground as an act that does not involve *darb* or effective deed by the court can be seen as a new development in Turkish high legalese.

Another reversal decision by the same chamber from 1956 shows that the technique of pushing acts of direct bodily violence into the scope of ill-treatment by using the power of definition and framing was used in multiple cases. In this case, the husband's acts against Pakize, his wife, were defined as *dövme* (beating) by the local court, and he was sentenced for the crime of ill-treatment for beating.[171] He had also forcibly poured lemon juice into her vagina (*tenasül aletine limon sıkmış*). According to the CCa, this particular act could be considered as ill-treatment depending on the intent of the husband. It seems that, for the CCa judges, this was an act that could be committed for a legitimate reason or in a way that was compatible with mercy and compassion because they argued that the intent of the husband would be taken into consideration in this regard. Although it is not clear from the decision, lemon juice is believed to be a means of birth control by some people (in Turkey and in some other parts of the world) and it seems that the CCa judges considered this practice, even if it was exercised by force and without consent, as an act that could be compatible with mercy and compassion if carried out for an acceptable end. Thus, apart from the question of whether this is an effective method or not, such forceful interventions in women's reproductive capacities were also pushed to the scope of ill-treatment by the CCa.

In this case, the local court's decision concerning the act of beating was overruled by the CCa which underlined that effective deeds were beyond the scope of ill-treatment. However, the high court did not suggest to punish this act as an effective deed. In the decision of the CCa, *dövme* was replaced with *sıkmak* (squeezing) and *hafif berelemek* (causing light bruises). Thus, what the local court was expected to do was defining the acts of the husband in a different way. In other words, with this decision, the chamber was teaching the local court the change it began to make in Turkish high legalese. Since this case was published in *Adalet Dergisi*, the

[171] 4. CD, E. 15681, K. 315, T. 18.1.1956, *AD* 3 (1956): 416.

recipients of this message were not only the people involved in this case but all members of the judiciary. Moreover, according to the CCa, the local court had to consider whether acts like beating (now re-framed as "squeezing and causing light bruises") were not natural components of marital life or not (*karı-koca hayatında tabii hallerden sayılıp sayılamayacağını*) while deciding whether these acts constituted the crime of ill-treatment. Thus, with this decision, the CCa was not only giving the message that a different framing was to be used in the definition of such acts of violence in judicial discourse but also directing the local court towards writing a decision discussing the question of whether the acts that it had defined as beating were a natural component of married life or not. In 1987, such elaborations on the part of a local civil court judge led to the first national campaign against wife-beating in Turkey. This decision from 1956 shows that this discourse and way of thinking on the part of lower court judges had not emerged in a vacuum or in a space independent from what had been imposed on them by the CCa. Lower court judges were practically obliged to discuss whether such acts of violence were natural elements of married life or not and the position of the CCa, which was noting them and determining their chances of promotion and relocation, was that they could well be.

In this period, the CCa also moved away from its earlier case-law according to which anal marital rape could be considered and punished as sexual assault. After a brief period in which these acts were considered as effective deeds (physical assault),[172] the CCa established the practice of pushing them to the scope of ill-treatment.[173] The earlier precedent according to which these acts were to be punished as sexual assault was simply forgotten. It was not mentioned or cited in any paper or book written after this change in case-law. It is important to note that there was not a time in Republican history in which such acts were not considered to be criminal acts by the CCa. Anal marital rape was always considered

[172] 4. CD, E. 823, K. 1010, T. 28.1.1948, in Alicanoğlu, *Ceza Kanunu*, vol. II, 392.
[173] 4. CD, E. 6019, K. 7556, T. 9.7.1953, in Dönmezer and Şensoy, *Ceza Hukukunda İçtihatlar*, 91-92.

a crime. However, there was no minimum punishment for spousal ill-treatment and it was possible for judges to issue punishments like 7 days imprisonment in such cases.[174] The fact that such very short-term prison sentences were actually issued by local courts and approved by the CCa indicates that they were seen as a means of sexual discipline.

Finally, the CCa formally introduced customs and traditions to the regime of intimate violence in this period. As examined in the previous chapter, the Code had not defined the meaning of incompatibility with mercy and compassion. In 1949, the CCa decided that the legislators had granted a margin of discretion to judges in this regard and that this discretion would be used by lower court judges who would take local customs and traditions into consideration.[175] In this case, there was a man who had thrown his official wife and four children to the streets in winter time and started to live with another woman in the family home. The local court had punished the man for the act of throwing his family to the street in winter time and leaving them in a situation in which they had to beg in the village, deciding that this was ill-treatment. This decision was overruled by the chamber but later came to the GCA upon the insistence of the local court and this insistence was approved by the GCA. What makes this case important is that the GCA had not only approved the punishment of these actions as ill-treatment but also introduced customs and traditions as criteria to be taken into consideration in the judicial decision-making process considering this crime. If they wanted, the GCA judges could reach to the outcome of sentencing this particular man on the basis of the Civil Code -without getting customs and traditions involved- because the TCiC gave husbands the responsibility to provide for their wives and children (art. 152). The fact that the CCa judges did not resort to this article but brought up customs and traditions suggests that they had wanted to introduce the latter into the judicial-practice concerning this crime rather than merely reaching the outcome of punishing this man.

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[174] Ibid.

[175] CGK, E. 4/380, K. 373, T. 5.12.1949, in Çağlayan, *Ceza Kanunu*, vol. II, 450-451.

§ 4.6 Scholarly Opposition, Approval, and Silence

The expansion of legal accommodation granted to intimate control murders through changes in the case-law of the CCa was not directly problematized by scholars and practitioners who wrote in the sources examined for this study. The abolition of the direct witnessing requirement, inclusion of illegitimate sexual relations within the scope of extraordinary mitigation, the CCa's shift to a wide interpretation of unjust provocation according to which leaving the domicile was an unjust act were not directly problematized. Even when they discussed issues related to these matters and presented interpretations contrary to that of the CCa, scholars did not directly criticize the masculinist interepretations of the high court.[176] Whatever their reasons were, criminal law scholars were generally silent about the transformations of case-law in this particular regard. When they spoke and directly address the case-law of the CCa concerning the application of unjust provocation in cases related to sexuality, their words were encouraging rather than critical. For example, Erem had explicitly approved the recent case law according to which unofficial husbands who killed their former partners for leaving them could benefit from unjust provocation, arguing that unjustness of the provocation should not have been assessed from an objectivist perspective.[177] Citing Italian scholars like Pozzolini, he argued that it was the perpetrator's mindset that should be considered. From a legal standpoint, it was impossible to accept such leaves as legally unjust acts because there was not a legal tie among such people. Hence, there was a need to move away from the legal domain to justify such mitigations. By justifying these moves of the CCa judges, Erem had provided support for the settlement of this case-law.

Until the 1950s, not a single scholar explicitly problematized the extraordinary mitigation article and its legislative and judicial expansions in principle. Erem had criticized the designation of this extraordinary

[176] The article by Okay and Arslan was actually full of claims contrary to the CCa practice of the time but the authors had not directly target the court in this paper. Okay and Arslan, *Adam Öldürme*.

[177] Erem, "Adalet Psikolojisi Bakımından," 59.

mitigation as a mandatory mitigation that had to be applied in every case fulfilling the material requirements (including murders committed by "degenerate husbands making a living by their wife's prostitution"), but what was problematized in these early texts was not the mitigation itself.[178] This lack of opposition and various framings that were popularized in the scholarly discourse might have played a role in the transformation of case-law and legislation in the period until 1953.

On the other hand, after the 1953 amendment, there was a stark change in the scholarly discourse. In his elaborations on this amendment, Tahir Taner, one of the most respected criminal law professors in the country, openly criticized the expansion of the scope of this article, noting that he disapproved the designation of illegitimate sexual relations other than adultery as grounds for legal mitigation for murder and effective deed. Quoting Dönmezer,[179] Taner underlined that it was not appropriate to accept murder and physical assault as lawful (*caiz*), even on relative terms, in order to enforce moral norms.[180] According to Dönmezer, what was problematic was not the extraordinary mitigation itself but its expansion. He claimed that it was "absolutely improper" to accept illegitimate sexual relations involving unmarried people as a partial excuse for murder and physical assault. For example, he argued, one could not find any lawful principle to legitimize mitigating the sentence of a sister who killed her sister for her illegitimate sexual relations. He also included these elaborations in his later commentary books on criminal law. Thus,

[178] Ibid., 70.

[179] Taner cites Sulhi Dönmezer, *Ceza Hukuku (Hususi Kısım)*, 2nd ed. (1953), 62. I was not able to reach the first and second editions of this work. According to my research, even the library of the Istanbul University does not have this second edition. However, this quote was also replicated in later editions of this book. In Nejat Özütürk's commentary there is a more extensive quote from the 1953 edition of Dönmezer's *Ceza Hukuku* and there is a perfect match between that quote and the 1968 edition of Dönmezer's book on crimes against persons and property. This shows that Dönmezer had not changed his stance on this matter after 1953. See Özütürk, *Ceza Kanunu Şerhi*, 975; Dönmezer, *Şahıslara ve Mala Karşı Cürümler*, 91.

[180] Tahir Taner, "Türk Ceza Kanunu'nun 9.7.1953 Tarihli ve 6123 Sayılı Kanunla Değiştirilen Hükümleri," *İÜHFM* 19, no. 3-4 (1954): 573.

this criticism became a part of the Turkish criminal law canon.[181] These initial elaborations of Taner and Dönmezer formed the basis of what I call the reserved reform approach that shaped legal debates, drafting initiatives, and judicial practice in later periods. According to this approach, a differential treatment for close relatives (especially husbands) who kill married people upon their sexual transgression of gender norms should be reserved but courts should not grant (extensive) accommodations for sexual control murders targeting unmarried relatives. This approach was very impactful in later years.

The post-1953 scholarly criticism concerning extraordinary mitigation was not confined to this reserved reform approach. In 1953, Faruk Erem wrote the first scholarly paper problematizing the extraordinary mitigation in principle.[182] Erem did not only object to the amendment but also to the fact that there was such an article in the code.

In this period, some traditions and customs, like blood feuds and polygamy, were defined as "false traditions" (*sakat gelenek*) by some law scholars.[183] According to Velidedeoğlu, false traditions were traditions that were not really Turkish traditions, were not compatible with rationality or morality, or were incompatible with the new principles adopted in the process of Kemalist Revolution. These false traditions could have no place in Turkish law and must have been eliminated. While not explicitly stating that these murders and accommodations granted to them were false traditions, Erem implied this in his elaborations on the extraordinary mitigation, noting that:

> In our times, it is very difficult to understand the principle behind this stipulation of the Code. This stipulation, which also had a place in the church law, was initially accepted under the influence of the ancient European law according to which husbands had the

[181] Sulhi Dönmezer, *Şahıslara ve Mala Karşı Cürümler*, 5th ed. (Istanbul: Sulhi Garan, 1963), 91; 8th ed., 1971, 89; *Kişilere ve Mala Karşı Cürümler*, 16th ed. (2001), 176.
[182] Faruk Erem, "Adam Öldürme," *AÜHFM* 10, no. 1 (1953): 33-91.
[183] For Velidedeoğlu's talk and the comments of other scholars who spoke in response, see Velidedeoğlu, "Evlenme ve Boşanma," 71-125.

> right to kill their wives if they were to catch them committing adultery. In the Catholic religion, there is no 'divorce.' Marriage only comes to an end with a spouse's death. As murder committed upon catching in adultery also causes death, marriage comes to an end through legitimate means. It is impossible to justify such an approach in contemporary law.[184]

By overlooking the fact that the prerogative to kill in such cases was also an element of the classical Ottoman regime and by explaining the historical rationale behind this norm on the basis of Catholic church law, Erem portrayed this practice as something alien to the Turkish cultural-legal sphere. The implication here was that this was not a Turkish but European tradition and this would render it a false tradition in Turkish context. Thus, one also finds culturalist tones in Erem's portrayal of these murders in the post-1953 era but this framing was very different from that of Kunter's. Here, culture was brought into the debate to alienate these murders from the Turkish cultural context, to undermine rather than normalize the extraordinary mitigation by implying that this was a "foreign" stipulation rather than a means of ensuring the protection of national particularities.

Another important point concerning Erem's post-1953 opposition to article 462 is that Erem explicitly recognized the gravity of the situation caused by this article. As I examined, especially after 1938, this article created the effect of granting practical impunity for these murders because of the degree of mitigation it stipulated. Erem was the first person writing in Turkish high legalese to identify this stipulation as a disposition that granted men "the right to kill" (*öldürmek hakkı*) their wives, noting that it practically annulled the punishment (*cezayı tamamiyle kaldırmağa eşit sayılacak derecede bir indirme*).[185] According to Erem, the right thing to do was abolishing this article because it was not only unjust but also unnecessary. Since the Turkish Code already had an unjust provocation mitigation, which took human psychology into consideration in a

[184] Erem, "Adam Öldürme," 67.
[185] Ibid.

more principled way, the abolition of this clause would not cause a problem.

In his later works, Erem continued this full-scale attack against the extraordinary mitigation. He included these elaborations in his commentaries on the special part. One of his commentary books, which later became a work co-authored with Nevzat Toroslu, was among the few scholarly commentaries on the special part for decades. This commentary continued to be published even after his death and even its millennial editions included large sections from the paper in which Erem objected to the extraordinary mitigation in principle for the first time.[186] Thus, just like Dönmezer's elaborations, Erem's elaborations also became a major component of legal debates over this issue in the years to come.

Did these scholarly objections matter? In other words, did they have any impact on the transformations of the regime of intimate violence? If we assess impact with a view focused on the code itself, both Dönmezer and Erem had pushed for a change in vain because this article remained intact until 2003. However, I think this post-1953 scholarly opposition that made it clear that the leading criminal law scholars were not on the same page with the recent judicial and legislative developments concerning this particular issue had some impact on the immediate and long-term transformations of this regime. As far as I was able to trace, after 1953, the CCa did not publish a decision in which it approved the application of extraordinary mitigation in the absence of some sort of immediate witnessing. On contrary, in the 1960s, it published some decisions that were reversed because the case failed to fulfill the direct witnessing requirement.[187] I do not think that this turn in the interpretation of the CCa can be explained without taking this strong scholarly opposition into consideration. Moreover, as I examine in the next chapter, there were novel developments in case-law in later decades (towards the limitation of accommodation granted to such cases) and this scholarly opposition

[186] Faruk Erem and Nevzat Toroslu, *Türk Ceza Hukuku: Özel Hükümler*, 5th ed. (Ankara: Savaş Yayınları, 1987), 448-453; *Özel Hükümle*r, 8th ed. (2000), 377-383.

[187] An early example of these decisions is 1. CD, E. 681, K. 1015, T. 13.4.1960, in Özütürk, *Ceza Kanunu Şerhi*, 975.

might have played a role in shaping those changes. Thus, it seems to me that these initial oppositions to extraordinary mitigation affected the regime of intimate violence both in the 1950s and in later years.

A text which indicates that these challenges had indeed troubled the waters is the 1958 Draft Criminal Code which was not submitted to the parliament and did not change the rules in force. Its organization of the extraordinary mitigation was seemingly affected by these challenges because it re-adjusted the margin of mitigation provided by this article as 3/4 instead of 7/8 (art. 452), because, noted the drafters, the legislation in force left a grave crime like murder almost unpunished in terms of criminal sanctions (*adam öldürmek gibi ağır bir suçu ceza bakımından hemen hemen müeyyidesiz bırakmaktadır*).[188] As seen in this minimal adjustment initiative, the challenges concerning this article had made some impact on the legal debates and developments of this period.

In terms of ill-treatment, there was a completely different picture. The expansion of the crime of ill-treatment is a remarkable event in Turkish legal history. Within two decades, one interpretation of this crime was replaced by another through case-law with enormous consequences for women, bodily hierarchies, and gendered relations of power. Through legal interpretation, the CCa had created a well with muddy waters into which various sorts of male violence could be thrown into, a well that ensured undersentencing and even total impunity for marital torture, imprisonment, battery, and rape. As far as I was able to trace, not a single scholar explicitly resisted this particular expansion. This might have facilitated the settlement of the new CCa interpretation as established case-law in this period and its maintenance in the years to come.

What lied at the basis of this indifference was not the lack of attention on the part of criminal law scholars to family. As examined in this chapter, Erem was deeply involved in the transformation of case law concerning the wife's right to bodily autonomy and he had personally amplified Menteş's push for a change in case-law concerning spousal violence committed with weaponry. Dönmezer was also very much interested in the issue of family. Presenting one of the first studies on child criminality in

[188] *Türk Ceza Kanunu Layihası* (Ankara: Yeni Cezaevi Matbaası, 1958), 55.

1943, Dönmezer, who was then a very young scholar in his 20s, had underlined that around ninety percent of child criminals in Istanbul prisons were beaten by their parents when they made mistakes.[189] In these remarks, there was a recognition of parental violence as a problem, as a factor contributing to child criminality. In later years, this recognition was dismissed. In Dönmezer's later works, for example in his *Kriminoloji*, improper parental discipline, too lax or too stringent discipline, was problematized but not the use of violence as a means of discipline.[190] As illuminated in this contrast between early and late Dönmezer, parental violence was not something that had never entered criminal law scholarship as a problem in this period. It was actually silenced and sidelined after making its entry. In the late 1940s, Dönmezer had personally suggested that a strong state could only be established on the basis of strong family morality, and discipline and excluded the issue of non-lethal violence, and the transnational trend towards abolition of marital and patriarchal prerogatives of violence from the scope of his elaborations on the relationship between family and criminal law.[191] By raising such voices and staying silent on some other matters, criminal law scholars had also affected this process of transformation.

The lack of scholarly opposition to the expansion of the crime of ill-treatment seems to have affected the drafting initiatives of the time. In the Draft of 1958, the punishments stipulated for ill-treatments targeting ascendants and descendants were the same with the code in force. However, the maximum punishment for marital ill-treatment, which by then had become a well with muddy waters, was established as one-year imprisonment (art. 466).[192] Thus, the Draft would reduce the punishment for this crime by three-folds and ensure wider legal tolerance for male violence. It would also widen the gap between the penal consequences of marital violence and violence targeting ascendants. It seems to me that

[189] Dönmezer, "Çocuk Suçluluğu," 241.
[190] Dönmezer, *Kriminoloji*, 221.
[191] Dönmezer, "Ailenin Ceza Hükümleriyle."
[192] *Türk Ceza Kanunu Layihası*, 1958, 209.

such an initiative would not be possible in the absence of scholarly backing.

§ 4.7 Making Sense of a Masculinist Restoration That Could Not Have Happened

In this chapter, I examined the transformation of the regime of intimate violence in the period between the late-1930s and 1960. According to the existing scholarship, this was a period devoid of changes in the outlines of the legal regime concerning gender relations in Turkey. According to one interpretation of this era, this was a period of stagnation in terms of the recognition of women's rights,[193] a period in which initiatives for *further improvement* were hindered.[194] On the other hand, my examination shows that this was a period of enormous changes. In terms of law, violence, and gendered hierarchies of power, this period was not characterized by a pause or stagnation. This was a period of change that brought about a complex re-ordering of intimate relations and marginalization of intimate violence in the field of law. What happened was nothing short of an enormous masculinist restoration.

As underlined by some authors, a legalist approach (*kanuncu gelenek*) is heavily dominant in scholarly and intellectual debates in Turkey.[195] I think the mismatch between my examination and that of many other scholars who have examined different aspects of the gender regime in Turkey is very much related to the dominance of legalism in Turkish academia. Not all but many of the changes that characterized this grand transformation happened without a change in the text of the codes, through changes in legal interpretation. From a legalist or legislation-based perspective, this was a transformation that could not have hap-

[193] Ecevit, "Women's Rights," 191.

[194] Köker, "Türkiye'de Kadın," 166.

[195] Orhangazi Ertekin, "Türkiye'de Hukuk Siyaset İlişkileri: Türk Devlet Biliminin Doğuşu ve Yükselişi," in *Dönemler ve Zihniyetler*, ed. Ömer Laçiner (Istanbul: İletişim, 2009), 285-312.

pened -at least not in the extent that it did. This might be why the juridico-legal aspect of this masculinist restoration and the massiveness of its extent have remained unaddressed so far.

The CCa was crucial in shaping this process of masculinist revival. Legal interpretation is not a power that is distributed equally to all people and every institution.[196] In these years, this power was particularly concentrated at this institution in terms of civil and criminal law matters. Radical changes in the orderings of gender relations were made through the CCa and with the help of this power. There were internal disagreements among the CCa people and many issues were not decided unanimously but the end result was an enormous change in the norms imposed by the CCa on local courts. These findings support the thesis that high courts can have a great impact on the transformations of regimes of intimate violence even in code countries where case-law and judicial lawmaking are generally accepted to be of minor importance.

This was a major transformation and many actors, including law scholars and politicians, had roles in shaping it. Parliamentarians and politicians were crucial. They amended the code in a way to expand the accommodations provided for some forms of intimate control murders. The 1938 amendment fixing the degree of mitigation was followed by the 1953 amendment that provided a legislative basis for its extensive application. As seen in the objections of scholars to the legal expansion of extraordinary mitigation, not everyone was contended with every single outcome but, considering the scholarly discourse and its silences, it is impossible to ignore the role of scholarly action in shaping this process of masculinist restoration.

Why was there such a change in the regime? This is a difficult question but I think the timing of changes in case-law and legislation provide clues in this regard. The CCa had begun to adopt a new approach to unjust provocation mitigation in 1938. Its novel approach to the extraordinary mitigation also dates back to this time period. At the same time, the parliament had amended this article in a way to grant practical immunity to every eligible perpetrator by fixing the margin of mitigation as 7/8. I

[196] Black, *Regulatory Conversations*, 194.

think these developments might have been facilitated by the deterioration of Atatürk's health. The possibility of his death might have triggered some inter-elite debates and concerns regarding the future of the regime because this was a single party regime built around the authority of a single man.

This was a period in which the demands and wishes of the masses had gained a new significance. I do not argue that being able to kill their wives, daughters or sisters with practical impunity was actually demanded by men or that this was a priority in people's political agenda. However, limitations in this regard, limitations that were shaped by the sexual liberation approach, were among the first reforms to be shelved when the possibility of a political crisis appeared on the horizon and when the political elite began to take what they understood to be the demands of the masses seriously. In later years, these initial changes were followed by the marginalization of non-lethal intimate violence in the field of law through the transformation of case-law concerning ill-treatment. While the nature of the relationship between these two developments remain to be studied, the findings of this study supports the argument that democratization can be a complicated process in terms of its outcomes for the lives and rights of women.[197] Finally, this overlap indicates that major shocks such as leadership changes in single-man regimes may pave the way for major changes in the regulation of intimate relations, and violence.

In her study that is based on Turkish newspapers from the period between 1945 and 1965, Serpil Sancar notes that this was a period of important changes. According to her, in this era, the tensions of the early Republican era that resulted from the difficulty of accommodating modernity (*asrilik*) and nationalism (*milliyetçilik*) at the same time were resolved by an inter-elite consensus on a conservative modernization approach.[198] My findings indicate that there was no consensus among scholars, judges, and politicians concerning the regulation of intimate violence in the strict sense of the term but there was a clear move away

[197] Htun, *Sex and the State*, 5.
[198] Sancar, *Türk Modernleşmesinin Cinsiyeti*, 21.

from the sexual liberation aspect of early Republican reforms in terms of the norms in force. Almost every scholar who wrote about this issue expressed discontent about the expansion of extraordinary mitigation to include unmarried people. On the other hand, the regime had changed and sexual liberation was almost completely dropped off regardless of this lack of consensus.

As I examined in this chapter, the past was very much operative in this transformation. It was frequently brought in to legitimize or oppose various positions. *Zulüm* vs. good governance distinction, differentiation of just and unjust beatings, late-Ottoman legislation concerning murders committed upon adultery all featured in this transformation. However, not all aspects of the past affected the politico-legal discourse and case-law of this era. Some parts of history, especially those parts that would undermine the legitimacy of ongoing expansions, were mostly sidelined in such referrals to the past. Neither the direct witnessing requirement that is found in classical and late-Ottoman law nor the early Republican case-law according to which anal marital rape was sexual assault was "remembered" by anyone.

Another way the theme of history is relevant to this chapter concerns the question of how important this era has been for shaping what was to come, including the present moment. As I examined throughout this chapter, some norms established in this period are still applied by Turkish courts. However, as I examine in the next chapter, the then-future of this regime was not absolutely determined by the qualities it acquired during this masculinist revival.

5

Technicians, Revolutionaries and Pianists in Action: The Regime of Intimate Violence in the Midst of Coups and the "Sexual Revolution" (1960-1980)

Women's rights that are currently expanding in every direction must also include women's sexual freedoms. It is impossible to accept that women, who are politically and economically free, do not have the freedom to [have] sex.[1]

– A Council of State Rapporteur, 1977

Thank God, Turkish women do not want such freedoms. But one may ask: "When will you grant sexual freedom to your wife?"[2]

– JP Senator Rıfat Eriş, 1977

[1] The Report for the Case no. 1976/2451, 1977/126, quoted in the speech of senator Rıfat Eriş, *Cumhuriyet Senatosu Tutanak Dergisi*, vol. 32, session 40 (1 March 1977), 116.
[2] Ibid. In response to the above-quoted rapporteur and the Council of State judges who agreed with them.

Don't be fooled by communists, Zühtü!
[Otherwise,] chastity and honor will be gone, Zühtü!

– Milliyetçi Zühtü, 1977 Election Propaganda Song of the JP

In many parts of the world, the 60s and 70s were interesting times in terms of gender and sexuality. There is a rich literature that largely focuses on the global north and examines what is called 'the sexual revolution.'[3] When we shift our attention to Turkey on the other hand, these decades do not appear so interesting. There is no disputing that they were full of important political developments. There were three coups, political turbulence, and violence, youth movements, socialist movements, Islamist movements, fascist movements. But, according to the existing scholarship, there was hardly anything particularly interesting in terms of gender or sexuality. There was some women's rights activism[4] but no autonomous feminist movement and nothing comparable to the sexual revolution in the global north. People in Turkey were seemingly preoccupied with other questions, questions related to 'politics proper.' According to some authors, in terms of decision-making authorities, governments, or public sphere, there were "no debates" on gender in Turkey

[3] I must note that the term itself is contested. Some scholars link the developments of the post-1960 era to the long-term transformations that took place since the late 19th century, others emphasize the post-1945 reconstruction or the radical and intense "sexual explosion" of the late 1960s. Gert Hekma and Alain Giami, eds., *Sexual Revolutions* (Basingstoke: Palgrave Macmillan, 2014), 2. Its effects on gendered hierarchies of power has also been debated. The debates linked to this question and conflicts over issues like pornography and prostitution in the USA evolved into what is called the feminist sex wars in the 1980s. Lisa Duggan and Nan D. Hunter, *Sex Wars: Sexual Dissent and Political Culture* (New York: Routledge, 1995).

[4] Aldıkaçtı Marshall, *Shaping*; Ecevit, "Women's Rights"; and Yelda Şahin and Ezgi Sarıtaş, "Altmışlı Yıllarda Kadın Hareketi: Süreklilikler, Kopuşlar ve Çeşitlenme," in *Türkiye'nin 1960'lı Yılları*, ed. Mete Kaan Kaynar (Istanbul: İletişim, 2017), 727-758.

in this period because people thought that the Republican legislators had provided more than enough for gender equality.[5]

In this chapter, I challenge this assumption and argue that this transnational trend had not simply skipped Turkey. As I show, there were not only extensive debates on gender and sexuality but also actual changes in the regulation of intimate violence, and sexual conduct. In other words, there was a major re-settlement in the regime of intimate violence. What did this re-settlement entail and exclude? And why and how did it come out to be? These are the questions that guide this chapter.

In terms of the institutional fields that I examine, there were two groups of protagonists in this story. At one end, there were revolutionaries. These were jurists, and scholars who either openly advocated for a revolution, or revolutionary changes in relations of power[6] or people whose ideas and discourses were identified as revolutionary by other members of the juridico-political elite. I use this term in a general manner to refer to both socialist, and sexual revolutionaries because -especially in terms of law scholars- there was a huge overlap between these groups. Among them were also some women scholars such as Şirin Tekeli or Nermin Abadan Unat but those who problematized the stipulations of criminal law related to intimate violence were mostly male scholars.

At the other end were technicians -members of the juridico-political elite who insisted on a "technical law" (*teknik hukuk*) perspective.[7] Not only but especially because of the nature of Turkish positive law, towards which they demanded unquestioned allegiance, their positions, and arguments were conservative in nature. This conservatism was underlined with references to the need for discipline, and authority and enhanced by

[5] Mustafa Fatih Özbilgin and Hanife Aliefendioğlu, "Kadın-Erkek Eşitliği Kurumsal Politikaları Üzerine Bir Değerlendirme: Türkiye ve Britanya Karşılaştırması," *Kadın Araştırmaları Dergisi* 9 (2010): 3.

[6] For some high legalese pieces written by such scholars, see Rona Serozan, "Yasacılık ve Hukukçuluk Üstüne," *MHAD* 4, no. 6 (1970): 107-115; Rona Serozan, "Hukukun Sefaleti," *MHAD* 5, no. 8 (1971): 61-74; and Bahri Savcı, "Devrimci Radikalizm Yolunu Buluyor," *AÜSBFD* 25, no. 2 (1970): 275-283.

[7] This approach was crystallized in *Nazari and Tatbiki Ceza Hukuku* (Theoretical and Practical Criminal Law) co-authored by Sahir Erman and Sulhi Dönmezer, two of the most influential criminal law scholars in the country. *Nazari ve Tatbiki Ceza Hukuku*, vol. I, 7th ed. (Istanbul: Istanbul Üniversitesi, 1979).

cultural reductionism. Technicians and revolutionaries were spread across all the institutional fields that I examine and contestations among these groups defined the debates of this era as well as the course of changes in the regime of intimate violence.

In this period, members of the juridico-political elite differed in their interpretations of rights, equality, purpose of law, history, characteristics of the Turkish society, and the very nature of legal interpretation. This brings me to 'pianists' -a term used by a CCa prosecutor to refer to the interpreters of law.[8] We can think of these actors -reformist, revolutionary, and technicist scholars, bureaucrats, and jurists- as performers or pianists. In this period, the notes of music that were available to these pianists were the same as before and many insisted on performing with a strict adherence to the text. However, some of them began to play much different songs and changed the sounds and effects of law.

§ 5.1 Historical Background and Changes in the Institutional Fields

In these two decades, there were three coups in Turkey. All of them led to legal, institutional, and political changes. The first coup that took place on 27 May 1960 brought an end to the Menderes era.[9] It was a heavy blow to democracy: The previous prime minister, along with two of his ministers, were executed, and the army made its first official and large-scale intervention to politics in the Republican era. After this coup, a new constitution was adopted. This constitution emphasized principles like equality, individual liberties and rule of law, as well as social rights. In later years, this constitution became a ground for intense contestations among the juridico-political elite and was utilized by many who wanted to further reformist or revolutionary agendas, including by those who advocated for changes in gender relations.

[8] Bülent Akmanlar, *50. Yil Sempozyumu*, 167.
[9] For decades, many law scholars argued that this was a revolution rather than a coup. For a critical examination of their approaches and the new constitution, see Kemal Gözler, *Türk Anayasa Hukuku* (Bursa: Ekin, 2000), 77-92.

As in many other countries, there were youth movements and protests in Turkey in the late 1960s. Here, the 68 movements transformed under the impact of another coup that took place in 12 March 1971. After this coup, 5 of the 8 constitutional law professors in the country were arrested -for resisting the changes that the coup regime wanted to introduce.[10] In the end, there were large scale constitutional and institutional changes and fundamental rights were curtailed to a great extent. In the 1970s, the left-right divide increasingly took the form of armed conflict. Assassinations, bombings, and lynches became more and more common. On 12 September 1980, the military seized power once again, carrying out the most violent coup in Turkish history.

A wide variety of actors were involved in shaping the outcomes of the 1960 Coup. The new constitution was prepared with the participation of numerous scholars. Law scholars also played important roles in legitimizing the coup[11] and, some of them (especially criminal law scholars) were also involved in Yassıada trials as expert witnesses. The CCa was also involved in shaping the course of these developments. The judicial committee that conducted these trials included many CCa members.[12]

After the 1960 Coup, the political field was re-organized and a bicameral system was introduced. In line with this change, a senate was established. In this period, the Justice Party (the JP) emerged as the successor of the DP. With the rise of Ecevit, the RPP moved towards a left-centrist position. Far-right nationalism, socialism, and political Islam were also represented in the political arena, respectively by the Nationalist Movement Party (the NMP), Worker's Party of Turkey (the WPT), and National Order Party (the NOP). In the early 1970s, the latter two parties were dissolved by the Constitutional Court but these movements continued their political activities. In this period, the left-right divide was deeply felt in politics. However, as seen in the coalition between Ecevit's RPP and

[10] Selçuk Koca, "Hürriyetten Otoriteye: 12 Mart Dönemi Anayasa Değişiklikleri," in *Türkiye'nin 1970'li Yılları*, ed. Mete Kaan Kaynar (Istanbul: İletişim, 2020), 91.
[11] Gözler, *Anayasa*, 77-80.
[12] For the members of the High Commission of Justice (Yüksek Adalet Divanı). A. Recai Seçkin, *Yargıtay Tarihçesi, Kuruluş ve İşleyişi* (Ankara: Yarı Açık Cezaevi Basımevi, 1967), 132.

Necmettin Erbakan's National Salvation Party, this division was not absolutely and completely effective in shaping political alliances.

The adoption of a new constitution was accompanied by the establishment of a constitutional court. Thus, the judicial field was restructured on major terms. In June 1960, 19 CCa members,[13] in other words roughly 1/5 of the CCa cadre,[14] were retired -through the same stipulations that were used for the discretionary retirements in the 1950s. In later years, many of these decisions were rescinded[15] and at least ten CCa judges returned to their posts.[16] Finally, some judges who had been purged in the DP era, such as Cemal Köseoğlu and Melahat Ruacan, returned to their posts. Thus, the data that I was able to reach does not indicate that there was a major revision in the member composition of the CCa after the 1960 Coup because, after the returns, the net personnel change in terms of CCa members was around 1/10. As examined in the next chapter, there was a much different situation after the 1980 Coup.

One of the main characteristics of the judicial field in this era was the high degree of judicial independence. The 1961 Constitution closed the

[13] The MJ, doc. no. 28910, 27 September 1962, in *Millet Meclisi Tutanak Dergisi*, period 1, vol. 7, session 122 (28 September 1962), 137-138.

[14] In 1965, there were 122 judgeship seats at the CCa. Seçkin, *Yargıtay*, p. 161. The number of active judges in 1960 must have been lower because a new chamber was added to the court in 1962 and the number of judges on-duty tends to be lower than the number of seats. The number of all judgeship seats at the court must have been at least 97 in 1960. Until 1954, there were 14 chambers that each had 6 members. With the addition of the president, there were 85 judgeship seats. In the 50s, 12 cadres were added to the court. This must have brought the total to 97. However, this gives us an approximate minimum number because the norm according to which there would be 6 members in each chamber was annulled in 1954 and 3 new chambers were added to the court in 1959. For the relevant legislation, see The Law no. 1221, 11 April 1928, art. 2, *RG* 863, April 14, 1928; and The Law No. 6274, *RG* 8644, February 26, 1954.

[15] I reached this conclusion based on the data in these sources; "5 Emeklilik Kararı Daha İptal Edildi," *Cumhuriyet*, May 27, 1963; and İmran Öktem, "1968-1969 Adli Yıl Açılış Konuşması," https://www.yargitay.gov.tr/documents/acilisKonusma/1968-1969.pdf and by comparing the list of purged judges with the list of judges serving at the CCa in 1966. For the latter list, see Seçkin, *Yargıtay Tarihçesi*. For the former list, see The MJ, doc. no. 28910, 27 September 1962, in *Millet Meclisi Tutanak Dergisi*, period 1, vol. 7, session 122 (28 September 1962), 137-138.

[16] *RG 11851*, November 9, 1964; *RG* 11888, December 22, 1964; *RG* 12143, November 5, 1965; *RG* 12429, October 18, 1966; *RG* 12570, April 11, 1967; the HCJ decision no. 373-1964/3, *AD* 55, no. 1 (January 1964), 4; and İmran Öktem, "1967-1968 Adli Yıl Açılış Konuşması," https://www.yargitay.gov.tr/documents/acilisKonusma/1967-1968.pdf.

door for administrative retirements for judges. Their retirement affairs would be handled by the High Council of Judges (HCJ) that would also appoint CCa members.[17] 6 members of the HCJ would be elected by the CCa, 6 by judges with first class ranking, 3 by the parliament and 3 by the senate. The constitutional amendment that followed the 1971 Coup changed this situation. According to the new stipulation, all HCJ members would be elected by the CCa.[18]

In this period, there were two large expansions at the CCa. In 1967, there were 117 CCa members. In that year, the Demirel government added 30 new cadres to the court -underlining that this was necessary to deal with the increasing work load. Thus, there was an addition that corresponded to the 1/4 of the total cadre.[19] In 1973, there was another major expansion, 6 new chambers and 42 members were added to the CCa.[20] The question of whether these expansions were court-packings or not can only be answered through more specific research. What is clear is that, after these expansions, the CCa cadre was almost doubled in size compared to 1960.

There were also changes in the ways in which CCa members engaged with the public. High court judges began to attend public gatherings and discuss their views with scholars, jurists, and lawyers in an extensive way. In 1966, selected CCa decisions began to be published in a special periodical (*Resmi Kararlar Dergisi*) along with other high court decisions. After 1975, a special and official periodical (*Yargıtay Kararları Dergisi*) devoted to these decisions began to be published. It was also in this period that *Yargıtay Dergisi* began to be published. With this publication, high court judges, along with other contributors, began to express their

[17] The 1961 Constitution, art. 144.
[18] This was explicitly demanded by the CCa president in 1967. "Siyasi Meclisler Y. Hakimler Kuruluna Üye Seçmemeli…" *Cumhuriyet*, January 29, 1967.
[19] Interestingly, the numbers provided by Demirel in the justification explanation for this expansion show that the workload of the court had not increased but declined compared to the early 1960s. The Prime Ministry, doc no. 71/344-2013, 12 April 1967, p.1. Enclosed in the parliament file on the Law No. 887, June 27, 1967, *RG* 12640, July 6, 1967, www5.tbmm.gov.tr/tutanaklar/TUTANAK/MM__/d02/c018/mm__02018113ss0289.pdf.
[20] The Law on the CCa, No. 1730, 16 May 1973, *RG* 14546, May 26, 1973.

views on legal and political matters in a forum managed by the CCa itself. Also important was the return of the judicial year opening ceremonies which were suspended after the CCa purge in 1956.[21]

After the 1960 coup, there were also changes in law faculties. Initially, 147 academics were discretionally retired by the new regime. There were various law scholars, including criminal law assistant Ayhan Önder, among these purged academics who are called *147'ler*. These retirements were strongly protested by students and other academics. The *147'ler*, who were accused of being communists or enemies of the state, were returned to their posts after these protests.[22]

In the 1960s, Faruk Erem, the chair of criminal law in Ankara,[23] developed his humanist criminal law doctrine (*ümanist ceza hukuku*). His approach was influenced by the Italian humanist school, as well as by philosophers like Sartre and Bergson. Erem rejected retributivism, eliminationism, and positivism and emphasized the primacy of human dignity.[24] At the Istanbul University, the members of the new generation of substantive criminal law scholars included socialist Çetin Özek and Duygun Yarsuvat who was one of the most important sexual revolutionaries of this period.[25] Finally, it was in this period that women began to be employed at the criminal law chairs in Ankara and Istanbul as scholars. As far as I was able to trace, the first female assistants in these chairs were Füsun Sokullu (Akıncı) and Gülseren Berki. Nur Başar (Centel), also started her academic career in the late-1970s.

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[21] In the 1970s, the president of the Turkish Bar Association, Faruk Erem, started another tradition by giving a speech in these ceremonies, in addition to the speech of the CCa president.

[22] Mehmet Ö. Alkan, "'1960 Darbesi ve Üniversite'den Tasfiyeler: 147'ler Olayı," *Toplumsal Tarih* 286 (October 2017): 58-69; and Derya Kayacan, "1960 Askeri Darbesinin Üniversitelere Müdahalesi ve 147'ler Tasfiyesi" (master's thesis, Gazi University, 2013), 159.

[23] Uğur Alacakaptan, Nevzat Toroslu, Selahattin Keyman, Zeki Hafızoğulları, and Eralp Özgen were the new generation of substantive criminal law scholars in Ankara.

[24] Faruk Erem, *Ümanist Doktrin Açısından Türk Ceza Hukuku* (Ankara: Ankara Üniversitesi, 1976).

[25] Istanbul University had a more extensive cadre and many scholars who shaped the future of Turkish criminal law such as Erol Cihan, Köksal Bayraktar, Erdener Yurtcan, Süheyl Donay, and Kayıhan İçel started their careers at this institution in this period.

After the second coup in 1971, there were major changes at both of these faculties. Various law scholars, including Çetin Özek, Uğur Alacakaptan, Bahri Savcı, and Bülent Nuri Esen were arrested. Along with many other leftist law scholars such as Rona Serozan and Bülent Tanör, Özek was removed from his post but later returned to the faculty thanks to a Council of State decision. Criminal law professor Alacakaptan resigned and became an RPP senator. In 1972, Erem resigned, protesting the Law on Universities which aimed to curb academic freedom. In criminal law chairs, the extent of post-coup changes was greater in Ankara because there were only two criminal law professors at this faculty and both of them were gone after the coup.

In the 1970s, Erem campaigned for civil liberties, rule of law, and defense rights as a scholar outside the academia and as the president of the Turkish Bar Association. He also contributed to leftist publications.[26] Dönmezer, on the other hand, became established in right wing politics. He was a regular columnist in the JP newspaper *Son Havadis* and developed a close relationship with Aydınlar Ocağı, the nationalist-conservative intellectual movement that later gave him the title of *şeyh-ül müderrisin* (the sheikh of teachers).[27] His approach to criminal law, sexuality, and gender relations was very much aligned with the outlook of this movement that emphasized the need for revitalizing Turkish culture and promoted what has been called the Turk-Islam synthesis.[28]

After 1960, there were intense contestations among law scholars concerning Ataturkism (*Atatürkçülük*), the past, and constitutional rights. Attempts to contain the waves of change met with attempts to promote and legitimize them. In these disputes, different interpretations of Ataturkism were brought to the table. According to constitutional law professor

[26] Faruk Erem, "Sıkıyönetim Mahkemeleri," *Çağımızda Hukuk ve Toplum* 7 (April 1977): 4-6; and "DGM ve İtalya-Fransa-Türkiye," *Çağımızda Hukuk ve Toplum* 1 (October 1976): 6-7.

[27] Dönmezer was one of the most frequent speakers in events organized by this movement. See Aydınlar Ocağı, "Konuşma Yapanlar," http://aydinlarocagi.org/konusma-yapanlar/

[28] On this synthesis, see Yüksel Taşkın, *Anti-Komünizmden Küreselleşme Karşıtlığına Milliyetçi Muhafazakâr Entelijansiya* (Istanbul: İletişim, 2007): 243-275.

Hüseyin Kubalı, civilization and culture were separate realities. The Kemalist revolution was clear in its orientation towards the West in terms of civilization but the case was different for culture because there could be no revolution in culture and Atatürk was respectful towards "national values" (*milli değerler*). Plus, even the Soviets had given concessions from the Marxist-Leninist doctrine in matters related to religion, family, and even property and the problems, and unrest in Turkish society which were in place despite the Kemalist revolution were proof of this necessity.[29] What were these problems? What was Kubalı suggesting? The text does not provide much clue to answer these questions but it seems that he was referring to gender relations[30] and advocating for a national particularities approach to gender matters. According to Kubalı, fascists were harmless because they would not be able to find a strong base in the society but Islamists were dangerous. Also dangerous were socialists, who were actually communists trying to benefit from the protections granted by the new constitution. From his perspective, the constitution could not be interpreted in a way that allowed the formation of a communist party and such ideologies were against Ataturkism.

In the writings of another constitutional law scholar, Bahri Savcı, one finds a much different approach. According to Savcı, not only right-wing politics but also center-left politics were far from providing real solutions to social problems (and would be rightfully crushed by revolutionary radicalism).[31] For Savcı, the Ataturkist approach (*Atatürkçü eylem çizgisi*) required the emancipation of people, family, professions, and the social categories at the base level -in terms of ideas, ethics, economic relations, politics- from the traditions that enslaved them. Thus, people and families needed to be liberated from these traditions. This state of liberation

[29] Hüseyin Kubalı, "Atatürk Devrimi ve Gerçeklerimiz," *İstanbul Üniversitesi Mukayeseli Hukuk Araştırmaları Dergisi* 1, no. 2 (1968): 13.
[30] I read these comments as targeting gender relations because economic back steps in the Soviets were totally irrelevant for Kubalı's discussion and he underlined that there could be no back step in terms of secularism. However, it is not clear what gender-related back steps he had in mind. He might have been referring to a wide number of practices and rules including unofficial marriages, polygamy, bride-price or the egalitarian marriage stipulations.
[31] Savcı, "Devrimci Radikalizm," 275-283.

would be multilayered and involve "humanly, social and economic autonomy."[32] In this approach, there was no room for national particularity or traditions. As seen in these two examples, there were different interpretations of Ataturkism, the constitution, the past, and the contemporary socio-political situation among law scholars and differences in terms of gender matters also featured in these divides. The first coup had opened a new space for political and academic debates and, in this new atmosphere of freedom, law scholars had found themselves discussing the fundamentals of constitutional freedoms and the characteristics of the Kemalist revolution, paying particular attention to gender-related issues.

In this period, the juridico-political elite was highly divided on issues such as the purpose of law and the nature of legal interpretation. According to Dönmezer and Erman, criminal law was a tool for ensuring social discipline and criminal law judges should not get creative while using it. A criminal law judge should not fill the gaps in the law but only apply the rules in force.[33] Interpretation was allowable (*caiz*) on condition that judges remained committed to the will of law-makers, did not create new rules, and took the code itself as a starting point with the aim of revealing the real will of the law-making authority. Interpretations that were against this will or were aimed at correcting the unlawful rules in force (*düzeltici yorum*) were unallowable.[34] The ideal criminal law jurist was a technical jurist (*teknik hukukçu*) and, for a technical jurist, it was "impossible and inappropriate to look for a measure outside or beyond positive law."[35]

Dönmezer and Erman highlighted the fact that the Technical School had emerged in Mussolini's Italy and that one of its main premises was accepting *all* norms and rules instated by the law-making authority as legitimate –regardless of their objectives and content. However, they argued, "it would be wrong to think that the Technical Law School preaches a totalitarian or authoritarian doctrine" because, according to this school,

[32] Bahri Savcı, "Atatürkçü Demokrasi – Bilim Politikası," *AÜSBFD* 27, no. 3 (1972): 461.
[33] Dönmezer and Erman, *Nazari ve Tatbiki*, vol. I, 24.
[34] Ibid., vol. I, 204-205.
[35] "*Bir teknik hukukçu için müsbet hukukun dışında veya ötesinde bir ölçü aramağa imkân ve yer yoktur.*" Ibid., vol II., 17.

one could take a critical stance towards positive law as long as they grounded this stance on "legal input" (*hukuki veri*) rather than philosophical speculation. Plus, philosophical speculation was also allowable (*caiz*) as long as one did not make it as a criminal law jurist (*ceza hukukçusu*) but as a philosopher, criminologist, or penologist.[36]

Junior criminal law scholars at the Istanbul University did not explicitly challenge their hierarchical superiors in their academic writings.[37] However, towards the end of the 1960s, leftist civil law scholar Rona Serozan fiercely criticized the technical law perspective, explicitly targeting its proponents.[38] According to him, the TCC was deeply fascist. One could easily imprison someone like Gandhi by adhering to it. How could such a code be implemented with a strictly formalist approach, with "legal norm fascism" (*yasa kuralı faşizmi*)? For him, legal formalists (*yasacılar*) were "idea robots" (*fikir robotu*) who approached judges as "syllogism automats" (*tasımlama otomatı*) and "parrots of legislation" (*yasa papağanı*). There were measures beyond the code that had to be considered because Turkey was not a "state of legislation" but a "state of law founded upon human rights."

While not directly targeting Dönmezer and Erman, Erem also criticized the technical approach. He wrote that there was a need to be wary of "the despots of technic" in the implementation of criminal law. According to Erem, these despots were the source of modern inquisition and this inquisition was able to be reproduced because they were brilliant masters in what they did.[39] According to his perspective, criminal law could not be separated from philosophy and the ground measure was not and

[36] Ibid., vol. I, 112. Strikingly, this approach to law was in complete contradiction with Dönmezer's writings from the 1950s. According to the younger Dönmezer, high ideals of justice should be taken into consideration and the precepts of the technical school were unacceptable. Sulhi Dönmezer, "Hukuk ve Hayat," *İÜHFM* 21, no. 1-4 (1957), 424-433.

[37] This does not mean that there was no challenge. Compare Duygun Yarsuvat, "Sovyet ve Amerikan Ceza Hukuklarında Kıyas Prensibinin Değerlendirilmesi," *İÜMHAD* 1, no. 2 (1968): 59-80; and Dönmezer and Erman, *Nazari ve Tatbiki*, vol. I, 27-34.

[38] Serozan, "Yasacılık ve Hukukçuluk"; and Rona Serozan, "Bir Daha: Yasacılık ve Hukukçuluk Üstüne," *MHAD* 5, no. 7 (1971): 89-112.

[39] Erem, *Ümanist,* vol. I, 10.

should not be positive law. It was humanity and its laws.[40] Criminal law had to be built upon this measure and unethical rules could not be called law.

A criminal law symposium that took place at the Istanbul University in 1976 provides important insights concerning these debates. Many top-level bureaucrats, high court judges, scholars, and the minister of justice attended this meeting. Notably, Erem and many of his former assistants were absent.[41] The divide between the technicians and their opponents also surfaced at this symposium. Dönmezer insisted that criminal law was a tool (*alet*) for protecting order. Since people were key to maintaining order, *creating* people who would act in line with the order and its requirements was a must. Also crucial was re-socializing those "who failed to acquire the capability of acting in line with social requirements" and making them acquire this character.[42] There were common measures of criminal law in pluralist Western democracies which were based on human rights and social justice because these societies had the same social order. However, these measures could not be the same for some Eastern countries (*bazı Doğu memleketleri*).[43]

As seen in these remarks, criminal law was a tool of disciplining people and protecting order for Dönmezer. Discouraging deviation from not only legal but also social norms was one of its functions. In this symposium, Nevzat Toroslu, one of Erem's former assistants and the only attendee from the Ankara law school, criticized this approach. He stated that the idea of sacrificing people to the state and freedoms to the protection of the state was incompatible with democracy. Criminal law was also a tool of protection for Toroslu. However, its objective was not protecting the state but the individual.[44] A similar objection was raised by Refet Tüzün Pasha, a retired major general and former president of the Military Court of Cassation. He noted that the TCC and the CCP were as

[40] Ibid., vol. I, 3.
[41] The only attendee from the Ankara law school circle was Nevzat Toroslu. Interestingly, his name was not included in the list of symposium participants.
[42] Sulhi Dönmezer, *50. Yıl Sempozyumu*, 13-14.
[43] Ibid., 14.
[44] Nevzat Toroslu, *50. Yıl Sempozyumu*, 556-557.

important as the constitution for the protection of fundamental rights and claimed that the new legal arrangements concerning the constitution, the TCC, and the CCP had established the state as the "goal" (*amaç*) and demoted the society and the individual to the status of tools. They had brought about new limitations to fundamental rights with the aim of protecting social discipline and strengthening the state.[45] In Tüzün's comments, there was a very visible criticism of Dönmezer. He had identified his approach to criminal law as an already materialized idea that had grave consequences for fundamental rights.

Secondly, this symposium made it clear that many high court judges were against the technical approach and supported expanding the interpretative authority of judges. "*Every pianist can play Chopin but can they bring about their own interpretation?*" This was a question raised by Bülent Akmanlar, a CCa prosecutor (and later CCa judge), who demanded his words to be interpreted in the light of this question. According to him, there was an urgent need for extensive interpretation (*gai tefsir*) and the CCa had begun to move in this direction.[46] Decriminalization of the possession of prohibited books through case-law was an example of this shift. Another example he gave was related to kissing in public. In 1968, the 2nd CC had reversed a decision concerning the punishment of two people kissing each other in a patisserie for public indecency and brought a new interpretation to the relevant article. On the basis of these decisions, Akmanlar argued that there was a new trend at the CCa.

Akmanlar's approach was also shared by Nasır Saydam, a judge at the 3rd CC.[47] According to him, even perfect laws would not lead to positive outcomes unless judges had enough authority. He noted that, forty years ago, when he was a law student, their professors used to teach that literal interpretation (*lafzi yorum*) was the norm. According to him, this approach was still dominant at the CCa and this was a problem. Because of this situation, the authority of judges was actually extremely limited. Saydam also suggested that this situation was causing problems because

[45] Refet Tüzün, *50. Yıl Sempozyumu*, 565.
[46] Bülent Akmanlar, *50. Yıl Sempozyumu*, 167.
[47] Nasır Saydam, *50. Yıl Sempozyumu*, 297-298.

of the dynamism of social and economic life. Stating that there was an urgent need to get rid of the literal interpretation approach, Saydam requested the support of professors.

What was the purpose of criminal law? And, what were the limits of the authority of judges and of the CCa? These two questions were at the hearth of these debates and the juridico-political elite was highly divided on these matters. As I examine in this chapter, these disagreements had a crucial impact on the regime of intimate violence because the trend towards extensive interpretation paved the way for numerous changes in ground rules related to intimate violence. In other words, this divide was crucial for the transformations of this regime.

In the 1970s, political violence affected all of these institutions. Dozens of academics, jurists, and intellectuals were assassinated.[48] There were bomb attacks on the Council of State and the Constitutional Court. At the same time, high courts began to take key decisions that had explicit political implications. For example, the Council of State annulled the discretionary retirement decisions concerning leftist public officials but many of these decisions were not implemented. The Bar Association strongly criticized this.[49] Especially towards the end of the decade, the CCa began to take critical decisions that would have clear political outcomes –such as de-criminalizing possession of prohibited publications and criminalizing even unintentional non-implementation of court decisions.[50]

In February 1980, Demirel proposed to take a measure according to which the decisions of high courts such as the Constitutional Court or the CCa would not be implemented during the state of emergency.[51] Soon after, some law professors called for the adoption of a new constitution and

[48] Suavi Aydın and Yüksel Taşkın, *1960'tan Günümüze Türkiye Tarihi* (Istanbul: İletişim, 2015): 251-318.
[49] The attempts of Erem, who attempted to introduce a lawyer's boycott day to protest this, led to a criminal investigation. *Çağımızda Hukuk ve Toplum* 9 (June 1977): 18-19.
[50] The CCa decision for the unification of case law, no. 7/2, 24 April 1979. Özcan Özbey, "İdari Yargı Kararlarının Uygulanmamasından Doğan Hukuki ve Cezai Sorumluluk," *ABD* 67, no. 4 (2009): 45-63.
[51] "Olağanüstü Yönetimin Kotarılması İçin AP'nin Asker Kökenli Üyeleri Devrede," *Cumhuriyet*, February 25, 1980.

for "disciplining" the Council of State and the CCa.[52] As it is examined in this chapter, the general judicial activism of the late-1970s was accompanied by the transformation of some ground rules concerning intimate violence and, as it is examined in the next chapter, the 12 September Coup did not only bring about a new constitution and the "disciplining" of high courts and universities (through a series of purges and legal changes) but also radical changes in the regime of intimate violence.

Finally, the period between 1960 and 1980 was an era in which the emergence of human rights as a global legal trend affected legal debates and education in Turkey on significant terms. This trend began in the post-war era but its effects started to be felt strongly in Turkey after 1960.[53] In this period, law faculties began to offer courses on this topic and the first human rights law institute was established. As examined in this chapter, this new trend also affected the debates on gender violence and women's rights.

As seen in this examination, the first coup in modern Turkish history changed the structuring of the judico-political field in major terms and opened the way for the emergence of an atmosphere of free speech. In this atmosphere of freedom, law people, including scholars and jurists, began to discuss a number of matters including the nature of the Kemalist revolution, the basics of legal interpretation and the objectives of criminal law. As it is examined in the following sections, this re-structuring would also be consequential for the transformation of the regime of intimate violence in the country.

[52] Such ideas were expressed in a seminar organized by the *Tercüman* newspaper. "Anayasa Seminerinde Bazı 27 Mayısçılar Bayar'dan Özür Diler Nitelikte Konuşmalar Yaptı," *Cumhuriyet*, April 21, 1980. For detailed information on this seminar and the response meeting of critics, see Osman Balcıgil, *Anayasa* (Istanbul: Birikim, 1982).
[53] Ozan Değer, *Türkiye Akademisinde Bir Disiplin Olarak İnsan Hakları* (Ankara: Kaged, 2018), 30-35.

§ 5.2 Public Debates on Gender and Sexuality

In this period, there were important changes in attitudes towards sexuality, sexual practices, and their regulation in various countries –a development that has been termed as the "sexual revolution." As underlined by various scholars of Turkish history, many youth movements and revolutionary organizations in Turkey were preoccupied with other issues, such as the prospects of a socialist revolution.[54] However, my findings indicate that this preoccupation should not be taken as a sign that this transnational trend skipped Turkey until the 1980s.

By the end of the 70s, disputes over sexual freedoms were seemingly everywhere. They were visible in academic debates, senate proceedings, political propaganda materials, legal reports, and court decisions. As noted by Tanıl Bora, the nationalist-conservative discourse was firmly against the relaxation of mores on gender relations and sexuality.[55] As seen in the JP's election propaganda song "Nationalist Zühtü", the left-right divide was portrayed as a divide over sexual mores by the conservative JP. If Ecevit were to be victorious in the elections, common man Zühtü would lose many things: Chastity and honor would be 'gone' along with faith and religion.[56]

This threat was clearly exaggerated. However, it was not completely baseless. The nationalist-conservative discourse on gender and sexuality had begun to be challenged under the impact of various translations concerning the sexual revolution. Two books written by Beria Onger, a socialist woman lawyer, provide insights concerning these challenges.

In 1965, Onger claimed that women were not free because men expected more than work from working women. Thus, women were being forced towards making a living through "other means" and this was leading to the deprivation of morals in the society. Thus, the decline or rise of

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[54] Zafer Toprak, "1968'i Yargılamak ya da 68 Kuşağına Mersiye," *Cogito* 14 (1998): 154-159; Fatmagül Berktay, "Türkiye Solu'nun Kadına Bakışı: Değişen Bir Şey Var Mı?," in Tekeli, *Kadın Bakış Açısından*, 313-327.

[55] Bora, "Analar, Bacılar."

[56] "Milliyetçi Zühtü," in Mehmet Ö. Alkan, "Yetmişli Yıllarda Seçimler ve Plakla Propaganda," in Kaynar, *70'li Yıllar*, 873.

morals in the society depended on women's freedom.[57] These words were strongly criticized. According to İffet Oruz, it was not only reactionary attitudes such as harassment at workplace that undermined women's freedoms.[58] Moral rules themselves were part of the problem and women and men should be equally free in their conduct. However, there was a line that Oruz draw to her covert call for sexual equality and freedom: Married people should not cheat on each other. According to another response, Onger's words were proof that "even people who adopted the most progressive ideas were unable to transgress the traditional frameworks on issues towards which the society was sensitive."[59]

A later book indicates that Onger changed her position on sexuality and morality in line with these critiques. In this book, she claimed that sexual freedom was constitutionally protected and that the state had no authority to administratively regulate sexuality through laws like the Law on Public Health. According to Onger, women's "freedom of sexual intercourse" (*cinsel birleşme özgürlüğü*) was equal to that of men's and could be exercised in three ways.[60] Women could marry with people of their own choice, free from any sort of pressure, and this freedom entitled them to conduct economic and professional activities utilizing their sexuality in line with their own will. Finally, Onger noted that this freedom also covered the freedom of having sexual relations without an official marriage. Such unofficial partnerships were a "natural consequence of the freedom of sexual relations" and this was why they were so common. As seen in these publications, there were debates about sexual freedoms and their relationship to the constitution and human rights in the 1960s.

At this point I also want to note that the debates on gender and sexual freedoms were also flamed by translations. In this period, Payel Publishing House published Turkish translations of books such as Simone de

[57] Beria Onger, "Kadın, Özgürlük ve Siyaset," in *Atatürk Devrimi ve Kadınlarımız* (Istanbul: Türkiye İlerici Kadınlar Derneği, 1965), 17-22, p.18-19.
[58] İffet Halim Oruz, "Kadın ve Devrimci Görüş," in Onger, *Kadınlarımız*, 86-93.
[59] Ali Sezai Sarısoy, "Kadın ve Toplum," in Onger, *Kadınlarımız*, 93-95.
[60] Beria Onger, "Kadınların Cinsel Özgürlüğü," in *Kadınların Kurtuluşu* (Istanbul: Fahri Onger, 1967), 53-56.

Beaviour's *Second Sex* and Wilhelm Reich's *Sexual Revolution*. The writings of Alexandra Kollontai also became available in Turkish in this era.[61] In sum, translations of various texts related to the sexual autonomy affected the public debates and opinion in Turkey in this era.

Second, in this period, there were significant public debates concerning gender equality and women's rights in Turkey. At this point, there were no autonomous feminist movements but there was women's rights activism. As early as the 1960s, there were street protests against rape and sexual harassment.[62] In various platforms, the idea that Turkish women had no legal problems thanks to the adoption of Western-style laws began to be challenged. Along with socio-economic problems encountered by women,[63] a wide variety of issues including the marriage and inheritance stipulations of the Civil Code[64] and some articles of the Criminal Code[65] were problematized by scholars and activists –despite the insistence of some established law scholars that the problems of women did not stem from legislation but from problems related to implementation, underdevelopment and culture.[66] Gender pay gap was also criticized strongly.[67]

The UN Women's Year in 1975 had a considerable impact on these debates. After this event, women's problems began to be discussed more

[61] Alexandra Kollontai, *Marksizm ve Cinsel Devrim*, trans. Aysem Göztok (Ankara: Bilgi, 1974).
[62] Sancar, *Türk Modernleşmesinin*, 264-265.
[63] Nermin Abadan Unat, "Türk Kadın Nüfusunun Toplumdaki Yeri," *Ankara Üniversitesi SBF Dergisi* 23, no. 4 (1968): 145-158.
[64] Onger, *Kadınlarımız*; and Ülker Gürkan, "Türk Kadınının Hukuki Statüsü ve Sorunları," *AÜHFD* 35, no. 1 (1978): 381-396.
[65] These include the adultery stipulations and the prostitution mitigation according to which the sentences of those who raped sex workers were reduced. For the former, see Gürkan, *Türk Kadınının*, 398. For the latter, see Beria Onger, "Kadınların Cinsel Özgürlüğü," in *Kadınların Kurtuluşu*, 55; Nermin Abadan Unat, "Toplumsal Değişme ve Türk Kadını," in Unat et al., *Türk Toplumunda*, 25.
[66] Hıfzı V. Velidedeoğlu, "Türk Kadınının Hukuki Durumu," in Onger, *Kadınların Kurtuluşu*, 11-25.
[67] Nermin Berki underlined that the abolition of the gender pay gap was a fundamental human rights issue that was similar to the abolition of slavery. Nermin Berki, "Kadın ve Erkek Bakımından Eşit Değerde İşe Eşit Ücret," *Bülent Esen'e Armağan*, ed. Ergun Özbudun et al. (Ankara: Ankara Üniversitesi Yayınları, 1977), 29-38. Also see Beria Onger, "Eşit Ücret Sorunu," *Kadınların Kurtuluşu*, 41-46.

broadly. While the Progressive Women's Association (*İlerici Kadınlar Derneği*, PWA), which was led by Onger, promoted a socialist reading of the UN Women's Year and its resolutions,[68] state agencies and some members of the political elite, including the president, tried to contain its effects by imposing a family-centered discourse.[69]

Apart from some brief remarks, intimate violence did not occupy a prominent place in public debates related to gender relations and legislation. At times, it was marked in passing. For example, in a speech she gave on the Women's Rights Day, Beria Onger underlined that women were disempowered by beatings and killings and argued that the state was constitutionally obliged to take measures against this situation.[70] However, neither female scholars writing on women's rights nor women's rights organizations specifically problematized issues like paternal or marital violence.[71] In the Turkish Women's Year Congress of 1975, women demanded the abolition of various legal norms and rules.[72] However, neither intimate control murders nor marital battery appeared in the resolutions of the congress. There was a similar lack of particular and explicit problematization in the campaigns of the PWA.[73] On the

[68] *Kadınların Sesi* 1, no. 5, 1975.
[69] In 1975, a Women's Year Congress was organized in Ankara. In his opening speech for this congress, Korutürk emphasized the importance of family and women's role as mothers and care-takers. The issue of women's rights was related to the necessity on the part of women "to learn and know their place in the family and society." The speech is quoted in full in, Enise Kantemir, "1975 Kadın Yılı Kongresi," *Ankara Üniversitesi Eğitim Bilimleri Fakültesi Dergisi* 8, no. 1 (1975): 375-388.
[70] Onger, *Kadınların Kurtuluşu*, 26.
[71] See Gürkan, *Türk Kadınının*; and Unat, "Toplumsal Değişme."
[72] These included the designation of husbands as family heads, requirement of husband's permission for women's employment, exclusion of women from employment in the military, and requirement to take the husband's surname. Improvement of the conditions of sex workers, longer paid maternity leave for public officials, adoption of effective measures against the practices of *başlık* (bride money) and religious marriage ceremonies conducted before official marriages, adoption of social security measures for rural women, new taxation practices treating wives and husbands as separate tax subjects, prevention of the abuse of female children who were officially adopted but were actually used in housework were the other demands raised in this congress. Unat, "Toplumsal Değişme," 24-25.
[73] For the program and campaigns of this organization, see Muazzez Pervan, ed., *İlerici Kadınlar Derneği (1975-1980): 'Kırmızı Çatkılı Kadınlar'ın Tarihi* (Istanbul: Tarih Vakfı, 2013). Also see Sevgi Adak, "Yetmişli Yıllarda Kadın Hareketi: Yeni Bir Feminizmin Ayak

other hand, this renewed interest in women's rights, heightened gender-related activism, and the initiatives of socialist women lawyers such as Onger, Necla Fertan and Gülçin Çaylıgil that I examine in the next section might have contributed to the transformation of rules concerning intimate violence by creating a push for change.

It is important to note that the issue of law reform was on the table in this period. In the 1970s, there was an expectation that new codes would be adopted in the near future. There was a commission working on a new civil code draft[74] and there were also pushes and preparations for the adoption of a new criminal code.[75] What norms would be enshrined in these new codes? There were debates over and negotiations around this major question. These drafting initiatives seemingly came to a halt with the 1980 coup. However, these problematizations did not only shape the legal developments of this era but also affected future debates on criminal and civil law reform.

Finally, there were some legal changes in this period. For example, after 1965, the state adopted a new policy towards birth control. In line with this shift, the sale and distribution of birth control devices was decriminalized. As underlined by many, this development was very much related to the changes in the population policy and it was officially legitimized on this ground.[76] However, as I analyze in this chapter, there was a larger push towards the recognition of sexual freedoms and autonomy in this period and I think that this trend might have also contributed to the emergence of this outcome. This shift had come at a time when there were massive changes in the regulation of sexuality and reproduction in

Sesleri," and Emel Akal, "Yetmişli Yıllarda Yığınsal Bir Kadın Örgütü: İlerici Kadınlar Derneği," both in Kaynar, *70'li Yıllar*, 609-631 and pp. 631-644.

[74] Mustafa Yaşar Aygün, "Tarihi Gelişimi Açısından Türk Özel Hukuku ve Medeni Kanun," *TBBD* 10, no. 3 (1998): 947.

[75] *50. Yıl Sempozyumu*; and Eyüp Sabri Erman, "Türk Hukukunda Aşamalar ve Devrim Kanunları," *AD* 4 (1973): 209-216.

[76] Belin Benezra, "The Institutional History of Family Planning in Turkey," in *Contemporary Turkey at a Glance: Interdisciplinary Perspectives on Local and Translocal Dynamics*, ed. Kristina Kamp et al. (Wiasbaden: Springer, 2014): 46; and Pelin Azer Binnet, "My Wife, My Choice: Reproductive Policymaking and Social Control" (PhD diss., University of Minnesota, 2015), 75-129.

various countries. For example, the supreme court in the US had paved the way for the legalization of the use of contraceptives in the same year with this turn in Turkish policy.[77] Thus, I think that this development fits into a global trend.

§ 5.3 The Sexual Revolution and Its Venularizations in Turkish High Legalese

In this period, sexual freedom was also a popular topic in the forums of high legalese. Since these debates are directly related to my topic and since even their existence has not been recognized in any other study, I find it necessary to elaborate on them. My research indicates that there were significant differences among the members of the juridico-political elite on this matter.

According to law professor Bülent Daver, the idea of a right to "free sexual life" was like a dynamite placed under the institution of family. Before the 1930s, anarchists, utopian socialists, and some liberals in Europe had adopted such an idea and become "extremists." According to these extremists, "*woman, who had every sort of right, was also free to use/enjoy her body in line with her own wishes; she was totally free, [and] no one could impinge on her*."[78] However, another extremism, the extremism of the fascists and the Nazis had "resisted" this trend. Accordingly, fascist and Nazis had taken radical steps towards curbing women's rights.

According to Daver's portrayal of post-war history, the West had moved past these extremisms after the war and there had emerged a "moderate" stance on women's rights. In this analysis written in 1968, at the height of the sexual revolution, the common Western perspective (*ortak görüş*) of the time was argued to be modest and balanced. In Daver's perspective, women's rights were fully protected by positive law in Turkey. The problem was religious practices and customs. These problems

[77] "Griswold v. State of Connecticut, 381 U.S. 479 (1965)," in Legal Information Institute, https://www.law.cornell.edu/wex/griswold_v_connecticut_(1965)
[78] Bülent Daver, "Kadınların Siyasal Hakları," *AÜSBFD* 23, no. 4 (1968): 123.

would be solved through education, political participation of women, and elite support for the elevation of women's status. In the end, "a progressive social order would arise on the shoulders of conscious mothers."[79] Thus, while some women were trying to raise the issue of sexual freedom, some law scholars were denouncing the calls for sexual autonomy as extremism, promoting a women's rights discourse that put the blame on the society, and engaging with the issue of women's rights through an emphasis on motherhood -without explicitly recognizing the existence of such calls.

Unlike Daver, who denied the new trend in the global north towards the recognition of sexual liberties altogether, Dönmezer translated this trend into Turkish. [80] However, due to its contents, his paper can also be read as an attempt to contain this flow. This was a paper about the resolutions of the 9th International Congress of Penal Law (1964) where offences against family and sexual morality was one of the primary topics. According to these resolutions,[81] fornication, adultery and distribution of birth control information should be decriminalized, possibility of obtaining legal abortions should be extended, and consensual artificial insemination should not be prohibited. Moreover, -except for certain categories-[82] homosexual intercourse among consenting adults should be de-criminalized.

Dönmezer had participated in this congress and approved many of these resolutions, including the one on abortion. His most explicit divergence from the rest of the attendees and the resolutions was related to adultery. Quoting two French criminal law scholars who wrote in the 19th century and Ömer Nasuhi Bilmen, an Islamic law scholar, he underlined that adultery was the worst of crimes.

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[79] Ibid., 130.
[80] Sulhi Dönmezer, "IX. Milletlerarası Ceza Hukuku Kongresi ve Cinsiyet Ahlakına Karşı Suçlar," *İUHFM* 30, no. 3-4 (1964): 451-465.
[81] "The Resolutions of the Second Section for the 9th International Congress of Penal Law," reprinted in José Luis de la Cuesta and Isidoro Blanco Cordero, eds., *Resolutions of the Congresses of the International Association of Penal Law (1926-2014)*, special issue of *International Review of Penal Law* 86, no. 1-2 (2015): 296.
[82] These exceptions included the use of force to compel homosexual behavior, involvement of minors, and sexual intercourse in public.

Dönmezer had also opposed this resolution at the congress with the argument that this was a matter of culture. Thus, cultural differences needed to be considered to resolve this matter. "*The conditions of the domestic culture and its sources, and the value and importance attached to the violation of the fidelity requirement in a particular culture*" were crucial because rationality could not be the only guide in determining whether an act should be criminalized. But what was "the Turkish culture" on this matter? In order to answer this question, Dönmezer drew on the parliamentary debates of the 1950s, which had resulted with the aggravation of the stipulated punishment for this crime and referred to the findings of the survey on homicides that had shown that honor was an important motive for these crimes. He argued that de-criminalization of adultery was impossible in Turkey because of the "customs and beliefs of peasants" (*köylülerin itiyat ve inançları*). People in big cities were becoming more tolerant towards such acts and they were not killing their wives because of infidelity. However, "traditional family" was strongly preserved and peasants had a different understanding. Thus, Dönmezer utilized national particularities, cultural specificity, high rate of intimate control murders, and -in a very veiled way- religion/Islam[83] in order to reject this particular aspect of the sexual liberalization trend and to defend the status quo with regards to this issue.

As seen in these papers, a disciplinary stance or a stance for the preservation of the existing regime of sexuality was visible in some scholarly writings. However, there were also different voices in the forums of high legalese. As early as 1961, Erem argued that criminalization of adultery was problematic and the sex-based differentiation of the elements of the crime of adultery[84] was not acceptable. For him, the sex-based differentiation, which was supported by Dönmezer until the late-1970s, was

[83] Dönmezer had brought up Islam or religion to his discussion by referring to the *belief*s of peasants, by citing Nasuhi Bilmen who was a fıqh scholar and by emphasizing the need for taking the sources of culture into consideration. For an earlier and more explicit utilization of Islamic law and the legal history concerning rejm in this context, see Dönmezer, "*Zina Cürümleri*," 862.

[84] As in many other countries like France and Italy, a singular sexual intercourse was a criminal act for women, while it was not for men. A man could only be convicted for

merely a reflection of the tendency to "look down" on women.[85] As far as I was able to trace, this was the first paper in Turkish high legalese scholarship that explicitly challenged the existing regime of sexuality and the legal norms in force with regards to adultery.

As examined in the previous chapter, the idea that an exceptionally high regard for honor or sexual conservatism was a characteristic feature of the Turkish people was an important element of the high legalese discourse in the 1950s. In the 60s and 70s, Dönmezer continued to promote this discourse but this convention began to be challenged. Various scholars and jurists presented alternative pictures of Turkish culture, society and history that were completely different from the portrayals of Kunter or Dönmezer. In other words, the sexual revolution was vernacularized in Turkish high legalese in this period.

According to (Nizamettin) Berin Taşan, a poet and public prosecutor,[86] public opinion had to be considered in code-making. However, he noted, the actual reaction of the public to elopements or sexual relations among the youth was different from what was assumed. Peasants did not see such acts as acts of criminal nature. Taşan noted that there were many murders related to jealousy, gossips concerning women, abduction, and familial disputes in Sinop. What was taken into consideration by the court was the motive at the time of murder. However, he argued, there was an underlying economic reason in many of these cases. With these elaborations, Taşan was challenging the assumption that the high rates of gender or honor related murders could be solely attributed to culture or to the honor conceptions of masses –an assumption that marked the discourses of Kunter or Dönmezer- and highlighting the importance of poverty and land disputes in shaping the circumstances and actions of peasants. [87]

adultery in case he openly lived together with another woman or brought her to the marital domicile.

[85] Faruk Erem, "Zina," *AÜHFD* 18, no. 1 (1961): 135.

[86] Berin Taşan, "Sinop Çevresinde Kriminolojik bir Araştırma," *AD* 8-9 (1966): 669-687; and Berin Taşan, *Ağır Cezalı 200 Karar* (Ankara: Gün Matbaacılık, 1966).

[87] For a work that underlines the links between property, gender relations, and honor crimes in the Mediterranean, see Germaine Tillion, *My Cousin, My Husband: Clans and Kinship in Mediterranean Societies* (London: Saqi Books, 2007), 150, 167.

A broader challenge to the regime was raised by Duygun Yarsuvat, a criminal law scholar from Istanbul University and a former assistant of Dönmezer. In 1976, Yarsuvat presented a paper titled "Crimes against Sexual Freedoms" at the symposium that I mentioned above when examining the debates over the technical approach. Even the title of this presentation was revolutionary because these crimes were categorized as "crimes against public morals and family order" in the TCC. By defining them as crimes against sexual freedoms, Yarsuvat was establishing sexual freedom as a legal good (*Rechtsgut*).[88] According to him, criminal law should not impede on consensual sexual acts with the objective of "protecting the society," decriminalization of adultery was unavoidable and erotic publications, and broadcasts should not be prohibited. He also criticized the criminalization of sexual intercourse among and with minors, which was introduced with the 1953 amendment.

In this presentation, Yarsuvat devoted considerable attention to the history of legislation concerning these crimes and argued that sexuality was not a taboo in pre-19th century Europe or in the Ottoman Empire. In Turkish folk culture and Ottoman literature, sexuality was discussed openly. What turned sexuality into a taboo was the bourgeois morality of the 19th century which had suppressed the rationalist approaches to this issue. With these elaborations, Yarsuvat rejected the national particularity or cultural specificity discourse concerning sexuality and marked sexual puritanism as a trend that had roots outside of the country. He emphasized the liberal nature of the early Republican TCC which did not criminalize homosexuality, prostitution, incest, or sexual relations among the youth. By emphasizing these issues and placing them into a broader historical context that included the Ottoman past, Yarsuvat challenged the idea that sexual puritanism or conservatism were natural elements of Turkish history or legal culture.

According to Dönmezer, sexual crimes were to be regulated and punished in line with culture and traditions, and stipulations concerning them could only change after there were all-encompassing changes at the

[88] Duygun Yarsuvat, "Cinsel Özgürlüğe Karşı Suçlar," *50. Yıl Sempozyumu*, 647-684.

social level. In this presentation, Yarsuvat did not only challenge Dönmezer's assumptions concerning Turkish culture but also this approach – without directly targeting Dönmezer:

> [Currently,] law-making authorities are not expected to codify customs and traditions settled in and accepted by the society as advocated by Savigny. This approach works very slowly and does not conform to [the reality of] social dynamism.

According to Yarsuvat, it would be practically impossible for the law-making authority to make changes that went against traditions concerning issues like morality or family. However, law-makers were "responsible" for adopting laws that had the potential to bring about changes by taking the attitudes that had begun to take root among the people into account.[89]

Finally, Yarsuvat also mentioned "the freedom of prostitution." Since prostitution was not prohibited, sex-workers could not be excluded from the legal protection granted to all citizens. Hence, the 438th article of the TCC, which stipulated sentence reductions for sexual crimes targeting prostitutes, was problematic and illogical.

The minute records of the discussion session indicate that this presentation shook the audience. Yarsuvat's ideas were marked as "revolutionary." Celebratory comments were accompanied by harsh criticisms and objections. Only two jurists from the CCa had participated in these debates and both of them supported Yarsuvat's ideas.[90] Nuri Süer, a judge at the 5th CC, noted that his own approach and the approach of his chamber to the crimes of obscenity and prostitution mitigation was perfectly in line with Yarsuvat's ideas.[91]

There were stark differences in the responses of law scholars to Yarsuvat's presentation. Nevzat Gürelli, a professor of procedural criminal

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[89] For a similar point raised by a jurist, see Ömer Faruk Karacabey, "Yargıç ve Sosyal Gerçek," *YD* 1 (1975): 91-100.
[90] These were Nuri Süer, who was a judge at the 5th Criminal Law Chamber of the CCa and Bülent Akmanlar, who was the first assistant of the head prosecutor.
[91] Nuri Süer, *50. Yıl Sempozyumu*, 699.

law, supported Yarsuvat by bringing up national customs and traditions: Since many of the folk songs were about young lovers, accepting that teenagers who were of marriage age could not consent to sexual intercourse was against Turkish culture.[92] Nevzat Toroslu also supported Yarsuvat's idea of classifying these crimes as crimes against sexual freedom. However, none of his colleagues from the substantive criminal law chair supported Yarsuvat in these debates. Füsun Sokullu (Akıncı), the only female attendee of the symposium, did not participate in this discussion. Her junior status and the awkwardness of being the only woman in a room full of men might have informed her silence.

Erol Cihan and Sulhi Dönmezer criticized Yarsuvat. Dönmezer insisted on the position that Yarsuvat found Savignian, arguing that the habits and understandings of a small group, like the attendees of the symposium, could not be seen as reflective of the society. According to him, there was a relaxation in approaches towards sexuality but this was only relevant for a selected stratum of the society, for those like the attendees "who spoke multiple languages, were university graduates, had a certain life-style, continuously visited Western countries, read Western newspapers and journals, and listened to classical music."[93] This stratum would have to wait for changing the rules concerning obscenity until there was a cultural change at the bottom. It would be wrong to decriminalize obscenity because "*if it was destined to disappear in time, it would disappear by itself.*"[94]

One of the most disquieting aspects of Yarsuvat's presentation was his establishment of sexual freedom as a legal good. This was criticized by various law scholars. Erol Cihan was rather reserved in his opposition. He argued that he had respect for Yarsuvat's ground idea that sexual freedom was supreme, because he was 'obliged' to respect it. However, he argued, freedom could not be understood in a partial manner and discussed only in relation to the freedom of '*perpetrators*' (*fail*).[95]

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[92] Nevzat Gürelli, *50. Yıl Sempozyumu*, 687.
[93] Dönmezer, *50. Yıl Sempozyumu*, 703-704.
[94] "*Eğer zamanla kalkacaksa zaten kalkar kendisi; zamanla kalkar*." Dönmezer, *50. Yıl Sempozyumu*, 704.
[95] Erol Cihan, *50. Yıl Sempozyumu*, 690.

A more explicit and direct challenge was raised by Hüseyin Hatemi. According to Hatemi, approaching these matters with a sexual freedom perspective was wrong. Since immoral acts were acts that were harmful to society, these had to approached with a social defense perspective. "*Even if we accept that sexual freedom exists* [as a legal good]," he noted, "*fundamental rights and freedoms can be restricted by the constitution.*"[96] Since the constitution stipulated that the family was the basis of the society and that the state was responsible for taking the necessary measures for the protection of mental health, criminalization of obscenity was a constitutional requirement.

Dönmezer also challenged Yarsuvat's idea that sexual freedom was a legal good. He did not explicitly argue that there was no such freedom but ridiculed it and presented it as a Western conception –which he implied to be improper for Turkey. According to Dönmezer, obscenity was "*a disease peculiar to Western democracies, to regimes where freedom was interpreted to include sexual freedom*." With these words, Dönmezer was claiming that such an interpretation of freedom was a Western idea and refuting Yarsuvat's thesis that Turkish legal culture was sexually liberal. Thus, what was foreign was not sexual puritanism or conservatism but the idea of sexual freedom. By using the word "disease," he was also demeaning this idea and marking it as something materially harmful. Finally, the concept of "freedom of prostitution" was inappropriate for Dönmezer because it appeared not so honorable (*namuslu*) to him.

Why was the idea of sexual freedom so unsettling? There were probably various factors behind these insistences and rejections but I think that the destabilizing potential of the establishment of sexual freedom as a legal good must have been one of them. If people were to be accepted to have sexual freedom, many legal or judicial norms such as the prostitution mitigation would appear as unlawful or unconstitutional. Moreover, this would also render various norms and rules related to intimate violence unlawful. In such a scenario, it would be extremely difficult to legitimize the existence of the extraordinary mitigation in the code or the

[96] Hüseyin Hatemi, *50. Yıl Sempozyumu*, 702.

application of unjust provocation mitigation for transgressions of sexual norms because such an acceptance would transform these "transgressions" or unlawful acts (*haksız fiil*) into exercises of constitutional or fundamental rights and freedoms. What was at stake was not only women's sexual freedom but also men's license to kill with practical impunity.

The destabilizing potential of the recognition of sexual autonomy or freedom for the regime of intimate violence must have been apparent to the actors involved in these debates. This recognition had brought about the exclusion of the extraordinary mitigation article from the 1968 draft of the Italian Criminal Code. They must have been aware of this because this was brought to their attention in a recent publication. In 1968, Çetin Özek had written a paper about the criminal law reform in Italy. He had reported that, according to the justification explanation of this new code, the extraordinary mitigation was abolished because it was in contradiction with the understanding of the society and did not have a valid ground at the face of modern/civilized understanding of morality and the trend towards sexual freedoms (*çağdaş ahlak anlayışı ve cinsel özgürlük akımı karşısında*).[97] Thus, such rejections of the idea of sexual freedom had implications for the regime of intimate violence and the members of the legal elite were well aware of these implications while they were raising or refuting calls for the establishment of sexual freedom as a legal good.

The translation of the rising human rights trend, and the sexual revolution into Turkish high legalese was a defining characteristic of this period. One of the most important high legalese forums that facilitated these translations was *Mukayeseli Hukuk Araştırmaları Dergisi* (Journal of Comparative Legal Studies) of the Istanbul University –which also published the harshest critiques targeting Dönmezer and various papers

[97] Çetin Özek, "İtalyan Ceza Kanunu Tadil Çalışmaları ve Tadil İçin Kabul Olunan Görüşler," *İÜHFM* 34, no. 1-4 (1968): 101. This justification explanation was also mentioned in a later publication by Sahir Erman. "İspanyol ve İtalyan Ceza Kanunlarında Yenileştirme," *İÜHFM* 45, no. 1-4 (1981): 848.

raising leftist ideas.[98] The journal published full-text translations or summaries of texts related to legal developments in different countries -such as the text of the English Abortion Act of 1967.[99] Secondly, issues related to gender, marriage or bodily autonomy were raised by Turkish scholars writing in this forum in this era. In some of these examinations, a rights-based approach that was accompanied by socialism was visible. For example, Rona Serozan criticized the legal dual standard for adultery.[100] He also argued that there was a "property-inheritance club" behind the rule according to which illegitimate children could only get half of the share reserved for legitimate children from their father's inheritance. According to him, bride-price was not an issue related to gratuity or unjust enrichment – as the CCa accepted it to be. It was slave trade.[101] Thus, there were criticisms concerning many gender issues in these papers.

The journal also published translations of texts written by foreign scholars. These include Italian scholar Luigi Mengoni's elaborations on the new family law in Italy[102] and Polish criminal law scholar Andrejew's report on the relationship between criminal law and family.[103] In the former paper, it was emphasized that the concern of Italian law had been shifting from the protection of family towards the protection of the rights of individuals in families. The Andrejew report, a report prepared for the 8th Congress of Comparative Law in 1966, emphasizes the same issue but with a particular focus on criminal law. Drawing on the critiques of the 1964 AIDP Congress, Andrejew had expanded the scope of the debate and provided an account of what he understood to be a general trend affecting the people's republics as well as the liberal world. According to

[98] In these years, this journal published various papers presenting alternative and explicitly socialist readings of existing legal norms, advocating for the abolition of capital punishment, supporting the participation of students in the decision-making processes in universities and criticizing the formalist or technical approaches to law.
[99] M. Şükrü Alparslan, trans., "1967 Tarihli İngiliz Kürtaj Yasası," *MHAD* 10, no. 13 (1976): 257-261.
[100] Serozan, "Bir Daha: Yasacılık," 89-112.
[101] Serozan, "Hukukun Sefaleti," 73.
[102] Luigi Mengoni, "İtalya'da Yeni Aile Hukuku," trans. Mes'ut Önen, *MHAD* 11, no. 14 (1977): 49-67.
[103] I. Andrejew, "Ailenin Ceza Hukuku Yönünden Korunması," trans. Duygun Yarsuvat, *MHAD* 3, no. 4 (1969): 251-267.

this report, which was translated by Yarsuvat, this trend entailed decriminalization of adultery, abolition of aggravating conditions for bottom-up violence, and introduction of aggravating conditions for top-down violence. Andrejew identified the exclusion of marital rape from the scope of criminal law as a problem upon which the attendees of the congress could not agree upon. Finally, he noted that the idea of granting legal impunity or mitigation to men who killed or assaulted their wives upon finding them committing adultery did not enjoy credit anymore, stating that Spain had abolished the relevant stipulation in 1963. Thus, this was a translation that problematized a number of issues related to intimate violence and its accommodation in the field of law.

In this period, the rise of human rights also affected the high-legalese debates on some crucial issues related to intimate violence. In a paper on the right to life, leftist constitutional law professor Bahri Savcı argued that unjust provocation mitigation should be completely abolished. Could killing be approved or allowed by law? This was the main question of his paper. According to him, the right to life was the ground norm or the ground legal value that was above everything else. Hence, he concluded, unjust provocation could not have a place in a regime based on the primacy of the right to life. Being attacked could disrupt the psychological balance of a person. In such situations, people might cease to be the "owners of their actions" (*kendi eylemlerinin sahibi*). However, human dignity, value of human life and personal integrity were supreme. Thus, no violations of bodily integrity could be seen as allowable or permissible (*cevaz içre*). He noted that this impermissibility was an abstract idea. Its realization would require the re-constitution of the human and the society (*insanın ve toplumun yeniden kurulması*).[104]

In this paper, Savcı also elaborated on honor-based excuses and mitigations. He claimed that the society approached those who carried out such acts of purification with sympathy and this lied at the basis of this allowance. "In the societies of modern culture," individual and social morality had become rationalized and harmonized with nature and this was

[104] Bahri Savcı, "Yaşam Hakkından Doğan Sorunlar: Öldürmeğe 'Cevaz' Sorunu," *AÜSBFD* 32, no. 1 (1977): 13.

why this allowance was losing its meaning. Practices of honor cleansing had become "primitive" given the highly developed individual and social understandings of the time.

There were three grounds on the basis of which Savcı opposed honor defenses.[105] First of all, such allowances were unacceptable because morality and honor were personal. In other words, one's sexuality and the question of how this was seen by others was their own business. Secondly, Savcı argued that neither the character of the act nor the abomination of the society would decrease one's value as a human being. In other words, these people could not be stripped of human dignity and pushed beyond the protection of law. Finally, there was a social argument. According to Savcı, there was no longer such a *demand* from the society for these people to kill themselves or their relatives.

This paper, the first high-legalese piece in which a Turkish scholar fully rejected the notion of unjust provocation and honor defenses, shows that leftist scholars and their interpretations of law had begun to challenge the basic premises of the regime of intimate violence in Turkey in the 70s. I find it striking that the most radical attack to the foundations of the regime of intimate violence that was raised by a law scholar in a forum of high legalese for the whole of the 20th century had come in the 70s because such a strong attack was not raised in the 1980s and 90s.

§ 5.4 Counter Arguments and Alternative Translations

In this period, there were also actors who continued to push for maintaining the existing order with reference to social factors, culture, and traditions. One such example is a paper written by CCa judge Ali Rıza Önder.[106] In a paper on traditional folk law, Önder touched upon many issues including blood feuds, local norms concerning agriculture, and non-official (religious) marriages. In such a paper on folk law, Önder could approach the issue of non-official marriages from many angles and

[105] Ibid., 14.
[106] A journalistic piece on his life suggests that Önder can be considered as a republicanist conservative close to Hakkı Baltacıoğlu's perspective. Abdullah Satoğlu, "Kayseri Basın Tarihi Müellifi Ali Rıza Önder," *Şehir* 29 (2019): 66-72.

demand various changes to improve the material conditions of these people. Women in these marriages were legally not entitled to a share from their husband's inheritance. Even if their husbands had social security, they were not allowed to benefit from it. One could challenge such issues by referring to the commonness of this practice. However, Önder highlighted only one aspect; the initiative of the 1st CC to strip these husbands from the privilege of benefiting from honor-based provocation mitigation. According to him, the attitude of the general assembly which stopped this initiative was appropriate because, by doing so, the assembly was approaching this matter from a social perspective and paying respect to customs and traditions on the basis of which such marriages were officiated.[107]

A novelty in terms of the utilization of culture for rejecting the pushes for change was the use of this strategy for legitimizing the extraordinary mitigation. An instance of such utilization can be found in the proceedings of the 1976 Symposium. At this event, Erol Cihan presented a paper on crimes against persons and property. In the discussion session, Ayhan Önder suggested that the extraordinary mitigation article needed to be reformed in line with the modern understandings of criminal law (*modern ceza hukuku telakkileri*). Önder was a professor who was educated in Germany, a country in northern Europe. Cihan categorized his suggestions and his conception of "the modern understanding of criminal law" as reflective of a northern understanding:

> In terms of killings for honor, there are different conceptions of honor [in different countries]. The law-making authority that adopted the Criminal Code had acted with a sociological approach [to this matter]. These phrases in the Criminal Code are related to the domestic conception of honor and they are interpreted in this way. We are in the group of Mediterranean countries. Here, the conception of honor is different from the conception of honor in the north. As a result, I think that -as long as these are not archaic (*çağdışı*)- it would be more appropriate to take into consideration

[107] Ali Rıza Önder, "Geleneksel Halk Hukuku," *YD* 1, no. 3 (1975): 26.

> the conceptions of honor and other conceptions in the country from where this code had been received as a whole and cannot [or shall not] ruin the coherence of the code and the way it is understood.[108]

The last part of these comments is grammatically weird. There is neither a passive sentence structure nor a subject. What or who could not ruin the coherence of the code and its established interpretation? This is not clear. In any case, it is clear that Cihan was dismissive of Önder's suggestions and brought up various issues to ground his objection. The need for maintaining the coherence of the code and its established interpretation was one of them. Another was the domestic conception of honor which was suggested to be geographically specific. One thing that was crucially missing from this elaboration was the fact that the regulation of honor related murders in other countries in southern Europe had been changing rapidly in this period. By the time these Turkish scholars were having this debate, the extraordinary mitigation articles in the Spanish[109] and French[110] codes had already been abolished. In Italy, this article was excluded from the 1968 draft.[111] Although the formal abolition of this stipulation only took place in 1981, the Italian Court of Cassation had already adjusted itself to this trend by the early 1970s by limiting the applicability of the extraordinary mitigation article and ruling that honor defense was anachronistic.[112] These developments, which were followed by Turkish scholars, were missing from Cihan's elaborations. Based on this exclusion, Cihan had portrayed "the modern understanding of criminal law" that was brought to the table by Ayhan Önder as a geographically specific understanding that was not relevant for southern Europe or Turkey.

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[108] Erol Cihan, *50. Yıl Sempozyumu*, 777.
[109] Andrejew, "Ailenin Ceza"; and Catherine Davies, *Spanish Women's Writing (1849-1996)* (London: The Athlone Press, 1998), 180.
[110] Catherine Warrick, "Not in Our Right Minds: The Implications of Reason and Passion in the Law," *Gender and Politics* 7, no. 2 (2011): 184.
[111] Özek, "İtalyan Ceza"; and Erman, "İspanyol ve İtalyan."
[112] Maria Gabriela Bettiga-Boukerbout, "Crimes of Honour in the Italian Penal Code: An Analysis of History and Reform," in *'Honour': Crimes, Paradigms, and Violence against Women,* ed. Lynn Welchmann and Sara Hossain (Victoria: Spinifex Press; New York: Zed Books, 2005), 237.

In this period, there appeared many alarmist papers in the forums of high legalese. In 1967, in a paper on youth criminality, Abdullah Güner wrote: "*We are alarmed about our sons who are resisting their parents, the school and the society and about our girls who are maturing before their time*."[113] As seen in these words, even before 1968, there was a crisis discourse concerning youth sexuality and rebelliousness. Güner had linked resisting parents and resisting society. This linkage, which can also be found in the writings of Ali Fuat Başgil from the 1940s,[114] became a much-elaborated idea in the 1970s. A parallel was established between the need for maintaining order and the need for maintaining hierarchical and authoritarian family relations. According to this conceptualization of state-society relations and basic rights, social discipline and order required family discipline.

A striking reflection of this parallel is found in the words of a JP senator, Ahmet Nusret Tuna from 14 January 1971. On that day, the senate was discussing youth protests, the Bloody Sunday of 1969, and torture because one of the senators had requested a general assembly meeting. Tuna came to the stage to speak for the rejection of this request and gave a long speech about these events. He blamed the left for violence and denied the allegations of torture. But there was also something more in this speech. This was the only time article 462, the extraordinary mitigation article in line with which those who killed upon witnessing adultery were granted practical immunity, was mentioned at the senate or the parliament between 1960 and 1980. After underlining that he was an enemy of anarchists and the radical left, Tuna suddenly moved to a new point:

> Yes, Sırrı Atalay says, God may protect him, [Atalay] says 'My son objects to me, I am proud of my son.' This is a matter of perspective. Dear friends, I accept that he is a patriot, but let me add something. If a husband finds his wife and her lover, he shoots and kills them. This is covered in our criminal code. A husband has the right

[113] Abdullah Güner, "Memleketimizde Çocuk Suçluluğu ve Çocuk İnfaz Müesseseleri," *AD* 6 (1967): 457.
[114] Ali Fuat Başgil, "Vatandaşların Amme Hakları ve Milli Camianın Emniyet ve Disiplini Meselesi," *İÜHFM* 6, no. 2-3 (1940): 289-300.

> to kill his wife and her lover. [But] there are exceptions. If this adulterer is the father or the mother, [the code] says, 'Don't you dare! You cannot lay a hand on them.' It says, 'Do not lay a hand on them, you cannot shoot your father or mother.' We are the representatives of a nation that demands respect for fathers and mothers in this way and that has been practicing this as an order for many years. [He says] 'My son objects to me.' Sir, these two are compatible. He can respect his father and practice his patriotism. In case he is not able to render them compatible, he shall be quiet, sit in his corner and do that job or that service elsewhere. But, in any case, my son must be reverent towards me. Atalay says, 'My son objects to me, I am proud.' I hope it ends well inshallah.[115]

I think that this is a crystal-clear example showing us the extent to which intimate violence and gendered hierarchies of power are intrinsic to politics. The extraordinary mitigation was not only one of the building blocks of the regime of intimate violence and masculine domination in Turkey. It was also a means of discrediting youth movements. For Tuna, murdering such a wife and her lover was not only what any husband would do. It was also a *right* protected by the code and allocated only to those in positions of authority. How could youngsters, who were not even allowed to commit bottom-up honor crimes with practical impunity, could dare to challenge their fathers or the order as such?

One also finds this authority parallel in the elaborations of Dönmezer on the 68 movement:

> Especially in Western societies and America, socialization of people living in a society without acquiring the consciousness and discipline of respect for law and legislation is one of the important factors behind the increase in criminality. In their general period of socialization, Turkish people are socialized in line with a social process which is based on discipline and respect for law, legislation and authority. In Turkey, one cannot observe criminality

[115] *Cumhuriyet Senatosu Tutanak Dergisi*, vol. 62, session 25 (14 January 1971), 611.

> caused by socialization. We are of the opinion that the events of 1968-1971 are of ephemeral nature.[116]

In this speech, Dönmezer had identified respect for authority and discipline as key matters for preventing some sorts of criminality and youth movements. Ensuring the continuation of this respect for authority at different levels and especially at the level of family -the initial environment of socialization for many- was key to maintaining the status quo and eliminating political dissent.

In the forums of high legalese, there were also more practical manifestations of this parallel. In this period, the techniques and policies of repressing the potential for youth movements, norm deviation and political dissent and of maintaining the existing gender order were also translated. Some of these were literal translations. For example, in 1965, the president of the Paris Court of Appeals Jean Chazal had presented a report at the congress of the International Criminological Society (*La Société Internationale de Criminologie*) on the treatment of "pre-delinquent" juveniles. This report was translated into Turkish and published in *Adliye Dergisi*. According to this translation, the necessary measures to tackle this problem included arranging the working hours of mothers and protecting family unity.[117]

In this period, youth criminality and deviance were very popular topics among jurists and politicians across the world. The relationship between juvenile delinquency and family was one of the main themes of the UN Crime Prevention and Criminal Justice Congress in 1965. In the early 1960s, the UN had emphasized the need for strengthening the family.[118] In 1965, there was a tone adjustment. The Secretariat noted that measures aimed at "preserving the family intact with its strong parental

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[116] Sulhi Dönmezer, "Ceza Adaletinde Reform İlkeleri," *İÜHFM* 37, no. 1-4 (1971): 1-35.
[117] Kemâlettin Kazuk, "Çocuk Suçluluğuna Sebep Olabilecek Hallerin Giderilmesi," *AD* 4 (1971): 208.
[118] UN Secretariat, "Social Forces and the Prevention of Criminality" (working paper, A/CONF.26/2, United Nations, 1965), 12, https://www.unodc.org/documents/congress//Previous_Congresses/3rd_Congress_1965/002_ACONF.26.2_Social_Forces_and_the_Prevention_of_Criminality.pdf.

controls" were doomed to fail because they sought to preserve untouched an institution which was being changed by "more powerful forces."[119] "Social defense planners" should not swim against social currents. Family no longer possessed "many of the functions for the control and conduct of its members," and it was impossible to restore these functions through "family strengthening measures" such as marriage guidance, counselling, or stricter divorce stipulations.[120] As noted by the secretariat, gradual weakening of arranged marriage practices, decline of parental authority over children, decline of importance attached to dowry and bride-price and "the trend toward acceptance of the equality of sexes in marriage" were reflective of the changes "in the character of the control the family once exerted."[121] Rather than a source of evils, the shift from traditional/extended to nuclear family was a positive trend because, with this shift, nuclear family was "enabled to free itself from the controls of exerted by extended family, to develop into "economically viable units" and "to promote stability in the modern setting."[122]

Three years after this congress, a Ministry of Justice bureaucrat educated in the US, Mustafa Tören Yücel, published his notes on this meeting in *Adalet Dergisi*. Various insights of the congress –such as the conclusion that the shift from extended to nuclear family was an unstoppable and positive development that entailed the recognition of gender equality- remained beyond the scope of his elaborations. What Yücel translated with regards to this matter was the association of juvenile delinquency with urbanization and decline of traditional family.[123] Family cohesion had been weakened through urbanization, children had begun to reject the guidance of their parents and commit crimes as a result of this loosening control. Employment outside home was also noted to contribute to child criminality. In addition to these statements in the concluding report, Yücel also translated the suggested measures to tackle this issue.

[119] Ibid., 13.
[120] Ibid., 16.
[121] Ibid., 6.
[122] Ibid.
[123] Mustafa Tören Yücel, "Suçluluğun Önlenmesi ve Suçluların İyileştirilmesi Konusundaki Üçüncü Birleşmiş Milletler Kongresinden Notlar," *AD* 3-4 (1968): 142-149.

These were the establishment of counselling centers and social assistance committees as well as provision of family aid. As examined in the previous chapter, the association of the decline of authority in family and women's employment with youth criminality was not new in Turkey. What was new was the UN authority behind this identification and the highly selective introduction of the UN debates into Turkish legalese.

At this point in time, Yücel's approach to family was still along the lines of social familism. What he proposed as a solution at this point was supporting families through social policies. Such an approach to family can be found in many high legalese texts from this era.[124] The main premise of this familism was supporting people and the institution of family through social policy. On the other hand, unlike what we may call repressive familism, social familism did not entail the marginalization of intimate violence in the field of law or the protection of the institution of family at the expense of individuals living in families. It is one thing to argue that family should be taken into consideration in policy making, it is another thing to argue that intimate violence should be decriminalized or differentiated from other sorts of violence. Through the 70s, Yücel moved towards this second approach that began to characterize the regime of intimate violence in Turkey after 1980.

In a paper published at the beginning of the 1968 movement, Yücel had emphasized the parallel between family and state authority by noting that children who were left on their own by their parents would find it difficult to submit to the authority of teachers, police, and other adults.[125] In his account, morally degenerated children who became acquainted with the knowledge of sexuality at a young age, psychological abnormals who grew up in broken homes or without affection, rebellious kids in well-to-do neighborhoods who were not able to find psycho-social balance were sources of alarm. After participating in a criminology conference organized by the Council of Europe[126] accompanying Dönmezer,

[124] Erol Cansel, "Sosyal Devlet ve Aile," *AÜHFD* 26, no. 3 (1969): 11-21.
[125] Mustafa Tören Yücel, "Çocuk Suçluluğu," *AD* 5 (1968): 262-271.
[126] The topic of the conference was the perception of deviance and criminality. At this conference, there were stark disputes among the attendees concerning the definition of

Yücel developed a solution to tackle such problems. He translated the concluding report of this conference[127] and the insights he derived from this event into Turkish[128] and presented a framework for criminal law reform in Turkey.

In a 1971 paper, he argued that there were various reasons related to family behind the problem of criminality that was associated with norm deviation.[129] Broken homes, working mothers, irresponsible parents were responsible for juvenile delinquency. With reference to Durkheim, he claimed that abrupt social changes would cause social anomy and this was the cause of 1968-71 events. Another factor that he particularly emphasized was the shattering of the "traditional family structure." Due to its erosion, there had emerged a deficit in terms of institutions that could impose "behavioral norms" on the youth. According to Yücel, the state must have taken measures to fill this gap and avoid from "unintentionally or unnecessarily contributing to this shattering" of the traditional family structure.

Yücel's papers from this era deserve much attention because he had not only explicitly called for the maintenance of the traditional family

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deviance. While some insisted that deviance and crime were related concepts, some others underlined that deviance could also be something positive. The expansion of the role of clinicians such as psychiatrists "in the field of social control," abolition of the binary approach (guilty vs. non-guilty) and of the concept of moral responsibility were some of the suggestions that were accepted at this conference. Thus, this conference can be seen as a crucial event in terms of the transnationalization of the long-term transformation of criminal law into a technique of discipline. At this event, creation of new offenses was debated with regards to pollution and de-criminalization was debated in terms of pornography, same-sex sexual relations, marihuana consumption, and adultery. The attendees agreed that both of these trends should be supported. Temporal and spatial variance in norms and perceptions of deviance was also emphasized. For the report of this conference, see Council of Europe, *Ninth Conference of Directors of Criminological Research Institutes,* report no. DPC/CDIR (72) 3 Final (Strasbourg, 1972).

[127] Mustafa Tören Yücel, "Normdan Sapma Anlayışındaki Değişmeler ve Ceza Siyaseti," *AD* 12 (1972): 882-890.

[128] Mustafa Tören Yücel, "Suçluları Damgalamanın Fonksiyonel Sonuçları," *AD* 1 (1972): 40-45.

[129] Mustafa Tören Yücel, "Suç ve Ceza Sistemi," *AD* 11 (1971): 698-719.

structure but was also the first translator of the American victim-blaming discourse concerning gender violence into Turkish high legalese.[130] Citing *Crime in a Changing Society* by Howard Jones, he wrote:

> Some psychoanalysts have asked the question of whether victims might be as responsible as the perpetrator –especially in sex and violence crimes committed against persons. According to another proposition, crime can be invited by the victim because it fulfills a subconscious desire on her part. There is enough evidence which proves the existence of this phenomenon. An apparent example is the woman who gets beaten by their husbands and does not leave homes despite her threats to do so. Neighbors do not understand why she does not leave home, given that she constantly complains. However, this relationship fulfills the woman's subconscious desire to be dominated and tortured and the husband's need to torture and dominate someone. In the light of this explanation, this question makes itself apparent: "Cannot we think that a person who was violated or raped wanted this to happen at a subconscious level?" Clinical evidence indicates that this is sometimes the case. [In such cases] the criminal is pushed into the crime. In such cases, attributing responsibility only to the perpetrator would be an unjust practice.[131]

According to Yücel, battered wives were the "worst" type of victims in terms of the harm they caused on the society (*cemiyete verdikleri zarar yönünden en kötü mağdur tipi*). Those who walked in dark or abandoned places or befriended strangers were also victim-provocateurs. Rapes committed without provocation were "rare" occurrences.

This piece is interesting for many reasons but I will elaborate on only two matters. First of all, this piece clearly shows that the rising flux of American legal knowledge into Turkey did not only bring about gender progressive ideas. What was translated from English to Turkish in this period was also the victim-blaming discourse which was a technique of

[130] Mustafa Tören Yücel, "Mağdur Kriminolojisi' *AD* 7 (1973): 496-502.
[131] Ibid., 500.

denying and repressing women's calls for justice. Second, in terms of intimate physical violence, this was the only translated discourse that was available in Turkish high legalese. In the 1970s, there were significant transformations in terms of the regulation of intimate violence in the US and there was much debate fueled by feminist critiques.[132] Neither these changes nor these debates but only the victim-blaming discourse was translated. I reviewed a wide variety of high legalese publications for this study and this was the only article that I was able to find that discussed wife-beating outside the scope of substantive criminal law. On this basis, it can be argued that intimate physical violence did not appear as a problem that needed to be solved in this period. In this rare case where it was mentioned, the effect of the discourse was relieving the perpetrators from responsibility and shifting the blame to women themselves. The suffering and pain of the victims of intimate violence were marginalized, their lack of options was completely disregarded and they were actually argued to be dangerous and harmful to the society in a text with an objective claim to truth and various references to Western authorities.

Finally, in another paper where he presented a plan for criminal law reform in Turkey, Yücel put forth various suggestions that would have long-term consequences. According to him, the State Planning Agency (SPA) had to collaborate with legal institutions for the reformation of the criminal justice system.[133] In his scheme, the task of dealing with misdemeanors and "deviations from behavioral norms" that did not victimize any particular individual would be given to institutions that were not traditional courts. In this way, crimes against persons and property would be hindered. Thus, Yücel proposed the establishment of institutions which would regulate non-criminalized conduct and discipline people – even those who had not committed a crime or misdemeanor- or the utilization of existing institutions for this task. Moreover, victimless crimes and misdemeanors would be dealt by neighbor and colleague courts that would be established. Another item in this criminal law reform plan was

[132] Rambo, *Trivial Complaints*, 160-255; and Schelong, *Domestic Violence*, 95.
[133] Mustafa Tören Yücel, "Suçluluğun Önlenmesi ve Suçluların İyileştirilmesi Üzerinde İnceleme," *AD* 4-5 (1972): 332-343.

the introduction of reconciliation and mediation (*uzlaşma ve hakemlik*) techniques for dealing with "disputes among family members and acquittances." Since the topic of this paper was criminal law reform, it is clear that he was not referring to civil disputes but to criminal acts committed among such people.

It is striking that, in his reformed regime, only acts of violence committed against family members or neighbors would be resolved through mediation. Stranger violence and violence among colleagues would continue to be prosecuted and punished at regular courts. Thus, this plan that was drawn up by one of the highest rankings Ministry of Justice bureaucrats differentiated stranger violence and intimate violence and prescribed the establishment of institutionally separated regimes for dealing with them.

§ 5.5 Scholarly Debates on Substantive Criminal Law and Norms on Intimate Violence

As seen in the previous sections, there were significant disputes and debates concerning sexuality, rights and freedoms, and norms related to intimate violence in this period. Such divisions were also visible in criminal code commentaries. As examined in the previous chapter, leading law scholars like Taner, Dönmezer, and Erem had criticized the expansion of the extraordinary mitigation in the 1950s.[134] Taner's and Dönmezer's criticisms were confined to this expansion but Erem had turned completely against the existence of this stipulation, emphasizing the importance of the right to life and the fact that this mitigation practically annulled punishment. In later years, the publications of Erem and Dönmezer continued to reflect these positions.[135] In the criminal law books written by CCa judges such as Gözübüyük or Özütürk, there were no ex-

[134] Taner, "Türk Ceza Kanunu'nun," 573; Erem, "Adam Öldürme," 33-91. Also see Dönmezer, *Hususi Kısım*, 2nd ed., 62, quoted in Özütürk, *Ceza Kanunu Şerhi*, 975.
[135] Dönmezer, *Şahıslara,* 91; and Erem and Toroslu, *Özel Hükümler*, 448-453.

plicit criticisms of this article and there was a naturalist tone in the framing of these murders.[136] However, Gözübüyük, who had a comparative approach, underlined that, in France, the group of perpetrators who could benefit from this mitigation had become more limited in time and that the French Code only provided mitigation for husbands rather than a larger group of relatives.[137] In other words, he implied that the 'modern approach' was granting this mitigation only to husbands.

An important initiative concerning this stipulation was the problematization of this article, along with some other gender-related stipulations of the Code, by the Turkish Bar Association. In 1977, the TBA formed commissions to examine antidemocratic legislations. One of these was the criminal law commission that was led by Necla Fertan, a socialist women lawyer. Gülçin Çaylıgil, another socialist lawyer, was the rapporteur of this commission. In its report, the commission demanded the abolition of various articles of the TCC.[138] They demanded the decriminalization of adultery, abolition of the prostitution mitigation, and of article 453 which provided mitigation for those who killed infants born out of wedlock. The commission also demanded the abolition of the extraordinary mitigation, arguing that this article led to "the tacit denial of the adulterous wife's right to life" and was in contradiction with the 11th and 12th articles of the Constitution.[139] Combined with the criticisms of scholars, this initiative that strongly problematized these stipulations must have created a push towards the limitation of accommodation granted to intimate violence.

As far as I was able to trace, no substantive criminal law scholar objected to the existence of unjust provocation mitigation in this period.

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[136] Gözübüyük, *Alman, Fransız, İsviçre*, vol. IV, 400; and Özütürk, *Ceza Kanunu Şerhi*, 973.

[137] Gözübüyük, *Alman, Fransız, İsviçre*, vol. IV, 400.

[138] Türkiye Baralor Birliği, *İstanbul Olağanüstü Genel Kurulu: Antidemokratik Yasalar Hakkında Komisyon Raporları* (Istanbul, 17-19 Haziran 1977), 7-8, http://tbbyayinlari.barobirlik.org.tr/TBBBooks/iougkt2.pdf.

[139] This finding provides support to İdil Elveriş's claim that the TBA has been operating as an advocacy network pushing for democracy and human rights in addition to its activities to protect the interests of lawyers as a group of professionals. *Barolar ve Siyaset: Türkiye'de Barolar ve Devlet Kurumları* (Istanbul: Bilgi University Press, 2014), 63.

While they seemed to agree on the necessity of such a provision, criminal law scholars had crucially different approaches to this concept. As in many other matters, Erem's position was opposed to the positions of Dönmezer and Erman. Dönmezer and Erman argued that this mitigation had two grounds.[140] First, because such perpetrators were under the influence of fury or sorrow caused by unjust acts, "the *motives* that led them to action were assessed to be less wrongful by the law-making authority." Second, these people were accepted to have reduced culpability (*kusurluluk*) because victims also contributed to the commission of the crime through their unlawful acts in such cases. Dönmezer and Erman had mentioned anger and sorrow but, in their account, what was at the basis of this mitigation was not the psychological state but the "abnormality" of the motives of such people (*failin saikinin normal olmayışı*). The motives of these people were accepted to be different from 'normal' criminals and this was one of the reasons to reduce their sentences. This was a positivist idea because differentiating criminals on the basis of their motives and hence their dangerousness to society lied at the heart of the positivist school. Their second ground was also positivist in spirit. From their perspective, unjust provocation mitigation was a means of deducting the fault of the victim from the fault of the criminal or a technique of offsetting for individualizing the punishment.

Erem rejected this approach according to which unjust provocation mitigation was a means of 'offsetting' (*mahsup*).[141] According to him, this mitigation had two grounds. One was psychological. With this stipulation, the law has provided a space for accommodating excitements (*heyecanlar*) and psychological collapses (*buhran hali*). The other reason was legal. For Erem, provocation was a factor that affected the degree of perpetrator's culpability.

These scholars also had different ideas concerning the conditions and applicability of this stipulation. According to Erem, unjust provocation mitigation could only be applied if both the psychological element and

[140] Dönmezer and Erman, *Nazari ve Tatbiki*, vol. II, 369-383.
[141] Erem, *Ümanist*, vol. II, 50-70.

the legal element were present in the case. He argued that one had to experience a temporary psychological crisis (*buhran*) to benefit from this mitigation. As a result, unjust provocation mitigation could not be applied in cases related to passion (*ihtiras*) because passions were not momentary but long-term affects. Moreover, this psychological crisis must have been triggered by the commission of a real unjust act by a criminally responsible human being. If a real injustice was not present and if it was only fantasized by the perpetrator, this mitigation could not be applied because the legal element would be missing.[142]

Dönmezer and Erman had a completely different approach. According to them, the wording of the Turkish Code was different from the Italian Code. Because of this, a state of psychological crisis was not a condition for this mitigation. One who argued that he was under the influence of sorrow or fury could benefit from the article. On contrary to Erem, they argued that unjust acts committed by criminally irresponsible people like small children or people with mental hindrances could also be seen as unjust provocation. Finally, according to them, an actual unjust act was not necessary for the implementation of this mitigation. Thus, they were against the reality requirement that was shelved by the CCa in the 1950s and was re-introduced in the late 1970s.

Their justification was multi-layered. First, they cited the proponents of this approach who argued that the psychological element was also present in such cases and that it would be 'unjust' to deny such perpetrators the possibility of benefiting from this mitigation because of the fact that they had been misled by their feelings or mental faculties (*adaletsizlik olur*). Second, they argued that the general principle that they accepted with regards to such matters had led them to accept the validity of putative provocation. According to this general principle, perpetrators should benefit from mitigation clauses if they made an error and wrongfully believed in the existence of non-existent mitigating circumstances.[143] In the main body of this text, there is not even a remark about gender. However, this debate had a lot to do with the regulation of intimate violence. In fact,

[142] Erem, *Ümanist,* vol. II, 50.
[143] Erman and Dönmezer*, Nazari ve Tatbiki*, vol. II, 367.

all of the case-law examples Erman and Dönmezer referred to with regards to putative provocation were related to crimes of violence linked to honor defense.

The main principle of Dönmezer and Erman entailed the expansion of the recognition of error in the field of law. In this case, the legal element of unjust provocation would be circumvented. If such a position were to be adopted by the CCa and if the court practice were to change in a way that left more room for the recognition of error, the applicability of this mitigation could expand in new ways. If this were to be accepted as a general principle, as proposed by Dönmezer and Erman, it could be accepted that perpetrators could also err in the injustice of the provoking act (*tahrik fiilinin haksızlığında yanılma*). In this case, relatives who killed rape victims for staining their honor by being raped could raise this defense - despite the absence of a real unlawful act on the part of the victim. Thus, Dönmezer and Erman's interpretation could have radical effects on the regime of intimate violence. As examined in the next chapter, this possibility became reality after 1980.

Perhaps with the awareness of this potential, Nur Başar (Centel), who was a very young women scholar at this point, strongly challenged this argument in a paper on unjust provocation.[144] Başar's interpretation of the legal element of unjust provocation was similar to Erman and Dönmezer. She claimed that there was a "state of mutual fault" (*karşılıklı kusurlu olma*) in such situations and this required reducing the sentence of the perpetrator due to the impact this would have on his or her culpability. From a feminist perspective, this acceptance can be criticized because courts in Turkey often try to determine the faults of women. In many cases, women themselves are put on trial. I do not think that such court practices can be understood in isolation from such scholarly ideas concerning "mutual fault." However, accepting this position was crucial for Başar's argument concerning putative provocation. Başar argued against this idea by utilizing this concept. She claimed that putative provocation could not be accepted as valid because, in the absence of a real unjust act committed by the victim, there could not be a state of mutual fault. With

[144] Nur Başar (Centel), "Türk Ceza Hukukunda Tahrik," *AD* 3 (1980): 251-263.

this reasoning, Başar had used Dönmezer and Erman's approach to challenge their suggestion concerning putative provocation. I think we can see this as an attempt to impact the transformation of the regime, as a scholarly initiative against the expansion of unjust provocation.

For all scholars who wrote on this topic, the provoking act had to be unjust. But what is an unjust act? What would be the measure of determining what is unjust? In the 1950s, Nevzat Gürelli had put forth the idea that unjust acts were unlawful (*hukuka aykırı*) acts and that acts that were not against the law but only against morals could not be accepted as unjust acts.[145] On the other hand, criminal law scholarship had developed in the opposite direction. According to Erem, unlawful acts were unjust acts but there were also unjust acts that were not unlawful. In a footnote, Erem quoted a sentence written by Hamdi Öner: "Unjust acts are acts and deeds which are not just in terms of law and morality/ethics (*hukuki ve ahlaki bakımdan*)."[146]

In Dönmezer and Erman's work, there was a different picture. In their understanding, this mitigation was a means of differentiating normal and abnormal people and a means of normalization. They did not only justify the existence of this mitigation by referring to the abnormality of the motives of these offenders (hence their difference from normal criminals) but also argued that normality had to be existent in various forms for the implementation of this mitigation. The nature of the provoking act had to be normal. It had to be an act that would *normally* cause fury or sorrow (*normal olarak öfke veya elem doğurucu*). In a way similar to the reasonable man doctrine in the US, they argued that the perpetrator had to be normal. People who were "too sensitive, too emotional" or "too angry" (*fazla alıngan, fazla duygulu, fazla öfkeli*) should not benefit from this mitigation if these traits had affected their reaction because the measure of the code was the normal person.[147] Finally, in this approach to unjust

[145] Nevzat Gürelli, "Ceza Hukukunda Mazeret Sebebi Olarak Haksız Tahrik," *IBD* 6 (1951): 331-344, cited in Başar, 258.
[146] Erem, *Ümanist*, vol. II, 55. Given Erem's elaborations on the types of morality and their relationship with his understanding of humanism, he might have been referring to ethics rather than social mores at this point because *ahlaki* can mean both ethical and moral in Turkish. Ibid, vol. I, 1-21.
[147] Dönmezer and Erman, *Nazari ve Tatbiki*, vol. II, 380-381.

provocation, this mitigation was a means of normalization and social norm enforcement. According to Dönmezer and Erman, the measures that should be used to determine whether an act was unjust were "the precepts of social values" (*sosyal değer hükümleri*) prevalent in a given society at a given time.[148] Thus, unjust acts were neither unlawful nor unethical acts but transgressions of social norms.[149]

As examined in the previous chapters, the CCa's interpretation of ill-treatment of family members had changed after the 1930s. With this new interpretation, this stipulation transformed into a means of ensuring impunity and under-sentencing for various acts of intimate violence. Moreover, the CCa had established customs and traditions as the benchmark against which incompatibility with mercy and compassion would be determined and imposed new framings for such acts of violence to ensure the utilization of this article in judicial practice. In the scholarship of the 1960s and 70s, this expansion was not challenged. In fact, there emerged a consensus among scholars and jurist authors that legitimized this new interpretation. According to this consensus, ill-treatments were acts that harmed or endangered a person on physical or psychological terms.[150] As examined in Chapter 3, these very same acts were excluded from the scope of ill-treatment in the hegemonic interpretations of this crime in the early Republican era. Thus, there was a radical change concerning this matter. Thanks to this change, the crime of ill-treatment was able to be established and maintained as a well with muddy waters where various sorts of violent acts could be thrown into. This consensus in scholarship must have played an important role in the settlement of this post-early Republican approach.

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[148] Ibid., 376.

[149] A similar definition is also found in Necdet Yalkut's paper published in *Yargıtay Dergisi*. According to this definition, unjust acts were "all kinds of actions that contradicted the law, morality, or precepts of social values." Necdet Yalkut, "Mukayeseli Hukuk Açısından Haksız Tahrik," *YD* 5, no. 2 (1979): 243-253.

[150] Faruk Erem, *Hususi Hükümler*, 900; Dönmezer, *Şahıslara,* 142; Gözübüyük, "Terbiye," 360; Özütürk, *Ceza Kanunu Şerhi*, vol. III, 17; Akdağ, *Ceza Kanunu Şerhi*, 749; Gözübüyük, *Alman, Fransız, İsviçre*, vol. IV, 360.

Authors interpreting the crime of ill-treatment in this era also established hierarchies concerning harm, suffering, and gravity of intimate violence. According to Dönmezer, acts of ill-treatment were acts that harmed the physical integrity or violated the freedom and dignity of the victim *in a serious extent* (*vücut bütünlüğüne zarar veren, hürriyet ve haysiyeti esaslı surette rencide eden fiiller*).[151] A similar exclusion of 'trivial complaints' is found in Erem's interpretation according to which acts of ill-treatment had to be "serious and grave enough to be legally relevant" (*hukuken nazara alınabilecek ehemmiyet ve derecede fiiller*).[152] Through such exclusions, the scope of the crime of ill-treatment was defined in a way to exclude acts of violence deemed insignificant. Second, some authors explicitly established a hierarchy among legally significant harms. For example, Nejat Özütürk claimed that effective deeds (physical assault) could also be considered within the scope of ill-treatment because the drafters of the Italian Code of 1889 had rejected the relevant stipulation of the 1887 draft with the argument that this crime also covered minor physical assault. Thus, he had brought in the Italian debates from the late 19th century in order to legitimize this expansionist interpretation. In Özütürk's interpretation, what differentiated effective deeds from ill-treatment was the gravity of harm. If the effective deed had emerged as a result of ill-treatment and if it was "of the lightest nature and quality" (*en hafif mahiyet ve vasıfta*), it had to be considered as ill-treatment.[153] In other words, harms thought to be of lesser gravity were pushed to the scope of ill-treatment, while the effective deeds stipulations were reserved for more significant or graver harms.

With the exception of CCa judge Cemal Köseoğlu,[154] all authors of this period completely skipped the early republican case-law and the interpretations of Tevfik Nazif Arıcan and Karaoğlan concerning the crime of ill-treatment. It is impossible to determine why they had done this or whether this was intentional or not. However, it can be stated that there

[151] Dönmezer, *Şahıslara*, 1963, 141.
[152] Faruk Erem, *Ceza Hukuku Hususi Hükümler*, vol. II, 1st ed. (Ankara: Ajans Türk Matbaacılık, 1962), 900.
[153] Özütürk, *Ceza Kanunu Şerhi,* vol. II, 16.
[154] Köseoğlu, *Haşiyeli*, 597.

was some instrumental value in this exclusion. Bringing these early republican interpretations to the table would be destabilizing for the regime of intimate violence in place. This would weaken the expansionist interpretation that was adopted by the CCa in the 1940s and 50s and was shared by all authors who commented on this stipulation in the 60s and 70s. Köseoğlu had not commented on this article but he had included a large quote from the evaluation of the Ministry written by Arıcan. It can be argued that Köseoğlu had challenged this expansionist interpretation merely by quoting this evaluation and by rendering it relevant. However, he had not made any elaborations on this and his challenge was very covert. Since the dominant position among scholars and jurist authors was very different, this covert challenge would hardly make a difference. Moreover, some elements of the early republican regime such as the case-law according to which anal marital rape would be punished as sexual assault (*ırza geçme*, rape) was simply "forgotten" by everyone.

Scholars and jurist authors of this period silenced a crucial part of Turkish legal history -specifically of early republican history- concerning ill-treatment. They also solidified the post-early republican conventions. The expansionist case-law of the previous era was not criticized or challenged. On contrary, many of these decisions were brought into current analysis in a positive light or were explicitly approved. For example, Dönmezer argued that normality would also be the measure that was to be taken into consideration concerning ill-treatment and claimed that acts that could be seen as ill-treatment for a particular locality or social group could be seen as "the normal life style" for others.[155] He approved the 1949 decision of the CCa that introduced customs and traditions into the judicial decision making concerning this practice on this basis. In a similar vein, Erem approved the CCa decision according to which anal marital rape was ill-treatment, noting that this was in line with the interpretation of the Italian CCa.[156]

As I examined in the previous chapter, some judges at the court had found a way of pushing physical violence into the scope of ill-treatment

[155] Dönmezer, *Şahıslara*, 143.
[156] Erem, *Ceza Hukuku Hususi Hükümler*, vol. II, 900.

without explicitly contradicting the justification explanation according to which *darb* could not be considered within the scope of ill-treatment by using the power of framing. They had begun to use words like harrowing or causing bruises (*hırpalamak, berelemek, yerlere vurmak*). This strategy was not criticized by law scholars. In fact, this approach was supported by Erem who wrote that *hırpalamak* was a form of ill-treatment.[157]

In this period, many authors explicitly argued that ill-treatment was a continuous offense.[158] According to this interpretation, if a husband had gotten angry for some reason and hit his wife, this would not necessarily be a crime. If her wounds were not serious and she was not incapacitated for a long time, this would not be considered as an effective deed. Plus, if this was not his habit, in other words if he was not habitually hitting his wife, such a "minor" beating would not be considered as ill-treatment. In terms of its practical outcomes, this interpretation entailed pushing "violent outbursts" beyond the scope of criminal law.

As seen in this examination, scholars and jurist commentators agreed upon various issues concerning ill-treatment. However, there were also disagreements. For example, there were stark disagreements concerning the scope of the term family in terms of this stipulation. According to Erem, family had to be understood in a practical and not legal sense in this context. Colleagues, old friends, neighbors, or acquittances were not family but the group of family members who could be ill-treated was also not limited to legal family members. Hence, ill-treatment was a crime that could be committed against servants, illegitimate children, and people who had married through religious ceremonies.[159] However, according to Dönmezer, this stipulation could only be used when there was a legal relationship (*hukuki rabıta*) between the people who were living together. Thus, this crime could not be committed against a "mistress." [160]

In this period, the positions of scholars and jurist authors were generally supportive of the existing regime concerning ill-treatment. As far

[157] Ibid.

[158] Akdağ, *Ceza Kanunu Şerhi*, 749; Özütürk, *Ceza Kanunu Şerhi*, 17; Gözübüyük, *Alman, Fransız, İsviçre*, vol. IV, 360-361; and Erem, *Ceza Hukuku Hususi Hükümler,* vol. II, 901.

[159] Erem, *Ceza Hukuku Hususi Hükümler*, vol. II, 898.

[160] Dönmezer, *Şahıslara*, 145.

as I was able to trace, there was only one major and explicit challenge to this body of rules. According to Erem, the dominant interpretation of causality was not appropriate and there was criminal responsibility in ill-treatments leading to suicide:

> It is impossible to explain the exclusion of some circumstances that cannot be accepted as distant and obscure [for the emergence of the outcome] from criminal law. Is it excessive to accept that there is a causal link between the acts of the perpetrator and suicide in cases of suicide linked to ill-treatment? Approaching the "causal element" in these outcomes in a naturalist and primitive (*doğal ve ilkel*) sense is not suitable in this age (*bu çağa uygun değildir*).[161]

What would happen if a woman who was tortured and imprisoned by her husband were to commit suicide? Could the husband be held criminally responsible for her death even if he had not told her to kill herself? These questions were at the hearth of Erem's elaborations. According to his humanist doctrine, such husbands should be held criminally responsible for these deaths. As examined in the next section, this suggestion found some resonance at the CCa at the end of this period.

§ 5.6 The Judicial Practice of the CCa

Beginning with the early 1960s, there were changes in the high court practice. In this era, the CCa took some steps towards the recognition of sexual autonomy and sexual liberties. For example, the court began to take an explicitly punitive approach in cases where young girls were unwillingly married off by their fathers for bride price and were raped by their unofficial husbands. In the 60s, the CCa frequently punished such fathers as principal perpetrators (*asli fail*) along with the rapists.[162]

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[161] Faruk Erem, "Nedensellik Bağı ve Ümanist Doktrin," *AÜHFD* 25, no. 3 (1968): 18.
[162] 5. CD, E. 1711, K. 1774, T. 28 May 1968, in *RKD* 10 (1969): 95-96; 5. CD, E. 1234, K. 1861, in *RKD* III/2 (1967): 60; and 5. CD, E. 731, K. 872, T. 18 March 1969, in *RKD* 10 (1969): 105-106.

According to the case law that emerged in the late 1930s despite significant opposition, keeping an underage person somewhere was not a crime if there was parental consent. Thus, as long as he did not rape her, a man who paid the bride price could legally keep a girl in his own home. On the other hand, if the girl had a lover and left the man she was sold to in order to live with him, her lover could be punished for the crime of detention (*alıkoyma*). In this period, this interpretation was strongly criticized[163] and the CCa began to provide a way out for these people. According to this new position, such lovers would not be punished for detention because consensually living together with a girl who had been sold by his father to another and had been raped by this person was not an 'act against the family order.'[164] Decriminalization of kissing in public through case-law was another element of this opening.[165] As I examine later, this shift towards the recognition of sexual autonomy also affected the norms and rules concerning intimate violence.

In 1962, the CCa decided that in cases where children were beaten by their father, their mother could file a complaint based on her guardianship rights. The prosecutor office objected to this decision, arguing that the recognition of such a right would destroy family unity and was against the principle according to which husbands had the upper hand in marital disputes. In its decision, the GCA claimed that the principle of recognizing the primacy of the husband's say should not be interpreted in a way to strip the kid from the protection of her/his mother.[166] In this decision, the judges also brought history to the table and emphasized that the law-making authority that prepared the Civil Code had introduced various stipulations for the protection of children but the desired protection had not been provided because these stipulations were not implemented. According to their decision, at least in cases where parents were

[163] Çetin Özek, "Küçüklerin Kaçırılması ve Alıkonulması Suçunda Velinin Rızasının Etkisi," *İÜHFM* 37, no. 1-4 (1970): 380-390.
[164] 5. CD, E. 1711, K. 1774, T. 28 May 1968, in *RKD* 10 (1969): 105-106.
[165] CGK, E. 295, K. 222, 1 July 1968, in Vural Savaş and Sadık Mollamahmutoğlu, *Türk Ceza Kanununun Yorumu*, vol. III (Ankara: Seçkin Yayınevi, 1995), 3744.
[166] CGK, E. 139/9, K. 7, T. 8 January 1962, in Köseoğlu, *Haşiyeli*, 595.

separated, mothers would have the right to issue complaints against violent fathers.

In this decision, the judges had brought the early republican history into their discussion and portrayed the norm shift they were making as an initiative aligned with the objectives of early Republican law makers. This norm shift is important but it was also limited. According to this interpretation, mothers who did not leave their husbands would not be able to issue complaints when their husbands beat or torture their kids because the position that the judges agreed upon was recognizing this right for separated mothers.

Another important development was the intimacy burden crisis and its resolution through a decision for the unification of case-law in 1966. As examined in the previous chapter, some jurists and scholars had pushed for a change in case-law concerning this aggravation in the 40s and 50s. In these pushes, a local prosecutor, Cevdet Menteş, had taken the lead. In 1966, almost a decade after Menteş was appointed as a CCa judge, his chamber applied for a decision for the unification of case-law. According to their interpretation, intimacy aggravation should not have been applied in cases such as shootings or stabbings if the victim withdrew her complaint. The 1956 decision for the unification of case law which established a parallel between parental and marital authority was cited among the relevant legislation for this decision. In the end, the CCa decided that the relationship aggravation had to be applied in such cases -even if the complaint was withdrawn.[167] The decision is rather short but it seems that there was much dispute and debate in this process because the decision was taken by bare majority at the second meeting. In other words, more than 1/3 and less than half of the judges at the assembly had supported Menteş's initiative.

In this period, the court did not take a step to reverse the 1956 decision concerning deprivation of liberty. If a husband had acted with the objective of protecting the family union, his acts would not be considered as deprivation of liberty. However, the court changed its interpretation of

[167] The decision for the unification of case law, E. 1965/4, K. 1966/1, 14 March 1966, in *İçtihadı Birleştirme Kararları*, vol II, 795-797.

the nature of such acts. These violations of personal liberty (such as kidnapping a wife to force her into cohabitation) began to be seen as unlawful acts by the CCa. In line with this new interpretation, relatives who tried to prevent such violations or to stop the husband by using force began to benefit from unjust provocation mitigation. According to more than 2/3 of GCA members, attempting to forcefully take a wife back home was heavy unjust provocation.[168]

Between 1960 and 1980, the CCa published very few decisions concerning ill-treatment. Some published decisions and the 1966 decision for the unification of case law suggest that physical violence against wives was not pushed into the scope of ill-treatment in this period.[169] If the court had continued its earlier approach and pushed such cases to the scope of this crime by using the power of framing (by re-defining them as harrowing or bruising instead of beating), it had done so in a covert way without publishing these decisions.

Towards the end of this era, the court took an important decision concerning intimate violence. In this case, there was a woman named Feruzan who was beaten and imprisoned by her husband Mehmet. She was later found dead. Seemingly approaching the matter in line with Erem's interpretation of criminal responsibility, the local court decided that this was murder -despite the fact that there was no material evidence which showed that it was the husband who had carried out the act of killing. The 1st CC reversed this decision. According to them, this was not murder but unintentionally causing death through physical assault (TCC 452/2).[170] The office of the chief prosecutor objected to this decision, arguing that Mehmet could not be held responsible for Feruzan's death because she had committed suicide.[171] Even though she was tortured and was not allowed to leave the house, it was Feruzan's choice to die. In the end, more than 2/3 of GCA members agreed with the prosecutor. Quoting

[168] CGK, E. 1/267, K. 285, T. 14 June 1976, in Vural Savaş and Sadık Mollamahmutoğlu, *Türk Ceza Kanununun Yorumu,* vol. II (Ankara: Sevinç, 1985), 931.
[169] 2. CD, E. 2113, K. 3738, T. 9 April 1973, in *RKD* 12 (1973): 42-43; and the decision for the unification of case law, E. 1965/4, K. 1966/1, 14 March 1966, in *İçtihadı Birleştirme Kararları,* vol II, 795-797.
[170] 1. CD, E. 4059, K. 1000, T. 6 March 1980, in *YKD* 5, no. 6 (1980): 858-859.
[171] CGK, E. 1-151, K. 206, T. 12 May 1980, in *YKD* 6, no. 9 (1980): 1280-1283.

Erman and Dönmezer, they decided that there was no criminal responsibility in this case. In the GCA decision, Feruzan was portrayed as a bad wife. It was implied that Mehmet had not beaten Feruzan without a just reason. She had had an abortion without his consent. She had not washed the dishes and left vegetable peels in the sink because she was having her period and was still trying to overcome the effects of this operation. All these details must have been seen as relevant to the case because they were included in the text of the decision.

The dissenting minority approached the matter in line with Erem's interpretation. According to Ahmet Sadık Selçuk, a member of the 1st CC who wrote a dissenting opinion, it was clear that there was a causal link between Mehmet's violence and Feruzan's death because there were around twenty ecchymoses on her body and there were witness statements proving that he had beaten her all the time and made her regret living. Feruzan had killed herself in order to save herself from this treatment and Mehmet must have been held legally responsible for this outcome. In this case, the outcome was not a norm change because these judges were the minority. However, this decision clearly shows that Erem's initiative to push for a change in this regard had found some resonance at the CCa. Although the CCa continued its established interpretation in this regard, there was contestation.

In this period, there were significant changes in the CCa's interpretation of unjust provocation. As examined in the previous chapter, in the CCa practice of the 50s, leaving the house or refusing to move to another place to cohabit with the husband were "clearly" unjust acts. According to the CCa, husbands who killed or assaulted their wives under such circumstances must have benefited from unjust provocation mitigation. Moreover, leaving an unofficial partner was also considered as unjust provocation.

In the 60s, the CCa changed its position on these matters and limited the applicability of this article. According to this new position, leaving the

marital domicile or filing for divorce were lawful acts. Thus, unjust provocation mitigation could not be granted on the basis of such acts.[172] This was an important change in the regime of intimate violence because this shift limited the accommodation granted to such acts and brought about the recognition of women's bodily autonomy and personal freedom on more extensive terms. However, this move towards freedom was not unlimited because the court also introduced a criterion which we may call the honor qualifier. If a husband claimed that his wife had not only left him but was also engaged in "immoral and illegal relations," he could still benefit from unjust provocation mitigation.[173] This reserved limitation initiative changed the regime and, unlike some other limitations concerning this stipulation, this shift stood the test of time.

In the previous period, the CCa had expanded the applicability of the extraordinary mitigation despite the absence of a legal change in this direction. According to this interpretation, which was parallel to the judicial practice in Italy after the adoption of the Rocco Code, one did not have to directly witness physical interaction between the people he attacked. Thus, the direct witnessing requirement that had been a component of this regime since the Ottoman era was dropped off. In April 1960, the Court took an important decision which indicates that it gave up this extensively accommodative interpretation.[174] In this case, a woman who had left home for a couple of days had returned to her village. After her return, she was killed by her husband who claimed that his wife had sexual relations with another man while she was gone. There were also bruises and bite marks on her body. The husband argued that these were proofs of her infidelity and it was decided that the wife "led an improper life" (*uygunsuz bir hayat sürmesi*). The local court had applied the extraordinary mitigation in this case. This was not unexpected, given the case law of the CCa from the 50s. However, this time, the CCa reversed the

[172] CGK, E. 3509, K. 5856, T. 12 December 1974; CGK, E. 1/289, K. 377, T. 25 November 1968, in Savaş and Mollamahmutoğlu, *Ceza Kanununun Yorumu*, vol. II, 857, 852.
[173] 1. CD, E. 69-1935, K. 460, T. 10 February 1970, in *RKD* 11 (1970): 75-77.
[174] 1. CD, E. 681, K. 1015, 13 April 1960, in Çağlayan, *Ceza Kanunu*, vol. II, 389-390.

case. With this decision, the direct witnessing requirement was instated back.

Another important decision of this era was taken in 1968.[175] In this case, a husband, X., had killed another man, Hakkı, whom he found in the hall (*sofa*) of his home. X had suspected that Hakkı and his wife had an affair. He had left home, saying that he would go to town, but stayed around the house to see what would happen. Hakkı had come to his house and was welcomed by his wife. X had killed Hakkı upon this. In this case, the 1st CC overruled the decision of the local court which had applied the extraordinary mitigation to the case. The Chamber underlined that, in order to benefit from this mitigation, the perpetrator had to see the victims in a state which left no doubt that they were about to commit adultery. In other words, visiting a neighbor when she was alone at home did not necessarily mean having an adulterous intent. This decision is important because it shows that the CCa adopted a new approach to social relations among men and women in this period. After 1980, this approach was shelved by the CCa but this decision was utilized by scholars who wanted to provide narrower interpretations for this article.[176]

Another norm that is found in the judicial practice of this era is the surprise requirement. Unlike the ICC, the TCC did not establish this as a requirement for the application of the extraordinary mitigation. However, some judges transposed this as a clearly established norm into the Turkish regime. According to this interpretation, perpetrators who knew that there was an affair before witnessing something and committing a crime could not benefit from this article.[177] As examined in the next chapter, the CCa did not completely depart from this interpretation in the post-1980 era but later softened this requirement, re-expanding the applicability of extraordinary mitigation.

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[175] 1. CD, E. 422, K. 738, 18 March 1968, in *RKD* 7 (1969): 68-69.
[176] Önder, *Şahıslara*, 140.
[177] CGK, E. 404, K. 459, T. 4 June 1973, in *RKD* 10 (1973): 123-125; and 1. CD, E. 2739, K. 2742, T. 27 September 1977, in *YKD* 3 (1978): 339.

In the previous era, unofficial marriages were accepted to be legally significant, especially in cases involving honor defenses. In cases of violence involving such couples, intimacy burdens were not applicable but honor defenses were accepted. A decision from 1963 shows that some local courts even applied the extraordinary mitigation to such cases. However, the CCa began to signal a change by reversing this decision.[178]

In the 1970s, the application of unjust provocation mitigation in cases involving unofficial couples became a major source of dispute at the CCa. In this dispute, the CCa was split into two camps. At one end were those who approached this matter through the concept of sexual freedom. At the other were those who brought up customs and traditions as a counter argument. One of the cases that illuminate this conflict was related to the murder of a man, Ali, and a woman, Fatma, by Fatma's unofficial husband Hasan.[179] In his defense, Hasan argued that he had caught them having sex and the local court reduced his sentence in a great extent by applying the heavy unjust provocation mitigation. The CCa reversed this decision on two grounds. First, there were witnesses who claimed that Hasan himself had invited Ali to his house to drink tea. Second, the court accepted that Fatma was free to enjoy her body as she wished (*bu ahvalde vücuduna serbestçe tasarruf edebileceği*) because there was no official marriage. Thus, the idea of sexual autonomy that was marked as an extremist idea by professor Daver in 1968 had already entered the parole of the CCa by the 1970s. However, the local court insisted on its former decision and this case came before the GCA. The GCA overruled the decision of the chamber and decided that heavy unjust provocation should be applied in this case -emphasizing customs, traditions, and the social lives, and conditions of peasants. According to the bare majority of GCA members, such marriages were "as sacred as official marriages" (*meşru evlenmeler kadar değer taşır*).

This decision shows that there were two opposing groups at the CCa and that the group that supported the customs and traditions approach

[178] 1. CD, E. 1992 K. 2350, T. 26 November 1963, in Önder, *Şahıslara*, 144.
[179] CGK, E. 1/231, K. 415, T. 23 September 74, in Savaş and Mollamahmutoğlu, *Ceza Kanununun Yorumu,* vol. II, 932-933.

was dominant in 1974. However, this dispute did not end there. Just three days later, the 1st CC took another decision related to this issue and took things one step further. According to this decision, an affair between an unofficial partner and another man could not be accepted as an unjust act because this would clearly contradict the Civil Code. Thus, neither heavy nor light unjust provocation could be applied in such cases.[180]

Various decisions from this era show that some judges fought against the accommodation granted to intimate violence on the basis of honor defenses. However, it seems that all they were able to do was limiting rather than abolishing this practice. Their names and numbers largely remain unknown but I was able to identify some of them. Two of them were O.E. and S.S. who wrote a dissenting opinion to one of these cases. Analyzing my dataset of retired judges, I was able to identify them as Orhan Erdoğan and Selahattin Sönmez.

In this case, there was a teenager, Aysel, who was sold to a married man, İshak, as *kuma* before turning 15.[181] İshak was a violent man who also beat his official wife. Aysel had escaped four times and sought refuge in her natal home. Every time, she was returned to İshak. When she escaped for the fifth time, she sought refuge in another house in the village. Plus, there was a letter which was allegedly written by her, a letter which had made İshak jealous. When he found Aysel, İshak took her by force, hold her at gun point, punched and beat her, tied her to a tree in the forest in a naked state, and cut her vagina with a knife. He then took her back to his home and chained her to the woodshed. In the end, he fired his gun in close proximity to her face, wounding her on the nose. As underlined in the dissenting opinion, there was horrific violence in this event but İshak was sentenced to a year in prison -an extremely light punishment given the very punitive nature of the TCC. In practice, İshak would be imprisoned only for a couple of months. According to Erdoğan and Sönmez, who found this sentence unjust, there was no unjust provocation in this case because there was no unjust act on Aysel's part. However, they were not

[180] 1. CD, E. 1788, K. 4507, T. 26 September 1974, quoted in Önder, "Geleneksel Halk," 25.
[181] 8. CD, E. 1979/7345 K. 1980/1980, T. 7 March 1980, in *YKD* 6, no. 8 (1980): 1175-1178.

able to convince the rest of the members at the 8th CC. According to the decision, İshak would benefit from unjust provocation but light rather than heavy provocation mitigation would be applied to the case.

The conflict between the supporters of the sexual freedom approach and conservatives who emphasized the importance of tradition also affected judicial debates concerning elopements and adult women's right to personal autonomy. One of the cases that illuminates this conflict was related to the murder of a man named Hüseyin. Türkan, a 19-year-old woman, and Hüseyin had eloped. Türkan's father Mahmut had killed Hüseyin after finding them. The local court had reduced Mahmut's sentence by applying heavy unjust provocation. This decision was reversed but the local court insisted on its position, underlining that there was "an established Turkish custom" according to which one had to get the father's consent before marrying a woman. Thus, the case was transferred to the GCA. According to some CCa judges, whose numbers were less than one third of the assembly members, there was no unjust provocation in this case because there was no unlawful act. Two young people had decided to get married and this could not be accepted as unjust provocation. The decision of the majority reflects a compromise. The sentence would be reduced but only on the basis of light unjust provocation. The majority provided this explanation for their stance:

> According to our legislation, a girl who is over 18 is free in her behavior (*hareketlerinde serbest bulunmaktadır*). Even if this situation contradicts the harmony and peace that should prevail in the relations among family members, this is not grave enough to require accepting a possibility provided by law (*yasaların tanıdığı bir imkan*) as heavy and severe provocation. However, adhering to such customs which protect social values while exercising legal rights is the normal course of action expected by family heads. Since the murdered man took a path contradicting this [custom], it must be accepted that there is unjust provocation.[182]

[182] CGK, E. 1/324, K. 537, T. 9 June 1973, in Savaş and Mollamahmutoğlu, *Ceza Kanununun Yorumu*, vol. II, 591-592.

This decision shows the extent to which customs and traditions were utilized by the court in order to legitimize the accommodations for intimate violence. These people were legally free to marry. However, their exercise of basic rights was accepted to be a transgression or an unlawful act not on the basis of law -because they were "free" in their behavior in terms of legislation- but on the basis of traditions. Thus, customs and traditions were brought in as measures in order to restrict basic rights and to limit young people's personal autonomy and their freedom of choice concerning their futures.

Another case that illuminates a similar point was decided upon by the GCA in 1978.[183] In this case, there was a husband who was in prison. Allegedly, he had requested Ziya, one of his friends, to keep an eye on his wife Emine while he was away. According to the decision, Emine was prostituting herself and Ziya had killed Salih with whom she was planning to have sexual relations. In this case, the local court had not applied unjust provocation mitigation. The sentence was reduced only on the basis of discretionary mitigation. In this case, there were two groups at the GCA. One group approved the local court decision but the bare majority was of the opinion that there was unjust provocation in this case. According to the majority, Emine was left to Ziya's "moral guardianship" by her husband. Because of this guardianship position, consensually going somewhere with her would be an unjust provocation against him. In this case too, customs and traditions were called in for legitimizing this conservative stance. According to the majority, "*Social value norms concerning the family, Turkish customs, and traditions give men a moral responsibility to own (sahip olma) women in such circumstances.*"

In this decision, there was an explicitly masculinist discourse. Women were accepted as things that could be owned. An adult woman was accepted to lack personal autonomy and to be under the moral guardianship of another -as if she was a child. What is more, this guardian was not

[183] CGK, E. 1/207, K. 363, T. 23 October 1978, in Savaş and Mollamahmutoğlu, *Ceza Kanununun Yorumu*, vol. II, 847-848.

even related to her. He was just someone to whom her husband had allegedly delegated his authority over her. In fact, the CCa had approached the case in a way that was reminiscent of the *walaya* doctrine of Islamic law.[184] However, as in the case of Göktürk's call for the re-establishment of household headship as a position of substantive domination in the previous period, what was used as an explicit source of legitimation in this case was not Islamic law but customs and traditions.

As seen in these cases, there were some gender reformists at the CCa who were not content with the changes introduced in the 1960s. However, the majority of CCa judges were not on the same page with them. Although there were some important changes compared to the previous era, the initiatives for the recognition of personal autonomy and sexual freedom and for the transformation of the regime in line with this recognition were seemingly suppressed by those who brought up customs and traditions as counter measures. However, after 1978, the majority at the CCa changed its stance on and interpretation of a number of matters, including some ground rules concerning intimate violence. Thus, the winds of change that had begun in the 1960s transformed into a hurricane.

First, there was a change in the CCa's interpretation of unjust provocation concerning the scope of family members who could benefit from heavy unjust provocation on the basis of honor defense. According to the legislative framework of the TCC, relatives such as brothers and fathers could benefit from such defenses. For example, if they killed a newborn born out of wedlock or if they killed a daughter or sister or her partner whilst they were committing adultery, their sentences would be reduced. However, in the stipulations concerning the crime of adultery, there was a different situation. According to the TCC, which was not similar to the OCC in this regard, only a husband could file a complaint for adultery committed by a woman. Thus, fathers or brothers could not bring law-

[184] On this doctrine, see Judith E. Tucker, *Women, Family*, 181; and Human Rights Watch, *Boxed in: Women and Saudi Arabia's Male Guardianship System*, 2016, https://www.hrw.org/report/2016/07/16/boxed/women-and-saudi-arabias-male-guardianship-system.

suits for adultery. In this period, the CCa limited the extent of accommodation through a norm change and established a new hierarchy among these masculine subject positions -placing husbands to the top- by appealing to the latter stipulation.

In this case, a man named Ahmet, who had committed adultery with a woman named Havva, was killed by Havva's brother Saadet upon the instigation of their father, Mustafa. In this case, the local court had reduced Saadet's sentence by applying heavy unjust provocation. According to the local court, such an extensive mitigation was appropriate because of the honor conception of the society (*toplumdaki namus anlayışı*). The 1st CC reversed this decision and the case was transferred to the GCA upon the insistence of the local court. In this case, there were various grounds for reversal. According to the majority, Saadet and Mustafa had not acted with an honor concern. What motivated them was the fact that this adultery had led to Havva's divorce and destroyed the order of their family. But what was emphasized as a norm was something else:

> The unjust act of the slayed is committing adultery with Havva. In terms of legislation, this act concerns Havva's spouse. This event should not be accepted as something severe [or grave] for people outside the spouse.[185]

This was an interesting interpretation of the TCC. It could easily be argued that, especially in terms of intimate control murders, adultery was something that legally concerned people such as brothers and fathers - especially because of the fact that there was a specific stipulation that gave them a practical license to kill their relatives if they found them committing adultery. And this was the established interpretation. In this decision, the reformists had brought up a new interpretation by claiming that adultery was an act that legally concerned Havva's spouse. Seemingly, they had utilized the exclusion of fathers and brothers from the group of relatives who could file law-suits for adultery to reach this outcome.

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[185] CGK, E. 1978/1-484, K. 1979/58, T. 12 February 1979, in *YKD* 5, no. 6 (1979): 877-880.

In this period, there was a scholarship that facilitated such a limitation, such a shift from extended to nuclear family. Gözübüyük had marked the limitation of the scope of extraordinary mitigation and its re-organization with an exclusive focus on spouses in France as a modern trend. Taner and Dönmezer had opposed the expansion of the scope of extraordinary mitigation in 1953 with the argument that this mitigation should be only provided for husbands. Thus, this was not a change that emerged out of the blue. However, as far as I was able to trace, no one had explicitly called for the CCa to introduce such a limitation for unjust provocation through case-law. In this case, the CCa had done this anyway by practicing extensive or creative interpretation.

In the first GCA meeting, 16 members had voted for this limitative position, and there were 4 dissenters. In the second meeting, the limitative position was adopted by a majority of 22 against 6. Unlike many others, the initials of dissenting and concurring members were provided in the published text of this decision. The first initials that appear in the list of concurring members are N.S.. My dataset of the CCa members shows that there were only two criminal law judges with these initials at the court at the time of this decision. Both of them were judges who had participated in the 1976 symposium. As I noted, Nasır Saydam had openly called for the adoption of the creative interpretation approach at this meeting and challenged the technical approach. Nuri Süer, on the other hand, had explicitly declared his support for the ideas raised by Duygun Yarsuvat in his presentation on sexual crimes and sexual freedom. It is not clear which of them had led this group who brought about a norm shift based on creative interpretation but it is clear that it was one of them. It is also important to note that Ahmet Sadık Selçuk, the only CCa member who had written a dissenting opinion in Feruzan's case and had embraced the reformist position suggested by Erem concerning criminal responsibility, was also among the members of this group. Clearly, reformists had not only talked about the necessity of reform or the possibilities of making changes through case-law and shifts in interpretation but were able to bring about significant and actual changes in the regime of intimate violence by using the method of extensive interpretation.

In this period, there were also other changes in the CCa's interpretation of the applicability of unjust provocation mitigation. The beginnings of one of these shifts can be traced to a decision from 1974. In this case, the victim was a man, O., who had sexual relations with a young woman.[186] He had promised to marry her but had not kept his promise. At the time, this act -causing loss of virginity by promise of marriage- was an offense. The man was killed by the woman's mother and siblings whose sentences were reduced by the local court which applied heavy unjust provocation mitigation on the basis of customs and traditions. This decision was reversed by the 1st CC with the argument that this act could not be accepted as heavy unjust provocation. O. had committed a crime. Since this was an offence, the perpetrators could solve the matter by suing him but they had not done so. Hence, they could not benefit from heavy unjust provocation.

In later years, this new interpretation was taken further. According to a GCA decision from 1979, perpetrators could not benefit from unjust provocation if the provoking act was under investigation at the time of the crime.[187] In this particular case, the provoking act was rape. A woman named Yüksel had been raped by her fiancée, Ahmet. Yüksel's brother Cavit had killed Ahmet while the rape case was being processed by local the court. The local court that decided upon the murder case applied heavy unjust provocation to this case. This decision was reversed by the special chamber. According to the chamber, granting Cavit heavy unjust provocation would be allowing the unlawful enforcement of a right (*ihkak-ı hakka cevaz vermek olacağından*) because there was a criminal trial for rape at the time of the murder. However, because Ahmet had behaved in a sarcastic and demeaning manner when he saw Cavit and hurt his pride, the latter could benefit from light unjust provocation. The local court insisted on its former position and the case was transferred to the general assembly. The GCA agreed with the chamber and reversed the insistence decision, noting:

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[186] 1. CD, E. 311, K. 5355, T. 20 November 1974, in Savaş and Mollamahmutoğlu, *Ceza Kanununun Yorumu*, vol. II, 951.
[187] CGK, E. 1/93, K. 71, T. 16 April 1979, in Mehmet Akif Tutumlu, *Türk Ceza Hukukunda Haksız Tahrik – Genel ve Özel Hükümler* (Ankara: Adil Yayınevi, 1999): 190-192.

> The provocation must be unlawful for the implementation of the 51st article of the TCC. The state of unlawfulness emerges when one steps outside the boundaries set by law. The crime of rape committed by the slayed against the accused's sister had been legally prosecuted, [and] he had been arrested as a result. Thus, the legally stipulated measures for the act of rape had been undertaken (…). It is impossible to reconcile the code with the state of finding the punishments stipulated in the code for forbidden acts inadequate. Acting in the opposite direction would lead one to think that the legally stipulated punishments are not enough and to behave in line with personal feelings, ideas, and discretion. This state would lead [or leads] people to private vengeance on the one hand, and would create [or creates] an anarchical environment on the other.

With these words, the GCA approved the interpretation of the chamber. According to the dominant position reflected in this decision, unlawful acts that had been or were being processed by courts could not be accepted as unjust provocation because this would create anarchy.

In this decision, one finds a binary that is emphasized in many books on the emergence of public criminal law. At one end was anarchy and private vengeance. At the other was public punishment and monopolization of violence. From Radbruch to Weber, many scholars examined European legal history with this binary in mind and underlined that there had been a move towards the latter through time.[188] As examined in previous chapters, this monopolization was not a natural occurrence but a historical development that was contested and negotiated. Tensions over this matter had surfaced in the Ottoman parliamentary debates on extraordinary mitigation and in the early republican parliamentary debates on honor mitigation provided for those who killed infants born out of wedlock. Historically, those who emphasized the need for this monopolization were

[188] Weber, *Economy and Society*; Weber, *Politics as Vocation*; Gustav Radbruch, "The Origin of Criminal Law in the Status of the Unfree," reprinted in English in *Foundational Texts in Modern Criminal Law,* ed. Markus D. Dubber (Oxford: Oxford University Press, 2014), 407-413.

also those who had limitative positions concerning the accommodation that would be granted to intimate violence in line with honor defenses.

This decision can be seen as an instance where this tension had once again become apparent and where the need for the monopolization of violence was once again utilized for limiting the accommodation granted to intimate violence. At this moment, the court was taking a radically new step and introducing a new criterion for the implementation of this mitigation. The exclusion of prosecuted acts or acts under prosecution from the scope of this mitigation was something novel and this was a major limitation.

In the decision, it was emphasized that approaching such matters from the opposite angle and granting mitigation to such cases would create or has created an anarchical environment where people would practice private vengeance. This suggests that the political and social context also played a role in this shift at the CCa because, according to many jurists, this was a period of anarchy in Turkey.[189]

Another point that makes this decision important is the potential it carried. This decision was related to a rape case but the norm established in this decision could have an even more tremendous impact on the regime of intimate violence if it were to be settled as a general principle. According to this norm, prosecuted or punished acts would not be accepted as unjust provocation. If this was to be established as a general principle, husbands who killed their wives or their partners after filing complaints for adultery would also be excluded from the group of perpetrators who could benefit from this mitigation. Thus, this shift was already great in terms of its effects but it had an even bigger potential.

Finally, the way in which unjust provocation mitigation was described in this decision is interesting. According to this interpretation, unjust provocations were unlawful acts and their measure was not customs, traditions, or honor conceptions of the society but the law. One would unjustly provoke another by "stepping outside the boundaries set by law."

[189] Eyüp Sabri Erman, "1972-1973 Adli Yıl Açılış Konuşması," https://www.yargitay.gov.tr/documents/acilisKonusma/1972-1973.pdf.

This definition was starkly different than the dominant scholarly interpretation of the time. However, this was not a fixed matter in terms of the judicial practice of the court. According to a decision of the 1st CC from the same era, "acts contradicting social value norms, morality, customs, and traditions" -in this particular case a man's failure to chastise his wife and daughters who were attacking another man- were also unjust provocations and required the implementation of light unjust provocation mitigation.[190] Thus, there were contestations over the meaning and applicability of unjust provocation at the court.

Finally, towards the end of this period, the CCa reintroduced the reality requirement that had been shelved in the previous era. This shift can be traced to a decision from 1977.[191] In this case, there was a husband who killed another man and wounded his wife upon the suspicion that they were having an affair. The local court had not applied the unjust provocation mitigation, noting that there was not a real affair between the victims. This decision was taken before the CCa by the prosecutor and the accused. However, the 1st CC approved the decision of the local court. With this decision, the reality requirement returned to the judicial practice of the CCa.

By the end of this period, there was an instable and dynamic regime of intimate violence, and there were various changes towards the limitation of accommodation granted to intimate violence. What lied at the basis of these changes were changes in the interpretations of CCa members. The room granted to the accommodation of intimate violence shrunk considerably. The court completely excluded some acts (such as unlawful acts under criminal investigation or unreal/putative provocations) from the group of unjust provocations on the basis of which legal mitigations could be granted. In some other regards, there was a trend towards limitation. Fathers, brothers, unofficial partners were excluded from the group of people who could benefit from heavy unjust provocation in cases related to adultery. While they were not totally excluded from this group, the sentences that would be given to them in line with this new

[190] 1. CD, E. 41 K. 1453, T. 1 April 1980, in *YKD* 10 (1980): 1420-1421.
[191] 1. CD, E. 1076, K. 1830, T. 24 May 1978, in Önder, *Şahıslara*, 138.

interpretation became much heavier. The unjust provocation article stipulated a mitigation by ¼ for light unjust provocation and a mitigation by up to the 2/3 of the original punishment for severe unjust provocation. Thus, on practical terms, the punitiveness of the regime concerning such crimes had doubled in this period because of the shifts in the interpretation of the CCa. In sum, there was a shift towards official and nuclear family in terms of the regulation of intimate violence and a general and significant shrinkage in the accommodation granted to such crimes.

§ 5.7 Conclusion

As examined in this chapter, there were serious debates over gender, sexuality, freedom, autonomy, and violence in this period. At this point, I want to underline that I am not the first person to point out that there were such debates in the 1960s and 70s. There are scholars who have pointed out to some related developments and debates, especially in the cultural/literary field.[192] What I argue however is something new because I claim that there was a full-blown crisis over sexuality. There were countless debates among the juridico-political elite concerning the regulation of sexuality, and sexual conduct, as well as the forms of violence committed in response to transgressions of sexual norms. Clearly, the 60s and 70s were not devoid of interesting developments related to sexuality or gender violence.

As seen in this chapter, there were not only debates but also actual changes in the regulation of sexual conduct and transgression. The regime of intimate violence in Turkey changed in this period through changes in the interpretations of people in different fields such as the CCa, and the academia. Despite the efforts of technicians, who discouraged extensive, or creative interpretation and who underlined the importance of customs, and traditions along with the necessity of discipline,

[192] For example, Mehmet Alkan pointed out to the emergence of the mini skirt trend in the 1960s and Tülin Ural examined how leftist woman writers of this period discussed sexuality. Mehmet Ö. Alkan, "Altmışlı Yıllarda Günlük Hayatın Siyaseti," in Kaynar, *60'lı Yıllar*, 933-987; and Tülin Ural, "Çok Derin, Fazla Sathi: 47'liler," in *Gaflet*, ed. Sema Kaygusuz and Deniz Gündoğan İbrişim (Istanbul: Metis, 2019), 186-201.

and order; there were radical changes in the judicial practice of the high court. By the end of the 1970s, there were clear victories on the part of reformists, and revolutionaries. For the first (and only) time in Republican history, judicial activism had brought about a *major* re-settlement which limited the allowances granted to intimate violence through changes in case-law. These changes were enormous in terms of their effects because the accommodation provided for intimate violence was practically cut by half. There was not only a move towards nuclear family. The allowances granted to official husbands were also limited in a great extent. What actually took place fell short of the expectations, and demands of some judges, and scholars but was still colossal.

Why was there such a change -before the emergence of autonomous feminist movements, and the rise of gender violence as a global concern? It seems to me that there were various factors behind this change. The transnational trend that is known as the sexual revolution seems to have contributed to this development. Rather than skipping Turkey, this trend was translated into Turkish high legalese by various authors and was vernacularized in multiple ways (with alternative portrayals of the beliefs, and approaches of peasants, references to folk songs, and Ottoman-Turkish legal history). Another factor was the change in the approaches, and understandings of legal interpreters. It is difficult to see these men as allies of a feminist movement or reactants responding to the demands of women's rights organizations. Moreover, some of them (such as Duygun Yarsuvat) were more explicitly radical than some women scholars, and activists in their commitment to sexual autonomy, and freedom.[193] On this basis, I think that it would be more appropriate to think of such actors as agents in their own right rather than side-kicks whose function is limited to amplifying the demands of women's organizations or activists.

Another factor that seems to have contributed to this turn is the changes in the structuring of the judicial field. This period was characterized by a high degree of judicial independence. I think that it would be

[193] For example, at that time, Nermin Abadan Unat, a pioneer scholar and women's rights activist, was against the idea of total sexual freedom and "pure principles of feminism." Unat, "Toplumsal Değişme," 39-40.

more difficult, if possible at all, for the judges at the CCa to take such courageous steps in a period in which political and legislative power was largely at the hands of right-wing parties emphasizing the importance of customs, traditions, and family; if their autonomy, and independence were not protected in the extent that it was with the 1961 Constitution. The atmosphere of freedom created by this Constitution and the rise of human rights were other factors related to the judico-political field. And it seems that these factors had also contributed to the changes in the regime of intimate violence.

As I showed in this chapter, there were socialist, and sexual revolutionaries in this period. They were sometimes very bold in their challenges to the regime and targeted its foundations. Even feminist activists, and scholars of the 1990s would not go as far as Savcı and demand the non-implementation of unjust provocation in all cases of honor killings, including in cases of murder committed by husbands witnessing adultery. Socialist scholars, and lawyers of this era were clearly not indifferent to the issue of intimate violence or unequal gender relations. They also did not push the solution of this problem to an indefinite future with the argument that these would be solved after the revolution to come. They pushed for changes by making translations, by raising alternative interpretations and by challenging the norms in force. This does not mean that the leftist movements granted women equal treatment or absolute sexual freedom in practice. Thanks to many women who shared their experiences in interviews given in the 1980s, and 1990s or wrote reflections on this era, we know that they did not.[194] However, it is clear that there were significant differences among left, and right-wing scholars in terms of their approaches to gender, sexuality, and intimate violence in this period.

On contrary to some scholars, I think that the inter-elite alliance on gender, and family that emerged in the 1940s did not stand the test of time.[195] I think that Turkey did not reach its present moment in a linear

[194] For some examples, see Vahide Yılmaz, "Bir Geçmiş Değerlendirmesi," *Kaktüs* 10 (1990): 38-43; and Fatmagül Berktay, "Türkiye Solu'nun Kadına Bakışı: Değişen Bir Şey Var Mı?," in Tekeli, *1980'lerde Kadınlar*, 313-327.
[195] Sancar, *Türk Modernleşmesinin*, 21.

course defined by the 1940s, or 50s because, as I showed in this chapter, there was much fluctuation in this course. Rather than a single past that can be pinpointed in time as the foundational moment that has dictated the terms of the future, there were many pasts that have informed the many presents along the temporal continuum and there was *variety* among these pasts.

The counter force in this contestation was exerted by technicians, and defenders of customs, traditions, or the gender status-quo as such. People in this group were also not oblivious to the developments in other parts of the world. In the 1970s, they responded to the translations of the sexual revolution in other countries into Turkish with translations of counter strategies, and discourses -such as the victim blaming discourse. As seen in this chapter, this group of people had lost the upper hand in the 1970s. The CCa had swiftly moved to a position closer to the demands and expectations of the first group and -especially because of the exceptionally strong position of high courts and the CCa within the Turkish legal regime in this era- this shift produced significant outcomes. This does not mean that people in this latter group did not have an impact on the future. They also contributed to the shaping of the present. Their arguments, discourses and schemes became official state policy after the 12 September Coup. As examined in the next chapter, they defined the parameters of the re-settlement that took place in this later era.

An important point concerning these contestations and debates is that there were some issues on which people from both groups came to agree upon by the late-1970s. Decriminalization of abortion, abolition of the prostitution mitigation, abolition of the sex-based differentiation for the elements of the crime of adultery, limitation of the mitigation article concerning murders targeting infants born out of wedlock to mothers, and limitation of the extraordinary mitigation article to spouses were ideas that enjoyed widespread support. Strikingly, the reforms of the succeeding era would be confined to these widely agreed upon suggestions and even fall short of responding to all of these demands that enjoyed the support of even conservative scholars, and jurists. This suggests that

there was a link between the problematizations of this period and the changes that took place in the 1980s and 1990s.

I want to conclude this chapter by returning to the theme of music. As suggested by various authors, legal interpretation can be seen as performance[196] carried out by scholars, or jurists through various kinds of actions such as judicial decision making, commentary writing, or debating in person at professional meetings. In this sense, it can be said that different beats, inspired by the beats produced across the world, characterized the performances of this era. On the other hand, these sounds were not mere copies of the latter. Turkish folk songs (and other elements of culture, and history) had not only inspired the literal musicians of the time (who gave birth to what is called the Anatolian Rock in this era) but also both revolutionary, and conservative interpreters of law. As examined in the next chapter, this variety and the new interpretations that threatened the dominance of masculinist voices were swiftly suppressed after the 1980 Coup which was announced with militarist and masculinist *Kahramanlık Türküleri* (Songs of Heroism).

[196] Julie Stone Peters, "Law as Performance: Historical Interpretation, Objects, Lexicons, and Other Methodological Problems," and Austin Sarat, "From Charisma to Routinization and Beyond: Speculations on the Future of the Study of Law and Literature," in *New Directions in Law and Literature*, ed. Elizabeth S. Anker and Bernadette Meyler (Oxford: Oxford University Press, 2017), 59-69, 193-210.

6

Family, Discipline, and Violence: The 1980 Coup and the Masculinist Restoration in its Aftermath

Let me start this chapter with a question: Have you ever come across a rare and beautiful butterfly in the nature? Something like a Palos Verdes Blue or Zebra Longwing? If you have, you probably know the urge that such a sight arouses. I, for one, instantly focus on its movements and feel some sort of compulsion to follow it. In such moments, I can hardly pay attention to the rest of the scenery.

As a feminist, I feel a similar joy when I come across feminist movements and challenges while digging the past or following the news. Of course, such movements are not natural beings and they do not fly away into the unknown like a butterfly after being sighted but they arouse a similar astonishment in some of us. And the volume of what has been written on feminist movements and challenges in Ottoman-Turkish history, especially on the autonomous feminist movements of the post-1980 era, indicate that I am not alone in feeling this way.

In this chapter, I argue that such affects should not divert us from paying attention to the rest of the scenery. For clarity, I want to note that I am

not calling for the exclusion of affects or subjectivity from academic studies or for an end to studies focusing on feminist movements and challenges. I just argue that one can also see such rare and astonishing butterflies in the worst of places, or times and that there is no guarantee that one will have a great day after such a sighting.

In the following, I show that there was a substantial masculinist turn in the regulation of intimate violence in Turkey after the coup in 1980. Allowances granted to intimate violence were extended greatly and in unprecedented ways. Why was there a masculinist expansion at a period characterized by the re-rise of strong and autonomous feminist movements and the emergence of gender violence as a global concern? This is the question that guides this chapter.

I argue that this turn took place because the 12 September Coup led to a major restructuring in the judico-political field and brought about the hegemony of a new gender discourse and policy underpinned by repressive familism. Moreover, I argue, the re-rise of autonomous and mass feminist movements might have been seen as the sign of a real crisis in the established gender order, triggering a masculinist response from the state elite.

§ 6.1 Changes in the Institutional Fields and Key Developments

After the 12 September Coup, there were drastic changes in the institutional fields that I examine. The political field was re-organized. The bicameral system was abolished and political parties were closed down.[1] Political leaders such as Demirel and Ecevit were barred from politics. The left was heavily crushed by the coup and the new regime imposed what has been called the Turkish-Islamic synthesis on the country.[2]

After this coup, there were also purges in universities. Many academics were removed from their posts. There were also resignations. Some

[1] For an extensive analysis on the political developments of this era, see Aydın and Taşkın, *1960'ta Günümüze*.

[2] Pınar Kaya Özçelik, "12 Eylül'ü Anlamak," *AÜSBFD* 66, no. 1 (2011): 73-93.

of the most active legal scholars who had pushed for changes in the rules related to intimate violence and gender relations were among the purged academics. For example, Rona Serozan and Bahri Savcı were both discretionally retired.[3] Criminal law scholar Çetin Özek also left the academia in this period, resigning in protest to the restructuring of universities. Taking the active role of these scholars in the problematization of ground norms concerning intimate violence and gender relations into consideration, we can conclude that these purges and resignations did not only bring about the removal of leftist academics from universities but also the removal of numerous key gender progressives. These men were not feminist scholars like Şirin Tekeli who also resigned in the same period because of the pressures on the academia.[4] However, they had played critical roles in terms of problematizing gender-related legal issues and pushing for the adoption of more egalitarian rules.

More than a decade later, most of the academics who were discretionally retired were allowed to go back to their jobs. However, these return decisions came too late and those who had resigned in protest were not allowed to return. By the time these retirement decisions were rescinded, the Turkish academia was a much more different place compared to the pre-1980 era. After a decade of political pressure, mass arrests, and censure and the institutional restructuring of universities in a hierarchical managerial scheme that terminated their autonomy,[5] the return of a limited number of purged academics could hardly be enough to reverse the silencing effects of the coup.

After 12 September, there were also drastic changes in the judicial field. First of all, judicial independence was not a strong feature of the new system that was built upon a new constitution. In this era, the power

[3] Both of them were among the *1402'likler*. This term refers to those who were retired in line with the State of Emergency Regulation no. 1402. For a list of these scholars, see Oya Köymen, *Kapitalizm ve Köylülük: Ağalar, Üretenler ve Patronlar* (Istanbul: Yordam, 2008), 196-204.

[4] Serpil Çakır, "Şirin Tekeli: Siyaset Biliminde Yeni Bir Soluk (Söyleşi)," *İÜSBFD* 40 (March 2009): 114-115.

[5] İnan Ö. Taştan and Aydın Ördek, *A Report on Academic Freedoms in Turkey in the Period of the State of Emergency* (Ankara: Kaged, 2020), 9.

of politicians over the members of the judiciary increased. There were changes in the rules on the composition of the High Council of Judges and Prosecutors and in the regulations on the promotion of judges. Moreover, the new constitution stipulated that the decisions of this council could not be taken before courts, re-instating a norm that was abolished by the Constitutional Court in the 1970s. The purview of the Constitutional Court was also limited. This restructuring was criticized by some constitutional law scholars[6] and jurists, including various CCa judges.[7] However, these criticisms and protests did not bear any fruit.

After the coup, there were mass resignations in the judicial field. Many judges and prosecutors resigned.[8] By the mid-1980s, more than one fourth of all judgeship seats in the country were empty.[9] According to Nihat Renda, the then-president of the CCa, what was happening through these resignations was the 'decomposition of the judiciary' (*yargıdaki çözülme*).[10]

An important detail concerning these mass resignations is the fact that they also affected the CCa. In other words, not only lower court

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[6] Bülent Tanör and Necmi Yüzbaşıoğlu, *1982 Anayasasına Göre Türk Anayasa Hukuku* (Istanbul: Yapı Kredi Yayınları, 2004), 454-455; Bülent Tanör, *İki Anayasa: 1961- 1982* (Istanbul: Beta, 1986), 116-119.

[7] Derviş Turhan, "1981-82 Adli Yıl Açılış Konuşması," https://www.yargitay.gov.tr/documents/acilisKonusma/1981-1982.pdf; Nihat Renda, "1985-86 Adli Yıl Açılış Konuşması," https://www.yargitay.gov.tr/documents/acilisKonusma/1985-1986.pdf; and Ahmet Çoşar, "1987-88 Adli Yıl Açılış Konuşması," https://www.yargitay.gov.tr/documents/acilisKonusma/1987-1988.pdf.

[8] For a critical examination of such resignations, see Dicle Koğacıoğlu, "Hukukçu Otobiyografileri ile 12 Eylül Yasallığını Yeniden Düşünmek," *European Journal of Turkish Studies* 15, (2012), published online on 20 June 2013, https://journals.openedition.org/ejts/4733#quotation.

[9] According to the president of the CCa, in 1984, there were 6,881 judgeship seats and around 2000 of them were empty. Nihat Renda, "1984-85 Adli Yıl Açılış Konuşmasıı," https://www.yargitay.gov.tr/documents/acilisKonusma/1984-1985.pdf. This continued to be a problem in later years. Nihat Renda, "1986-87 Adli Yıl Açılış Konuşması," https://www.yargitay.gov.tr/documents/acilisKonusma/1986-1987.pdf.

[10] Nihat Renda, "1984-85 Adli Yıl Açılış Konuşması," https://www.yargitay.gov.tr/documents/acilisKonusma/1984-1985.pdf.

judges and prosecutors but also dozens of CCa judges resigned in this period. The scale of change in the member composition of the CCa was drastic. According to the data I derived from "The News from the CCa" sections of *Yargıtay Dergisi*, between 1978 and 1987 -in other words in the period between the declaration of the state of emergency and the abolition of the political bans introduced after the coup- at least 66 CCa members had resigned. In this period, 166 members had left the court due to resignation, death or reaching the legal age of retirement. This is a very significant number because the total number of CCa judges was around 200. In other words, when the country regained some degree of post-coup political normalcy in 1987, there was a highly renewed CCa cadre and more than ¾ of this cadre consisted of judges who were appointed during the coup regime.

On paper, there was not a purge at the CCa. However, the exceptionally high number of resignations indicate that some judges might have been pushed or forced into resignation. Moreover, when the larger CCa cadre is taken into consideration, in other words when we take rapporteur judges and assistant prosecutors into account, the number of resignations reaches to hundreds.

Among those who resigned were also jurists who had pushed for changes in norms related to gender by underlining the changes in the family structure, who actively worked for the adoption of more limitative interpretations and wrote dissenting opinions, and who openly allied with gender progressives such as Duygun Yarsuvat in academic meetings.[11] In other words, similar to the academia, the post-coup restructuring also brought about the removal of various gender progressives from the high court. Combined with the retirements of some other key judges such as Sadık Selçuk and Nuri Süer, who had pushed for changes in the ground rules concerning intimate violence, due to the age limit; these resignations must have significantly weakened the gender reformist group at the court.

[11] Examples of such jurists include Ömer Faruk Karacabey, Selahattin Sönmez, and Bülent Akmanlar.

There were several key developments that shaped the transformations of the regime of intimate violence in this period. One of them was the institutionalization of what can be called 'repressive familism.' This approach to family relations entailed the prioritization of the institution of family at the expense of individuals within families. As examined in the previous chapter, in the 1970s, some jurists and scholars had established a parallel between family order and social order, called for the mobilization of the state planning agency for the preservation of the 'traditional' family structure, and advocated for the institutional differentiation of intimate violence from stranger violence. After the 1980 Coup, there emerged a new kind of familist policy that was shaped by such ideas.

One of the key documents that illuminate this new trend is the National Culture Report of 1983 (*Milli Kültür Raporu*) which was published by the State Planning Agency. This report, which was prepared by a commission headed by criminal law professor Dönmezer, whose relationship to Aydınlar Ocağı gained a new character in this era,[12] was crucial for establishing the Turkish-Islamic synthesis as state policy.[13] My examination indicates that this was also a key document in terms of the institutionalization of repressive familism.

In this report, it was claimed that there was a cultural crisis in Turkey and that this crisis was linked to changes in the family structure.[14] Families were getting smaller and their functions were becoming more and more limited. As a result, people were "getting confused about their roles." According to the rapporteurs, the crisis could only be solved

[12] In this period, Dönmezer officially endorsed the constitution project of this organization, serving in the advisory board of the committee that prepared it. This project was even more radical and repressive than the 1982 Constitution. Taşkın, *Milliyetçi Muhafazakar*, 262.

[13] Binnaz Toprak, "Religion as State Ideology in a Secular Setting: The Turkish-Islamic Synthesis," in *Aspects of Religion in Secular Turkey*, ed. Malcolm Wagstaff, Occasional Paper Series, no. 40 (Durham: University of Durham, 1990), 14; and Bozkurt Güvenç et al., *Türk-İslam Sentezi* (Istanbul: Sarmal Yayıncılık, 1991), 54.

[14] Devlet Planlama Teşkilatı, *Milli Kültür Raporu: V. 5 Yıllık Kalkınma Planı Özel İhtisas Komisyonu Raporu*, no. 1920/300 (Ankara: DPT, 1984), 137.

through the strengthening and protection of family. Since "confusion about gender roles" was identified as the main problem, it was also implied that people, especially women and young people, needed to be reminded of their roles and place in life and in families as such. According to the advices of the report, Turkish morality and customs would be revered, elders would be respected, and family members would be tied to their homes.[15] Moreover, relations among family members would be organized along the lines of religious and moral norms.[16] The rapporteurs argued that Turkish family had maintained its power as an institution despite the changes in beliefs, attitudes, and values -thanks to the loyalty of the Turkish people to religious and moral values. Hence, protection of the traditional Turkish family structure had to go hand in hand with the enhancement of moral, and religious discipline, and education.

Cultural reductionism that can be traced in the earlier writings of Dönmezer was an important element of this report that was prepared under his leadership. According to the report, the specificities of the Turkish-Islamic family and its moral structure had to be taken into consideration in policy-making, especially in terms of 'family protection policies.'[17] Moreover, state agencies would be promoted towards conducting research on the specificities of the Turkish family structure and principles of Turkish family discipline. After this, measures would be taken to protect the 'Turkish-Islamic family' (*Türk-İslam ailesi*) which was claimed to be the historically dominant family form in Anatolia.[18] Another recurring theme of the report was the idea of parallel orders, according to which social order, and discipline depended on family discipline. This is also not surprising given the discourses of many scholars, jurists, and politicians from the 1970s.

[15] These were identified as the objectives of planned public broadcasts. Ibid., 99.

[16] Ibid., 147.

[17] Ibid., 147, 553.

[18] Ibid., 553.

The report specifically identified the trend towards the recognition of sexual autonomy as an immediate threat that could destroy the social order. This trend was called 'Freudism' (*Froydizm*) and was noted to cause a great moral crisis in Western societies. Similar to Sartrean philosophy, it was argued, Freudism was a destructive approach and needed to be suppressed by the state. Otherwise, these approaches would turn the society upside down (*cemiyetin altı üstüne gelir*).[19] It is also important to note that not only this trend but also sex itself was identified as a threat to national unity and Turkish culture. "All family members," especially kids and youngsters were in material danger (*elle tutulur birtakım tehlikeler*).[20] There was a trend that tended to put them under pressure and to severe their commitment to national consciousness, religion, morality, and customs and to the traditions that must have been reproduced (*yaşatılması gereken gelenekler*). The impact of this trend was aggravated by ideological provocations, drugs, sex, and unhealthy publications. Hence, all state policies and legislation had to be restructured to alleviate these dangers.

As seen in this report, conservative discourses and ideas that were visible in the forums of high legalese in earlier years were established as the building blocks of state planning in the post-1980 era. Moreover, these ideas continued to shape policy development and planning in later years. For example, the Five Year Development Plan for 1985-89 established the enhancement of family discipline as an objective that would be pursued by the state.[21] With respect to social welfare, the same report also declared that measures would be taken for the preservation and promotion of social solidarity *within* the family system.[22] What was meant by this was not clear in the context of this particular report but this was clarified in the next 5-Year Development Plan: Care services for children,

[19] Ibid., 541.

[20] Ibid., 393.

[21] Devlet Planlama Teşkilatı, *Beşinci Beş Yıllık Kalkınma Planı (1985-1989)*, 141, https://www.sbb.gov.tr/wp-content/uploads/2021/12/Besinci_Bes_Yillik_Kalkinma_Plani-1985-1989.pdf.

[22] Ibid., 200.

elderly, and disabled people would be de-institutionalized as much as possible and "care-within-the-family" (*aile içinde bakım*) would be promoted.[23]

The key elements of family policies that were established in these plans and reports (the emphasis on the Turkish-Islamic family, prioritization of family discipline and its establishment as a requirement for social order, establishment sexual liberation as a threat, idea of de-institutionalizing and familializing care policies) were novel. These elements did not feature in earlier development plans, the family policies of which can be defined with the term 'social familism.' Thus, this report shows that there was a shift in the official state discourse, and planning concerning gender relations, sexuality, and social policy in the aftermath of the coup.

These reports and plans indicate that a particularly conservative approach became dominant after the coup. However, not all developments of this era were dictated by this dominance. In this period, there were some important after-effects of the trend towards the recognition of sexual autonomy and freedom that had begun in earlier years. There were critical changes in some legal rules concerning gender and sexuality. The recognition of the right of abortion, abolition of the prostitution mitigation, and limitation of the mitigation clause concerning the murder of newborns born out of wedlock were important developments.[24] Moreover, adultery became decriminalized after the constitutional court found the sex-based differentiation in the material elements of this crime unconstitutional, despite the stark opposition of some CCa members to the

[23] Devlet Planlama Teşkilatı, *Altıncı Beş Yıllık Kalkınma Planı (1990-1994)*, 305, https://www.sbb.gov.tr/wp-content/uploads/2021/12/Altinci_Bes_Yillik_Kalkinma_Plani-1990-1994.pdf. As examined by Berna Yazıcı, this approach was effective in shaping the social policies of the 2000s that were marked with a return to family. "The Return to the Family: Welfare, State, and Politics of the Family in Turkey," *Anthropological Quarterly* 85, no. 1 (2012): 103-140.

[24] The Law No. 2827, 24 May 1983, *RG* 18059, May 27, 1983; The Law No. 3679, 21 November 1990, *RG* 20710, November 29, 1990; and The Law No. 3756, 6 June 1991, *RG* 20901, June 14, 1991.

idea of a sex-equal adultery stipulation.[25] As the parliament did not adopt new stipulations for replacing the annulled ones in the second half of the 1990s, adultery ceased to be an offense.

My research indicates that these developments were very much related to the debates and problematizations of earlier decades. I think that these outcomes were closely linked to this earlier wave because all the changes that actually took place were among the reform demands of the earlier era, and all of them had been demanded, supported, or approved by many scholars, jurists, and bureaucrats, including rather conservative actors such as Dönmezer.[26] However, there was also something new in the context of the 1980s. Thus, it was not only the past and its after-effects that determined this course of events. This new and important development was the re-rise of mass and autonomous feminist movements.

In the post-1980 era, there were multiple women's movements and feminist movements in Turkey.[27] Statist women's rights advocacy that emphasized the positive aspects of the Kemalist period -albeit falling short of recognizing the sexual liberation dimension of these reforms- continued to be an important force. However, there were also new feminist movements. Radical feminism, socialist feminism, Islamist feminism or Muslim women's movements, and Kurdish feminism were all important movements in the post-1980 context. The relations among these

[25] The Constitutional Court, E.1996/15, K.1996/34, T. 23 September 1996; E.1998/3, K.1998/28, T. 23 June 1998; E.1999/24, K.1999/30, T. 13 July 1999; and Vural Savaş, "Kanun Önünde Eşitlik İlkesi Gerekmediği Halde Bazı Eylemleri Suç Saymanın Haklı Gerekçesi Olabilir Mi?," *YD* 16, no. 3 (1990): 352-362.

[26] Dönmezer had changed his position on adultery in the late-1970s. According to his new position, adultery should be a crime but the sex-based differentiation should be abolished by the Constitutional Court. Dönmezer, *Genel Adap ve Aile Düzenine Karşı Cürümler*, 1975, 358, quoted in Savaş, "Kanun Önünde Eşitlik," 359.

[27] Sirman, "Feminism in Turkey," 1-34; Tekeli, *Kadın Bakış Açısından*; Bora and Günal, *90'larda Türkiye'de*; Handan Çağlayan, *Analar, Yoldaşlar, Tanrıçalar: Kürt Hareketinde Kadınlar ve Kadın Kimliğinin Oluşumu* (Istanbul: İletişim, 2007); Yeşim Arat and Şevket Pamuk, *Turkey between Democracy and Authritarianism* (Cambridge: Cambridge University Press, 2019), 228-262.

movements and the relations between these movements and other political movements like the Islamist movement or the socialist movement were full of tensions. In the 1990s, there also emerged a conflict between those who were engaged in "project feminism" and their critiques.[28] Despite their differences, all these movements contributed to the problematization of gender inequality and problems faced by women. In this problematizations, violence against women was attached a special importance. The feminist movements of this era greatly expanded with the Solidarity March against Battery (*Dayağa Karşı Dayanışma Yürüyüşü*) that was organized in 1987. Since then, violence against women has been a key issue in public debates on gender in Turkey.

Another important development was the emergence of intimate violence as a global concern, especially through the activities of the UN.[29] Beginning with the 1980s, this transnational trend provided a push for the recognition of women's rights across the world. Some of the institutional and legal developments of this era were closely affected by this development. For example, the General Directorate for Women's Status and Problems (*Kadının Statüsü ve Sorunları Genel Müdürlüğü*) was established in this period under the influence of this international trend and domestic feminist activism.[30] Another related issue was the establishment of the CEDAW framework and Turkey's participation in it. This Convention and the activities of the UN provided pushes for reform in Turkey – especially in the second half of the 1990s. However, as I examine in the next section, there were various problems in the translation of this transnational trend and the demands of feminist movements into Turkish high

[28] Filiz Koçali, "Kadınlara Mahsus Gazete Pazartesi," in Bora and Günal, *90'larda Türkiye'de*, 73-87; and Belkıs Kümbetoğlu, "Kadınlara İlişkin Projeler," in Bora and Günal, *90'larda Türkiye'de*, 125-159.

[29] For a brief overview of the history of this trend, see UN, "The United Nations Work on Violence against Women," https://www.un.org/womenwatch/daw/news/unwvaw.html.

[30] Selma Acuner, "90'lı Yıllar ve Resmi Düzeyde Kurumsallaşmanın Doğuş Aşamaları," in Bora and Günal, *90'larda Türkiye'de*, 125-159.

legalese, and these two key developments did not ensure the transformation of the regime of intimate violence in Turkey in an egalitarian fashion.

Reflecting on the developments of this era, Nermin Abadan Unat notes that the coup delayed the adoption of some measures, such as the legalization of abortion.[31] The relevant amendment draft was simply put on shelf after the coup and was only adopted after a three years delay. The efforts for the adoption of a new and more egalitarian Civil Code shared a similar fate. These efforts briefly came to a halt after the coup. Later on, a new drafting commission was established and this commission prepared a draft from which many stipulations that ensured inequality were excluded.[32] However, unlike the abortion amendment which was adopted despite some delay, the efforts for the re-organization of family relations through the adoption of a new civil code did not bear any fruit for decades. As examined in the subsequent sections of this chapter, in terms of the norms examined in this study, there was not a delay in terms of the acceptance of reform demands raised in the 1970s but a solid turn towards the expansion of accommodation granted to intimate violence. In other words, the coup was not only followed by the shelving of some gender-related reform schemes but also by the introduction of some particularly violent measures in terms of the regulation of intimate violence.

The 12 September Coup was a significantly violent event. The scale of prosecution and torture that it brought with was much greater than the previous coups.[33] Moreover, in the second half of the 1980s, the Kurdish conflict transformed into a large-scale military conflict. Terrorist attacks targeting civilians and clashes between the PKK, and state forces were

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[31] Nermin Abadan, *Radikal*, 2012, cited in Hazal Atay, "Kürtaj Yasasının Arkeolojisi: Türkiye'de Kürtaj Düzenlemeleri, Edimleri, Kısıtları ve Mücadele Alanları," *Fe Dergi* 9, no. 2 (2017): 9.

[32] Selim Kaneti, "A General Review of the New Turkish Civil Code Project," *İÜHFM* 52, no. 1-4 (1987): 335-344.

[33] After this coup, hundreds of thousands were detained, arrested, and/or tortured. Aydın and Taşkın, *1960'tan Günümüze*, 330-331; and Erik J. Zürcher, *Turkey: A Modern History*, 4th ed. (London: I.B. Tauris, 2017), 285.

accompanied by mass human rights violations.[34] In other words, this was an era in which various forms of violence were effective in shaping everyday life in Turkey. The impact of these developments on the transformation of norms and rules concerning intimate violence can only be explored in a more specific study. However, I think that this normalization of violence, especially of state violence, should be taken into consideration for making sense of the transformations of the regime of intimate violence in this period.

§ 6.2 Developments and Debates Related to Intimate Violence in High Legalese

In the 1980s and 1990s, intimate violence was problematized by a number of actors at different levels of politics across the world. In many countries, there were feminist initiatives against impunity for battery and pushes for the provision of shelters.[35] This trend also affected the debates at the level of international organizations.[36] In the 1980s, the UN took several measures to address the issue and urged the member states to take the necessary steps for ensuring adequate responses to domestic violence.

In 1990, domestic violence was discussed as a specific agenda item at the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders. For this congress, the secretariat prepared a report on domestic violence. In the report, it was underlined that this form of violence was generally pushed beyond the purview of criminal justice systems for many reasons, including the "emphasis put on family."[37] It was noted that

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[34] Aydın and Taşkın, *1960'tan Günümüze*, 393-399.

[35] Kantola, *Feminists Theorize*; and Schneider, *Domestic Violence.*

[36] For an ethnographic account on consensus building at the UN, see Merry, *Human Rights*.

[37] The UN Secretariat, *The Report of the Secretariat on Domestic Violence,* A/CONF.144/17 (20 July 1990), 3.

this exclusion contributed to the perpetuation of this practice.[38] Reform attempts in different countries (such as criminal justice reform initiatives or criminalization of marital rape) were highlighted and the secretariat called for the abolition of the differentiation of stranger violence and family violence in terms of their legal outcomes, along with the adoption of measures to provide safety for victims.[39] In the 1990s, intimate violence became an even more discussed and problematized issue at the international level and the CEDAW Committee began to play an active role in monitoring the related developments in different countries.

As noted in the previous section, intimate violence was also problematized strongly by domestic actors in Turkey. In order to trace the demands and critiques of feminist movements in this era, I reviewed all issues of *Feminist, Kaktüs,* and *Pazartesi.* In these publications, the recognition of women's sexual and bodily autonomy was established as a necessity, impact of violence on women's lives, and the inadequacy of the responses of the justice system were exposed. There were also calls directed at readers that encouraged campaigning and organizing against different forms of gender violence.

In this period, there were various campaigns against gender violence. The March against Battery was followed by the Purple Needle Campaign[40] which problematized sexual harassment, and the campaign for the abolition of prostitution mitigation, which ended with the abolition of this stipulation.[41] Thus, feminist activists had not only contributed to the problematization of gender violence. Some of these campaigns had tangible outcomes. However, it is not possible to conclude that all aspects of this problem were addressed in these campaigns. To be specific, the campaigns of this era hardly touched upon the legal aspect in terms of

[38] Ibid., 11.

[39] Ibid., 24.

[40] On these two campaigns, see Gülhan Balsoy, "Dayağa Karşı Dayanışma ve Mor İğne Kampanyalarında 'Şiddet' ve 'Cinsel Taciz'in Kavramsallaştırılması," *Reflektif* 2, no. 1 (2021): 49-60.

[41] "438'e Hayır!," *Kaktüs* 10 (1990): 6.

the problem of intimate violence. For example, in this period, the problems posed by the extraordinary mitigation article which provided a sentence reduction by 7/8 were not addressed in these publications. Conditional criminalization of domestic violence through the ill-treatment article was also not recognized or explicitly problematized. According to an article from 1987, family violence was not differentiated from stranger violence in Turkish law because it was regulated through article 456 (effective deed/physical assault).[42] Thus, what was problematic was not the code but merely its implementation. In other words, impunity and under-sentencing did not stem from legislation but from legal practice. As examined in this study, it was actually differentiated. In sum, there were strong feminist problematizations of gender violence in this era but there were also many important legal aspects of the issue that went unadressed.

In this period, feminists achieved to problematize intimate violence, called for an end for impunity, and under-sentencing and advocated for the provision of safety measures through shelters. Strikingly, the demands and campaigns which had specific targets were successful. Despite various difficulties posed by some male politicians, women were able to establish and run shelters.[43] Later on, the state responded to this demand by opening more shelters.[44] However, unlike the shelter campaign and the call for the abolition of the prostitution mitigation article, the calls for the elimination of intimate violence and termination of impunity and under-sentencing were not specific. What was the state expected or demanded to do to achieve these objectives? This was not clear.

This, of course, does not mean that not a single feminist problematized these legal and judicial norms. For example, in an article on law and

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[42] Sedef Öztürk, "Taraflı Bir Kitap Tanıtma Yazısı: Bağır Herkes Duysun," *Kaktüs* 1 (1987): 70.

[43] S. Nazik Işık, "1990'larda Kadına Yönelik Aile İçi Şiddetle Mücadele Hareketi İçinde Oluşmuş Bazı Gözlem ve Düşünceler," in Aksu and Bora and Günal, *90'larda Türkiye'de*, 64.

[44] Berna Ekal, "Collaboration Gone Awry: The Formation of Women's Shelters as Public Institutions in Turkey," *Mediterranean Politics* 24, no. 3 (2019): 320-337.

gender violence, Canan Arın problematized the CCa's interpretation of the crime of ill-treatment.[45] However, some other norms like the extraordinary mitigation or the fact that not all forms of ill-treatment were actually criminalized in the TCC were largely missing from this problematization. In this period, there were no campaigns against these norms, and they were missing from the pages of feminist periodicals like *Pazartesi*.

Another striking example concerning this issue is the CEDAW Shadow report prepared by one of the main women's rights organizations of this era, Women for Women's Human Rights-New Ways. The Equality Watch Committee and the Purple Roof Foundation also contributed to this report.[46] In this report, honor killings and intimate violence were described as grave problems. Impunity and under-sentencing were also problematized in this text which highlighted several stipulations in Turkish law that needed to be reformed for the implementation of the CEDAW in Turkey.

What is striking is that there was not a single sentence about the extraordinary mitigation in this report. What the activists demanded for the solution of these problems was a legislative reform that would ensure the abolition of the age-based mitigation (according to which sentences of all children who commit crimes are reduced), allow the participation of women's organizations in such trials, and hinder the judicial practice according to which cultural attitudes were accepted as grounds for mitigation.[47] In other words, the report had not demanded the abolition of the extraordinary mitigation article which ensured practical impunity (through a sentence reduction by 7/8), abolition or re-designation of the unjust provocation mitigation, or criminalization of all forms of intimate violence through the abolition of the incompatibility with mercy and compassion criterion.

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[45] Canan Arın, "Kadına Yönelik Şiddet Açısından Türk Hukuku'nun Kadına Yaklaşımı," in *Evdeki Terör* (Istanbul: Mor Çatı Yayınları, 1996), 132.

[46] WWHR-New Ways, *NGO Country Report on Implementation of the CEDAW in Turkey*, 1997.

[47] Ibid., 2.

Why were these norms not strongly and specifically problematized in this period? Why did not women's organizations and feminist activists demand changes in the code in terms of the extraordinary mitigation or ill-treatment? I think various factors might have informed this situation.

One of the factors that contributed to this outcome might be the male dominance in the legal field, especially in the field of criminal law. By the 1990s, there were thousands of women law graduates in Turkey because law was one of the most popular profession choices among educated women[48] and there were many women lawyers among the feminist activists of this era. However, criminal law scholarship was highly dominated by men. This male dominance in the domain of knowledge-production might have limited the types of expertise and knowledge accumulation available for feminist movements and actors.

Second, the nature of available legal knowledge might have played a role in this. On some of these issues, there was hardly anything critical that had been written. For example, it would have been difficult to recognize the problems inherent in the legislative designation and workings of the ill-treatment article because, until the late-1990s, these were not identified in criminal law scholarship. In the absence of such knowledge, recognizing the fact that the problem was not only implementation but also the text of the code would be difficult. However, this does not explain why the extraordinary mitigation, which had been problematized by all commentary-writing scholars for decades and by the socialist women lawyers of the 70s, was missing from these problematizations and critiques. I think that the violence and silencing effects of the 12 September Coup and removal of gender progressive men and women from the academia might have impeded the rise of such critiques in the post-1980 era. The pure violence of the post-coup years and pressures targeting critical voices might have hindered the continuation of earlier debates and problematizations.

Another factor that might have informed this lack is the characteristics of the framework through which some feminists and women's rights

[48] Öncü, "Uzman Mesleklerde," 272-273.

activists interpreted women's problems in Turkey. The dominant framework of this era was informed by feminist activism and scholarship in the global north, especially in the US. According to this framework, the main problem related to intimate violence was the private/public divide and what was to be done was pushing for the abolition of the privacy doctrine, and for the establishment of shelters. In this framework, there was hardly any place for code-based mitigation articles or stipulations that explicitly guaranteed the exclusion of trivial complaints from the domain of criminal law. [49]

Fourth, the difficulties of speaking about the past might have informed this silence. Both the extraordinary mitigation and conditional criminalization of non-lethal intimate violence had their roots in the TCC that was adopted during the early Republican era. Attacking them would invite a questioning of early republican history, and such attacks or critiques could undermine the state discourse according to which women were emancipated with the establishment of the Republic. Criticisms targeting the early Republican era were not unheard of in this period.[50] In other words, not all activists or scholars avoided from taking such steps. However, this might have been a factor that deterred some others.

Finally, as underlined by Koğacıoğlu, some women's rights activists and organizations embraced and promoted the dominant culturalist discourse of the post-coup era, according to which honor crimes were essentially related to the cultural characteristics of the masses, Turkish society and/or Kurds and this framing created a tradition effect saving secular institutions and law from blame.[51] This might have also hindered the emergence of wide-spread problematizations targeting legislation.

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[49] This framework was not only popular. It was sometimes harshly defended against alternative frameworks or questionings. For example, the suggestions that experiences of all women across the world could not be explained with universal frameworks or frameworks developed on the basis of Western history and that private-public dichotomy failed to explain all of women's problems in Turkey were marked as orientalist. Gülnur Savran, "Özel Alan/Kamusal Alan İkiliği Batı Merkezli Mi?," *Pazartesi* 54 (1999): 14-15.

[50] Tekeli, *Kadınlar*.

[51] Koğacıoğlu, '' Tradition Effect''.

In sum, there might have been various factors behind this lack of specific problematization. However, its effects seem clear. This lack of targeted problematization and silence about legal norms regulating intimate violence facilitated the reproduction of these norms because, in the absence of such problematizations, there was no specific push for the juridico-political elite to address or change these norms.

Before conducting this research, I was expecting to find some debates concerning intimate physical violence in the forums of high legalese because I was aware of the outlines of this transnational trend and I had read extensively on the feminist campaigns of this era. I expected to find some debates and problematizations triggered by these developments. Surprisingly, I could not find much. A person who lived in a bubble and followed the political, and legal debates, and developments in Turkey in the 1980s and early 1990s only through journals like *the IUHFM* or *the Journal of the Court of Appeals* would have no idea that there were feminist campaigns against intimate violence attended by thousands. Unlike the previous era in which transnational trends concerning gender relations were translated in such periodicals, the transnational trend towards the criminalization of different forms of intimate violence and the recognition of gender violence as a human rights issue was largely missing from these pages in the 1980s and 1990s. In other words, in this period, neither these transnational trends nor the demands of feminists were successfully translated into Turkish high legalese.

I think three factors might have informed this situation. First of all, some high legalese forums were closed in this period. For example, *Mukayeseli Hukuk Araştırmaları Mecmuası*, through which the trend towards the recognition of sexual autonomy, and freedom was translated into Turkish high legalese in various ways in the 1960s and 1970s, was not published between 1978 and 1990. Secondly, some key gender progressives, who could play active roles in such translations, were removed from their posts. Third, the emergence of repressive familism as state policy after the coup might have hindered such translations. In a context where academic and judicial freedom had been curbed, it might have

been more difficult for the actors in these institutional fields to fight against what had emerged as state policy.

The pushes of some male criminal law scholars and jurists for the recognition of sexual autonomy with regards to some issues such as abortion continued in the early 1980s.[52] There were also some translations from the world with regards to law and sexuality. For example, CCa judge Bülent Akmanlar, a flagbearer of the extensive interpretation approach, wrote a news from the world section for the *Yargıtay Dergisi*, until his resignation from the court in 1987. In that section, there were some brief remarks on issues like the de-criminalization of adultery, or same-sex sexual relations and criminalization of marital rape in different countries.[53] However, these pushes were scant and rather vague and, as far as I was able to trace, did not include problematizations of intimate control murders or non-sexual marital violence. Moreover, there were various counter-pushes, raised through texts underlining the primacy of family and the need for hierarchical family relations, and adherence to social norms.[54]

By the 1990s, there were feminist movements emphasizing the importance of sexual autonomy and questioning sexual norms.[55] On the other hand, there was nothing that can be compared to the debates of the 70s in terms of institutions. As far as I was able to trace, there was no scholar or jurist author who called for the complete abolition of unjust provocation or non-implementation of unjust provocation in all cases related to honor defenses in these years. Another important element of the

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[52] Duygun Yarsuvat, "Ceza Hukukunda Gebeliğin Durdurulması Meselesi," *İÜHFD* 48, no. 1-4 (2011): 451-471; and Faruk Erem, "Soyunu Sürdürebilmek Özgürlüğü," *YD* 7 (1981): 236-240.

[53] Bülent Akmanlar, "Karşılaştırmalı Hukuk Açısından Uluslararası Çalışmalar, Gelişmeler, Haberler," *YD* 9 (1983): 388-392.

[54] Cengiz Koçhisarlıoğlu, "Aile Hukukunda Eşlerin Eşitliği," *AÜHFD* 40, no. 1-4 (1988): 251-279; and Sulhi Dönmezer, *Sosyoloji* (Istanbul: Beta, 1990), 249-301.

[55] Sexuality was an openly discussed topic in feminist publications like *Feminist* and *Pazartesi.* For an account on these movements, see Ayşe Gül Altınay, "Bedenimiz ve Biz: Bekaret ve Cinselliğin Siyaseti," in Bora and Günal, *90'larda Türkiye'de*, 323-345.

1960s and 70s, challenges to the regime with references to the sexual liberalism of Ottoman-Turkish history or peasant culture, were also missing from the institutional parole of this later period.

In the 1980s, the need for order and discipline at the levels of the state and family was emphasized by various actors. For example, in a paper on the freedom of will and the subconscious, Erem argued that psychologists and psychiatrists should take a greater role in the judicial field. Punishment had to take the form of 'treatment' and such experts on human soul were better equipped than judges for finding out people's real motives and drawing up effective treatment plans. This was not an original idea but an approach that has been defended by many across the world in the 20th century. What is particularly interesting for this study is Erem's vision of the future. In this ideal future, discipline would replace punishment (*ceza yerine terbiye kaim olacaktır*).[56] Erem's interest in psychology was not new. However, in his earlier work where he provided a humanist interpretation of the TCC, he had not established the enforcement of social discipline as the objective of criminal law.[57] In other words, in the 70s, his position was different from Dönmezer who argued that the aim of criminal law was ensuring adherence to social norms and social discipline.[58] This suggests that Erem had also moved closer to Dönmezer in some regards by the 1990s.

As I showed in the previous chapter, neither the parallel established between family discipline and social discipline nor the idea of conceptualizing delinquency as deviation from social norms and criminal law as a tool of ensuring social discipline and adherence to not only legal but also social norms were new. However, in the previous era, these ideas were strongly contested by many members of the juridico-political elite. After 1980, however, they acquired a novel dominance.

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[56] Faruk Erem, "Psikanalizm Açısından Ceza Hukuku," *AÜHFD* 44, no. 1-4 (1995): 479-488.

[57] Erem, *Ümanist*.

[58] Dönmezer and Erman, *Nazari ve Tatkibiki*, vol. I, 1-5.

I think this should be taken into consideration in analysis of the transformations of the regime in this period. If family discipline were to be accepted as a necessity for the good of the state, acts committed to ensure this discipline could (or maybe had to) be encouraged and tolerated for the sake of the state. Moreover, according to many scholars, jurists, and some feminists, there were social norms that led people towards violently responding to transgressions of social conventions regarding modesty, honor, and gender roles.[59] Unlike the previous era, where this culturalist argument was challenged on cultural grounds, this understanding was very dominant in the post-1980 era. If it was to be accepted that the objective of criminal law was ensuring adherence to social norms, there would be no point in punishing such 'disciplinarians' or social norm enforcers. The newly acquired dominance of these discourses might have affected how jurists thought about and decided upon intimate violence in this era.

In terms of legislation concerning criminal law and intimate violence, there were two important initiatives. In 1985, the Ministry of Justice established a criminal code drafting commission. This commission which was led by Dönmezer submitted a first draft in 1987 and a second draft in 1989. These drafts were not adopted by the parliament. However, they provide important insights for the transformations of this regime.

In the 1989 Draft,[60] the two-layered family burdens aggravation was maintained. Murder or physical assaults committed against ascendants or descendants was aggravated in the maximum extent. Violence against siblings or spouses, on the other hand, was established as something of lesser importance. There were also no major changes concerning unjust provocation.

In this Draft, there were some interesting changes concerning the extraordinary mitigation and the ill-treatment article. According to this Draft, the group of actors who could benefit from extraordinary mitigation would be limited. The proposed extraordinary mitigation article (art.

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[59] Erdem Akkay, "Irza Geçme," *İÜHFD* 51, no. 1-4 (1985): 653-657; and *Türk Ceza Kanunu Öntasarısı* (Ankara, Mart 1989); and *Shadow NGO Report*.

[60] *Türk Ceza Kanunu Öntasarısı*, Mart 1989.

219) was limited to spouses. In the justification explanation, it was stated that this stipulation "reflected the impact of ancient Western law, according to which husbands had a right to kill their wives upon catching them committing adultery." Thus, one "could think" that the unjust provocation clause would be "enough" in such cases. "However," the drafters noted, "keeping such an article in the code was assessed to be appropriate -given the fact that the honor and reputation conception of our society became settled in a very strong way and with a particular content and affects the mentality [of people]."[61] Its scope, on the other hand, was limited because of "the stated reason."

There is an apparent contradiction in this reasoning. On the one hand, this mitigation was marked as a product of Western legal history, and culture or as an 'outsider' to Turkish legal history. This was why the drafters had limited it. On the other hand, its maintenance in the code was justified on the basis of Turkish culture, more specifically on the basis of the cultural attitudes of Turkish masses. Thus, the license to kill article was limited because it was 'foreign' but maintained because it was 'ours.'

The Draft also had some novelties concerning the crime of ill-treatment. First of all, this crime was removed from the list of crimes against persons and was placed under the heading of crimes against the public order. Thus, it was textually separated from other crimes of personal violence such as murder or physical assault. As examined in Chapter 3, such a move was made in Mussolini's Italy in the 1930s but this was not followed by the Turkish legislators of the time. In the late-1980s, at the height of domestic feminist movements protesting intimate violence and at a time when intimate violence had emerged as a global concern, Turkish drafters were imitating the fascist Italian legislators of the 1930s with a lapse of five decades and marginalizing intimate violence within the text of the Code.

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[61] "*… ancak toplumumuzda geçerli namus ve şeref telakkisinin çok güçlü olarak ve belirli bir muhtevada yerleştiği ve zihniyetleri etkilediği gözönünde bulundurularak böyle bir maddenin muhafazası uygun mütalaa edilmiş*…" Ibid., 329.

The justification explanation of this article is also interesting. In this explanation, trivial complaints were explicitly pushed beyond the scope of law. The drafters noted that not all ill-treatments would lead to the emergence of this crime and that this crime could only occur if ill-treatment was of a certain gravity (*belirli bir ölçüde vehamet taşıması*).[62] In line with the scholarly interpretations of this crime in the 1970s, the drafters defined ill-treatment as acts that significantly violated bodily integrity, personal dignity, and freedom. However, they noted that acts against bodily integrity that took the form of physical assault would be excluded from its scope. According to the justification explanation, anal marital rape, depriving someone of sleep, food, or water or forcing someone to spend the night outside in the cold were examples of this crime. In other words, various forms of torture were specifically listed as examples of this crime which was now textually separated from other crimes of violence. Furthermore, in terms of marital violence, the punishment stipulated for this crime was lower than the punishment stipulated by the legislation in force. The legislation in force stipulated imprisonment for up to 30 months for this crime, on condition that it was committed against people who were not ascendants or descendants – for example, against wives. For ill-treatments targeting ascendants and descendants, the stipulated punishment was imprisonment between 3 months and 3 years. In the 1989 Draft, the minimum imprisonment term for the latter group was increased (art. 329). However, according to this Draft, ill-treatments targeting other people (such as wives) could only be punished with imprisonment up to 2 years.[63] In other words, if this Draft were to be adopted, the stipulated maximum punishment for marital ill-treatment would be reduced by 1/3.

As noted, the parliament did not adopt a new criminal code or amended the relevant stipulations of the existing code in this era. However, these drafts informed the legal debates of this period and shaped the course of later drafting initiatives.

[62] Ibid., 385.

[63] Ibid., 120.

Another important initiative concerning legislation was the amendment proposal concerning the crime of ill-treatment. In 1990, Ahmet Ersin, a deputy from the Social Democrat People's Party (*Sosyaldemokrat Halkçı Parti*), submitted a proposal for the amendment of this article.[64] According to this proposal, the minimum and maximum punishments stipulated by the code would be increased. Ersin underlined that battery and ill-treatment were the most important sources of marital disputes and noted that article 478 was about such acts of violence that needed to be met with punishment. Interestingly, Ersin's proposal did not include a demand for the unconditional criminalization of such acts. In other words, he did not propose to abolish the incompatibility with mercy and compassion requirement. What he proposed instead was limiting victim's autonomy over the trial process and introducing a court-based mediation procedure. According to the scheme he proposed, prosecution of this crime would not depend on complaint. Thus, even if there was not a complainant, there would be a prepatory investigation process. After this, the victim would be granted the opportunity "to forgive the perpetrator" before the court and the perpetrators "who were momentarily moved by anger" (*bir anlık öfkeye kapılarak*) and used brute force or committed ill-treatments through other means, would be given the opportunity to "regret their actions and seek forgiveness" (*pişmanlık duyup, af dileme şansı*). On the other hand, this opportunity to seek and grant forgiveness before court would not be granted in case the same person were to be investigated for this crime for more than once.

Ersin's proposal was rejected by the justice commission which underlined that the TCC did not have a "reconciliation" (*barışma*) procedure.[65] Thus, this proposal did not affect the legislation in force. However, I think that this amendment proposal is interesting and important for various

[64] Ahmet Ersin, TBMM Sosyaldemokrat Halkçı Parti Grup Başkanlığı, no. 154, 4 May 1990. Enclosed in the parliament file on the Law No. 3756, 6 June 1991, *RG* 20901, June 14, 1991, https://www5.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d18/c061/tbmm18061123ss0513.pdf

[65] TBMM Adalet Komisyonu, "Adalet Komisyonu Raporu," E. 1/757, 2/276, 2/345, 2/420, 2/442, K. 41, 4 February 1991, enclosed in the parliament file on the Law No. 3756, 6 June 1991.

reasons. First of all, Ersin's proposal was strikingly similar to the late-Ottoman legislation which granted family members and acquittances the right to forgive the perpetrator in cases of non-aggravated physical assault. As examined in previous chapters, this measure was abolished after the establishment of the Republic and there were calls for the adoption of a similar norm through case-law in the 1940s and 1950s, but, in the 1960s, these calls were largely suppressed by the CCa through a decision for the unification of case law. What Ersin demanded was the reintroduction of a such measure. It is not clear whether he was aware of this Ottoman stipulation and earlier debates or not. However, the match between the outlines of his proposal and this late-Ottoman stipulation indicates that the idea of an exceptional right to forgive reserved for cases of intimate violence resurfaced in this era. Secondly, Ersin's proposal would introduce a mediation mechanism for intimate violence. If this proposal were to be accepted, intimate violence would be further differentiated from other crimes of bodily violence such as physical assault. It would be a special crime subject to different procedures. This was very much in line with the reform frameworks of Mustafa Tören Yücel from the 1970s and Ersin's proposal might have been informed by these earlier suggestions. Moreover, this proposal was submitted by the Social Democrat People's Party, the main leftist party in the political scene in these years. This shows that, in the post-1980 era, such calls for the differentiation of intimate violence from stranger violence and the introduction of special procedures and norms (such as the right to forgive) were not exclusive to right-wing politics. In other words, by the 1990s, the discursive universe had shifted so much that even the mainstream leftist party endorsed such a language.

Another important document which provides insights on this issue is the Justice Report (*Adalet Raporu*) of Birlik Vakfı. Birlik Vakfı is a right-wing political foundation. Recep Tayyip Erdoğan, Cemil Çiçek, and Abdülkadir Aksu were among its founding members. The Justice Report was written by active and retired CCa judges, and Şakir Şeker, a member of the Motherland Party and a former minister of justice.[66] This report also

[66] O. Kadri Keskin et al., *Adalet Raporu* (Ankara: Birlik Vakfı, 1996).

reflects the outlines of the Turkish-Islamic synthesis that was visible in the National Culture Report of 1983. It was argued that the primary factor behind the rise of crime rates was the transformation of the "national and moral structure" (*milli ve manevi yapımız*). Some unidentified forces were severing the links between the Turkish people and their identity.[67] The solution was educating the citizenry along the lines of religious norms and values and enhancing these values.[68] The authors of the report also proposed the introduction of reconciliation procedures to the Turkish justice system, legitimizing it with references to the past. I think that this document is important because it shows that the idea of introducing reconciliation procedures was quite popular across the political spectrum in this era.

In this period, there were no large-scale debates concerning non-lethal intimate violence and criminal law in the forums of high-legalese. However, there were some rather technical disputes concerning the crime of ill-treatment. On the one hand, there were conservative approaches to this crime. For example, referring to Özütürk's elaborations that were grounded on the debates that accompanied the preparation of the ICC in the 19th century, Savaş and Mahmutoğlu argued that this crime also covered non-aggravated physical assaults. They also claimed that there were modern scholars who thought that husbands had a right to chastise their wives. [69] They thus portrayed this as a valid scholarly position. Many authors underscored that insignificant harms or trivial complaints would not suffice for the emergence of the crime of ill-treatment or abuse of authority. For example, Ayhan Önder, one of the reformists in many regards, claimed that pushing someone or hitting her with a ruler would not create 'harm' (*zarar oluşturmaz*).[70] Such acts lacked the necessary gravity (*ağırlık*) and could not be punished as abuse of disciplinary authority. There were also supporters of the idea that ill-treatment was a

[67] Ibid., 14.

[68] Ibid., 15.

[69] Savaş and Mollamahmutoğlu, *Türk Ceza Kanununun,* vol. IV, 4741.

[70] Önder, *Şahıslara,* 212.

continuous offense which would not occur when an act of ill-treatment was committed only for once.[71] There were also debates concerning the question of who could be considered as a family member in terms of this crime.[72]

In some elaborations on this crime, there was a reformist tone. This tone is traceable in the writings of scholars such as Ayhan Önder, Çetin Özek, and Sahir Erman, who were also reformist in some other gender-related criminal law matters such as the extraordinary mitigation. For example, unlike many other authors, Ayhan Önder emphasized that battery or physical assault could not be considered within the scope of this crime and argued that ill-treatments did not have to be habitual in order to be met with criminal sanctions.[73] In a book published in the mid-1990s, Özek and Erman objected to the case-law according to which anal marital rape was pushed into the scope of this crime rather than being punished as sexual assault, arguing that this reflected an outdated and uncivilized (*çağdışı ve gayrımedeni*) approach to marital relations.[74] They also problematized the 1956 decision for the unification of case-law, according to which deprivation of liberty by husbands could not be punished as such if it was committed with the aim of protecting family unity. The most scandalous parts of this decision were the parts in which the court established a parallel between the rights of parents over their children and the rights of spouses over their wives and claimed that husbands could imprison their wives to control their behavior. While not analyzing these parts, Özek and Erman problematized this decision and argued that the court had transgressed its constitutional authority by "creating a totally

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[71] Savaş and Mollamahmutoğlu, *Türk Ceza Kanununun,* vol. IV, 4744; and Ali Parlar and Güleç Demirel, *Kişilerin Hayatına ve Beden Bütünlüğüne Karşı Suçlar* (Ankara: Adalet Yayınevi, 2002), 788.

[72] Sahir Erman and Çetin Özek, *Ceza Hukuku Özel Bölüm -Kişilere Karşı İşlenen Suçlar* (Istanbul: Dünya Yayıncılık, 1994), 247-248; Sulhi Dönmezer, *Kişilere ve Mala Karşı Cürümler*, 16th ed. (Istanbul: Beta, 2001), 264; and Savaş and Mollamahmutoğlu, *Türk Ceza Kanununun,* vol. IV, 4743.

[73] Önder, *Şahıslara*, 214-219.

[74] Erman and Özek, *Kişilere*, 250.

new code" (*yepyeni bir kanun yaratarak*) through the adoption of the specific intent requirement.[75] Erman and Özek also underlined that the incompatibility with mercy and compassion criterion was an invention of Turkish law-makers and that it ensured the partial or conditional criminalization of such acts. Thanks to this criterion, some ill-treatments, ill-treatments that were interpreted to be compatible with mercy and compassion, were allowed by law (*cevaz vermekte*).[76] As far as I was able to trace, this was the first (and maybe only) high legalese text which highlighted the fact that this criterion was an invention of Republican law-makers and served the end of ensuring impunity.

Strikingly, such reformist elaborations were sometimes accompanied by some very conservative assumptions and approaches. On the one hand, Erman and Özek wrote that acts that constituted other offenses should not have been considered as ill-treatment.[77] They argued that rape or deprivation of liberty should not have been pushed to the scope of ill-treatment. This approach was much more limitative than the regime in place because such acts were considered as ill-treatment and were accordingly under-punished or met with impunity by the CCa. However, Erman and Özek also argued that some other forms of violence -such as threat, insult/swearing, or non-aggravated physical assault- had to be considered as ill-treatment.[78] In other words, even these two scholars, who were critical in their approach to this crime and to the relevant interpretations of the CCa, supported the idea of pushing certain acts of violence into the scope of this crime.

It is also important to note that there were scholars who legitimized the outlines of the 1956 decision concerning deprivation of liberty. Thus, this important element of the regime was not criticized by all scholars or jurist authors. For example, Artuk, Gökçen, and Yenidünya criticized this decision, arguing that it was wrong for the CCa to establish specific intent

[75] Ibid.

[76] Ibid., 251.

[77] Ibid., 250.

[78] Ibid., p. 252.

as an element of this crime. However, they argued that this decision could be interpreted as having introduced an 'awareness of illegality' (*hukuka aykırılık bilinci*) requirement.[79] According to them, perpetrators who had committed this crime without being aware of the fact that what they did was wrong, harmful, or unallowed should not be punished. In other words, the 1956 decision was inappropriate for the terminology it employed, but its main outcome -pushing such acts outside the field of criminal law- was appropriate. As seen in this example, there was not a critical stance against some key elements of the regime of intimate violence among all scholars.

As examined in the next part, the CCa considerably expanded the applicability of the unjust provocation mitigation in these years. In the criminal law scholarship of this era and in the high legalese forums that I examined, there was no dramatic opposition to this expansion. Many authors approved the interpretation according to which immoral acts or acts that were against customs and traditions were unjust acts, requiring sentence reductions if responded by violence. In this period, the CCa considered a wide variety of gender norm transgressions such as socializing with other men, demanding autonomy or "sloughing off the institution of marriage and longing for an independent life" (*evlilik kurumunu ciddiye almayıp, başına buyruk bir yaşam özlemi içinde olmak*)[80] and even being raped as grounds for unjust provocation. This expansion did not meet with strong protests directly targeting the CCa practice. Moreover, until the 2000s, the idea that acts violating customs and traditions or social value norms were also unjust acts received widespread support from legal scholars.[81] This might have contributed to the perpetuation of this interpretation in judicial decision-making.

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[79] Mehmet Emin Artuk, Ahmet Gökçen, and Ahmet Caner Yenidünya, *Ceza Hukuku Özel Hükümler* (Ankara: Seçkin, 1998), 145-146.

[80] CGK, E. 1/220, K. 246, T. 30 September 1991, in Tutumlu, *Türk Ceza Hukukunda*, 52.

[81] Tutumlu, *Türk Ceza Hukukunda*, 24; Erem, *Ümanist*, vol. II, 55; Dönmezer and Erman, *Nazari ve Tatbiki*, vol. II, 376; and Necdet Yalkut, "Mukayeseli," 243-253. For a contrary view from the 2000s, see Nur Centel, Hamide Zafer, and Özlem Çakmut, *Türk Ceza Hukukuna Giriş* (Istanbul: Beta, 2016), 439.

In this period, scholars and jurists had no consensus concerning the interpretation of unjust provocation. With regards to some issues, there were critical voices. Could a criminal act that was being prosecuted or was already punished by the state be accepted as an unjust act? There was no consensus on this question. As I examine later, the CCa moved towards re-expanding the applicability of this mitigation by accepting that unjust provocation mitigation could be provided on such grounds. However, there were some jurists and scholars who were critical of this particular expansion. According to them, the right to punish (*cezalandırma hakkı*) lied with the state and this was why unjust provocation mitigation should not have been applied in such cases.[82] It is also important to note that the 1979 decision in which the CCa underlined the necessity for the monopoly of violence by referring to anarchy was utilized in these critiques. For example, Tutumlu directly referred to this decision in order to legitimize his point.[83] However, these scant critiques missed the point that most of these cases, including the much cited 1979 decision, were related to gender violence and gender norms. Thus, they were not gendered critiques of the regime.

Presumed provocation (*mefruz tahrik*) was also a disputed issue. As I examine in the next part, the CCa changed its interpretation concerning this issue in this period and moved to a point close to Dönmezer and Erman. According to this interpretation, there did not have to be a real unjust act for the implementation of this article. A simple defense such as 'I *thought* she was cheating on me' or 'I suspected that she had an affair although I was later proven wrong' would suffice for sentence reduction. In other words, punishments could be reduced even if there was no adultery.

As examined in the next part, this turn opened the way for sentence reductions in cases of violence targeting rape victims. According to this interpretation, the legal element of unjust provocation could be circumvented. Technically, being raped was not an unjust act. However, thanks to the circumvention of this requirement, perpetrators who killed rape

[82] Tutumlu, *Türk Ceza Hukukunda*, 99.

[83] Ibid., 27.

victims could be allowed to benefit from this sentence mitigation. This was a drastic turn in the regime of intimate violence in Turkey. However, while receiving some criticism from the ranks of jurist authors and scholars, it was not made into a scandal. For example, some authors raised their opposition to presumed provocation and criticized the changes in case-law. On the other hand, these critical voices were very technical and none of the authors whose works I examined elaborated on the implications of this shift for the regulation of gender violence.[84] Furthermore, some authors who were partly critical of this turn brought about a milder alternative. According to this alternative interpretation, perpetrators would not be allowed to benefit from unjust provocation if they had erred in the injustice of the act solely due to their own fault. However, their sentences would be reduced if the case involved the fault of a third party.[85]

As examined in the previous chapter, the trend towards the recognition of sexual freedom had a transformative potential in terms of the regulation of intimate violence. If people were accepted to be free in their consensual sexual conduct, transgression of norms related to sexuality could not be accepted as unjust. This potential had also brought about some changes in legal interpretation. In this era, this case-law transformation was interrupted and many of the limitative interpretations of the 1970s were shelved. However, this trend continued to affect the field of criminal law scholarship. The staunchest critiques of the unjust provocation mitigation and the extraordinary mitigation were built upon the recognition of sexual liberty. For example, in his examination on unjust provocation, Timur Demirbaş argued that sexual relations of a female sibling or descendant could not be accepted as a ground for unjust provocation because -as long as she was not married- such a relationship could not be seen as an act against the legal order (*hukuk düzenine aykırı*

[84] Yaşar Yavuz, "Haksız Tahrik," *YD* 4 (1991): 445-466; and Ayhan Önder, *Ceza Hukuku Dersleri* (Istanbul: Filiz Kitabevi, 1992), 348.

[85] Tutumlu, *Türk Ceza Hukukunda*, 47; and Timur Demirbaş, *Türk Ceza Kanununda Özel Tahrik Halleri* (Istanbul: Üçdal Neşriyat, 1985), 46-47.

eylem).[86] A similar opposition was also raised by Erman and Özek who argued that it was impossible to accept that such relationships involving unmarried people could be unjust.[87] In sum, scholarly interpretations against the application of this mitigation in such cases were built upon the idea of sexual freedom. On the other hand, it would be wrong to attribute the emergence of such critiques solely to the rise of this transnational trend. As examined in Chapter 2, early Republican legislators had made a distinction among such relations and limited the applicability of extraordinary mitigation to cases of adultery. Moreover, some feminists of the 1960s who had pushed for equality in sexual freedom had argued that the cases of married and unmarried people were different and that the former could not be accepted as sexually free. Thus, there was a long history behind this differentiation.

One of the most interesting aspects of these debates and elaborations was the conservativeness of the criticisms of this era compared to the previous period. In this period, no author who wrote in the sources that I examined called for the total abolition of unjust provocation or for the non-implementation of this mitigation in all cases justified on the basis of honor. At most, there were technical oppositions to the expansions of the CCa and some warnings concerning implementation. For example, in a 1999 book on unjust provocation, Tutumlu problematized some CCa decisions and argued against the widespread implementation of this article in cases related to honor or sexuality. However, what he proposed as an alternative was a very minor reform. According to his proposal, this mitigation would not be granted without thorough investigation and the courts would find out if there was a real gender norm transgression by women instead of a mere excuse.[88] In other words, the courts would return to the pre-1980 practice by taking a step back from the recognition of presumed provocation. What is striking is that this was one of the few material reform demands concerning unjust provocation in this era. The

[86] Demirbaş, *Türk Ceza Kanununda*, 154.

[87] Erman and Özek, *Kişilere,* 154.

[88] Tutumlu, *Türk Ceza Hukukunda*, 52.

limited nature of this demand shows how weak the pushes towards a limitative change were in this period.

In contrast to other articles of the Code that are examined in this study, there was strong opposition to the extraordinary mitigation article. This difference might have been informed by history. As examined in previous chapters, this article had already been problematized for more than three decades by scholars. In the post-1980 era, there were explicit references to sexual freedom in the critiques of this norm. For example, Timur Demirbaş argued that sexual intercourse was the most natural right of an adult (*en doğal hakkı*) and claimed that this mitigation violated sexual freedom which was protected by the 12th and 17th articles of the constitution as a basic right and freedom.[89] However, gendered critiques of this norm were scant. In this regard, Tutumlu's remarks that this norm functioned to create an advantage for men because of the patriarchal structure of the Turkish society and that it posed a threat against women's right to life were exceptional.[90] Moreover, in some examinations on criminal law reform, this article was completely left outside the scope of analysis.[91] There were also authors who argued that what needed to be done was reforming this article and limiting it to cases related to adultery rather than completely abolishing it.[92] In other words, there was no clear consensus for the abolition of this article.

Another important point is that almost every author who wrote on this subject underlined that in case this article were to be abolished, heavy unjust provocation mitigation should be applied to the cases of husbands killing their wives upon finding them committing adultery. According to many, there was no need for such an article since there was already a norm for granting heavy unjust provocation mitigation. This reasoning was embedded in the critiques of the previous era and shaped

[89] Demirbaş, *Türk Ceza Kanununda*, 110.

[90] Tutumlu, *Türk Ceza Hukukunda*, 81.

[91] Nevzat Toroslu, *Nasıl Bir Ceza Kanunu?* (Ankara: V Yayınları, 1987).

[92] Doğan Soyaslan*, Ceza Hukuku Özel Hükümler: Kişi ve Mala Karşı Cürümler*, vol. I (Ankara: Savaş, 1995), 152.

the future of the regime. When Turkey entered the process of criminal law reform in the 2000s, there was widespread consensus among scholars for the application of unjust provocation to such cases involving spouses.[93] It can be argued that reformists who had pushed for the abolition of this extraordinary mitigation had also contributed to the normalization of the idea that such cases could be met with sentence reductions through unjust provocation mitigation.

As noted, in the new criminal code drafts that were prepared in the 1980s, the extraordinary mitigation was maintained but limited to spouses. Some scholars and jurists appreciated this development. According to them, even a limitation was a step forward.[94] However, there were also harsh critiques. In its report on the 1987 Draft, the Turkish Bar Association presented a strong critique that was mostly in line with Erem's approach to the issue. In this report, it was underlined that this stipulation practically annulled punishment and reflected an ancient approach according to which husbands had a right to kill their wives. There was no place for such a norm in a country in which people could file for divorce. According to the report of the Bar, heavy unjust provocation would suffice in such cases.[95]

Sahir Erman and Çetin Özek were also among the critiques of the 1989 Draft with regards to this issue. This is especially striking since Erman was among the drafters in this commission. This suggests that the inclusion of this norm in the draft had happened despite some resistance. As noted earlier, the inclusion of this norm in the draft was justified by the drafters with reference to the beliefs and mentality of Turkish people and the particular character of their conceptions of honor. Taking Dönmezer's earlier writings into consideration, we can define this as the Dönmezerian approach. In the 1990s, Erman and Özek problematized

[93] In the 2000s, various gender reformist scholars accepted that unjust provocation mitigation could be applied to such cases. Türkan Yalçın Sancar, "Türk Ceza Kanunu Tasarısının (2000) Bazı Hükümleri Hakkında Düşünceler," *AÜHFD* 53, no. 4 (2004): 23; Devrim Aydın, "Yeni Türk Ceza Kanununda Haksız Tahrik," *AÜHFD* 54, no. 1 (2004): 235.

[94] See Eralp Özgen's comments in *Ceza Yasası Öntasarısı Paneli*, 38.

[95] "Türkiye Barolar Birliğinin Görüşleri," in *Ceza Yasası Öntasarısı Paneli*, 74.

this justification and approach, noting that this justification explanation "officially assumed and certified" that "some primitive feelings were still valid" in Turkish society (*böylece ilkel bazı duyguların toplumumuzda hala geçerli olduğu gerekçede resmen kabul ve tescil edilmekte*).[96] They challenged this assumption. According to them, the common moral sense (*ortak ahlak duygusu*) did not approve such killings, which were related to a misconception of the affect of honor (*şeref duygusunun yanlış anlaşılması*) and a perverted understanding of the notion of personal dignity (*kişisel haysiyetin sapık bir değerlendirmesi*).

In these elaborations, Dönmezer was not personally targeted. However, his response to this particular criticism suggests that he might have felt so. In a 2001 edition of his work on crimes against persons and property, he responded to this criticism without mentioning who had made it. He argued that criticizing the drafters of this code for attributing primitiveness to the Turkish society was very wrong (*çok hatalı idi*). According to Dönmezer, it was a sociological fact that each society had a unique value set and Turkish drafters were not alone in adopting such stipulations.[97] As seen in this debate, this issue had created some tension among criminal law scholars in the 1990s and 2000s.

Another important point in the elaborations of Özek and Erman is that these staunchest critiques of the extraordinary mitigation had a surprisingly expansionist interpretation of this article compared to some other scholars such as Dönmezer. For example, -unlike many other scholars and in opposition to the CCa's interpretation that was settled in the 1930s and upheld until the abrogation of this article in the 2000s- they argued that this stipulation did not establish a specific form of unjust provocation mitigation but a specific type of murder and physical assault.[98] Thus, they concluded that a person who committed murder under such circumstances could benefit from both the unjust provocation mitigation *and* the extraordinary mitigation. Furthermore, Erman and

[96] Erman and Özek, *Kişilere,* 154.

[97] Dönmezer, *Kişilere*, 177.

[98] Erman and Özek, *Kişilere,* 153.

Özek argued that a state of psychological crisis was not a requirement of this stipulation.[99] Hence, they argued, even the sentences of those who already knew about such affairs beforehand and who made plans to catch their victims under such circumstances should be reduced on the basis of article 462. This interpretation was also more accommodative than the interpretation of the CCa. In sum, perhaps the most extensive interpretation of this stipulation was presented by scholars who were most critical of it.

§ 6.3 Changes in the High Court Practice

After the coup, the CCa began to change its stance on a number of matters related to the regulation of intimate violence. In this process, the limitations introduced in the 1970s were rescinded through case-law and the accommodation granted to intimate violence in the field of law was extended in new ways. Moreover, the parole of the court became very explicit in terms of its masculinism.

First of all, in a very short time span, the CCa shelved the limitative interpretations of the previous decade. In the previous era, the court had limited the applicability of the unjust provocation mitigation in various ways. One of these was the exclusion of unjust acts that were under trial or had already been prosecuted or punished by the authorities from the scope of unjust acts on the basis of which this mitigation could be granted. According to the CCa judges who had led this shift, unless such a limitation was accepted, anarchy would prevail. In just about three years, this concern vanished.

This shift was clearly illuminated in a GCA decision from 1983.[100] In this case, the victim was a man who had raped a woman. He was tried and sentenced for rape. However, after completing his sentence and being released from prison, he was killed by the woman's father-in-law. In this case, the local court did not apply the unjust provocation mitigation

[99] Ibid., 157.

[100] CGK, E. 1/43, K. 275, T. 6 June 1983, in Savaş and Mollamahmutoğlu, *Türk Ceza Kanununun*, vol. II, 868-869.

because the unjust act had already been punished by the state. This decision was reversed by the CCa. In the end, the case was transferred to the GCA. In the final decision, all members of the assembly agreed with the chamber. According to this unanimous position, a fault could be accepted as unjust provocation even if it was punished by the state. This shift in interpretation had long-lasting effects. From then on, the CCa insisted on the application of unjust provocation mitigation in such cases.[101]

Another important limitation of the previous era was the establishment of a new hierarchy among masculine subject positions through case-law. Only husbands would be able to benefit from the greatest degree of mitigation in blood crimes related to adultery or sexual transgressions. According to this interpretation that focused on the marital union, such transgressions were not severe provocations for people like brothers or fathers. Moreover, unofficial husbands would not be able to benefit from this mitigation in the same extent with official husbands. Beginning with the 1980s, the court re-expanded the actor group who could benefit from severe unjust provocation mitigation. According to this interpretation, all sorts of relatives and even people from the same neighborhood or hometown (*hemşehri ve memleketli*)[102] could benefit from unjust provocation on the basis of honor defense. Plus, relatives like brothers[103] or unofficial husbands[104] could benefit from the same degree of mitigation granted to official husbands.

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[101] 1. CD, E. 1781, K. 2485, T. 21 September 1995, in Cengiz Otacı, *Genel Hükümlerle Bağlantılı Olarak Kasten İnsan Öldürme Suçları* (Ankara: Seçkin, 2009), 132; 4. CD, E. 17858, K. 14138, T. 2 October 2002, in Necati Meran, *Yeni Türk Ceza Kanunu* (Ankara: Seçkin, 2007), 183; and 1. CD, E. 2913, K. 3944, T. 5 November 2002, Meran*, Yeni Türk Ceza,* 181.

[102] CGK, E. 1-133, K. 192, T. 22 May 1989, in Tutumlu, *Türk Ceza Hukukunda*, 150.

[103] 1. CD, E. 1781, K. 2485, T. 21 September 1995, in Timur Demirbaş, *Türk Ceza Hukuku Genel Hükümler*, 9th ed. (Ankara: Seçkin, 2002), 429; Otacı, *Genel Hükümlerle Bağlantılı*, 599.

[104] CGK, E. 1-494, K. 438, T. 8 July 1985, in Savaş and Mollamahmutoğlu, *Türk Ceza Kanununun,* vol. II, 831-833.

This interpretation brought about a major change in terms of the regulation of intimate violence because it entailed a return to the extended family framework. In line with this turn, even very distant relatives were granted the opportunity to benefit from the greatest available mitigation on the basis of unjust provocation. In other words, this actor group was even broader than what might be considered as extended family proper (spouse, descendants, ascendants, and siblings) in terms of civil law. For example, in terms of Turkish civil law, the husband of an aunt is a very distant relative. One cannot legally demand his support in times of financial trouble.[105] In other words, he has no financial obligations towards the niece of his wife. Moreover, the niece of a wife is not one of his legal inheritors. The same is also true for relatives like the brother of a husband. However, even such relatives were granted the highest mitigation possible on the basis of unjust provocation mitigation in cases related to transgressions of sexual norms. In one such case, the husband of an aunt had killed a young woman who had left her husband, acting together with some other relatives. Despite the fact that he was not a very close relative, he was granted the maximum mitigation possible.[106] In another case, a young man had killed one of his uncles and a woman who was married to his other uncle upon rumors that they were having an affair. His sentence was also reduced on the basis of heavy unjust provocation with references to the conceptions of morality, beliefs, and customs of the society.[107]

Another important development in this regard was the shelving of the reality requirement. In the 1970s, the CCa had changed its approach to putative/presumed provocation. According to this limitative interpretation, there had to be a real unjust act for the application of this mitigation. In the post-1980 era, the court expanded the applicability of this mitiga-

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[105] For an examination of financial support requirements among relatives in Turkish law, see Seda İrem Çakırca, "Kardeşler Arasında Nafaka Yükümlülüğü," *AÜHFD* 64, no. 1 (2015): 65-101.

[106] 1. CD, E. 3126, K. 3379, T. 9 November 1998, in *YKD* 2 (1999): 254

[107] CGK, E. 361, K. 26, T. 10 February 1998, in Sedat Bakıcı, *Ceza Hukuku Genel Hükümleri* (Ankara: Adalet Yayınevi, 2007), 561.

tion with regards to this issue in two ways. First, rumors and gossips began to be accepted as grounds for unjust provocation.[108] As in the 1950s, rumors that two people were having an affair began to suffice for benefiting from sentence reduction on the basis of unjust provocation. In a murder case, one could raise the defense that he suspected that one of her female relatives and his victim had a relationship. According to this interpretation, his sentence could be reduced even if there was no such relationship.

The reality requirement and the legal element of unjust provocation are closely linked to each other. This is why the shelving of one was accompanied by the undermining of the other. However, the extent to which the CCa expanded the accommodation granted to intimate violence with this change is rather surprising. With this shift, being raped began to be accepted as unjust provocation in judicial practice.

Despite reviewing various sources, I did not come across a single such case -where a woman who had been raped was killed by her relatives who benefited from unjust provocation mitigation for killing a rape victim- from the earlier decades. If the CCa had indeed approved such decisions or pushed for the implementation of unjust provocation mitigation on this ground in earlier decades, it had done so in secret. Plus, this was against the basics of unjust provocation as discussed by jurist authors and scholars. This situation changed in the 1980s and the relevant decisions of the CCa indicate that this was a new development and that it took some time for the majority at the court to embrace this interpretation.

This matter led to some internal dispute at the court in the late 1980s. The first decision related to this matter concerned a murder.[109] In this case, a young woman who had been raped by a man was later killed by her brother. In this case, the local court did not apply unjust provocation. However, this decision was reversed by the special chamber. According

[108] CGK, E. 1/284, K. 304, T. 28 November 1994, in Erhan Günay, *Kusurluluğu Azaltan Bir Sebep Olarak Haksız Tahrik* (Ankara: Seçkin, 2009), 23-24; and 1. CD, E. 4129, K. 2102, T. 28 May 2002, in Meran, *Yeni Türk Ceza*, 414-15.

[109] CGK, E. 1-536, K. 133, T. 23 March 1987, in Kayıhan İçel and Feridun Yenisey, *Karşılaştırmalı ve Uygulamalı Ceza Kanunları* (Istanbul: Beta, 1994), 368.

to them, "since the victim was raped, such an event would provoke the accused because of local customs" and the judges had to take this into consideration (*maktulenin ırzına geçilmiş olması nedeniyle bölgesel gelenekler gereği bu tip olayın, sanığın üzerinde tahrik usulde getireceğinin düşünülmemesi*). Upon the insistence of the local court that there was no unjust act on the part of the victim, the case was transferred to the General Assembly. At this stage, the decision of the special chamber was overruled by the majority of judges at the GCA.

A couple of years after this failed initiative, the expansionists achieved to convince the rest of the judges at the general assembly by raising a more indirect and legal argument that was very much in line with the arguments of Dönmezer and Erman. In this case, there was a woman, X, who was harassed by bus drivers.[110] These harassments were noticed by her husband Ramazan, who began to suspect her honor. When he confronted her, X stated that she had been raped by a bus driver on the road to work and that was why other bus drivers were also harassing her. X was killed by her husband who claimed that she had later stated that her relationship to the driver was consensual.

In this case, the local court did not apply severe unjust provocation because they established that X had been raped. However, the sentence of the husband was reduced in line with light unjust provocation because she had not told her husband that she had been raped. Seemingly, keeping a trauma secret could also be unjust provocation. This decision was overruled by the special chamber. According to the chamber, having sexual intercourse with strangers was an "extrasocial" or literally "outside-the-society" event (*toplum dışı olay*) *-even if it had happened via force* (*zora dayalı olsa dahi*). In other words, according to the CCa judges, being raped was an experience that placed women outside the society and outside the full protection of law.

The local court insisted on its decision, underlining that the case was linked to rape. According to them, applying heavy unjust provocation to such a case concerning the murder of a rape victim was incompatible with justice and equity (*hak ve nefasete uygun görülmemiştir*). Upon this

[110] CGK, E. 1-176, K. 194, T. 25 June 1990, in *YKD* (1991): 257.

insistence, the case was transferred to the general assembly. The GCA overruled the insistence decision. According to this final decision, what was important was the psychological state of the perpetrator. What happened was in contradiction with "customs, traditions, and morality" and the existence of a real affair between the deceased and another man was not necessary for the application of this mitigation. Hence, Ramazan would benefit from the maximum sentence reduction stipulated by the unjust provocation stipulation. With this decision that was published in *Yargıtay Dergisi,* the CCa opened a new chapter in the story of the regime of intimate violence in the country. For the first time in modern Turkish history, being raped was explicitly and definitively accepted as unjust provocation by the CCa.

In this period, there was a relaxation in the approach of the CCa to the extraordinary mitigation. In the previous era, the CCa had adopted a limitative interpretation concerning this matter. The re-introduction of the direct witnessing requirement was an important element of this shift. In the post-1980 era, the court did not abolish this requirement altogether but changed its interpretation of it. Witnessing what sort of an interaction or situation would suffice for the application of this mitigation? The answer of the post-1980 CCa to this question was much different than the previous era. According to this new interpretation, catching two people together in various sorts of places and circumstances would suffice. In one of these cases, a brother who had visited his sister had become suspicious because the door was opened after some delay.[111] He had searched the house but could not find anyone. Later on, he had killed another man who was in the vicinity of his sister's garden. In this case, the CCa pushed for the application of the extraordinary mitigation instead of the light unjust provocation mitigation.

This case and many others where the CCa pushed for the implementation of this mitigation despite the absence of what is called the appropriateness of place requirement (*mekan açısından uygunluk şartı*)[112] are

[111] 1.CD, E. 3884, K. 186, T. 9 February 1999, in Parlar and Demirel, *Kişilerin Hayatına*, 666-667.

[112] Önder, *Şahıslara*, 141.

especially striking when we take the interpretation and judicial practice of the Ottoman CCa into consideration. As examined in Chapter 2, the Ottoman CCa did not apply the pardon/extraordinary mitigation article in such cases. For example, according to the interpretation of the Ottoman CCa, if two people were found together in a cart or if a man was found with untied pants around a house, the extraordinary mitigation could not be implemented. Thus, the interpretation of the post-1980 CCa was not only more permissive towards intimate violence than the CCa of the 1960s. It was also more permissive than the late Ottoman CCa.

In this period, the court circumvented the direct and immediate witnessing requirement in various cases -without explicitly abolishing it. In one of these cases, a husband was woken up by a kid who stated that he had just seen his wife hugging a stranger.[113] For two years, there were rumors that the said people were having an affair. The husband went to the spot reported by the kid and found his wife and a man walking around there, going in opposite directions. Then, he killed his wife. In this case from 1981, the decision of the local court for the application of extraordinary mitigation was overruled by the special chamber but the general assembly agreed that the husband should benefit from it. What is striking in this case is that the husband had not witnessed *any* interaction between the man and his wife. Thus, there was a state of indirect discovery because he had learnt this interaction from a kid. However, this was accepted to be enough for a sentence reduction by 7/8.

A related expansion of this era was related to the cases of husbands who knew that their wives had affairs before witnessing such scenes and committing crimes. According to the interpretation of the CCa from the 60s and 70s, such perpetrators could not benefit from the extraordinary mitigation. After 1980, on the other hand, the surprise requirement was frequently circumvented by the court. According to this new approach, suspecting an affair or being told by others that there was such an affair could not be taken as an indicator that the perpetrator *knew* the affair

[113] CGK, E. 1/254, K. 347, T. 19 October 1981, in Tutumlu, *Türk Ceza Hukukunda*, 84.

"for sure."[114] Thus, a man, who was told that there was such an affair by many, could act as if he was 'surprised' upon witnessing such a scene and benefit from the extraordinary mitigation. As I examined with regards to changes in the approach of the court to putative provocation; suspicions, gossips, and rumors had become as valid as the truth in terms of the application of unjust provocation mitigation. On the other hand, in terms of the application of the extraordinary mitigation, the court went in the complete opposite direction. In this regard, suspicions and rumors were accepted to have no impact on the sentence. This contradiction created a very particular effect: It ensured the accommodation of intimate violence in the field of law in the most extensive way possible.

In this period, the regime became enormously permissive towards such murders. It became extremely easy to benefit from the extraordinary mitigation. The case concerning the murder of a woman named Feride by her husband, X, illuminates this very clearly.[115] Feride was married to X for 13 years, and she and her husband had various problems. Allegedly, she was the problem-maker. She had relations with others, came home late, did not take care of the children, and was not attracted to her husband. Thus, Feride was marked as a bad mother and a bad wife by the court. In this case, the element of surprise was missing because Feride's alleged affair was accepted to be the source of their marital problems. One night, X was on his way home and saw someone leaving their house and walking out. He then went home and killed Feride. In this case, the local court had applied only light unjust provocation but the 1st CC overruled this decision. According to them, this case required the application of the extraordinary mitigation. In fact, X had only seen a man leaving his house. He might have been a lover, but he could also be a friend, a

[114] CGK, E. 1/254, K. 347, T. 19 October 1981, in Tutumlu, *Türk Ceza Hukukunda*, 84; CGK, E. 1-55, K. 113, T. 20 March 1989, in Tutumlu, *Türk Ceza Hukukunda*, 255-257; and 1. CD, E. 1258, K. 1790, T. 29 September 1993, in Parlar and Demirel, *Kişilerin Hayatına*, 670-672.

[115] 1. CD, E. 171, K. 335, T. 19 February 1992, in Tutumlu, *Türk Ceza Hukukunda*, 265-266.

neighbor, a relative, or even an uninvited visitor such as a burglar. According to the court, the extraordinary mitigation would be implemented anyway. As seen in this case, after these shifts in the interpretation of the court, it became extremely easy to benefit from the extraordinary mitigation article. In this case, the only ground for the implementation of this article was X's allegation that he had seen someone exiting his house. That allegation -supported by judgements on Feride's motherhood and wifehood- was sufficient for the application of what many called the license to kill article and benefiting a sentence reduction by 7/8.

In the Code, the relatives whose extramarital relations could be accepted as grounds for extraordinary mitigation were specified in detail. As examined in Chapter 3, the early Republican legislators had changed this group and excluded ascendants (including mothers) from this list. In other words, the extraordinary mitigation was not available for murderers who violently intervened in the sexual lives of their mothers and tried to control or punish their transgressions.

Similar to various other issues, there was a novel change in this situation in the mid-1980s. At this point in time, the 1st CC began to push for the inclusion of murders related to mothers within the scope of this mitigation – despite the casuistic formulation of the article which clearly did not include them. In line with this change, the 1st CC overruled a lower court decision, underlining that this mitigation had to be applied to such cases involving mothers and/or their paramours.[116] This decision was later overruled by the GCA upon the insistence of the local court and I could not find a decision which provide insights concerning what happened in the following years. However, this attempt itself highlights the extent to which some judges at the CCa expanded the scope of accommodation granted to intimate violence in these years because this was an unprecedented legal interpretation. It is also striking that this initiative to strip mothers from their relative inviolability was carried out at a time when state institutions such as the SPA placed a strong emphasis on motherhood.

[116] CGK, E. 1-429, K. 611, T. 22 December 1986, in Parlar and Demirel, *Kişilerin Hayatına*, 663.

In this period, there were also case-law developments related to the ill-treatment of family members. As noted with regards to unjust provocation, there was a move towards extended family in the regulation of intimate violence. I also found traces of this in the case-law concerning ill-treatment. In 1983, the 5th CC gave an important decision concerning this matter. In this case, there was an adult and unmarried woman.[117] She had eloped and married with someone. His cousins forcibly abducted her and brought her back to her natal home. The local court decided that this was a case of deprivation of liberty -a crime subject to grave sanctions. However, the CCa overruled this decision, arguing that there was no specific intent in this case. This overruling decision was also supported with a reference to the 1956 decision for the unification of case-law. According to the CCa judges, the cousins had acted with the motive of honor and reputation and this was a case 0f ill-treatment -a crime subject to much lighter sanctions.

This decision is striking for many reasons. First of all, there was not a *legal* honor issue in this case because these people were married and there was an official marriage that was jeopardized by this violence. It is striking that this accommodation was granted despite this fact. Secondly, the perpetrators were not very close relatives. However, the court accepted that they could also benefit from the under-punishment provided by the body of rules concerning ill-treatment of family members. Without this intervention on the part of the CCa, these cousins would receive much harsher sentences because the punishments stipulated by the deprivation of liberty article were much higher compared to ill-treatment.

As examined in the previous chapter, there was consensus among jurist authors and scholars concerning the material elements of this crime. Some forms of direct physical violence were accepted to fall in its scope and this was different from the dominant interpretations of the early republican era. However, the position of the CCa was difficult to be ascertained because of the limited number of published case-law. In the post-

[117] 5. CD, E. 1907 K. 3638, T. 4 November 1983, in Parlar and Demirel, *Kişilerin Hayatına,* 802.

1980 era, there were more decisions that were circulated in the public domain. However, the ambiguity continued.

One of the most important CCa decisions concerning ill-treatment was taken in 1982.[118] In this case, there was a mother who had beaten her kid. There was a medical report which showed that the child had been incapacitated for four days because of this beating. The local court punished the mother for ill-treatment and this decision was approved by the special chamber. However, the office of the chief prosecutor objected to this decision and the case was thus transferred to the general assembly. In the end, the GCA approved the decision, noting that acts that caused bodily or psychological harm or endangerment were acts falling to the scope of ill-treatment. "All sorts of acts leading to torment and pain" could be accepted as ill-treatment and since this mother had "gone too far" (*ölçüyü kaçırıp*) and beaten the kid in such a way, it was appropriate to punish her for this crime.

At the first glance, this might seem like a decision against impunity or under-sentencing. In the end, there was punishment for this violent mother. However, when we take the larger context into consideration, the instrumental value of this decision and its place in the expansion of accommodation granted to intimate violence become apparent. In this case, an act of violence that was explicitly defined as beating that had grave health consequences was pushed to the scope of ill-treatment. The court could reach the end of punishing the mother by using the abuse of the disciplinary authority article or rule that this was a case of physical assault. Instead, the court had explicitly pushed a case of *darb* to the scope of ill-treatment. This was in contradiction with the justification explanation according to which *darb* could not be pushed to the scope of this crime. Even in the 1950s when the CCa was very permissive towards intimate violence, the majority of the CCa judges had decided that pushing cases defined as *darb* to the scope of this crime would lead to injustice. Back then, the expansionists had found a way of circumventing this rule by imposing a new framing and by pushing the courts towards using

[118] CGK, E. 4-161 K 202, T. 10 May 1982, in Parlar and Demirel, *Kişilerin Hayatına,* 792-793.

terms like "harrowing" or "consistently throwing on the floor" rather than "beating." With this decision, on the other hand, the CCa was showing that it did not exclude beatings -even beatings with rather severe consequences- from the scope of this crime.

As examined in previous chapters, when such acts were pushed into this field, the result was often under-punishment or even impunity because not all sorts of ill-treatment but only those that were incompatible with mercy and compassion were criminalized in the TCC and customs and traditions were established as the measure of this by the CCa. Thus, this expansion of the scope of ill-treatment further marginalized intimate violence in the field of law.

In the years that followed this decision, case-law was not stable. Towards the end of the 1980s and early 1990s, the CCa took some decisions which showed that it excluded beatings or physical assaults from the scope of ill-treatment.[119] Thus, it seems that the court had taken a step back from the position it had adopted in the early 1980s. This change might have been related to the feminist activism of the post-1987 era and the problematization of this particular article by the Social Democrat People's Party. However, it is important to note that this new position did not become clearly established as case law. For example, in a 1992 case, the CCa decided that "harrowing" someone could be considered as ill-treatment.[120] This decision indicates that the method of reframing such acts of violence as harrowing had not disappeared from the judicial practice of the court. This ambiguity concerning the stance of the Court on the material elements of this crime continued until the late-1990s. However, towards the end of 1990s, the CCa clearly established that ill-treatment of family members was a crime that covered "minor" physical violence,

[119] 4. CD, E. 950, K. 1658, T. 13 March 1991; 4. CD, E. 950, K. 7841, T. 21 September 1989; 4. CD, E. 6267, K. 7632, T. 5 December 1991; and 4. CD., E. 7816, K. 427, T. 27 January 1993, in Parlar and Demirel, *Kişilerin Hayatına,* 800-801.

[120] 4. CD, E. 7064, K. 7719, T. 8 December 1992, in Parlar and Demirel, *Kişilerin Hayatına*, 801.

non-aggravated threats, and insults[121] -in addition to other acts like anal marital rape, imprisonment, and abduction that were considered to fall under its scope since the mid-20th century.

As examined in the previous chapter, many jurist authors and some scholars who wrote in the 1960s and 70s were of the opinion that a single act of ill-treatment would not lead to the occurrence of this crime. According to them, there had to be continuity or habitualness. Thus, a one-time beating or slap should not be punished by courts. The adoption of such an additional criterion through case law would marginalize various forms of intimate violence even further. By this point, acts that were in line with customs and traditions -on practical terms acts of violence committed for honor or acts that were seen as "natural elements" of marital life- were already de-criminalized through case-law and the CCa's interpretation of incompatibility with mercy and compassion. The introduction of something like a habitualness requirement would push more acts beyond the scope of law and enhance the margin of impunity. In the post-1980 era, the CCa also moved in this direction. In various cases, the court emphasized that a one-time incident would not suffice for the emergence of ill-treatment.[122] However, this requirement did not become firmly established and, seemingly, the court left some room for punishing some certain one-time violations such as anal marital rape within the scope of ill-treatment.

As examined in previous chapters, there was at least one case in which anal marital rape was punished as sexual assault by the CCa in the early Republican era. However, such acts were later pushed to the scope

[121] According to a decision from 1998, frequently beating, threatening and mistreating a spouse was ill-treatment. 4. CD, E. 2257, K. 299, T. 30 March 1998, in Parlar and Demirel, *Kişilerin Hayatına*, 795. This position was stabilized further with a general criminal assembly decision in 2001. According to this decision, minor physical assault and non-aggravated threat fall under the scope of ill-treatment but aggravated threat should be considered as a separate crime. CGK, E. 4/165, K. 195, T. 10 February 2001, in www.kazanci.com.tr.

[122] 4. CD, E. 9675, K. 2087, T. 10 March 1994, in Parlar and Demirel, *Kişilerin Hayatına*, 796; and 4. CD, E. 8656, K. 8821, T. 22 October 1997, in Parlar and Demirel, *Kişilerin Hayatına*, 796.

of ill-treatment and this was approved by scholars. However, in the 1960s and 70s, marital rape had entered the high legalese debates in new ways. Turkish jurists were following the criminalization of marital rape in countries like Sweden and there were authors -including some gender conservatives like Mustafa Yücel- who argued that marital rape *was* a crime because it was norm deviation. In the 1990s, Sami Selçuk, who was a CCa judge, openly objected to the CCa's interpretation of this crime. According to him, anal marital rape could not be pushed to the scope of ill-treatment because all forms of forced intercourse had to be punished as sexual assault. In one of his dissenting opinions, he argued:

> No legal norm allows one to exert violence or to threaten family members. This is also the case with marital intercourse. Faced with a spouse who do not consent to sexual intercourse, the other spouse only has a right to file for divorce or separation. If the interest or value of sexual inviolability in marital relationships does not become recognized, it will be impossible to protect sexual freedom.[123]

As seen in this quote, the destabilizing potential of the recognition of sexual freedom continued to be present in this new era. According to Selçuk, marital rape should be punished as sexual assault because of the necessity of protecting sexual freedom. Selçuk was insistent in its objections to this particular matter. He wrote dissenting opinions to various similar cases. However, his opposition did not change the dominant interpretation of the court and the CCa continued its established interpretation.

In this period, the GCA did not deny that adults were free in their conduct. However, it established limits to this freedom by references to customs and traditions, continuing a practice that was contested in the 1970s. In one of the decisions which reflect this interpretation, the victim, X, was an adult woman who had extramarital sexual relations. In this decision, the GCA accepted that X was free to determine her life-style be-

[123] Dissenting opinion of Sami Selçuk, 4. CD, E. 2788, K. 6217, T. 7 July 1994, in www.kazancı.com.tr.

cause she was an adult (*hayat tarzını dilediği gibi çizebilecek yaşta*). However, noted the judges, her attackers must have benefited from unjust provocation because the case had taken place in a location where "established traditions" (*köklü gelenekler*) prevailed.[124] A similar appeal to customs and traditions was also at play in the first CCa decision concerning the application of unjust provocation mitigation in murders targeting rape victims. In that case, the judges had legitimized the application of this mitigation on the basis of "regional customs."[125] However, the CCa was not always regionalist in its approach to such crimes. In other words, there were also decisions in which customs and traditions concerning sexual norms and their transgression were understood to be general or valid for the whole country.[126] Finally, traditions and customs also re-surfaced in case-law concerning ill-treatment in this era. In the mid-1980s, almost four decades after it had taken the decision establishing customs and traditions as the measure of incompatibility with mercy and compassion, the CCa took a decision re-stating this point.[127] Refusal to have sexual intercourse with the husband was also accepted as unjust provocation on the basis of customs, traditions and morality (*örf, adet ve ahlaka aykırı*).[128] In sum, customs and traditions were widely utilized for the justification of allowances granted to intimate violence.

As highlighted throughout this study, the judicial practice concerning such cases of intimate violence entails the categorization and regulation of experiences, affects, and emotions. When deciding on such cases, courts do not only decide what will happen to a perpetrator but also on

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[124] CGK, E. 91, K. 225, T. 28 April 1986, in İzzet Özgenç, *Türk Ceza Hukuku Genel Hükümler*, 7th ed. (Ankara: Seçkin, 2012), 405.

[125] CGK, E. 536, K. 1333, 23 February 1987, in Kemal Esin, *Uygulamada Adam Öldürme Suçları* (Ankara: Yetkin, 1989), 238.

[126] CGK, E. 1-176, K. 194, T. 25 June 1990, *YKD* (1991): 257.

[127] CGK, E. 2/393, K. 5, T. 14 January 1985, in Parlar and Demirel, *Kişilerin Hayatına*, 792. This decision was harshly criticized by feminist activists of the time. See Arın, "Kadına Yönelik Şiddet," 132.

[128] CGK, E. 1/252, K. 273, T. 12 November 1990, Tutumlu, *Türk Ceza Hukukunda*, 168-170.

what qualifies as a legally significant harm or what affects justify violent conduct. The CCa practice of this era is also interesting in this regard. According to the civil chambers of the Court, trauma of victimization was not a legally significant affect. It was a trivial emotion which could not have legal consequences. For example, a woman who was beaten and thrown out of the house by her husband had to return to the domicile if her husband called her back. Otherwise, she would be the faulty party in divorce proceedings. Such refusals could only be justified if it was 'absolutely clear' that she would be beaten again if she were to return to the domicile.[129] According to the court, such experiences, experiences such as being beaten and becoming incapacitated for four days, were trivial. One could and should forget them in short time. As expressed in a decision, "it was clear that the effects of a simple case of (marital) beating would completely vanish in a period of two years" (*basit bir dövme olayının etkilerinin iki yıl içinde tamamen ortadan kalkacağı açıktır*).[130]

On the other hand, according to CCa judges, some other affects -such as anger and frustration resulting from transgressions of sexual norms- could last a life time. For example, in a case from 1998, the GCA decided that the effects of adultery could continue for decades and lead one to commit murder. In this case, a woman named Evidiye was killed by her husband. The murder was premeditated and the husband had raised the honor defense, claiming that Evidiye had committed adultery 17 years before the murder.[131] The 1st CC overruled the local court decision, arguing that not light but heavy unjust provocation mitigation must have been applied in this case. Despite the insistence of the local court, the GCA approved the decision of the 1st CC. As seen in these decisions, time was accepted to heal some wounds but not others.

[129] 2. HD, E. 1974/5372 K. 1974/5212, T. 23 September 1974, *YKD* (1977).

[130] 2. HD, E. 1978/2100 K. 1978/2252T. 21 March 1978, *YKD* (1979). Also see 2. HD, E. 1985/2526 K. 1985/2713, T. 21 March 1985, *YKD* (1985).

[131] CGK, E. 230, K. 325, 20 October 1998, in Bakıcı, *Ceza Hukuku Genel*, 558.

As underlined in various studies on intimate violence in Turkey, many women do not want to take such cases of violence to courts.[132] There might be various reasons behind this situation which is not specific to Turkey. Discouraging conduct of police officers, inadequacy of legal measures and practices of judicial authorities, and cultural and official discourses which have promoted the idea that such experiences should not be publicized might have all informed such decisions. My research indicates that the judiciary might have also promoted this by accepting reporting itself as provocation in some cases. In one such case, a woman was killed by her husband after leaving home and filing for divorce. In her appeals to the authorities, she had underlined that she had experienced anal marital rape. According to the 1st CC, submitting such a petition accusing the husband of anal marital rape was unjust provocation and the decision of the local court which had not applied unjust provocation mitigation to this case was overruled on this basis.[133] The GCA later overruled this decision. In other words, the majority at the court was also more moderate than the 1st CC with regards to this specific issue. However, the fact that the 1st CC took such a decision in the first place suggests that this might have been a common judicial practice.

In this case and many others, the 1st CC pushed for expanding the scope of accommodation for intimate violence even further but could not convince the majority at the court. This does not only show that the regime could actually become even more accommodative in these years but also supports the argument that inclusion of women in decision-making positions might not always bring about gender progressive changes. Between 1989 and 2003, the president of the 1st CC was a female jurist, Türkan Güven. Güven was the first woman in Turkish history to be elected as the president of a chamber at the CCa. The fact that it was her chamber

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[132] Ayşe Gül Altınay and Yeşim Arat, *Violence against Women in Turkey: A Nationwide Survey*, trans. Amy Spangler (Istanbul: Punto, 2009), 15; and Tuba Kabasakal, "Violence Against Women in Turkey: An Analysis of Barriers to the Effective Implementation of International Commitments" (master's thesis, Lund University, 2018), 50.

[133] CGK, E. 1-37, K. 47, T. 19 March 1996, in Demirbaş *Türk Ceza Hukuku Genel*, 426.

that pushed for such initiatives highlights that inclusion of women in decision-making positions does not necessarily mean the inclusion of feminist approaches.

§ 6.4 Unrecognized Continuities: The Masculinist Restoration of the 1980s and the Criminal Law Reform of the 2000s

At the end of the 1990s, Turkish politics, judico-political field, and public debates began to transform under the impact of a new development. The prospects of EU membership led to a major wave of reforms. In this process, gender equality gained a new importance and new codes, such as the new civil code and the new criminal code, were adopted under intense pressure from feminist movements. The adoption of the new criminal code was celebrated as a feminist success story for some time but, especially after the 2010s, after the harshening of the masculinist discourse of the JDP that came to power in early 2000s, it became clear that the adoption of the new code did not bring about the solution of problems related to intimate violence. Especially after this, some scholars elaborating on the TCC began to write with more critical tones.[134] However, this legal text and its story are still understood in an almost explicitly positive light, as markers of a bright path from which the country deviated along with its drift towards authoritarianism in the last decade.[135]

According to me, on the other hand, this legislation itself was deeply problematic and the continuation of impunity and under-sentencing for intimate violence in the aftermath of its adoption cannot be seen as merely a problem of implementation. Of course, the impact of the code could and can change a lot depending on its interpretation but this code,

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[134] Feride Acar and Gülbanu Altunok, "Neo-Liberalizm ve Neo-Muhafazakarlık Ekseninde Türkiye'de Özel Alan Politikası," in *2000'ler Türkiye'sinde Sosyal Politika ve Toplumsal Cinsiyet*, ed. Saniye Dedeoğlu and Adem Yavuz Elveren (Istanbul: İmge, 2015), 50-51.

[135] For an analysis on this turn, see Dilek Cindoğlu and Didem Ünal, "Gender and Sexuality in the Authoritarian Discursive Strategies of 'New Turkey,' " *European Journal of Women's Studies* 24, no. 1 (2017): 39-54.

I argue, is a deeply problematic text in terms of its organization of intimate violence. And I think that the masculinist restoration that followed the 12 September 1980 Coup casted a long shadow over this process and affected this outcome. As examined in this section, what happened in this process was not a feminist revolution in terms of the organization of intimate violence but the codification of a reserved masculinist adjustment, protecting the prerogatives of men in a large extent at the face of feminist challenges and global trends concerning gender violence. While it is true that the new code brought about many improvements concerning women's rights, it was not crafted to ensure the termination of impunity and under-sentencing for intimate violence.

The new code did not include an extraordinary mitigation article. This article of the old code was abolished in 2003 through a parliamentary amendment carried out for EU adjustment.[136] Moreover, the new code adopted in 2004 established custom killings (*töre cinayeti*) as an aggravated form of murder, subject to the harshest punishment in the code (art. 82/1-j).[137] However, the new code was designed to ensure the continuation of under-sentencing for husbands who killed their wives upon witnessing adultery. True, the new code did not ensure a sentence reduction of 7/8 for these killers. However, the extent of mitigation provided by unjust provocation mitigation was expanded in the new code. According to this legislation, judges would be able to reduce the sentences by 3/4 (instead of 2/3 as in the old code) on the basis of unjust provocation mitigation (art. 29). Moreover, during the reform process, it was made clear that the punishments for murders committed under these circumstances would be reduced on this basis and in this extent because the law-makers had made this clear[138] and because, by this moment in time, the CCa had established custom killing as a specific form of murder that

[136] The Law No. 4928, 15 July 2003, *RG* 25173, July 19, 2003.

[137] The Turkish Criminal Code, No. 5237, 26 September 2004, *RG* 25611, October 12, 2004.

[138] Bekir Bozdağ, *TBMM Tutanak Dergisi*, period 22, vol. 59, session 119 (14 September 2004), 76.

did include marital intimate control murders.[139] The new code was presented as a breakthrough, as a paradigm shift but what it actually did in this regard was nothing more than adjusting the margin of mitigation on minimal terms. Strikingly, the new margins provided by this millennial breakthrough were the same with the ones provided in the 1958 Criminal Code Draft prepared in the middle of a violent masculinist restoration.[140]

According to the justification explanation of the new code, unjust provocation mitigation would not be applied in cases of paternal or fraternal intimate control murders targeting rape victims.[141] This was presented as a grand achievement for women's rights. However, as examined in this chapter, this was not a break from a decades-old legal tradition but simply a step back from the masculinist restoration of the post-1980s.

With regards to some matters, the new code was even more problematic because it either codified the elements of the post-1980 regime or introduced highly masculinist elements to the regime of intimate violence. For example, until the adoption of this code, there was ambiguity concerning the issue of presumed or putative provocation. Could the sentence of a husband who wrongfully thought that his wife cheated on him be reduced on the basis of unjust provocation? As I examined in previous chapters, this question was responded differently at different periods and the position of Dönmezer was that it could be. With the new code, his

[139] In the early 2000s, The CCa continued to grant sentence reductions to various sorts of intimate control murders, especially to those involving husbands. At the same time, it created a new legal category (custom killings) that encompassed murders committed with the motive of adhering to customs by relatives other than husbands. According to this adjustment, the perpetrators of customs killings could not benefit from unjust provocation mitigation. Thus, what happened with the adoption of the new code was actually the codification of the CCa's new position. For these custom killing decisions taken before adoption of the Code, see 1. CD, E. 460, K. 1048, T. 28 March 2002 and 1. CD, E. 146, K. 766, T. 12 March 2002, both in İskender, *Töre Saikiyle*, 370-371.

[140] The margin of reduction provided by the extraordinary mitigation was also 3/4 in the Draft of 1958 (art. 452). *Türk Ceza Kanunu Layihası* (Ankara: Yeni Cezaevi Matbaası, 1958), 204.

[141] Zekeriya Yılmaz, *Gerekçe ve Tutanaklarla Yeni Türk Ceza Kanunu* (Ankara: Seçkin, 2004), 1314.

approach was codified as legislation (art. 30). According to the new code, as long as the error did not result from his own fault, the perpetrator must benefit from unjust provocation. This circumvention of the reality requirement was crucially related to the regulation of intimate violence and, with the adoption of the new code, this expansionist interpretation that had tremendous implications for women's rights was given a legislative basis.

Another element of the post-1980 legal discourse, the idea that ill-treatment was not a crime against persons but a crime against family and that its punishment should be reduced, was also codified with the adoption of the new code. In the old code, this crime was placed among the crimes against persons, along with other crimes of violence such as murder and physical assault. In the new code, on the other hand, it is placed under the heading of crimes against family (art. 232). In other words, Turkish legislators had followed the Italians who had made such a move with the adoption of the Rocco Code after many decades.

Moreover, the legislators had taken some steps to ensure the continuation of the existing judicial practice concerning ill-treatment. In the justification explanation, acts of physical violence leading to minor injury were specified to fall under the scope of this crime. Plus, incompatibility with mercy and companion criterion which was an invention of the Republican law-makers and which functioned to ensure impunity for "just" marital violence throughout the 20th century was included in the justification explanation.[142] Finally, the new code decreased the punishment stipulated for this crime in an astonishing extent. In the old code, the maximum stipulated sentence was imprisonment for 30 months for marital ill-treatment and 3 years imprisonment for ill-treatments targeting ascendants or descendants. The new code, on the other hand, stipulates imprisonment between 2 months and 1 year for this crime (art. 232/1). In other words, with the adoption of the new code, there was a punishment reduction by three-folds for this crime. This maximum punishment limit introduced with the new criminal code was the same with the one stipulated for marital ill-treatment in the 1958 Draft, a draft

[142] Ibid., 1466.

which was prepared at the height of the first masculinist restoration period (art. 466).[143] Thus, with regards to this issue, the legislators of the 2000s had actually codified a proposal put forth by the masculinist restorators of the 50s and reduced the stipulated punishments for a crime encompassing various sorts of gendered harms.

As seen in this examination, criminal law reform in Turkey did not lead to the adoption of a code that would ensure the termination of impunity and under-sentencing for intimate violence. In fact, with regards to the regulation of intimate violence, this new code contained many elements that could guarantee the continuation of existing practices with some revisions. I think that this outcome cannot be understood in isolation from the masculinist restorations that this regime went through. True, this reform process was affected by feminist movements and global trends concerning gender violence but it was also affected by major masculinist restorations of the previous eras that casted long shadows on legal discourse and imagination.

§ 6.5 Conclusion

In the existing scholarship on gender violence and state policies in Turkey, the post-1980 era is generally seen as a period of positive developments, as a period of progress. This conclusion is not only found in studies focusing on Turkey[144] but also in some multiple-n studies that examine such changes in many countries across the globe.[145] For example, according to Htun and Waylon's study, which presents a violence against women index, Turkey began to respond to women's calls for justice between 1985 and 1995. This was the era when Turkey, whose score in the 1970s was 0, 'scored' for the first time. A similar point is also highlighted in studies focusing on shelter politics or public debates on gender

[143] *Türk Ceza Kanunu Layihası* (Ankara: Yeni Cezaevi Matbaası, 1958), 209.

[144] Sallan-Gül, "Türkiye'de Eril; Ecevit, "Women's Rights"; and Aldıkaçtı-Marshall, *Shaping.*

[145] Htun and Weldon, *Logics*, 45.

violence in Turkey. In these studies, the combination of the transnational trend that established intimate violence as a global concern and the rise of domestic feminist movements that problematized and campaigned against this violence are accepted to push the Turkish state towards adopting more egalitarian measures in the post-1980 era.[146]

The findings of my research, on the other hand, indicate that there was a sharp turn in terms of the regulation of gender violence. In this period, the regime did not only become more accommodative towards intimate violence compared to the previous period. With regards to some issues, such as murders targeting rape victims, it officially became more accommodative than ever.

During the research phase of this study, I found this lack of fit discomforting. I found it difficult to make sense of my findings. After countless instances of self-doubt and fact-checking, I began to think that this lack of fit was a very valuable finding in itself because it shows that regimes of violence are complex webs, which may transform in surprising ways. As clearly seen in the case of this masculinist restoration, the rise of feminist movements and unprecedented problematizations of intimate violence in public debates can be accompanied by expansions of accommodation granted to this violence. And I think that this invites a questioning of the basic premises of the FSM approach.

Why was there such an overlap in this case? And, why do I think that this provides support to the thesis that we need more complex explanatory frameworks than the FSMA? To start with the first question, I think that there were multiple factors behind this turn in the regulation of intimate violence in the post-1980 era. One of them was the radical political and institutional restructuring that the 12 September Coup brought with. As underlined by Deniz Kandiyoti, gender is intrinsic to politics.[147] Moreover, it is not unusual for large-scale political shifts such as revolutions or coups to bring about swift changes in the regulation of gender relations because such events reshuffle the people in positions of authority and

[146] Nükhet Kardam, "Turkey's Response to the Global Gender Regime," *The GEMC Journal* 4, no. 3 (2011): 8-22.

[147] Kandiyoti, "Locating the Politics of Gender."

can lead to the escalation of contestations over gender roles or adoption of new discourses or policies, even if it is for brief periods of time. Gender related developments and debates in post-revolutionary Russia, France and China[148] or in post-coup Brazil, Argentine and Chile in the 1960s and 70s[149] can be seen as examples of this. I think a similar dynamic was at play in post-1980 Turkey, where a coup was followed by the removal of various gender progressives from the academia, and judiciary and the emergence of repressive familism as state policy. Further normalization of violence in the post-coup period and during the Kurdish conflict might have also contributed to this turn. Another factor might be the limited nature of feminist engagement with law in this period. Because of the male-dominated nature of the judico-political field and barriers hindering feminists from using the legal field (such as the rejection of the applications of feminist organizations to take part in trials concerning intimate control murders), there was a limited engagement and this might have contributed to the lack of progressive legal change concerning intimate violence.

Through the CCa practice, women were frequently reminded of their place in the family hierarchy, rendered more violable towards intimate violence and their transgressions of gender norms, especially but necessarily of norms on sexuality, were 'punished' with enormous sentence reductions granted to their killers, and assaulters. I do not think that this judicial practice can be understood in isolation from the emergence of repressive familism. As I examined in this chapter, people's (especially women's and young people's) "confusion" about their roles was identified as the main source of the alleged cultural crisis in the country and disciplining of families and repression of sexuality were among the officially stated objectives of the Turkish state in the 1980s. Combined with

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[148] Kaminsky, *Free Love*; Mishina, *Soviet Family Law*; Maggie E. Stanton, "Paradoxical Feminism: Attempts at Gender Equality in the French Revolution," *Young Historians Conference* 3 (2020): 1-21; and Wang Zeng, *Finding Women in the State: A Socialist Feminist Revolution in the People's Republic of China, 1949–1964* (Oakland: University of California Press, 2017).

[149] Htun, *Sex and the State*.

the eradication of judicial autonomy and the historically exceptional change in the member composition of the CCa, this turn in the official discourse must have created a strong push for the expansion of accommodation granted to intimate violence.

I think that these findings also cast doubts on the approach according to which feminist social movements are the *actant*s and other actors (such as scholars, jurists, and bureaucrats) are the *reactant*s in shaping the course of developments related to the regulation of intimate violence. I do not argue that feminist movements, and campaigns are not important but that we need more complex explanatory frameworks to make sense of such processes. As shown in this study, favorable transnational trends plus feminist activism do not always equal egalitarian changes in regimes of intimate violence.

How can one explain such instances, in which wide-scale expansions in terms of the accommodation of intimate violence in the field of law overlap with strong feminist movements and transnational trends towards the recognition of women's rights? I can think of two explanations. To start with the simpler, pushes created by such developments might be weaker than pushes to the contrary. In our case, one could argue that there was such a masculinist turn in this regime in this period because other factors and developments prevailed over the rise of feminist movements and this transnational trend. This is a plausible explanation. However, this does not explain why this regime hit its low-point with regards to so many issues (such as the application of unjust provocation in cases of murder targeting rape victims or formal establishment of physical assault defined as beating as a form of ill-treatment) precisely at a time when thousands of women took the streets to protest intimate violence for the first time.

Moreover, this was not the first time that such an overlap took place in Ottoman-Turkish history. As I examined in Chapter 2, the emergence of feminist movements as a strong political force and the recognition of women's rights in a number of areas in the post-1908 era was also accompanied by such an expansion. In other words, there are two highlight

periods or break-through epochs in the history of women's rights activism in this country and *both of them* were accompanied by empirically traceable masculinist turns in the regulation of intimate violence.

I think that Connell's approach to gender regimes provides valuable insights for making sense of such overlaps. According to her, gender regimes are not clock-like mechanisms. Different aspects of these regimes can evolve in different directions. Moreover, Connell underlines that, especially in times of crisis, there might be greater incoherence and contestation.[150] Drawing on these insights and my findings, I think that break-through epochs in the history of women's activism in a country may be accompanied by such turns because such movements emerge when contestation over gender relations reach a certain point and pose a threat to the established gender order. People (especially men) in decision-making positions may respond to such threats by expanding such accommodations -to keep women under control by strengthening the hands of men in their lives.

This also means that, when we see a break-through moment or epoch in terms of feminist movements in a country, we should not assume that it will be accompanied or followed by the improvement of the regime of intimate violence. On contrary, we should be wary that such contestations can be seen as life-and-death crisis by male elites and can be responded with wider institutional tolerance, and allowance for violence against women. The affects that are triggered by the sight of a rare butterfly can vary. People who love them get astonished, but there are also people who are terrified of butterflies.

The fact that such radical expansions happened in *both* of the break-through epochs of feminism in this country provides ample support to the argument that such contestations and changes can be responded by the expansion of allowances for violence. On the other hand, on the basis of a single-case study, it is not possible to answer the question of whether this is a common occurrence or not. Moreover, since this is a study focusing on a country in the Middle East, these findings, and conclusions might be seen as indicative of an Oriental exception.

[150] Connell, *Gender and Power*, 116.

As I underlined in the introduction of this study, histories of the regulation of intimate violence in the global south largely remain to be written in English. Because of this, I am not able to support my point with references to similar overlaps in China, Japan, Africa, or the Balkans. However, there is one study focusing on the USA that supports the argument that what happened in this case was not a singular exception. As shown by Hendrig Hartog, the emergence of feminist movements and the recognition of women's rights in a number of areas in the 19th century USA was also accompanied by such an expansion.[151] There, "the unwritten law," according to which husbands should be granted impunity for killing their wives, or their lovers upon catching them committing adultery, appeared for the first time at the context of these changes. Hartog argues that this was a *response* to the recognition of women's rights in different areas. In other words, it was not only the juridico-political elite in the Ottoman Empire/Turkey who responded to such challenges by granting a wider allowance for intimate violence. Because of this, I do not think that the Ottoman-Turkish case is an (Oriental) exception.

The temporal flows of law and the ways in which the past relates to the future is one of the key themes of this study. Many of the findings presented in this chapter indicate that the past was effective in shaping the debates and developments of this era. Social democrat Ersin's proposal for the introduction of a special 'right to forgive' measure for cases of intimate violence, repressive familism promoted by state institutions, reform demands that brought about changes in some criminal law norms concerning sexuality all had histories behind them. I do not think that they can be understood in isolation from these histories. However, I also do not think that this turn was a predetermined or unmediated result of the past. There were multiple breaks between the 1980s and the 1970s, and also between this period and the rest of modern Turkish history. Key elements of the state planning discourse were new. So were many of the norms through which the CCa expanded the allowances granted to intimate violence.

[151] Hartog, "Lawyering, Husbands' Rights."

As examined in the previous chapter, sounds and effects of law had begun to change in the 1960s and 70s. In that era, there was some sort of harmony between the changes in the Turkish regime of intimate violence and those in many countries in the global north. Does this mean that the last coup changed Turkey's course and pushed it towards an exceptional path? It is not easy to answer this question with the findings of a single case study. However, I incline to think otherwise. As I analyzed in the previous chapter, members of the juridico-political elite who pushed for repressive familism, discipline, and the protection of gender status-quo were very much inspired by the schemes of social stabilization developed in response to the 68 movements across the world and by the counter discourses that silenced women's call for justice (such as the victim blaming discourse). In other words, this turn had not taken place in a vacuum isolated from the global flows of ideas about law and gender.

Whether these flows also inspired the juridico-political elite in other countries, or not can only be answered through further research. However, there is an existing literature which shows that these Turkish men were not alone in the world in trying to repress the calls for sexual autonomy or more egalitarian family relations in this era. In the same period, political elites in various Latin American countries adopted gender repressive policies, deviating from the course followed during the dictatorships of the previous era.[152] In the 1970s, state elites in many socialist East European countries decided to introduce family education courses to schools.[153] In Czechoslovakia, love suddenly disappeared from the sexology discourse and people began to be "encouraged to forget love and

[152] Htun, *Sex and the State*.

[153] Katerina Lišková, Natalia Jarska, and Gábor Szegedi, "Sexuality and Gender in School-based Sex Education in Czechoslovakia, Hungary and Poland in the 1970s and 1980s," *The History of the Family* 25, no. 4 (2020): 550-575.

embrace discipline instead."[154] In the global north, there was a new emphasis on family with the rise of conservative neo-liberal politics.[155] As I have emphasized throughout this study, I think of gender regimes as complex webs. Thus, such developments might not have been necessarily accompanied by changes in the regulation of intimate violence. However, I think that they provide enough reason to suspect the idea that such a turn was specific to Turkey -a doubt that remains to be tested through further research.

The findings of my research concerning this period also highlight the importance of institutions and changes in the institutional fields in shaping such transformations. In this period, there was not a single change in the TCC in terms of the norms examined in this study. The legislation was the same. What changed were the interpretations of these stipulations - most importantly the interpretations of the CCa. This supports the argument that regimes of intimate violence can change in dramatic ways even in the absence of 'legal reform' understood as the adoption of new texts by legislating authorities. As also shown in Chapter 4 and Chapter 5, such radical changes can also happen through case-law. There are various studies which have pointed to the importance of judicial interpretation with regards to the transformations of such rules in different countries.[156] My findings support the thesis that this importance is not particular to countries in the Anglosphere, where case-law is accepted as a primary source of law. As seen in this case, even in code countries, interpretations of high courts might change with time and such changes may bring about shifts in the outlines of regimes of intimate violence.

Customs, traditions, and honor conceptions of the masses were crucial to the post-1980 regime. The CCa 'punished' women who violated customs and traditions by granting sentence reductions to their killers

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[154] Katerina Lišková and Gabor Szegedi, "Sex and Gender Norms in Marriage: Comparing Expert Advice in Socialist Czechoslovakia and Hungary Between the 1950s and 1980s," *History of Psychology* 24, no. 1 (2021): 83.

[155] Melinda Cooper, *Family Values: Between Neoliberalism and the New Social Conservatism* (New York: Zone Books, 2017).

[156] Rambo, *Trivial*; Frevert, *Honour;* and Siegel, *Rule of Love.*

on the basis of their transgressions of gender norms. Refusing sexual intercourse (or resisting marital rape), questioning a brother's or husband's authority, socializing with 'stranger' men, having extramarital sexual relations, and even being raped were seen as violations of 'social value norms,' and unjust provocations by the CCa. These decisions clearly show that secular institutions like the CCa have been crucial for the reproduction of such practices.

One of the most problematized forms of intimate violence in the 2000s were intimate control murders targeting rape victims. In this period, these murders became the text book definition of "bad customs" (*kötü/çağdışı töre*) and were argued to be related to the ignorance of the masses and sometimes to the 'feudalism' that was argued to prevail in regions inhabited by Kurds. As underlined by Koğacıoğlu, various institutions, including the judiciary as well as some feminist organizations, created a 'tradition effect' alleviating the state from responsibility for the perpetuation of such practices of violence. My research shows that Koğacıoğlu's argument that such institutions were deeply involved in the reproduction of these practices was spot on.[157] Even murders targeting rape victims -in other words even forms of intimate control murders that were later portrayed as having nothing to do with the state- were granted an enormous margin of mitigation by the CCa. This finding indicates that these practices of violence were not reproduced *despite* the efforts of the state to eradicate them but rather *thanks to* the allowances granted by state institutions.

[157] Koğacıoğlu, "Tradition Effect"; and Koğacıoğlu, "Knowledge, Practice."

7

Conclusion

In contemporary Turkey, various forms of gender violence characterize the rhythms of everyday life and shape women's lived experiences, options, and visions for the future. Faced with intimate violence, few women take things to courts and demand justice from the state.[1] Many people live in and reproduce large circles of namus (honor). In other words, honor is not something that exclusively concerns individuals. More often than not, it is something that also concerns immediate relatives and extended families, and even neighbors, or acquittances.[2] Unofficial marriages are not the norm but this is a practice that continues to be reproduced. Many people, including many young people, accept the narratives legitimizing violence against women.[3] This, of course, is not

[1] Altınay and Arat, *Violence against Women*, 40.

[2] Ferya Tas-Cifci, "Conceptualisation of Honour Codes among Turkish-Kurdish Mothers and Daughters Living in London," *Journal of International Women's Studies* 20, no. 7 (2019): 222.

[3] Gülseren Dağlar, Dilek Bilgiç, and Gülbahtiyar Demirel, "Ebelik ve Hemşirelik Öğrencilerinin Kadına Yönelik Şiddete İlişkin Tutumları," *DEUHFED* 10, no. 4 (2017): 220-228; Ezgi Şahin and İlkay Güngör Satılmış, "İlk ve Acil Yardım Öğrencilerinin Kadına Yönelik Şiddete ve Şiddette Mesleki Rollerine İlişkin Tutumları," *Ordu Üniversitesi Hemşirelik*

the whole picture of our present. There are women who challenge the constraints put on them in their individual lives or at the macro-political level.[4] There are women who are lucky and/or privileged enough to exercise sexual autonomy and freedom without the fear of being killed by their relatives. There are people who do not accept that there can be just marital beatings[5] and there are also people who push for the recognition of LGBTQ+ rights.[6] However, the depressing elements of the present social reality are also a part of this complicated contemporary picture.

The analysis of law and legal change presented in this study provides new insights for making sense of this contemporary social reality and the role of the state and law in its reproduction by shedding light onto the legal and historical aspects of these phenomena. Given the long and turbulent history of impunity and under-sentencing for intimate violence, social practices -such as the widespread use of violence as a means of gendered control- cease to appear as phenomena that have been reproduced despite the attempts of the state to eliminate them. The state, rather, is actively involved in the making of such a regime of control and violence.

As noted, a considerable number of people in Turkey continue to see some harms as insignificant and unpunishable today. This is especially the case for non-physical (psychological or economic) violence. The numbers of those who agree with legitimizing narratives -which some scholars call 'myths'- are also not miniscule.[7] I argue that these elements of our

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Çalışmaları Dergisi 3, no. 2 (2020): 114-124; and Derya Adıbelli, Selvinaz Saçan, and Nihan Türkoğlu, "Üniversite Öğrencilerinde Şiddete Yönelik Tutum Ölçeği Geliştirilmesi," *Anatolian Journal of Psychiatry* 19, no. 2 (2018): 202-209.

[4] Bora, *İradenin İyimserliği.*

[5] Altınay and Arat*, Violence against Women*, 35.

[6] Zülfikar Çetin, "The Dynamics of the Queer Movement in Turkey before and during the Conservative AKP Government" (working paper, Research Group EU/Europe, SWP Berlin, January 2016); and Evren Savcı, *Queer in Translation: Sexual Politics under Neoliberal Islam* (Durham: Duke University Press, 2021).

[7] Özen Gömbül, "Hemşirelerin Ailede Kadına Eşi Tarafından Uygulanan Şiddete ve Şiddette Mesleki Role İlişkin Tutumları," *Hemşirelik Araştırma Dergisi* 2, no. 1 (2000): 19-32; and Dağlar et al., "Ebelik ve Hemşirelik," 220-228.

present cannot be understood in isolation from Turkish legal history in which some harms have been pushed beyond the pale of the law because of their triviality and grave physical harm was established as *the proper harm* subject to punishment. What some scholars call traditional narratives and 'legitimizing myths' -for example the belief that some forms of intimate violence should not be punished, that women should and would forget something like a single slap, or that it is understandable or tolerable to use violence against a wife if she does something 'wrong'-[8] have not been purely cultural understandings but proper legal defenses. And -as I showed in my analysis of the crime of ill-treatment- some of them are *legal norms* that have been upheld in and reinforced through judicial practice.

Unofficial marriages are generally seen as practices that have been reproduced despite the attempts of the state to eradicate them. In this study, I show that the state has actually recognized these marriages in a very gendered way: It denied the validity of such bonds -especially when the issue concerned the claims of women concerning inheritance, social security, or protection from violence. However, it recognized them 'as sacred as official marriages' when the issue was honor killings or men's right to control women's sexuality or social relations. In other words, it was the state and state law which transformed this practice into a very advantageous option for men who wanted to oppress their partners in the maximum extent possible, by rendering women vulnerable in a double manner. Taking this situation into consideration, I find it impossible to see the reproduction of this practice as something exclusively related to culture or people's devotion to Islam[9] or to comprehend its reproduction in isolation from the state and its law.

A similar point concerns the large circles of namus that surround many women in contemporary Turkey. According to existing scholarship, these must have been reproduced despite the efforts of the state because

[8] Gömbül, "Hemşirelerin Ailede"; and Dağlar et al., "Ebelik ve Hemşirelik."

[9] İhsan Yılmaz, "Non-recognition of Post-modern Turkish Socio-legal Reality and the Predicament of Women," *British Journal of Middle Eastern Studies* 30, no. 1 (2003): 25-41.

this scholarship accepts that, with the Republican reforms, there was a shift to nuclear family in the legal organization of familial relations. The multitude of ties binding people to kin outside nuclear family was disregarded by the Turkish law instated by the Republican reformers. In this study, I show that this was not the case in terms of the regulation of violence. Members of the extended family, very distant relatives, members of large kin groups, even neighbors, *hemşehri*s (townspeople), and acquittances were accepted to have legally recognized ties that gave them a license to control women's sexuality, social relations, and life choices through violent means. Taking this into consideration, the large circles of namus that continue to surround us cease to appear as a social phenomenon that has come to this day despite the legal shift to nuclear family and it seems that this has been a phenomenon that was reproduced thanks to the state and its law.

In the Introduction, I noted that Turkey has been seen as a good case for discussing the question of whether law could bring about social change, highlighting different elaborations in this regard. For some, this case showed that it could not because some major reforms on family were not embraced by the masses.[10] For others, it showed that it could because they were.[11] The story that I traced through various chapters raises the question of whether this is a good case for tracing this particular question -at least in terms of intimate violence. As shown in this study, after the establishment of the Republic, there was not a stable regime change concerning intimate violence. The history of this regime was marked with two tremendous masculinist restorations that both brought about unprecedented accommodations for intimate violence. In other words, temporal variations in this case were very stark and this makes it difficult to make generalizations about the power of law in bringing about social change. However, as I discussed above, this study of the Turkish regime provides new insights for making sense of the social and the possible effects of law in shaping it.

[10] Kandiyoti, "Emancipated."

[11] Starr, *Law as Metaphor.*

As many law and society scholars, I also think that the social also has an impact on law. In this study, I devoted a limited space to the impact of the social on the law and its transformations -not because I think that it is unimportant but because I tried to avoid from projecting my assumptions to the society and social changes running across the 19th and 20th centuries. I focused instead on certain institutional fields that I believe are highly important in determining the changing gender regime. However, I also do not wish to suggest that the changes that I have traced throughout this study were endogenic ones that happened solely because of the changes in the institutional fields that I focus on. As I tried to show in my discussions on the relationship between the rise of feminist movements, crisis of the gender regime, and expansion of accommodations granted to intimate violence or the demands, and needs of the masses as they were perceived by the state elite in the late-1930s and other periods, the social was integral to the debates on and changes in the regulation of intimate violence. On the other hand, there is much that remains to be explored in terms of the history of the social and its impact on the changes in the regime of intimate violence. How was the sexual revolution experienced by people from different walks of life? What were the actual demands and practices of masses concerning the sexual liberation of the early republican era? Such questions remain to be answered in future studies.

Despite its limitations in this regard, this study also provides some significant insights concerning the power of the social on the law. One of the most striking findings of this research is the temporal match between the rise of autonomous and mass feminist movements and the expansion of accommodations granted to intimate violence in the field of law. I found that this happened in Turkish history, not even once but twice. The first had taken place in the 1910s while Ottoman women were pushing for their rights in a number of areas and the other in the 1980s when thousands of women took the streets to protest against intimate violence for the first time. During both of these expansions, law had become traceably more accommodative of male violence compared to the previous eras.

I was totally unprepared to come across such findings and was honestly baffled by these overlaps. I had once thought that I had the perfect shoe only to find out that it did not fit. My perfect shoe was the feminist social movements approach according to which the regulation of intimate violence must change for the better (or at least should not get worse) with the rise of such feminist movements. After much unease, I came to treasure these unfitting findings. All in all, I was not one of Cinderella's evil sisters trying to charm a prince, but a PhD student who had the option of finding another shoe. Here is my explanation for this (mis)match: Such expansions might happen precisely in such periods because the rise of such movements may indicate a real crisis in the established gender regime. Male elites may respond to such real and extensive challenges by disciplining women through strengthening the hands of actual men in their lives, by granting men more leeway in terms of the regulation of intimate violence. To borrow a phrase from Wendy Brown and another from Deniz Kandiyoti, 'the men in the state' may ally with men in homes when women raise the stakes in 'patriarchal bargains.'[12]

As underlined by G. John Ikenberry, there has been a divide between the historical institutionalist scholarship and 'societal-centered theories' which see societal dynamics, interests, and movements as 'more or less straightforward determinants of policy.'[13] The above-mentioned overlap between the rises of mass and autonomous feminist movements and the expansions of accommodations granted to male violence provides important insights concerning this debate. This finding indicates that transformations of regimes of intimate violence might defy such straightforward explanations and that institutions and their 'intervening and constraining roles' might be crucial for understanding such outcomes that do not easily match with social dynamics and movements.

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[12] Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton: Princeton University Press, 1996), 166; and Deniz Kandiyoti, "Bargaining with Patriarchy," *Gender & Society* 2, no. 3 (1988): 274-290.

[13] G. John Ikenberry, "History's Heavy Hand: Institutions and the Politics of the State" (presented at the Conference on The New Institutionalism, University of Maryland, 1 October 1994), 4.

In this study, I present an alternative reading of Turkish history. In most accounts on women's rights in Turkey, there is an assumption that Turkish history followed the course of a 'self-reinforcing sequence.'[14] The country had entered into a certain path marked by fraternal rather than patriarchal masculine domination with Tanzimat. Then comes the II. Constitutional Revolution, and the First World War -both with the expansion of women's rights. What comes next is the War of Independence and the early republican era -a period which brought about unprecedented improvements in terms of women's rights, and status and a gender regime that prevailed for the rest of the 20th century. According to many, the gender regime in Turkey was highly stabilized in this period.[15] Some scholars note that there was a 'stagnation' in the 1940s and some openings in the 60s but that there were no changes in the outlines of the gender regime.[16] In most accounts of Turkish history and women's rights, the clock stops in the early republican era -at least until it begins ticking again with the re-rise of autonomous and mass feminist movements in the 1980s.[17]

As I show in this study, early Republican law was not the QWERTY keyboard that persisted despite the availability of other alternatives and determined the practice of decision-writing for the rest of the Republican era. There were in fact two masculinist restorations which can be seen as 'reactive sequences,' each responding to developments in preceding eras and bringing about 'backlash processes' that entailed transformations and sometimes reversals of earlier events.[18] There was also an unnoticed sexual revolution, which brought about radical changes in the regulation

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[14] As defined by Mahoney, such sequences are "characterized by the formation and long-term reproduction of a given institutional pattern." James Mahoney, "Path Dependence in Historical Sociology," *Theory and Society* 29 (2000): 508.

[15] Aldıkaçtı-Marshall, *Shaping*; Taşkın, "Türkiye'de Sağcılık"; Sirman, "Kinship"; and Pınar Melis Yelsalı Parmaksız, "Paternalism, Modernization, and the Gender Regime in Turkey," *Aspasia* 10 (2016): 40-62.

[16] Ecevit, "Women's Rights"; and Köker, "Türkiye'de Kadın."

[17] Aydın and Taşkın, *1960'tan Günümüze*; Zürcher, *Modern Türkiye*; and Arat and Pamuk, *Turkey*, 10.

[18] Mahoney, "Path Dependence," 527.

of intimate violence and sexual autonomy in the 70s. In terms of the regulation of intimate violence, there was not one path but many that were built and abandoned through legislation and legal interpretation. These findings suggest that modern Turkish history is much more complicated and surprising than it has been presumed.

This is a historical study that focuses on institutions. Hence, it may be unsurprising that its main findings also relate to a point underlined in the historical institutionalist scholarship –that is the importance of major shocks[19] or critical junctures.[20] As I showed in this study, there were radical fluctuations in the regime of intimate violence in Turkey and there were enormous variations through time. On the other hand, modern Turkish history was not a chaotic mess in this regard. The beginnings of each chapter of this history can be traced back to a major shock that redefined the parameters of political, legal, and institutional activity and of the structuring and/or qualities of the legal field in Turkey.

The first change that I examine in this study had taken place at the context of Tanzimat, the period of modern state formation in the Ottoman Empire. This period of legal, administrative, and institutional formation did not only bring about the adoption of the first modern criminal code but also the foundation of the predecessor of the Court of Cassation, hence the start of modern cassatory decision-making. In this period, total

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[19] Robert Gilpin, *War and Change in World Politics* (Cambridge: Cambridge University Press, 1981); and Colin Crouch and Maarten Keune, "Changing Dominant Practice: Making Use of Institutional Diversity in Hungary and the United Kingdom," in *Beyond Continuity: Institutional Change in Advanced Political Economies*, ed. Wolfgang Streeck and Kathleen Thelen (Oxford: Oxford Universitty Press, 2005), 83-102.

[20] Barrington Moore, *Social Origins of Democracy and Dictatorship: Lord and Peasant in the Making of the Modern World* (Penguin University Books, 1973); Seymour M. Lipset and Stein Rokkan, eds., *Party Systems and Voter Alignments: Cross-National Perspectives* (New York: The Free Press; London: Collier-Macmillan, 1967); Ruth Berins Collier and David Collier, *Shaping the Political Arena: Critical Junctures, the Labor Movement, and the Regime Dynamics in Latin America* (Notre Dame: University of Notre Dame Press, 2002). Also see Ikenberry, "History's Heavy Hand"; and Giovanni Capoccia and R. Daniel Kelemen, "The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical İnstitutionalism," *World Politics* 59 (April 2007): 341-369.

immunity for killings committed upon adultery was abolished. In other words, Tanzimat reforms might have fallen short of bringing about the recognition of gender equality[21] but they actually entailed a major limitation in terms of the accommodation of intimate violence -by formally abolishing men's prerogative to kill adulterous female relatives.

Much had changed in the Ottoman Empire after the constitutional revolution of 1908 which can also be seen as a major shock. Strengthening of the standardization of legal practice and education, westernization of legal scholarship in new ways, full secularization of the legal system, and codification of family law for the first time all took place after this major event. In this period, which was marked by widespread women's rights activism, there were also changes in the regulation of intimate violence. With an amendment to the Ottoman Criminal Code, legal grounds for mitigation in honor killings were expanded. Total immunity for murders committed upon adultery was restored. The prosecution of physical assaults targeting relatives and acquittances was tied to insistent complaint. In other words, soon after the start of the second constitutional era, there were major changes in the outlines of the regime of intimate violence.

The foundation of the Turkish Republic was another major event that accompanied large-scale institutional changes and legal reforms. As a woman who lived in Turkey for most of her life and as an avid reader of modern Turkish history, this era appeared both very familiar and very strange to me. It was familiar because the legal concepts that I traced for this study -the crime of ill-treatment of family members and unjust provocation mitigation- both entered Turkish legislation in this period. Yet, I felt as a stranger when tracing their interpretations and the actual contents of the Turkish Criminal Code. The early Republican TCC was much more emancipatory than I had initially thought. It was not only better than the OCC in many ways. It was also better than what it turned into after its amendments in the post-1937 era. I was also surprised when I

[21] Gökçen Alpkaya, "Tanzimatın 'Daha Az Eşit' Unsurları: Kadınlar ve Köleler," *OTAM - Ankara Üniversitesi Osmanlı Tarihi Araştırma ve Uygulama Merkezi Dergisi* 1, no. 1 (1990): 1-10.

found out that there was a sexual emancipation dimension among the reforms of the early republican era. Two things stroke me the most. First, the actual legal interpretations of unjust provocation and ill-treatment were different from what I expected to find. Ill-treatment was not interpreted as an umbrella crime that encompassed acts such as anal marital rape or battery. And a wife's leaving of a marriage was not accepted as unjust provocation. These findings surprised me because these were interpreted much differently in later cases with which I was familiar. Most shockingly, there was a CCa decision in which anal marital rape was actually accepted to be and punished as rape (*ırza geçme*). I could not believe this because -to the best of my knowledge- this was never repeated in the 20th century and it was not mentioned even once in law books and articles published after the 1930s. Moreover, achieving this very end had taken so much effort and feminist pressure in the 2000s. Clearly, something radical had taken place in the early Republican era -something more radical and surprising than accounts on this era tend to admit. And, as I noted, this radical re-ordering had come after yet another major shock.

In terms of the regulation of intimate violence, the early republican period was officially closed with the sickness and death of Ataturk –a major shock for any single-man regime imaginable. What followed was a change in the approaches of the judico-political elite and a violent masculinist restoration during which women were brutally sent back home through the expansion of accommodations provided for intimate violence in an extent that was unprecedented in various regards. In this period, leaving the domicile was accepted as unjust provocation. The scope of the extraordinary mitigation was expanded in a manner that was much more extensive than the late Ottoman period and the age-old direct witnessing requirement, which limited the applicability of this mitigation, was abolished. Marital imprisonment ceased to be accepted as an absolutely criminal act and ill-treatment of family members took the form of an umbrella crime, encompassing various sorts of gendered harms (such as battery or marital rape), which could be left completely unpunished on the grounds of honor or the requirements of marital life.

Another major shock -the first coup in modern Turkish history- was followed by major changes in the institutional fields and in the regime of intimate violence. After this coup, which took place in 27 May 1960, high courts were empowered, there emerged alternative interpretations of Ataturkism in universities and sexual freedom, and individual autonomy began to be stressed as important values that resonated well with Turkish culture by some members of the legal elite. What followed was a major reform in the regulation of intimate violence. For the first time in republican history, the building blocks of this regime were changed in favor of sexual freedom and individual autonomy through case-law.

In 1980, another major shock -yet another coup which brought about a new constitution- changed the playing field on major terms. Purges in high-judiciary and academia accompanied a massive re-ordering that limited the autonomy and power of high courts and the emergence of a conservative family discourse as the hegemonic state discourse. In this period, the regime reached its most accommodative point with regards to some issues. For example, for the first time in Turkish history, being raped was explicitly accepted as unjust provocation by the CCa.

These overlaps between major shocks and transformations of the regime of intimate violence point out to the importance of such major events for the regulation of intimate violence. I think we can see these major shocks as events that "eroded or swamped the mechanisms of reproduction that generate continuity"[22] because of their impact on the judico-political field or on the field of state power. But big events were not all that mattered. In fact, all shifts in the regime of intimate violence unfolded in an 'incremental'[23] fashion, through the adding up of decisions and amendments reinforcing a certain direction. In other words, the findings of this study indicate that wars, revolutions, coups, and leadership/regime changes matter. But so do expert reports and briefings, court decisions, parliamentary proceedings, and scholarly debates. Thus, this

[22] Paul Pierson, "Increasing Returns, Path Dependence, and the Study of Politics," *The American Political Science Review* 94, no. 2 (2000): 265.

[23] James Mahoney and Kathleen Thelen, eds., *Explaining Institutional Change: Ambiguity, Agency, and Power* (Cambridge: Cambridge University Press, 2010).

research indicates that both big and small events might be relevant for the transformations of such regimes.

As noted, some of my major findings overlap with the historical institutionalist scholarship. However, my analysis also departs from this scholarship in some ways. As underlined by Iza R. Hussin, this scholarship generally approaches the preferences of actors as constant.[24] While conducting this research, I came across a basic point that challenges this assumption. As I came to 'discover', people change. True, professor Dönmezer, one of the conservative archangels of Turkish criminal law after the 1970s, had vigorously resisted the calls for the limitation of accommodations granted to intimate violence and supported the need for parental discipline. However, there was also another and younger Dönmezer, who had criticized parental violence in one of his first academic writings. When one digs far enough, there was also a Dönmezer who had pushed for the legalization of abortion and birth control. In sum, my research confronts the idea that the preferences and agendas of actors can be taken as constant.

Another point where I deviate from this scholarship concerns my approach to the past. What characterizes the historical institutionalist scholarship is mostly an attention to the factual aspect of the past. How does something that really happened in the past, a decision that was taken or a path that was actually entered into shape the then-future? This question is central to historical institutionalism.[25] However, I think that fantasies of the past and fictional historical narratives are also important for understanding large-processes. What gets to be remembered? What becomes silenced? What is imagined or constructed into being as a historical fact? How do contestations over the past impact the many futures along the temporal continuum? How does law write history? I think such

[24] Iza R. Hussin, *The Politics of Islamic Law: Local Elites, Colonial Authority, and the Making of the Muslim State* (Chicago: University of Chicago Press, 2016), 12.

[25] Thelen and Mahoney, *Explaining Institutional*; Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Cambridge, MA: Harvard University Press, 1992); and O'Connor, Orloff and Shaver, *States, Markets and Families*.

questions that many historians[26] (especially critical legal historians),[27] law and society scholars,[28] and anthropologists[29] find important can also be helpful for making sense of such transformations.

Throughout this research, I became even more convinced with the idea that these are very important questions. Visions of the past were integral to the debates of the Turkish judico-political elite on gender violence, family, and sexual autonomy throughout the 20th century. Masculinist restorators often referred to the Ottoman era -sometimes with ungrounded claims such as the idea that full immunity for honor killings was recognized in late-Ottoman law. What early Republican law-makers had *really* intended to do preoccupied jurists, politicians, and scholars for decades. Turkish state elite clearly loved to discuss this issue but there were also parts of the early Republican history that were silenced and even erased from history. The early republican legal elite had actually chosen to recognize (at least one form of) marital rape as rape by taking a judicial decision. They had actually decided to exclude *darb* (battery) from the scope of ill-treatment through case-law and legislation. Such aspects of the past were fully or partially erased from these beloved debates on early Republican history. In sum, both remembering and forgetting were crucial for the transformations of the regime of intimate violence in Turkey.

The notion of flow has been central to this research. I tried to approach law as something that flows across *time* and *space*. I find formalist understandings of law, which assume legal practice to work like a wind-

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[26] Eric Hobsbawm and Terence Ranger, *The Invention of Tradition* (Cambridge: Cambridge University Press, 1983); and Selim Deringil, *The Well-Protected Domains: Ideology and the Legitimation of Power in the Ottoman Empire, 1876-1909* (London: I.B. Tauris, 1999).

[27] Robert W. Gordon, *Taming the Past: Essays on Law in History and History in Law* (Cambridge: Cambridge University Press, 2017).

[28] Austin Sarat and Thomas R. Kearns, eds., *History, Memory and the Law* (Ann Arbor: The University of Michigan Press, 1999).

[29] Esra Özyürek, *Nostalgia for the Modern: State Secularism and Everyday Politics in Turkey* (Durham: Duke University Press, 2006); Altınay, *The Myth*.

up toy the actions of which are determined by legislators, to be far from explanatory, especially given the importance of legal interpretation that I document in this study. The latter understanding is highly dominant in legal and historical scholarship in Turkey.[30] And I began to think that its dominance closes an important window into Turkish history. Since codes are attributed an omnipowerful determinatory power, hardly anyone studies how they are interpreted over time in scholarly or judicial contexts. This research shows that much can change through such historical studies because it documents how a number of things radically changed over the course of time through legal interpretation and portrays an account of Turkish history that is much more colorful and even shocking in many ways. This is a bright and wide window with a wonderfully complex scenery and I hope that I will be joined by many fellow onlookers in years to come. Scholars who do this kind of historical research in terms of constitutional law[31] may be great company but the more the merrier at any party.

I also want to elaborate here on the space dimension. I think working with the notion of flow rather than alternative concepts such as transplant or import was the right choice for this study. As highlighted in a well-known Turkish study, even the meanings and uses of simple objects -such as an ordinary table- may change when they are moved in space (in that particular case from Germany to Turkey).[32] How can we treat law as a commodity and expect something as textual and complex as law to re-

[30] Ertekin, "Türkiye'de Hukuk Siyaset."

[31] Belge, "Friends of the Court"; Joakim Parslow, "Theories of Exceptional Executive Powers in Turkey, 1933-1945," *New Perspectives on Turkey* 55 (2016): 29-54; and Hootan Shambayati, "The Guardian of the Regime: The Turkish Constitutional Court in Comparative Perspective," in *Constitutional Politics in the Middle East*, ed. Saïd Amir Arjomand (Oxford: Hart, 2008), 99-123.

[32] Ayşe Şimşek Çağlar, "A Table in Two Hands," in *Fragments of Culture: The Everyday of Modern Turkey*, ed. Deniz Kandiyoti and Ayşe Saktanber (London: I.B. Tauris, 2002), 294-308.

tain its properties and meanings when it is separated from its spatio-temporal context? As many others,[33] I think that such an expectation is far from realistic and this study indicates that the notion of flow might be much more helpful for understanding the transformations of law in Turkey. As I have shown, in terms of the regulation of intimate violence, neither the French Criminal Code nor the Italian Criminal Code were transplanted or imported to Turkey. Both in the late Ottoman period and the Republican period, domestic concepts, and understandings and preferences of law-makers were definitive in shaping the contents of the codes that have been seen as transplants. What is more, in some periods, what flew across borders was not the letter of laws but the actual contents of case law -despite the preference of Turkish law-makers to abstain from adopting the legal changes in the 'source' country. Thus, I think that it might be more fitting to approach such interactions as flows and to consider the legislations of countries such as France or Italy as *some* of the sources[34] that affected the transformations of law in Turkey.

In much of the scholarship on gender violence and global flows of law, the debate centers on the post-1980 era. This is also the case for studies on Turkey. There are numerous studies that focus on the interactions between the emergence of gender violence as a violation of human rights at the global level and domestic factors such as the rise of feminist movements in the post-1980 era.[35] This state of the scholarship enhances a narrative according to which law and legal ideas on gender violence started their global journey after 1980 and global or transnational flows can be seen as absolute goods for the improvement of women's rights. This study challenges this narrative on major terms. Even in the late Ottoman era, developments in other parts of the world, especially in the global north, were closely followed by scholars, and were brought into

[33] Meccarelli and Solla Sastre, *Spatial and Temporal*; Türem and Ballestero, "Regulatory Translations"; and Duve, "What is Global."

[34] For a similar interpretation, see Avi Rubin, "Legal Borrowing and its Impact on Ottoman Legal Culture of the late Nineteenth Century," *Continuity and Change* 22, no. 2 (2007): 281-282.

[35] Kardam, "Turkey's Response; Aldıkaçtı Marshall, *Shaping*; Birdal, *The Interplay*; Arat and Pamuk, *Turkey*, 228-262.

domestic debates. The return to the family in the Soviets was closely followed by the Turkish legal elite and was sometimes referred to as proof that it was okay to give up some revolutionary ideals. What flew across borders was certainly not only progressive doctrines or ideas. Of all things that could be translated, the only American idea translated into Turkish legal scholarship on intimate violence in the 1970s was the victim blaming discourse -according to which beaten or raped women shared some of the guilt with their attackers. Through the long period of time that I examined for this study, transnational flows of law were always relevant and this was not an absolute good.

What is the relationship between modern state power and masculine domination? What happens after the termination of domination by patriarchal authority, that is masculine authority based on the recognition of prerogatives of violence, in the process of modern state formation and monopolization of the authority to distribute and legitimize violence by the state? These were among the questions that preoccupied me throughout this research and I think that this study provides important insights concerning them. First, this study shows that post-prerogative regimes can take many forms and may not follow the models built upon the historical experience of the global north, or of the Anglosphere to be specific. In this regime, there was nothing like the privacy doctrine of the US in line with which the judges refrained from intervening in domestic affairs. For Turkish judges, everything was under judicial purview. For example, when they attended to the cases of raped wives, they did not dismiss the case with reference to the limits of their authority, but considered the specifics of the sexual assault at hand and punished the perpetrators of anal marital rapes -even if with extremely light sentences. In Turkey, what ensured impunity and under-sentencing for non-lethal intimate violence was not the sacredness of the domicile or of private life but the transformation of a specific crime (ill-treatment of family members) into a well with muddy waters through legislative design and legal interpretation. These particular characteristics are impossible to be spotted, let alone understood, with northern frameworks built upon the particulars of the Anglosphere. And I think that their existence and importance in

this context highlights the need for more empirical research on the structures and historical experiences of people in the global south and for theory-building based on these geographies.

In this case, monopolization of violence was not an automatic result of modern state formation. It was a contested and negotiated process. Plus, with the re-introduction of the recognition of the prerogative to kill in the 1910s, there was in fact a formal and temporary return to a regime based on prerogatives. These findings and the fact that the need for this monopoly featured in the debates over the regulation of intimate violence throughout the 20th century show that monopolization of violence can be a messy process full of ups and downs and that it is in fact a highly gendered process.

Second, this examination shows that gender was central to the transformations of state power, and the ground rules of criminal justice in Turkey. Personalization of punishments, one of the marks of the modern Turkish criminal justice system, was introduced to this legal regime in the late Ottoman era for providing accommodation to a wider range of honor killings. This was how the sovereign authority to reduce the sentences began to be shared with judges. The specific intent requirement for deprivation of liberty, a norm that was crucially linked to the impunity and undersentencing provided for all kidnappings (including political ones), was introduced to this legal regime in 1956 for accommodating husbands who imprisoned or kidnapped their wives. These findings do not only support the argument that gender is intrinsic rather than incidental to state power.[36] They also show that gender is indeed a very useful category of historical analysis because they provide new insights for understanding the transformations of the Turkish state and the field of Turkish state power.[37]

Finally, this examination shows that palace wars[38] -which entail competition for state power and contestations over the basics of state-society

[36] Kandiyoti, "Locating the Politics."

[37] Joan W. Scott, "Gender: A Useful Category of Historical Analysis," *The American Historical Review* 91, no. 5 (1986): 1053-1075.

[38] Dezalay and Garth, *Internationalization of Palace*.

relations- might be consequential for such regimes of intimate violence. As shown in this study, these wars were some of the main pillars of change concerning the transformations of the legal structuring of gender relations in Turkey. In other words, this study confirms that macro-politics might have an enormous impact on gender and the distribution of gendered vulnerability and power.

As seen in my analysis of the transformation of the regime of intimate violence in the 60s and 70s, high courts can play crucial roles in legal developments and shape the course of events in a radical manner, giving substance to abstract frameworks and notions such as human rights. As underlined in Kim L. Scheppele's work on Eastern Europe in the post-communist era, certain institutional designs and socio-political conditions may allow high courts to play such progressive roles -even in the absence of parliamentary support for the legal substance they produce.[39] The findings of this study support that conclusion. What ensures a positive human rights or democracy outcome in such cases might be the court's willingness to undertake creative interpretation efforts with appeals to higher ideals of justice or human rights -notions beyond the legislation on paper. Moreover, the masculinist restoration of the 80s shows that such activisms do not only depend on the willingness of jurists to adopt such interpretations but also on the structuring of the legal field. In other words, performances of law depend a lot but not absolutely on the preferences and inclinations of the performers and the structuring of the legal field (or the stage) also imprints such performances.

Another important finding of this research concerns the concept of culture. As underlined by various scholars, culturalist arguments had a

[39] Kim Lane Scheppele, "Democracy by Judiciary. Or, Why Courts Can Be More Demoocratic than Parliaments," in *Rethinking the Rule of Law after Communism*, ed. Adam Czarnota, Martin Krygier, and Wojciech Sadurski (Budapest: Central European University Press, 2005), 25-60; and Kim Lane Scheppele, "Constitutional Negotiations: Political Contexts of Judicial Activism in Post-Soviet Europe," *International Sociology* 18, no. 1 (March 2003): 219-238.

special place in the debates over honor killings in Turkey in the 2000s.[40] By pushing them to the domain of tradition, secular institutions like courts were able to save themselves from responsibility concerning their reproduction and the association of such murders with backwardness, feudalism and tradition also contributed to the criminalization and marginalization of Kurds.[41]

In this study, I show that the culture defense, according to which such murders should be tolerated because they reflect the cultural understandings of the society, was not the only way in which culture was utilized in debates over such crimes, sexual freedom, and individual autonomy. In the 1960s and 1970s, there was a real culture war among the state elite. On the one hand, there were people who argued that Turkish culture was sexually conservative and that the idea of sexual freedom was alien to this culture. Hence, people who 'punished' men or women who transgressed social norms about chastity had to be tolerated because they were enforcing the dictates of Turkish culture. What is interesting is that there were also *others*. I call these people who provided alternative readings of Turkish culture as revolutionaries because they actually called for and -temporarily and partially achieved- to bring about a radical revisioning of the gender regime in line with the recognition of sexual freedom and individual autonomy. According to these people, many of whom had leftist leanings, Turkish culture and masses were sexually liberal in nature. With references to folk songs, Ottoman history, Hacıvat-Karagöz and the actual practices and approaches of peasants, they argued that sexual freedom was not an idea alien to Turkish culture but an actual part of Turkish history and lived experience.

The existence of such a group and the changes that actually took place because of this wave has not been recognized in the accounts on Turkish history so far. This makes them and this unrecognized 'revolution' a very important finding for this particular literature. However, I think that this

[40] Koğacıoğlu, "Tradition Effect," 173; and Nükhet Sirman, "Kürtlerle Dans," *Kültür ve Siyasette Feminist Yaklaşımlar* 2 (2007): 119-125.

[41] Koğacıoğlu, "Tradition Effect"; and Koğacıoğlu, "Knowledge, Practice."

story also tells us something more. I think that the cultural interpretations of these people and the fact that these interpretations accompanied a real change in law-in-action provides insights concerning the issue of vernacularization.

As underlined by Sally Merry, the successful translation of human rights into real outcomes depends on their vernacularization. In other words, such ideas can lead to tangible change if only they can be successfully remade in the vernacular.[42] I think that the accounts of these revolutionaries can be read as vernacularizations of the sexual revolution and human rights in Turkish. These people had not only demanded the recognition of human rights but also made a case for this by situating their advocacy into Turkish culture. Furthermore, they had actually *won* their case -even if not in full- because case-law had begun to change in this direction in multiple and radical ways. So far so good. But what happened next begs an explanation. These people lost this culture war. After the coup in 1980, there emerged a state discourse according to which even sex itself was a threat to national security and Turkish culture was undisputably conservative. A change in case-law followed suit. After the purges at the universities and courts, not only the limitations to the accommodation granted to intimate violence that were introduced in the 1970s were undone but the CCa took the existing accommodations to new and unprecedented depths. Seemingly, vernacularization does not guarantee success.[43]

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[42] Merry, *Human Rights*; and Sally E. Merry and Peggy Levitt, "The Vernacularization of Women's Human Rights," in *Human Rights Futures*, ed. Stephen Hopgood, Jack Snyder, and Leslie Vinjamuri (Cambridge: Cambridge University Press, 2017).

[43] As underlined in an analysis on vernacularization and labor policies in Turkey in recent decades, vernacularization may also lead to the emergence of outcomes contradicting the core principles of the framework that is vernacularized. In other words, even in uninterrupted processes of vernacularization related to gender, much might be lost in the process. Ayşe Alnıaçık, Özlem Altan-Olcay, Ceren Deniz and Fatoş Gökşen, "Gender Policy Architecture in Turkey: Localizing Transnational Discourses of Women's Employment," *Social Politics* (Summer 2017): 1-26.

What seems to determine the outcome in this case was not the nature of the cultural stock that could be used for vernacularization. The revolutionaries had found more than enough material to translate these rights into Turkish. It was also not the lack of people to do such translations. There were more than enough of them and, judging by the decisions of the CCa, they had gained the upper hand in some key institutions by the late 1970s. The problem was also not the use of the wrong strategy. Many jurists and scholars were clearly aware of the need for vernacularizing their case. They lost this war anyway because of a major shock after which only one interpretation of Turkish culture could be voiced in these institutions. I think this course of events suggests that vernacularization does not only depend on the strategies and preferences of actors but also on the structuring of institutional fields and the distribution of power among the people who populate them.

This brings me to the concept of *field*. I think this concept can help us understand *why* there were major changes in the regime of intimate violence in Turkey after major shocks. Let me start with the initial one after the foundation of the Republic. Ataturk's sickness and death were accompanied by a re-shuffling in the scene of politics and a couple of years later the country entered into the multi-party era. But the changes that I traced in this study did not initially come from legislators. They also did not start with the victory of the DP that sought to represent a more conservative and rural electorate. They came from the ranks of high judiciary and started as soon as Ataturk's health began to deteriorate in 1937. Sure, there were revisionist voices in the legal discourse since the mid-1930s but the decisions that led to the regime change began to be taken at this later moment in time. As far as I am able to trace, what changed at this point was not the composition of the CCa. The judges were more or less the same but there were radical changes in their approach to sexual freedom, individual autonomy, and intimate violence. Suddenly, they had become much more tolerant of masculine violence.

What changed at this point was not the structuring of the institutional fields that I examine but the stance and standing of the Republican elite populating the field of state power as such vis-a-vis the society. Suddenly,

the future of the regime, and the revolution was at stake and the demands of the masses were more important than ever. Lacking a foundational and mythicized leader, the state elite would need the support of the masses much more than before. As it has been well-documented, this support was tried to be derived through many means. Some measures reflecting the militant laicism approach were taken back.[44] A land reform was promised and put into action.[45] In this study, I show that sexual freedom and autonomy were among the first revolutionary gains to be abandoned in this process. This can be seen as yet another response to the demands of the masses as they were perceived by the state elite at this critical juncture. It seems that the Turkish state elite, well-known for their preoccupancy with the objective of 'saving the state'[46] had sacrificed the sexual emancipation and women's right to bodily and sexual autonomy to save the republic.

During two other major shocks that affected the transformations of the regime of intimate violence in the republican era, there were extensive institutional changes. After the 1960 coup, there was minimal change concerning the composition of CCa members but this coup brought about an otherwise enormous institutional re-structuring, including a constitution that emphasized social rights, human rights, rule of law, and independence of the judiciary. The revolutionaries that challenged and changed the rules of the game concerning intimate violence had flourished under the atmosphere and in the institutional arrangement this major change brought about. The 1980 Coup did not only bring purges that silenced them or ousted them from these institutions but also a much different constitution that curbed constitutional rights and judicial autonomy. After this coup, all the fields that I examined in this study were re-organized in a much different way -in a centralized, totalitarian,

[44] Murat Akan, *The Politics of Secularism: Religion, Diversity, and Institutional Change in France and Turkey*, (e-book version) (New York: Columbia University Press, 2017), 45.
[45] M. Asım Karaömerlioğlu, "Elite Perceptions of Land Reform in Early Republican Turkey," *The Journal of Peasant Studies* 27, no. 3 (2000): 115-141.
[46] Çağlar Keyder, *Türkiye'de Devlet ve Sınıflar* (Istanbul: İletişim, 1989), 239.

and conservative way. In terms of intimate violence, the outcome was an extremely violent masculinist restoration.

These findings indicate that what happens in such institutional settings do not only depend on the education, tendencies, and approaches of people who populate them or the histories of these institutions. These might be important in many ways but they are not all that matters. People in these fields may change their positions -sometimes rather swiftly. The settings of these fields may change. And all these might change what can be said or decided. In other words, changes in the structuring of the legal field might bring about constraints on the realm of possibilities. If we are to see law as a playing field, we can see major shocks as events that change the rules of the game and sometimes the players themselves (by kicking some people out, and by disciplining or strengthening others). And as far as I am able to trace in this research, this is key for understanding how and why legal change on intimate violence happens when it does.

As said by Robert Cover, "legal interpretation takes place in a field of pain and death."[47] During this journey that costed me years spent by reading these decisions and thinking about them over and over, I came to witness that it does and felt the bitterness of this truth at the bottom of my heart. But this journey also gave me hope. At the initial stages of this research, I was frustrated with the premises of criminal law reform in Turkey -thinking that we had lost a once in a life-time opportunity in the 2000s. While conducting this research, I noticed that we were not the first generation that tried to change these rules and experienced such frustrations. What gives me hope is not a sense of company in this regard but the facts that things had sometimes changed for the better and some of these changes proved to be permanent -even at the face of major masculinist restorations. If there is one lesson to be derived from this study, it is this: This regime is changeable and this has been proven so many times. This was the main narrative of this study and this is what gives me hope. And I hope that it will also give hope and courage to others.

[47] Cover, "Violence," 1601.

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