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The Unacceptable Spectre of Under-Aged Forced Marriage in Turkey

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Abstract

In many respects, Turkey is an exception among Muslim countries. Whilst being a secular democratic state, Turkey still struggles however with some remnants of its religious and socio-cultural heritage. The issue of forced marriage of children is one of those issues. Marriage is commonly defined as a union concluded by parties with their full and free consent. If consent is lacking, a forced marriage occurs. In case of a forced-marriage, consent is lacking because one of the prospective spouses does not give her/his consent freely, or sometimes because she/he is incapable of giving her/his consent for age reason.

As a founding member of the Council of Europe, Turkey has not only ratified the European Convention on Human Rights (ECHR) already in 1954 and then Protocol Nr. 1, but it has also ratified many of the core international documents on human rights and rights of children

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such as the U.N. Convention on the Rights of the Child, the U.N. Convention on the Elimination of All forms of Discrimination against Women, or the European Convention on Human Rights, religious, socio-cultural and legal practices. Nevertheless, forced marriage of children is still a prevalent social problem in Turkey, and in the majority of cases girls are the victims of such practices. This article examines the factors behind forced marriage of children in Turkey, while exposing the available legal background and Turkey's international commitments to fight legally against such practices. Finally, it will suggest reinforcement of available legal remedies in order to prevent forced marriage of children.

Keywords: Forced-marriage, ECHR, the Council of Europe, Turkey

Introduction

According to United Nations Populations Fund's (UNFPA) estimation over 10 million child marriages occur in 107 low-income countries each year.[1] Furthermore, 14.2 million girls under the age of 18 are expected to be married every year which means that 39,000 girls marryevery day.[2] Unfortunately, the aforementioned girls marry or enter into a union often against their will,in many cases with men who are much olderthan them,[3] and Turkey is not an exception. In Nevşehir, a city in the central Anatolia of Turkey, the Office of the Prosecutor filed a case against the alleged husband and the father of a girl at the age of fifteen (or perhaps younger) for sexual molestation. The defendants argued that early marriage is a tradition in that part of Turkey and many people get married in the same way.[4] Moreover, it was argued that they were not aware of the fact that their act constituted a violation of the criminal code. Nevşehir Court of Assize decided no ground for prosecution on the basis that "[i]n the social

[1] UNITED NATIONS POPULATION FUND, MARRYING TOO YOUNG: END CHILD MARRIAGES 6 (2012), http://www.unfpa.org/end-child-marriage (last visited Oct. 18, 2017).

[2] *Id.*

[3] UNICEF, PROGRESS FOR CHILDREN, A REPORT CARD ON ADOLESCENTS 5 (2012), https://www.unicef.org/publications/files/Progress_for_Children_-_No._10_EN_04232012.pdf (last visited Oct. 18, 2017).

[4] It is a fact that not all early marriages are made under force. However, statistics show that 46.8 % of early marriages are decided by parents in Turkey, *see* HACETTEPE UNIVERSITESI NUFUS ETUTLERI MUDURLUGU, TURKIYE'DE KADINA YONELIK AILE ICI SIDDET ARASTIRMASI 76 (2015), http://www.hips.hacettepe.edu.tr/KKSA-TRAnaRaporKitap26Mart.pdf, (last visited Oct. 19, 2017); GeetanjaliGangoli& Melanie McCarry& Amina Razak, *Child Marriage or Forced Marriage? South Asian Communities in North East England*, 23 CHILDREN & SOCIETY, 418, 426 (2009) (arguing although most of the children did not regret their marriage, they could have been forced to do so in the light of social mentality over women).

and cultural atmosphere they live in, many children generally get married before appropriate age and early marriage is not considered illegal or inconvenient. The defendants intended to set up a happy home. In this case, there is no sign of sexual molestation".[5]

As stated in this regrettable court decision, child marriage is still a social fact in Turkey. The problem is that there is sometimes a very slight line between forced marriage and marriage with full and free consent of the children.[6]Giving the fact that the existence of competent and informed consent is controversial where one of the prospective spouses is a child.[7]Forced marriage of children is commonly seen as violation of human rights and the rights of the children.[8]

[5]NevsehirAgirCezaMahkemesi [NEVŞEHIR COURT OF ASSIZE] 2010/142 E., 2012/20 K.

[6] International documents overtly emphasize the importance of full and free consent. For instance, Article 23(3) of the International Covenant on Civil and Political Rights (ICCPR), Article 10(1) of the International Covenant on Economic Social and cultural Rights and Article 1(1) of the Convention on Consent to Marriage state that marriage must be entered into with the free consent of the intending spouses.

[7] Loretta M. Kopelman, *The Forced Marriage of Minors: A neglected Form of Child Abuse*, 44 THE JOURNAL OF LAW, MEDICINE & ETHICS, 173, 174 (2016).

[8]Universal Declaration of Human Rights.G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen.mtg., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR]; Convention on the Rights of the Child, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (Sep. 2, 1990); Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage, 521 UNTS 231 (Dec. 9, 1964); Child, Early and Forced Marriage, G.A. Res. 68/148, U.N. GAOR, 68th Sess., U.N. Doc.A/RES/68/148 (Dec. 18, 2013); Forced Marriages and Child Marriages, EUR.PARL. ASS.DEB. 29th SESS. RES. 1468 (Oct. 5, 2005); U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, FORCED MARRIAGE (2015), https://travel.state.gov/content/travel/en/international-travel/emergencies/forced-marriage.html (last visited Oct. 23, 2017). UNITED KINGDOM FOREIGN & COMMONWEALTH OFFICE, THE RIGHT TO CHOOSE: MULTI-AGENCY STATUTORY GUIDANCE FOR DEALING WITH FORCED MARRIAGE 1 (2014), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/322310/HMG_Statutory_Guidance_publication_180614_Final.pdf (last visited Oct. 23,

A child is defined as a person below the age of 18 unless the laws of a particular state set the legal age of consent younger according toArticle 1 of the U.N. Convention on the Rights of the Child (UNCRC). In the Turkish legal system, the age of majority is set at 18[9] and under the age of 18 every person is considered as a child.[10] Although Turkey has ratified the UNCRC, marriage of children is still a reality and the statistics show that the girls are mostly the victims.[11] It is worth stressing that Turkey was one of the sixty nine states that ratified the U.N. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), considering also the request of the Committees of the CEDAW and the UNCRC to the member states "[n]ot to allow exceptions to minimum age of marriage even with consent".

There are many factors behind the fact of forced marriages, and specifically in the form of child marriage in Turkey. First of all, even though the age of majority is stated as 18, the Turkish Civil Code, also accepts the minimum age for marriage as 17 and allows a marriage of future spouses who are 17 years old upon the consent of their guardians.[12]In case of exceptional circumstances, the Turkish Civil Code allows a marriage of future spouses who are 16 years old upon a

2017) [hereinafter COMMONWEALTH]; Anti-Social Behavior, Crime and Policing Act 2014, c. 12 (Eng.); *supra* note 1.

[9]TURK MEDENI KANUNU [TMK] [TURKISH CIVIL CODE] Jan. 1, 2002, art.11 (Tur.).

[10]TURK CEZA KANUNU [TCK] [TURKISH CRIMINAL CODE] Jun. 1, 2005, art. 6(b) (Tur.)

[11] In 2011, 31 % of the women married under the age of 18. More specific 4.1 % of women were under the age of 14; 23.9 % were between the age of 15 and 17 when they married, *see* TURKIYE CUMHURIYETI AILE VE SOSYAL POLITIKALAR BAKANLIGI, TURKIYE AILE YAPISI ARASTIRMASI TESPITLER, ONERILER 121 (2014), http://ailetoplum.aile.gov.tr/data/5550af1d369dc51954e43522/taya2013trk.pdf, (last visited Nov. 5, 2017).

[12]*Supra* note 9, art. 124(1).

court's approval.[13] In addition, religious, social and economic factors also play a key role in the creation of such a drawback. Especially statistics show that 31 %of girls under the age of 18 got married, mostly with a religious ceremony that is not recognised by the Turkish legal system as a "legal marriage".[14]

It is remarkable that after considerable wave ofimmigration of Muslims to different countries around the world, this problem also has a tendency to become a global issue.[15]The aim of this study is firstly to uncover the root causes of forced marriages in the form of child marriage, as well as examining historical legal background and some social facts related to Turkey. Then the study focuses on the effect of these historical and social facts on the legal applications. Lastly, in order to eliminate the application of forced marriage of children in Turkey, the study suggests a new legal approach to the problem and amendments of the existing laws.

I. Background

A. The Concept and Terminology Regarding Forced Marriage from International and Turkish Perspective

It can be argued that arriving at a legal definition of forced marriage is rather problematic because of the divergent definitions in different

[13]*Id.* art.124(2).

[14]NazlanErtan, *Early Marriage, Lifelong Abuse*, HURRIYET DAILY NEWS, (Nov. 25, 2016), http://www.hurriyetdailynews.com/early-marriage-lifelong-abuse-106543.

[15]Over 3.4 million registered Syrians currently live in Turkey which is the largest host of the refugees in the world, *see*EUROPEAN CIVIL PROTECTION AND HUMANITARIAN AID OPERATIONS, TURKEY (2017), http://ec.europa.eu/echo/files/aid/countries/factsheets/turkey_syrian_crisis_en.pdf (last visited Oct. 18, 2017); Statistics and reports show that the frequency of early marriages among the female Syrians in Turkey is considerably high, *id est*, nearly 15 % females in the 15-18 age group are married, mostly by reason of economical motivations, *see* DISASTER AND EMERGENCY MANAGEMENT AUTHORITY, SYRIAN WOMEN IN TURKEY 27 (2014), https://data2.unhcr.org/en/documents/download/54512(last visited Oct. 18, 2017).

parts of the world.[16]In fact, forced marriage is described by showing which type of marriages does not constitute forced marriage.[17] On the contrary, in the study carried out by the Council of Europe, forced marriage is considered as an umbrella term to cover "[s]lavery, arranged marriage, traditional marriage, marriage for reasons of custom, expediency or perceived respectability, child marriage, early marriage, fictitious, bogus or sham marriage, marriage of convenience, unconsummated marriage, putative marriage, marriage to acquire nationality and undesirable marriage – in all of which the concept of consent to marriage is at issue".[18] Although different roaches have been taken for defining forced marriage,one main factor can be seen under them all: lack of consent.[19] In this context, in the most widely-accepted definition, Foreign and Commonwealth Office states that "[a] forced marriage is a marriage in which one or both spouses do not (or, in the case of some adults with support needs, cannot) consent to the marriage and duress is involved".[20]

In order to arrive at, an explicit definition of forced marriage, the terms of "marriage" and "forced" need to be clarified.[21]The first definition of marriage is contained in the U.N. Universal Declaration of Human Rights (UDHR) which was declared on Dec. 10, 1948 as follows: "[m]arriage shall be entered into only with the free and full consent of the intended spouses].[22]Although various number of international and regional human rights documents contain provisions regarding basic standards of marriage such as the same right to enter

[16]*Seegenerally* Neha Jain, *Forced Marriage as a Crime against Humanity: Problems of Definition and Prosecution*, 6 J. INT'l.CRIM. JUST.1013, (2008).

[17]Frances Simmons & Jennifer Burn, *Without Consent: Forced Marriage in Australia*, 36 MELBOURNE UNIVERSITY LAW REVIEW, 970, 973 (2013).

[18]EDWIGE RUDE-ANTOINE, FORCED MARRİAGES İN COUNCİL OF EUROPE MEMBER STATES 7 (2005).

[19]*Id.* at 17.

[20] COMMONWEALTH, *supra* note 8, at 8.

[21]*Supra* note 18, at 16.

[22] UDHR, *supra* note 8, art. 16(2).

into marriage, none of them provide a legal definition of marriage.[23] Commonly, marriage is considered as a legal union between a man and a woman who are attached by an exclusive commitment.[24] Nevertheless, the way of understanding the concept of marriage in one society may not be true for others. In this regard, legal definition and consequences of marriage differ from one country to another.[25] Today, a new model of marriage, which considers marriage as a relationship, has been acknowledged by some academics.[26] In the way of creating a universal definition of marriage, it is highlighted that there is no need to categorize marriage as a legal contract between a man and a woman.[27] Hence, it is argued that defining marriage as "[a]ny union between two or more people which, in a specific society is legally, culturally and/or religiously sanctioned, which is binding, and which, within the particular context of that society, establishes certain rights and obligations between these people and is seen as marital or marital alike"[28] seems appropriate in terms of dealing with any possible case.

[23] IRIS HAENEN, FORCE & MARRIAGE: THE CRIMINALISATION OF FORCED MARRIAGE IN DUTCH, ENGLISH AND INTERNATIONAL CRIMINAL LAW 17 (2014).

[24]SherifGirgis& Robert P. George & Ryan T. Anderson, *What is Marriage?*, 34 HARV. J.L. & PUB.POL'Y, 245, 252 (2011).

[25]Schalk and Kopf v. Austria, App. No. 30141/04.¶ 62, (Eur. Ct. H.R. June 24, 2010).

[26] David Orgon Coolidge, *Same-Sex Marriage? Baehr v. Miike and the Meaning Of Marriage*, 38 S. TEX. L. REV., 1, 38 (1997); *see generally* Milton C. Regan, *Law, Marriage, and Intimate Commitment*, 9 VA. J. SOC. POL'Y & L., l16 (2001).

[27] It can be argued that the attitude against cohabitation has changed. According to a study conducted by the British Social Attitudes, 61 % of participants stated that a woman with no children should have the same rights as a married woman, when her relationship ends, *see* ANNE BARLOW & SIMON DUNCAN & GRACE JAMES & ALISON PARK, COHABITATION, MARRIAGE AND THE LAW: SOCIAL CHANGE IN THE 21ST CENTURY 81 (2005).

[28]*Supra* note 23, at 18.

The second problem with the definition of forced marriage is the notion of consent and its relation to the issue of duress.[29]In other words, the future spouses shall give their competent and informed authorization willingly.[30] Hence, a lack of consent contains not only those who do not give consent but also who cannot give consent because of being underaged, disabled or incapable of giving informed consent.[31] The consent is lacking where the spouse givesher/his consent due to duress, misinformation, deception, fraud or lies.[32]On this basis, a marriage may be based on different practices of duress, from external influences such as emotional pressure, to more extreme cases such as abduction or rape.[33] In some cases, determining whether or not the parties have made a voluntary statement is a complex task to deal with except duress in the form of physical violence.[34]It is especially difficult to detect the nature of a marriage agreement between a forced and/or arranged marriage (where the bride and groom are pre-selected by their families) since considerable emotional pressure is involved.[35] In an arranged marriage, spouses give their full

[29] Susan Edwards, *The Straw Woman' at Law's Precipice: An Unwilling Party*, *in* PARTICIPATION IN CRIME: DOMESTIC AND COMPARATIVE PERSPECTIVES 70 (Alan Reed & Michael Bohlander eds., 2013).

[30]*Supra* note 7.

[31]*Id.;* ANGELA VIGIL, AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC AND SEXUAL VIOLENCE REPORT TO THE HOUSE OF DELEGATES (2014), https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2014_hod_annual_meeting_112b.authcheckdam.pdf(last visited Oct. 18, 2017).

[32]*Supra* note 7.

[33]Amrit Wilson, *The Forced Marriage Debate and the British State*, 49 RACE & CLASS, 25, 32 (2007); COMMONWEALTH, *supra* note 8, at 9.

[34] Alexia Sabbe& Marleen Temmerman& Eva Brems&ElsLeye, *Forced Marriage: An Analysis of Legislation and Political Measures in Europe*, 62 CRIME, LAW AND SOCIAL CHANGE, 171, 173 (2014).

[35]GeentanjaliGangoli&KhatidjaChantler, *Protecting Victims of Forced Marriage: Is Age a Protective Factor?*, 17 FEMINIST LEGAL STUDIES, 267, 269 (2009); *supra* note 17, at 974.

consent even though emotional pressure is involved.[36] However, in many cases, a woman knows that she cannot decline otherwise she would have to face the consequences.[37] In addition, after marriage, a spouse may realize she/he had been forced to marry at the time of marriage.[38]

As stated under Article 142 of the Turkish Civil Code, the officer of marriage asks the bride and groom individually whether each individual wishes to marry the other; if both answer in the affirmative, they are pronounced married by mutual consent. Accordingly, despite the global tendency regarding marriage, marriage is defined as an agreement between man and woman in Turkish legal system.[39] The basic problem which arisesin relation to the concept of marriage is where the spouses only conclude a religious marriage which has no legal effects in the contemporary Turkish legal system.[40]

There is no legal definition of "forced marriage" in the Turkish Civil Code.[41] The Code only accepts an action of annulment in case of duress.[42]If the spouse is coerced under duress that there is an immediate and serious danger towards her/his or one of the relatives' life, health, honour or dignity, she/he can sue for the annulment of the

[36]Mahmood v. Mahmood (1994) SLT 599 (Scot.) (The Court annulled the marriage, but nevertheless Lord Prosser argues that "under pressure–and perhaps very considerable pressure—a party does indeed change his or her mind and consents to a marriage, with however ill a grace and however resentfully, then the marriage is in my opinion valid").

[37]Kalwant Bhopal, *South Asian Women and Arranged Marriages in East London, in* ETHNİCİTY, GENDER AND SOCİAL CHANGE 121 (RohitBarot& Harriet Bradley & Steve Fenton eds. 1999).

[38]Gangoli&Chantler, *supra* note 35, at 269.

[39]*Supra* note 9; EVLENDIRME YONETMELIGI [THE REGULATION REGARDING MARRIAGE] Nov. 7, 1985, art. 14 (Tur.).

[40]Gotthard Jaschke, *Imam-Ehe in der Türkei*, 4 DIE WELT DES ISLAMS, 164, 170 (1955).

[41] 2 Pinar Ilkkaracan, *Access to the Legal System:Turkey*, *in* ENCYCLOPEDIA OF WOMEN AND ISLAMIC CULTURES: FAMILY, LAW AND POLITICS 383 (Suad Joseph ed. 2005).

[42]*Supra* note 9, art. 151.

marriage.[43] In this regard, only the acts which violate rights of a person such as life, health, honour and dignity are considered as duress and constitute a reason for claiming the annulment of the marriage.[44]The spouse who gave her/his consent under duress shall bring a suit within six months after being subjected to duress and five years after the date of marriage in any case.[45] Therefore, the annulment of marriage under duress would be secured before a court i.e. family division of the court of first instance within the time limitation and only the spouse who gave her/his consents under duress can ask for the annulment of marriage. This provision needs a critical approach on two grounds. The first one is regarding the legal understanding of the concept of duress. The Turkish Civil Code defines the acts which violate personal rights directly by the third ones as duress; but this definition excludes physiological pressure of the families as well as social pressure.[46] The second critique is related to the annulment claim which should not be limited by time which allows to use duress during five years after the marriage concluded by the one party in order to continue the marriage which may have become intolerable for the other party.[47]

B. Legal Modernization of Turkey: The Story of Westernization

Until 1923, Turkey was ruled by the Ottoman Empire and the legal system was based primarily on Islamic law and the Hanafi legalschool[48]which was the official doctrine in the empire since the

[43]*Id.*

[44]AyseHavutcu, *MukayeseliHukuktakiGelismelerIsiginda Turk MedeniKanunuAcisindanZorlaEvlenmeProbleminin Degerlendirmesi*, 8 E-JOURNAL OF YASAR UNIVERSITY, 1341, 1377 (2013), https://journal.yasar.edu.tr/wp-content/uploads/2014/01/9-Ay%C5%9Fe-HAVUTCU.pdf, (last visited Dec. 1, 2017).

[45]*Supra* note 9, art. 152.

[46]*Supra* note 44, at 1377-1378.

[47]*Id.*

[48]Sunni branch of the Islam was developed through four major Sunni schools: *Hanbali, Hanafi, Maliki* and *Shaf'i*of which representatives produced their works on

middle of the sixteenth century.[49]The fundamental classification of private law was based on religion, consequently on one hand there was the Islamic law which was applied only to Muslims and on the other there was the specific religious or customary law that was applied to the non-Muslim population of the Empire.[50]

At the end of the seventeenth century, the idea of being part of the Western civilization gathered momentum in order to save the empire from collapse.[51] Indeed, the period of Tanzimat(reorganization)[52]from

jurisprudence (*fiqh*) and textbooks that summarised the doctrine of the school or commentaries on legal doctrine and yet jurists were called also to give their legal opinions (*fatawa*) in response to questions about concrete cases, *see*JUDITH E. TUCKER, WOMEN, FAMILY, AND GENDER IN ISLAMIC LAW 14 (2012).

[49] Paul Magnarella, *The Reception of Swiss Family Law in Turkey*, 46 ANTHROPOLOGICAL QUARTERLY, 100, 101 (1973); HALIL CIN & GUL AKYILMAZ, TURKHUKUK TARIHI 90 (2011).

[50]EsinOrucu, *Turkey: Reconciling Traditional Society and Secular Demands*, 26 J. Fam. L. 221, 236 (1987); 2 Pinar Ilkkaracan, *Customary:Turkey*, *in* ENCYCLOPEDIA OF WOMEN AND ISLAMIC CULTURES: FAMILY, LAW AND POLITICS 426, 427 (Suad Joseph ed. 2005); Alan Watson, *The Evolution of Law: Continued*, SCHOLARLY WORKS, 538, 550 (1987); ArzuOguz, *The Role of Comparative Law*, 17 PACE INT'L L. REV., 373, 376 (2005); RODERIC H. DAVISON, REFORM IN THE OTTOMAN EMPIRE 1856-187612 (1963)(The main community of non-Muslims were the Orthodox Greeks, Gregorian Armani and Jews).

[51]ERGUN OZBUDUN, TURK ANAYASA HUKUKU 25 (2010); KEMAL GOZLER, TURK ANAYASA HUKUKU DERSLERI 11 (2014)In fact the treaty called *Sened-iIttifak* (Charter of Alliance) signed in 1808 between the government and the representative of the local governing authorities (*Ayans*) which was considered the first constitutional phase of the Ottoman Empire and for the first time in the history of the Empire the power of the Sultan was limited. According to this treaty only officials of empire could interfere in the affairs of government and the grand vizier contributed to the administration and as a result he was responsible for his actions. However, this treaty had an interesting feature, because it was not recognized a mechanism to ensure its execution.

[52] The word of *Tanzimat*derives from an Arabic word "order" and means also "reform" *see*, DAVISON, *supra* note 50, at 42; *see also* CARTER VAUGHN FINDLEY, *The Tanzimat*, *in* 4 THE CAMBRIDGE HISTORY OF TURKEY: TURKEY IN THE MODERN WORLD 13 (RelatKasaba ed., 2008).

1839[53]to 1876[54], the era of modernisation of the empire[55] opened the way for education of women and questioning of repressive system against them.[56]It is worth mentioning that the principles of Tanzimat had been interpreted in such a way that the rules were applicable to the entire population, Muslims or not, who composed the entire of the Ottoman Empire.[57] In addition, theIslahatFermanı(reform edict), was enacted in 1856, finally settled that the laws were equal for all without any distinction of religious affiliation.[58] In this context, a need arose in order to promote a series of reforms[59] with special emphasis on

[53]Sultan recognized the fundamental principles such as security of life, honor and property for the first time in the edict of *Tanzimat.*BERNARD LEWIS, THE EMERGENCE OF MODERN TURKEY 107 (1968); GULNIHAL BOZKURT, BATI HUKUKUNUN TURKIYE'DE BENIMSENMESI 48 (1996); COSKUN UCOK & AHMET MUMCU & GULNIHAL BOZKURT.TURK HUKUK TARIHI 333 (20080); DAVISON, *supra* note 50, at 40; ILBER ORTAYLI, IMPARATORLUGUN EN UZUN YUZYILI 99 (2006).

[54] ERGUN OZBUDUN, THE CONSTITUTIONAL SYTEM OF TURKEY: 1876 TO PRESENT 2 (2011) (Even though the *Tanzimat* reforms had no effect on the powers of sultans, it leaded the way in the first Constitiuion of Ottoman Empire in 1876. The period of *Tanzimat* ended with the enactment of the Constitution).

[55] Linda T. Darling, *Islamic Empires, The Ottoman Empire and the Circle of Justice*, *in*CONSTITUTIONAL POLITICS IN THE MIDDLE EAST, WITH SPECIAL REFERENCE TO TURKEY, IRAQ, IRAN AND AFGHANISTAN 23(Said Amir Arjomand ed. 2008); FINDLEY, *supra* note 52, at 13.

[56]ZuhalYesilyurtGunduz, *The Women's Movement In Turkey: From Tanzimat Towards European Union Membership*, 9 PERCEPTIONS, 115, 115 (2004); Darling, *Id*.; FINDLEY *Id*.

[57]BOZKURT, *supra* note 53, at 49; OZBUDUN, *supra* note 51, at 26.

[58] DAVISON, supra note 50, at 55; BOZKURT, *Id*.; OZBUDUN, *Id*.; FINDLEY, *supra* note 52, at 18; Darling, *Id*.; Erik J. ZURCHER, TURKEY A MODERN HISTORY 51 (2004)

[59]HifziVeldetVelidedeoglu, *Les Facteurs De Codification DansL'Empire Ottoman Et Les Causes De La Réception Du Code Civil Suisse Par La TurquieRépublicaine,* 11 ANNALES DE LA FACULTE DE DROIT D'ISTANBUL, 21, 24-25 (1961)(As a starting point such gaps were filled partly with the enactment of the Commercial Code in 1850 which consisted of the first two chapters of the French Code and supplemented with appendices. In 1881, moreover, taking as a model of the French

contract law and commercial law, just to fill-in the legislative gaps, in a progressively dynamic world and influenced by the increasing trade relations with European countries.[60]Under this wave of reform, the Ottoman Criminal Code (Qanun al-jaza' al-Humayuni), a translation of the 1810 French Criminal Code, came into force in 1859.[61]Nevertheless, the translation seems as a modified version since some Islamic norms and customswere added to the Code. In addition, in later years, more provisions were modelled on Islamic standards.[62]As a part of this phase of the reforms, a codification entitled "Mecelle"[63] which had a large context such as the commercial law, law of civil procedure, property law and contract law was completed.[64]Nevertheless,Mecelle is not considered as a civil code of western codifications of the nineteenth century, since the matters regarding law related to individuals, family law and inheritance law

Code of Civil Procedure of 1807, the Code of Civil Procedure which replaced the decree of the procedure of commercial courts in 1860 was enacted); UCOK & MUMCU & BOZKURT, *supra* note 53, at 357; LEWIS, *supra* note 53, at 110; Paul J. Magnarella, *East Meets West: The Reception of West European Law in the Ottoman Empire and the Modern Turkish Republic*, 2 J. INT'L L. & PRAC. 281, 284 (1993) (arguing in order to apply the new European originated codes, mixed tribunals composed of Muslim and non-Muslim judges were constituted),

[60] For a deep analysis on relations with European countries we refer to,*see* ORTAYLI, *supra* note 53, at 114. With the introduction of these reforms, the efficiency of both in the commercial field and administrative one increased; their goal was to change the social and cultural customs of the people *see*, Kurt Lipstein, *The Reception of Western Law in Turkey, The Purpose and the Results of the Meeting of International Association of Legal Science held in Istanbul inSeptember 1955*, 5 ANNALES DE LA FACULTÉ DE DROIT D'ISTANBUL, 226, 229 (1956).

[61]Velidedeoglu, *supra* note 59, at 24 ; LEWIS, *supra* note 53, at 109 ; UCOK & MUMCU & BOZKURT, *supra* note 53, at 344 ; ORTAYLI, *supra* note 53, at 179.

[62]1 SULHI DONMEZER & SAHIR ERMAN, NAZARI VE TATBIKI CEZA HUKUKU 126 (1997).

[63]The full name of the codification is "*Mecelle-iAhkâm-ıAdliye*".

[64] The codification was constituted between 1869 and 1876 and consisted of 16 books. *See* LEWIS, *supra* note 53, at 123; Velidedeoglu, *supra* note 59, at 26; BOZKURT, *supra* note 53, at 159.

were not regulated.[65] The text in question was also criticized for not reflecting the spirit of its time and to have a strong Islamic imprint.[66] The period from the foundation of the republic in 1923 to the adoption of the western civil codes in 1926, was revolutionary both legally and politically for the Republic of Turkey.[67]Indeed, this period has a particular importance,given the fact that, both the caliphate and the office of shaykh al-islam[68]and the sharia courts were abolished in 1924.[69]In the same year the secular courts were introduced.[70]Thus, the old system was entirely abandoned and the new legal system was established by the reception of the western European codes.[71] In 1926,

[65] In fact there was no need for such areas of law to regulate because they were governed by Islamic law for Muslims and their own religious law for non-Muslims,*see* BOZKURT, *supra* note 53, at 161-162.

[66] LEWIS, *supra* note 53, at 123; SevalYildirim, *Aftermath of a Revolution: A Case Study of Turkish Family Law*, 17 PACA INT'L L.REV. 347, 353 (2005).

[67] It is also claimed to be a very good example of revolutionary and radically reformist social engineering through laws,*see*, Orucu,*supra* note 50, at 222.

[68] Giving consultancy in matter of legality of the matters, *shaykh al-islam*, chief mufti was at the second highest rank of governance after the caliph himself,*see*, Wael B. Hallaq, *The Legal Crises of Modern Islam*, 19 JOURNAL OF LAW AND RELIGION, 243, 253 (2003 - 2004).

[69]Yildirim, *supra* note 66, at 356; JEAN PAUL GARNIER, OSMANLI IMPARATORLUGUNUN SONU 297 (2007). However Islam was officially the religion of the Turkish state until 1928 and the principle of secularism was recognized and inserted in the Constitution in 1937 for the first time. *See*, GOZLER, supra note 51, at 29. In order to constitute a state control mechanism, the authority of the Religious Affairs Directorate was established which licenses preachers, supervises the content of their sermons, appoints all the muftis in the provinces and if asked, gives an occasional opinion on religious law,*see*TolgaKoker, *The Establishment of Kemalist Secularism in Turkey*, 2 MIDDLE E. L. & GOVERNANCE, 17, 32 (2010).

[70] The Constitution of 1924 granted to the independent courts the exercise of judicial authority in the name of nation,*see*Koker, *Id.* at 30.

[71]*See generally*Gulnihal Bozkurt, *The Reception of western European Law in Turkey (From Tanzimat to the Turkish republic, 1839-1939)*, 72 DER ISLAM, 283 (1998).

in fact, the incumbent government decided to fully adopt[72] the Swiss Civil Code of 1907[73]which had a crucial role for the revolution in the lives of women in Turkey. Indeed, by the virtue of this code polygamy was abolished, forbidding the marriage under the age of 15 for women and 17 for men and recognised women as legally equal to men in every aspect.[74]Nevertheless, this code has been criticised for neglecting the true gender equality in relation to family law.[75] The enactment of the new Turkish Civil Code in 2002, which established a new gender regime based on equality of men and women in relation to marriage and divorce is considered as an important development for women's right in Turkey.[76]

Following the birth of the Republic, the first Turkish Criminal Code of 1926, a translation of the 1889 Italian Criminal Code (Zanardelli

[72]After the foundation of the republic, the theocratic feature of *Mecelle* was not adequate with the new revolutionary mentality. The committees were formed in order to prepare a new Civil Code, but they failed to free from the mindset of Islamic law, *see*Velidedeoglu, *supra* note 59, at 33.

[73] Besides the Civil Code, a range of western codes was adopted in this period. In 1926 both the Code of Obligations of 1911 and the Code of Civil Procedure and the Bankruptcy and Enforcement Code were adopted from Switzerland yet, the Commercial Code and the Code of Criminal Procedure were adopted from Germany.

[74] The Civil Code of 1926 also outlawed the practice according to which husbands could end their marriages by repudiation. Zehra F. KabasakalArat, *Women, in* THE ROUTLEDGE HANDBOOK OF MODERN TURKEY 260 (MetinHeper&SabriSayan Eds., 2012). The Code granted women the right to choose their spouses, initiate divorce, and maintain certain maternal rights after divorce. Orucu, *supra* note 50, at 224; Ilkkaracan, *supra* note 50, at 426.

[75] According to the Turkish Civil Code of 1926, the husband was designated as the head of the household and the representative of the family; therefore, the husband was solely liable for the administration of the matrimonial property,*see*, Yildirim, *supra* note 66, at 359; CengizKochisarlioglu, *AileHukukundaEslerinEsitligi*, 40 ANKARA UNIVERSITESI HUKUK FAKULTESI DERGISI 253, 254 (1998).

[76]Ilkkaracan, *supra* note 41, at 383; G. ALDIKACTI MARSHALL, SHAPING GENDER POLICY IN TURKEY: GRASSROOTS WOMEN ACTIVISTS, THE EUROPEAN UNION, AND THE TURKISH STATE 93 (2014).

Code), was adopted and was in force until 2005.[77] Despite the protective nature of the Code in terms of human rights, certain provisionswere against gender equality.[78] The new Turkish Criminal Code numbered 5237 was praised by scholars and lawyers on the basis of innovative perspective against women's rights.[79] Article 3 of the Code succinctly emphasized that in the implementation of the Criminal Code, no one shall receive any privileges and there shall be no discrimination against any individual on the basis of their race, language, religion, sect, nationality, colour, gender, political (or other) ideas and thought, philosophical beliefs, ethnic and social background, birth, economic and other social positions.[80] In fact, the male dominant character of the former Turkish Criminal Code was abrogated; however, the discriminatory practice of courts stands as undeniable fact. It was rightly argued that judges and state officials act under the effect of what is customary within the Turkish society.[81]

[77] The reason behind the adoption of such a code is that *Zanardelli Code* was considered the most liberal example of its time,*see generally* ZEKI HAFIZOGULLARI & MUHARREM OZEN: TURK CEZA HUKUKU GENEL HUKUMLER (2015).

[78]Gulriz Uygur &TurkanYalcinSancar, *Law, Woman's Subordination and Changing Face of the Turkish Legal System in the Example of Article 434 of the Turkish Criminal Code*, 1 EASTERN EUROPEAN COMMUNITY LAW JOURNAL, 31, 34 (2005) (For instance, defloration by promise of marriage was regulated under a special criminal provision which shaped by the customs and attached importance to the women's virginity).

[79]TURKAN YALCIN SANCAR, TURK CEZA HUKUKUNDA KADIN 191 (2013).

[80]*Supra* note 10, art. 3.

[81]*Supra* note 78, at 35; Similarly, the European Court of Human Rights observed that *"the alleged discrimination at issue was not based on the legislation per se but rather resulted from the general attitude of the local authorities, such as the manner in which the women were treated at police stations when they reported domestic violence and judicial passivity in providing effective protection to victims"*. Opuz v. Turkey, App. No. 33401/02, ¶ 192, (Eur. Ct. H.R. July 9, 2009). For example, in some cases, the Turkish Court of Cassation decided on the reduction of the sentence of the accused for committing murder against his partner by reason of unjust

C. Turkey's Obligations Emerged from International Law Based on Elimination of Forced Marriages of Children

Under international law, a number of agreements have been created in order to criminalize forced marriage. As one of the core international instruments, which manifest the European's approach towards forced marriage that is based on criminalization which can be deduced under the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention)[82] which was ratified by Turkey on Mar. 14, 2012.[83]Article 37 of the Conventionplaces state parties under obligation to take necessary legislative measures to criminalize forced marriage.[84]

In addition, Turkey has already ratified various other international human rights documents, in some cases particularly in relation to women's human rights. On Dec. 2, 1985, Turkey became a state party to theCEDAW[85] by means of pertinacious demand of feminist

provocation. The Court held that there was an unjust provocation against the husband by the wife who declined drinking the fruit juice offered by him. *See*Yargitay [YARG] [TURKISH COURT OF CASSATION] March 31, 2009, 9687/1691.

[82]The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, Aug. 1, 2014, CETS No. 210.

[83]Approved by the Parliament on Nov. 24, 2011, published in the Official Gazette on March 8, 2012.

[84]Supra note 82; Unfortunately, Turkey is not a state party to the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages. The Convention is a vital tool in terms of fighting against child and forced marriages. According to the Convention, No marriage shall be legally entered into without the full and free consent of both parties, and all state parties must set a minimum age for marriage.

[85]U.N. Convention on the Elimination of All Forms of Discrimination against Women, GA res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46; 1249 UNTS 13; 19 ILM 33 (1980).CEDAW has been described as a powerful international human rights instrument that reflects a global determination on the part of the international community to achieve gender equality through advancing women's rights. For an overall view of CEDAW *see generally* WOMEN'S

movement in Turkey.[86]Article 16 of the CEDAW places state parties under obligation to take appropriate measures to ensure that women have the right to freely choose a spouse and to enter into a marriage only with their free and full consent. In the same vein, the ECHR which ratified by Turkey in 1954[87] ensures some of the basic rights that may be violated in a forced marriage, also puts the responsibility firmly on the public officials in terms of preventing such violations. State parties are under obligation to particularly secure the basic rights which are violated by a forced marriage; Article 3 of the ECHR which guarantees prohibition of torture, and Article 8 which concerns the right to respect for private and family life could be applicable in such cases.[88]

Turkey has also ratified the UNCRC in 1995. Unlike the UNCRC which does not contain any specific article regarding the marriage of child, the CEDAW, in Article 16(2) states that "[t]he betrothal and the marriage of a child shall have no legal effect" and requires the member states "[t]o specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory".[89] Nonetheless, the UNCRC significantly requires member states to abolish "traditional practices prejudicial to the health of children" as

HUMAN RIGHTS: CEDAW IN INTERNATIONAL, REGIONAL AND NATIONAL LAW (Anne Hellum& Henriette Sinding Aasen eds., 2013); *see also* U.N. Committee on the Elimination of Discrimination Against Women,*General recommendation on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic consequences of marriage, family relations and their dissolution)*, U.N. Doc. CEDAW/C/GC/29 (Oct. 30, 2013).

[86]Gunduz, *supra* note 57, at 119.

[87] As a founding member of the Council of Europe, Turkey ratified the ECHR with Law No. 6366, published in the Official Gazette No. 1567 on March 10, 1954.

[88]Shazia Choudhry, *Forced Marriage: the European Convention on Human Rights and the Human Rights Act 1998*, *in* FORCED MARRIAGE: INTRODUCING A SOCIAL JUSTICE AND HUMAN RIGHTS PERSPECTIVE 72 (Aisha K. Gill &SundariAnitha eds., 2011).

[89]*Supra* note 12, art. 16(2).

well as to protect children from "all forms of sexual exploitation and sexual abuse". Furthermore, the UNCRC Committee has persistently scrutinised child marriage in its Concluding Observations to member states which have ratified the UNCRC.[90] The CEDAW and the UNCRC Committees have recommended to state parties to "[r]aise the minimum age of marriage for both women and men" and "[n]ot to allow exceptions to minimum age of marriage even with consent". In this regard the marriage of minors cannot be justified with their consent. Another recommendation of the Committees is to "[p]rovide for sanctions against perpetrators of early marriage and ensure the investigation of cases as well as the prosecution and punishment of perpetrators".

II. Turkey's Challenges of Marriage Law, Religious, Socio-Cultural and Legal Practises on Marriages of Children

As stated above, prior to the republic era, Turkey was ruled according to the Ottoman law which was based on Islamic law until the legal revolutions of the Turkish Republic. Yet, family law was the core of the Islamic law which governed the lives of the Muslim population of the empire over centuries.[91]It is remarkable that the Islamic family law was replaced by the family law based on the Swiss Civil Code in a country which had almost98 % of the Muslim population in that time.[92]Also today, the majority of the societyin the modern Turkey defines themselves as Muslims.[93]Therefore, being part of the history

[90]*See generally* EQUALITY NOW, U.N. CEDAW AND CRC RECCOMMENDATIONS ON MINIMUM AGE OF MARRIAGE LAWS AROUND THE WORLD (2013), https://www.equalitynow.org/sites/default/files/UN_Committee_Recommendations_on_Minimum_Age_of_Marriage_Laws.pdf (last visited Oct. 18, 2017).

[91]Magnarella, *supra* note 59, at 285.

[92]*Id.*

[93] According to a study in 2017, 86 % of people calls themselves Muslims, and 92 % of population believes the existence of Allahs*see* MAK DANISMANLIK, TURKIYE'DE TOPLUMUN DINE VE DINI DEGERLERE BAKISI 4 (2017), http://www.makdanismanlik.org/wp-content/uploads/2017/06/MAK-DANI%C5%9EMANLIK-T%C3%9CRK%C4%B0YEDE-TOPLUMUN-

of the country, Islamic law has also inevitably a large application in people's daily life at present, and the act marriage is one of its manifestations.

According to Islamic law, marriage is a legal binding contract which can only be concluded between a man and a woman[94] who had the capacity of judgement and had reached puberty.[95] Different schools of Islam established minimum age of marriage which is based on gender. According to Hanafi school (officially legal doctrine of Ottoman Empire); minimum age of marriage was 9 for girls and 12 was for boys.[96]Under these age groups nobody was assumed to have reached puberty therefore could not marry.[97]

The necessity of the consent of woman who fulfilled the requirements for marriage was discussed also among Hanafi scholars. According to some scholars of Hanafi sect, women who reached puberty and had the capacity of judgement could give their consent for their own marriage without any need for the consent of their legal guardians.[98] Nevertheless, according to the others, the women who had the capacity of judgement and reached the puberty could not get married without the consent of their legal guardians.[99] The first interpretation was applied predominantly between 941 and 1544 in the Ottoman territories.[100] In 1544, the Ottoman Sultan (as Lord of the Caliphate) adopted the second reading which was applied in the Ottoman territories until the end of the Empire.[101] However,the application

D%C4%B0NE-VE-D%C4%B0N%C4%B0-DE%C4%9EERLERE-BAKI%C5%9EI-ARA%C5%9ETIRMASI.pdf(last visited Dec. 5, 2017).

[94]*Supra* note 48, at 41; *supra* note 59, at 294.

[95] CIN & AKYILMAZ, *supra* note 49, at 378; M. AKIF AYDIN, OSMANLI AILE HUKUKU 52 (2017).

[96] CIN & AKYILMAZ *Id.*

[97]*Id.*

[98] AYDIN, *supra* note 95, at 53.

[99]*Id.*

[100]*Id.* at 54.

[101]*Supra* note 48, at 60; AYDIN, *supra* note 95, at 55.

differed whether the women who had previously been married or not. Even though Hanafi's school did not let the legal guardians of the bride who reached the puberty conclude a marriage agreement without her consent[102], the same religious school would let the legal guardians of the children –boys or girls- who did not reach the puberty conclude a marriage agreement without consulting them.[103] Yet, the legal guardians referred to above were a very large category of the family members such as fathers, grandfathers, brothers and their sons, paternal uncles and their sons.[104]

At the time, the minimum age for marriage for girls was set at nine and 12 for boys was regulated under the codification regarding family was the law entitled Hukuk-iAileKararnamesi(the Ottoman Family Law Ordinance) as part of the codification movement of Tanzimatperiod which entered into force in 1917 and remained in force only for twenty months in the Ottoman Empire.[105] Accordingly, it was an innovation for that Ottoman family law that the

[102] CIN & AKYILMAZ, *supra* note 49, at 381.

[103] Nevertheless if the marriage concluded by the legal guardians except father and grandfather, the minors (girls or boys) could request the annulment of marriage from the court when they reached the puberty, called *khiyar al-bulug*- option of puberty. See *Supra* note 49, at 43; CIN & AKYILMAZ, *supra* note 49, at 382. However the application differed on the basis of gender, more clearly the men could ask the annulment anytime during their life but the women should declare their intention of annulment of the marriage as soon as they reached the puberty; otherwise they could never request the annulment of the marriage from the court. Furthermore according to imperial sharia court records, the number of women who exercised the right to request the annulment of marriage after reaching the puberty is much less than the number of men. CIN & AKYILMAZ, *supra* note 49, at 383.

[104] CIN & AKYILMAZ, *supra* note 49, at 382.

[105] CIN & AKYILMAZ, *supra* note 49, at 370. It must be underlined that *Hukuk-iAileKararnamesi*was the first codification regarding family law in Islamic countries which is still in force in Lebanon and remained in force in Syria until 1953, in Jordan until 1951 for Sunni populations*see* AYDIN, *supra* note 95, at 53.

aforementioned law banned concluding a marriage agreement under these ages by legal guardians.[106]

The fundamental sources of Islamic law[107] stated that the marriage contract should have been concluded through the participation of the parties and testimonies nonetheless any requirement was stated regarding participation of legal officer or religious figure.[108]However, as an administrative custom, in many Ottoman cities it was customary to register marriages in the court and this practice was strengthened by the decree of the Sultan in the sixteenth century which necessitated the registration of all marriages.[109] However, in the successive centuries the practice varied in different parts of the Empire such as in Rumelia, the localimam (religious representative) generally concluded the marriage without recourse to the court.[110] Yet, imams could not conclude the marriage without an authorization of marriage which was given by the court upon a request of the prospective spouses. [111]After the abolition of the Sharia courts in 1924 and prior to the enactment of the Turkish Civil Code of 1926, the court of peace was appointed to grant authorizationto imams to conclude a religious marriage ceremony.[112]

In the contemporary Turkish legal system, marriage is defined as an agreement which is concluded upon mutual and verbal declaration of

[106] AYDIN, *supra* note 95, at 195 (It was written on the preamble of this codification that the marriages of minors were forbidden because of creating a lot of problems in family life).

[107] The most important source is Qur'an and the second important source is *sunna*, *i.e.* the practises and the sayings of the Prophet Muhammed, *see* s*upra* note 48, at 12.

[108]AYDIN, *supra* note 95, at 59; Magnarella, *supra* note 60, at 294.

[109] S*upra* note 48, at 60.

[110] Most of the marriages were registered in Jerusalem but the records of marriages were varied in Syria and Palestines*see* AYDIN, *supra* note 95, at 65; s*upra* note 48, at 60.

[111] AYDIN, *supra* note 95, at 67; *supra* note 40, at 170.

[112]*Supra* note 40, at 176.

wills of prospective spouses (consensus facitnuptias).[113]Any other kind of union (de facto unions) has not been legally recognised in Turkish legal system, thus has no legal effects.[114]After the legal reform of 1926, the civil marriage ceremony became compulsory and the religious marriage ceremony lost its legal effectiveness.[115]Thus, in order to conclude a marriage agreement the prospective spouses will declare their own intentions in presence of two witnesses and the officer of marriage.[116]The officer of marriage is the mayor or the officer appointed by the mayor,[117] therefore the religious representative (imam) was not appointed as the officer of marriage.[118] Consequently, the ceremony which is performed by an imam is not recognised by the civil law and has only religious significance but has no legal effect.[119] Even though the Turkish Civil Code does not recognise the religious marriage as a legal one, Islamic marriage is still performing both alongside a legal marriage and separately from a civil marriage.[120]While, fundamental Islamic sources and the practice of Ottoman Empire illustrated that the participation of religious representative was not compulsory in order to conclude a marriage in

[113]*Supra* note 9, art. 142.

[114] Therefore the couples did not have rights and obligations in relation to property, inheritance and maintenance payments following a separation. Turkey does not allow same-sex couples to get married or register their partnership in any way.

[115]Magnarella, *supra* note 59, at 103; Orucu,*supra* note 50, at 225; TugrulAnsay, *Introduction to Turkish Law* 116 (TugrulAnsay& Don Wallace Jr. eds., 2007).

[116]*Supra* note 9, art. 142.

[117]However also the Minister of Interior shall appoint officers among foreign representatives of Turkey. THE REGULATION REGARDING MARRIAGE, *supra* note 39.

[118] Supra note 40, at 180.

[119]*Id*.;MUSTAFA DURAL & TUFAN OGUZ & ALPER GUMUS, TURK OZEL HUKUKU CILT III AILE HUKUKU 74 (2010).

[120] According to the statistics of 2012 of Turkish Statistical Institute, 93,7 % of couples concluded both civil and religious marriage, 3,3 % of couples concluded only civil marriage and 3 % of couples concluded only religious marriage. TURKISH STATISTICAL INSTITUTE, ISTATISTIKLERLE AILE, http://www.tuik.gov.tr/PreHaberBultenleri.do?id=13662 (last visited Oct. 2, 2017).

Islamic law, it became a social practise in Turkey[121]which is still a matter of debate within thecontemporary society. In fact, a draft bill recently passed by the Grand National Assembly (Turkish parliament) to grant permission to "muftis" who are religious civil servants within the body of Turkey's Directorate of Religious Affairs in order to conclude a civil marriage[122] which divided the society into two blocks: Religious conservatives in favour of the bill and the secular Population against it.[123]

In the Turkish legal system,thecapacity to marry requires certain qualifications[124] such as: majority, and capacity of judgement. A

[121]Orucu, *supra* note 50, at 226; HALIL CIN, ISLAM VE OSMANLI HUKUKUNDA EVLENME 313 (1988).In the survey which conducted in the 1970s of Turkey showed that the religious marriage ceremony performed by *imam* with the participation of two male witnesses, and two male representatives for the spouses. The ceremony is realizing as follows: [a]*fter the imam had read passages from the Quran, he turned to the bride's representative and said, "In the name of Allah and in accordance with the exalted traditions of the Prophet, you have been named representative of so and so's daughter." The imam then asked him three times: "By Allah's command, did you give this girl?" The representative responded three times: "By the power of my office, I gave her." The imam then turned to the groom's representative and asked: "By Allah's command, did you take this girl?" He, too, responded affirmatively three times. The imam then solemnly said, "Amen," and together those present recited the Fatiha-the Quran's opening chapter]*, *See*Magnarella,*supra* note 60, at 294.

[122] The bill passed by the Turkish Parliament on Oct. 18, 2017. *See*, *Marriage Authority Passed to Mufti of Parliament*, TURKEY TELEGRAPH (Oct. 18, 2017), http://www.turkeytelegraph.com/breaking/marriage-authority-passed-to-mufti-of-parliament-h13580.html.

[123]*See*MahmutBozarslan, *Bill Allowing Turkish Muftis To Perform Civil Marriages Stokes Concern Read More*, AL-MONITOR (Aug. 9, 2017), http://www.al-monitor.com/pulse/originals/2017/08/turkeys-muftis-to-conduct-marriages.html#ixzz50NEN7Hb8; *Turkish Parliament Passes Law Allowing Muftis To Register Civil Marriages*, DAILY SABAH TURKEY (Oct. 18, 2017), https://www.dailysabah.com/turkey/2017/10/18/turkish-parliament-passes-law-allowing-muftis-to-register-civil-marriages.

[124]*Supra* note 9, art. 124-125.

person, who has the capacity to choose and has reached the age of marriage i.e. 18 years old, can marry without any consent or court approval.[125] It is worth noting that pursuant to the Turkish Civil Code of 1926 the minimum age for marriage differed on the basis of gender. More clearly, unless the woman had reached 15 years of age and the man 17 years old, the prospective spouse could not married upon consent of her/his guardian.[126]In such circumstances, the guardian could not declare the intention of marriage, only the prospective spouse can do so, but the guardian only could have declare her/his consent for the marriage.[127] On the basis of exceptional circumstances, the woman who had reached 14 years of age and the man who had reached 15 years old could have got married upon a court's approval.[128]

The Turkish Civil Code of 2002, however, adopted a new perspective of gender equality and changed the minimum age for marriage. In order to be able to marry, the future spouses must have reached 18 years old, the age of consent. Hence, the spouses could onlymarry when they had reached 17 years of age upon consent of her/his guardian.[129] Furthermore the court could allow a "[m]arriage of a person (both men and women) of the age of 16 in case of exceptional circumstances".[130]According to Article 11 (2) of the Turkish Civil Code, a person is recognised as an adult upon marriage, consequently a person under the age of 18 receives the same rights and responsibilities as an adult. There is no specific definition regarding "exceptional circumstances" in the Turkish Civil Code of 2002. Hence, the Civil Code grants a wide discretion to judges in order to evaluate the circumstances in every concrete case before reaching a

[125]*Supra* note 119, at 51.

[126]1926 TARIHLI TURK MEDENİ KANUNU [ETMK] [TURKISH CIVIL CODE OF 1926] (Tur.) art.88(1).

[127]*Supra* note 119, at 52-53.

[128]*Supra* note 126, art. 88(2).

[129]*Supra* note 9, art. 124(1).

[130]*Id.*

conclusion regarding exceptional circumstances.[131] The Turkish Court of Cassation, in a recent decision in 2015, reversed the judgement which allowed a marriage involving a 16 years old girl that while considering the fact as living together such as husband and wife did not constitute an exceptional circumstance.[132]It is regrettable that the cases that the Turkish Court of Cassation considered related to judge approved marriages in relation to girls under the age of 17 not to a boy.[133] However, sadly, in most cases the Court reversed the judgement due to the fact that the girls concerned did not even reach the age of 16 which can be permitted upon a judge's approval.[134]These cases illustrate the fact that unfortunately the girls under the age of 16 were already married with a religious marriage ceremony and thereafter their legal guardians sought the judge's approval for a civil marriage.

Moreover, in the Swiss law the age of consent is 18[135], however, in contrast to the Turkish law; in order to get married the prospective spouses must be of age id est must have reached 18 years of age.[136]Yet

[131] TURGUT AKINTURK & D. ATES KARAMAN, TURK MEDENI HUKUKU AILE HUKUKU 69 (2012)

[132]Yargitay [YARG] [TURKISH COURT OF CASSATION] Second Chamber of Law Division, May 6, 2015, 2015/3626 E., 2015/9331 K. (Tur.).

[133]*Id.*; Yargitay [YARG] [TURKISH COURT OF CASSATION] Second Chamber of Law Division, March 21, 2013, 2012/7078 E., 2015/7749 K.(Tur.).

[134]*Id.*; Yargitay [YARG] [TURKISH COURT OF CASSATION] Second Chamber of Law Division, May 3, 2011, 2011/4235 E., 2011/7649 K. (Tur.); Yargitay [YARG] [TURKISH COURT OF CASSATION] Second Chamber of Law Division, March 30, 2011, 2010/3710 E., 2011/5584 K. (Tur.); Yargitay [YARG] [TURKISH COURT OF CASSATION] Second Chamber of Law Division, June 7, 2010, 2009/9099 E., 2010/11210 K. (Tur.); Yargitay [YARG] [TURKISH COURT OF CASSATION] Second Chamber of Law Division, Nov. 8, 2010, 2009/16479 E., 2010/18720 K. (Tur.); Yargitay [YARG] [TURKISH COURT OF CASSATION] Second Chamber of Law Division, Apr. 29, 2010, 2009/4262 E., 2010/8639 K. (Tur.).

[135]SchweizerischesZivilgesetzbuch [ZGB] [SWISS CIVIL CODE] Dec. 10, 1907, art.14, (Swi.)

[136]*Id.* art. 94.

it is worth noting that until 2008, the Swiss Civil Code used to allow marriage under the age of 18 based on exceptional circumstances.[137] The provision which allowed marriage under age of 18 based on exceptional circumstances was abrogated with the Federal Law regarding the protection of adults, law of persons and affiliation of Dec. 19, 2008[138] which entered into force on Jan. 1, 2013.

III. Socio-cultural and Economic Determinants of Forced Marriages of Children in Turkey

The majority of child marriages in Turkey take place as a result of cultural and social norms. In many cases, especially in the eastern part of Turkey, girls have no choice but to marry with the man chosen for them by their parents because of the social pressure, even though in certain cases they are consulted for theirconsent.[139] In consideration of family reputation, a girl has to get married before having the opportunity for inappropriate romantic affairs, and hence, be swayed bysexual feelings.[140] According to this, girls are considered marriageable after experiencing the menarche as their virginity is a matter of life and death.[141] The main reason is that pre-marital sexual

[137]Id. art.94(2).

[138]French version is available at https://www.admin.ch/opc/fr/official-compilation/2011/725.pdf ; German version is available at https://www.admin.ch/opc/de/federal-gazette/2009/141.pdf ((last accesses October, 18 2017)

[139] Pinar Ilkkaracan, *Exploring the Context of Women's Sexuality in Eastern Turkey*, 6 REPRODUCTIVE HEALTH MATTERS, 66, 70 (1998).

[140]MeliksahErtem&Gunay Saka & Ali Ceylan&VasfiyeDeger&SemaCiftci, *The Factors Associated with Adolescent Marriages and Outcomes of Adolescent Pregnancies in Mardin Turkey*, 39 JOURNAL OF COMPARATIVE FAMILY STUDIES, 229, 237 (2008).

[141]MeliksahErtem&TahireKocturk, *Opinions on Early-age Marriage and Marriage Customs among Kurdish-speaking Women in Southeast Turkey*, 34 JOURNAL OF FAMILY PLANNING AND REPRODUCTIVE HEALTH CARE, 147, 149-151 (2008). The importance of virginity constitute an important part of cultural rituals, such as displaying the bloodied sheets of the marriage bed to inlaws to prove the worthiness of the wife. *See* Aysan Sever &GokcecicekYurdakul, *Culture of Honor, Culture of Change: A Feminist Analysis of Honor Killings in Turkey*, 7 VIOLENCE AGAINST WOMEN, 964, 975 (2001).

intercourse is a taboo in respect of social norm. Hence, an unmarried woman is in potential danger for her family honour since an ingenuous woman could put her decency in danger by making mistakes.[142]

Cultural phenomena could emerge in different fashions, although most of them are very rare nowadays. Endogamy is a common practice among Turkish society; official statistic of 2011 indicates that 21,3% of all marriages in Turkey are consanguineous.[143] Within consanguineous marriages, the marriage between cousins[144] is the most common type.[145]The main factor is that a marriage between relatives is considered to be more long-lasting since families share the same values.[146] The economic considerations are also directly related to this tradition. The reason being that bride's family would not demand a high dowry from the groom because of the blood-relationship. In addition to cousin marriages, statistics indicate that 0,3% of marriages were berdel, a custom based on exchange of brides by two consenting families instead of paying a dowry.[147] By the same token, in terms of economic effects, this is an option for poor families as affording a dowry is not an option.

The issue of forced marriage of girls in Turkey also stems largely from economic factors. A survey conducted by the Ministry of Family and Social Policies indicates that 15,6% of the marriage agreements in Turkey are reached on the ground of dowry (başlıkparası).[148] The figures increase up to 43 % in rural areas, particularly in the eastern

[142]Ertem&Kocturk, *Id.* at 149.

[143]*Supra* note 11, at 132.

[144] According to article 129 of the Turkish Civil Code, *"[m]arriage between lineal relatives and between siblings or halfsiblings, whether related to each other by parentage or adoption, between aunts and nephews, between uncles and nieces is prohibited*".

[145]*Supra* note 142, at 135.

[146]Ertem&Kocturk, *supra* note 141, at 150.

[147]*Supra* note 142, at 135.

[148]*Supra* note 142, at 138.

part of the Country.[149] According to the custom of dowry, a certain amount of money is paid to the bride's family, mostly her father, by the groom's family for consummation of marriage. Under this perverse understanding, girls are merely considered as commodities. The economical dimension of forced marriage is that dishonesty of woman's occasion induces refund of the dowry as she is bound by the agreement.[150] Another issue is that the payment of the dowry by the husband shapes his attitude towards the bride on the proviso that the control of sexuality and fertility are granted to him by the means of the agreement.[151] The phenomenon of dowry leads to forced marriages mostly in the form of child brides. The dowry increases the risk of marrying of a child bride to an older man.[152] In Turkey, 72 % of such marriages are conducted without the consent of the girl concerned, and 45, 7 % of the girls in reality are married off in exchange for money.[153]Lastly, the economic considerations may trigger child marriages since pecuniousfamilies force their children (generally cousins) to marry as soon as possible in an effort to keep the wealth within the family.[154]

IV. Suggestion: Rearrangement of Legal Remedies against Forced Marriage ofChildren

The question as to how the legal system must react to forced marriages has been discussed and scrutinized among practitioners and academics for a long time.[155] In terms of dealing with forced

[149]*Id.*

[150] Sever &Yurdakul, *supra* note 141, at 989.

[151]*Supra* note 139, at 69.

[152] Anita Raj, *When The Mother Is a Child: The Impact of Child Marriage on the Healthand Human Rights Abuse*, 95 ARCHIVES OF DISEASE IN CHILDHOOD, 931 (2010).

[153]*Supra* note 79, at 242.

[154]Ertem&Kocturk, *supra* note 141, at 151.

[155]*Seegenerally*Teertha Gupta &KhatunSapnar, *The Law, the courts and their effectiveness, in*FORCED MARRIAGE: INTRODUCING A SOCIAL JUSTICE AND HUMAN RIGHTS PERSPECTIVE (Aisha K. Gill &SundariAnitha eds., 2011); Brigitte Clark &Claudina Richards, *The Prevention and Prohibiton of Forced Marriages – A Comparative Approach*, 57 INTERNATIONAL AND

marriages, some maintain that criminal prosecutions have to be utilized, while opponents argue that protection of women is best secured through the civil law mechanism. Putting separate examples as in the case of the United Kingdom (UK), and many other European countries which have adopted special provisions on criminalizing forced marriage such as Germany[156], Switzerland[157], Austria[158] and Belgium[159]. However, it is worth mentioning briefly the pros and cons of criminal intervention in particular to illustrate whether it is a necessity to adopt the same approach in the Turkish criminal system or not.

The main argument of the opponents against a special criminal provision is that the majority of the victims do not want their parents to be prosecuted and ultimately faced with imprisonment.[160] As a result, those against criminalisation state that victims may decide not to come forward.[161] In fact, although victims seek legal protection, the possible isolation from their social relations may induce them to realign with their families.[162] Another point to consider is that criminal proceedings may found to be ineffective on the basis that higher burden of proof of criminal offences will make civil cases more

COMPARATIVE LAW QUARTERLY, 501 (2008); Yener Unver, *Kinderbraute in der Türkei*, *in*STRAFRECHTLICHER REFORMBEDARF. MATERIALIEN EINER DEUTSCH-JAPANISCH-POLNISCH-TÜRKISCHEN TAGUNG IM JAHRE 2015 IN RZESZÓW UND KRAKÓW (2016); *supra* note 34; *supra* note 35; *supra* note 23.

[156]SchweizerischesStrafgesetzbuch [StGB] [SWISS CRIMINAL CODE] Dec. 21, 1937, art.181(a) (Swi.).

[157]Reichsstrafgesetzbuchfür das Deutsche Reich [StGB] [GERMAN CRIMINAL CODE] May 15, 1871, art. 237 (Ger.)

[158]Das österreichische Strafgesetzbuch [StGB] [AUSTRIAN CRIMINAL CODE] Jan. 23, 1974, art.106(a) (Aus.).

[159] Belgique Code Penal [BCP] [BELGIUM CRIMINAL CODE] June 8, 1867, art. 391(e) (Bel.).

[160]*Supra* note 34, at 177.

[161]*Supra* note 35, at 272.

[162] Gupta &Khatun, *supra* note 155, at 171.

advantageous. The conviction of offenders seems more unlikely because of the required proof beyond the reasonable doubt in criminal cases.[163] In addition, it may be argued that perpetrators could already be charged for the offences committed in the duration of a marriage, such as assault, sexual abuse and abduction. In this context, it is argued that codification of such a special provision would be seen nothing but a symbolic gesture.[164]

In order to argue in favour of criminalizing forced marriage, the key argument is that the prosecution could abstract the attention of not only citizens but also government officers on intolerability of these violations.[165] By doing so, victims would be given the opportunity to question their parents and seek for legal assistance.[166] The assumption based on unwillingness of victims could turn out to be inaccurate since some of them may take action for emancipation from the authority of their parents.[167] In the southeast of Turkey, the office of the prosecutor filed a public claim against the parents of a girl for attempting sexual molestation after the report of the girl as she was forced into marriage.[168] In fact, the best interest of a child is the primary consideration under the article 3 of the UNCRC.[169] According to the Convention, the state parties are under the obligation to protect the child from abuse while in the care of parents. The UK's Select Committee on Home Affairs emphasized that the deterrent power of criminalization is another key reason stated by the victims.[170] It may

[163]*Supra* note 17, at 994.

[164]*Supra* note 34, at 178.

[165] Clark & Richards, *supra* note 155, at 504.

[166]*Supra* note 23, at 252.

[167] Mohammad Shams Uddin,*Arranged Marriage: A Dilemma for Young British Asians*, 3 DIVERSITY IN HEALTH AND SOCIAL CARE, 211, 214 (2006).

[168]*CocukGelinlerKonusundaOrnekDava*, http://www.sacitaslan.com/cocuk-gelinler-konusunda-ornek-dava-haberi-67482 (last visited Jan. 8, 2012).

[169] UNCRC, *supra* note 8.

[170]UNITED KINGDOM HOUSE OF COMMONS, HOME AFFAIRS SIXTH REPORT (2008). http://www.publications.
parliament.uk/pa/cm200708/cmselect/cmhaff/263/26316.htm (last visited Nov. 2, 2017).

be argued that criminal law has already affords sufficient apparatus to fight in defence of women as most of the offences are punishable acts under current criminal provisions.[171]Nevertheless, this argument disregards the fact that a forced marriage violates some of the very basic human right standards set by national and international documents. Physical, psychological, financial, sexual and emotional force against the victim may be seen as a form of coercion in a forced marriage.[172] In this sense, only a special provision could be sufficient to address such a violationof numerous fundamental rights simultaneously.

The former Turkish Criminal Code took a leading position regarding forced marriages. One of the most controversial regulations was Article 434 which relates to reduction of the period of imprisonment for sexual offences.[173] According to the said Article "If the abducted or detained girl or woman and one of the accused or convicted get married, the public prosecution initiated against the husband or if the sentence has been pronounced, the punishment shall be suspended".[174] The present provision had been revealed as forced marriage in many cases since the victim is coerced to marry with offender in order to assure family honour.[175] In fact, many women were raped and then

[171]Clark & Richards, *supra* note 155, at 505.

[172]GeentanjaliGangoli&KhatidjaChantler& Marianne Hester & Ann Singleton, *Understanding Forced Marriage: Definitions and Realities, in* FORCED MARRIAGE: INTRODUCING A SOCIAL JUSTICE AND HUMAN RIGHTS PERSPECTIVE 26 (Aisha K. Gill &SundariAnitha eds., 2011).

[173] In fact, a bill, relates to overturn sex offenders' conviction in return of marriage, was proposed by the Government in 2016. By the opposition of the NGOs, the bill was withdrawn due to lack of public consensus. *Fury at Turkish bill to clear men of child sex assault if they marry victims*, THE GUARDIAN (Nov. 22, 2016), https://www.theguardian.com/world/2016/nov/18/turkish-bill-to-clear-men-of-child-sex-assault-if-the-marry-their-victims

[174]1926 TARIHLI TURK CEZA KANUNU [ETCK] [TURKISH CRIMINAL CODE OF 1926] March 1, 1926, art.434 (Tur.).

[175]II Canan Arin, *Turkey, in* ENCYLOPEDIA WOMEN & ISLAMIC CULTURES 409 (Suad Joseph ed., 2005).

forced to marry by families on the basis that a marriage is the way of abrogate the disgrace as no one would acquiesce in a defective good other than the offender.[176]

The New Turkish Criminal Code includes no specific offence of forcing someone to marry, although binding international mechanisms have previously been adopted. Under the current legislation, forced marriage could be charged in the context of a list of provisions in the Turkish Criminal Code such as human trade (article 80), threat (article 106) and child molestation (article 103).[177] Turkish criminal scholars and lawyers have criticized the lack of a special provision on the basis that above mentioned offences are not adequate to bring justice for the victims of forced marriages which violates multiple rights at the same time.[178]

In practice, Turkish national courts have in the past prosecuted force marriage perpetrators on the basis of sexual crimes. In many cases, girls under the age of 15 are married to men over the age of 15 by the mutual consent of their parents.[179]Under Article 103 of the Turkish Criminal Code, regardless of whether the victim gives consent or not, all kinds of sexual attempt against children who are under the age of 15 constitute child molestation. Sexual acts committed against other children (between the age of 15 and 18) by force, threat, fraud or other reasons affecting the willpower of the victims is also a violation of Article 103. Therefore, the alleged husbands have been sentenced to no less than sixteen years imprisonment, in case of performance of sexual abuse by inserting an organ or instrument into a body.[180] Moreover, Turkish Court of Cassation held that parents of victims and

[176]*Supra* note 79, at 137.

[177]*Id.*

[178]MeralEkiciSahin, *CezaHukukuveZorlaEvlendirme*, PROF. DR. NEVZAT TOROSLU'YA ARMAGAN 395, 425-426 (2015).

[179] Consensual sexual intercourse of two children between the age of 15 and 18 is not a criminal offence under Turkish criminal law.

[180]*Supra* note 10, art. 103/2.

offenders will be subjected to an appropriate penalty to the offence that was committed for incitement.[181]

Sexual intercourse between/with persons whom have not attained the lawful age of consent is another sexual crime for penalizing the offenders of forced marriage. According to Article 104 of the Turkish Criminal Code, any person who had a sexual intercourse with a child who reached the age of 15, without using force, threat and fraud is sentenced to a term of imprisonment from two years to five years upon filing of a complaint. This clearly illustrates that in opposition to child molestation, the sexual intercourse must occur under the consent of the victim. In terms of protection of the victim the said provision is problematic on two grounds. Firstly, it is worth mentioning that sexual acts besides sexual intercourse, such as oral sex or penetration of a non-sexual organ, do not violate Article 104. For instance, the Turkish Court of Cassation stated that penetration of finger into the vagina of a girl by a woman cannot be interpreted as sexual intercourse since such a relationship is possible only by penetration of penis by a man into the vagina or anus.[182] Secondly, a criminal case against the offender is possible only if the victim submits a claim related to the crime to the office of the public prosecution, or the offices of the security forces. In certain cases, the court of the first instance shall render dismissal of the case, on the grounds that the right to file a complaint is the preserve of the parents concerned notwithstanding the victim's resolve. However, in the opinion of the present authors, the Turkish Court of Cassation rightly held that the

[181]Yargitay [YARG] [TURKISH COURT OF CASSATION] Fifth Chamber of Criminal Division, Feb. 28, 2007, 2007/29 E., 2007/1609 K. (Tur.).
[182]Yargitay [YARG] [TURKISH COURT OF CASSATION] Fourteenth Chamber of Criminal Division, Apr. 21, 2014, 2012/6729 E., 2014/5373 K. (Tur.).

court of first instance is under obligation to continue the adjudication if the victim demanded to do so.[183]

In spite of the general acceptance of the High Court on preventing forced marriage by sentencing offenders for sexual offences, courts of first instance may decide on no grounds for prosecution in consideration of mistake of the law. In Nevşehir, as stated above, the court of assize found that the defendant made an inevitable mistake about his act was unjust since early marriage is not considered illegal or inconvenient in the eyes of the society.[184] In the same manner, some Turkish academics did concur with theconclusion of the court.[185]

The findings of the Court indeed invite criticism in two main respects. Firstly, the defence on the unawareness of criminalization of early marriage is baseless since nationwide campaigns against forced and child marriage have been running by NGOs for women's rights for a considerable time. Additionally, the Ministry of Family and Social Policies broadcasts instructional films on national television.[186] Therefore, the act cannot be considered a reasonable mistake to make as the defendants must have known the illegality of their acts. Arguments based on ignorance of illegality of child marriage cannot be deemed reasonable in the modern age.[187] Secondly, the judgement of the Court which rests on the social and cultural factualityfails to comply with the developmental effect of the judiciary. It cannot be

[183]Yargitay [YARG] [TURKISH COURT OF CASSATION] Fourteenth Chamber of Criminal Division, May 7, 2015, 2013/7341 E., 2015/6190 K. (Tur.).

[184]*Supra* note 5.

[185] MAHMUT KOCA & ILHAN UZULMEZ: TURK CEZA HUKUKU OZEL HUKUMLER (2015).

[186]TURKIYE CUMHURIYETI AILE VE SOSYAL POLITIKALAR BAKANLIGI, KAMU SPOTU (2017), http://uzem.aile.gov.tr/(last visited Nov. 7, 2017).

[187]FahriGokcenTaner, *AnayasaMahkemesi'ninCocuklarinCinselIstismarınaveEvlenmeninDinselTorenineIliskinIptalKararlarininArdindanCokKatmanliBirCozumOnerisi*, 124 TBBD 221, 240 (2016).

denied that social norms are highly influential in formulating criminal law.[188]Crime control becomes possible only if a criminal law contains moral codes reflecting the community it rules.[189]However, these norms may also encourage violation of the laws as in the case of forced marriage.[190] Although, criminal law cannot change the acceptance of the community, it can shape social norms and understanding of the individual morality.[191]The forcing power of criminal law is a key factor in terms of dealing with such a false understanding.

Another related point to the subject is the effect of religious marriage performed by imams on the underage marriages. Although it may be argued that there is no connection between religious rituals and such marriages, the statistics indicate to the contrary. According to surveys, 62,7 % of underage marriages are performed by religious representative (imam) therefore has only religious significance but no legal effect, given the fact that, the civil law marriage has not be concluded.[192] The main reason is that, as stated above, the Turkish Civil Code states, as a rule, that the age of marriage as 18, the age of 17 upon consent of the legal guardians and the age of 16 in case of exceptional circumstances upon a court's approval, the victims are mostly under the age of 16. Hence, legal impossibility of a civil marriage under the age of 16 leads the society to religious marriage and open the way to sexual abuse.

[188]WAYNE R. LAFAVE, CRIMINAL LAW 14 (2003).

[189] Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks is Just? Coercive versus Normative Crime Control*, 86 VIRGINIA LAW REVIEW 1839, 1841 (2000).

[190] For instance, the findings show that cultural acceptance of violence triggers use of violence in the future. *See* Jennifer E. Lansford & Kenneth A Dodge, *Cultural Norms for Adult Corporal Punishment of Children and Societal Rates of Endorsement and Use of Violence*, 8 SCIENCE AND PRACTICE 257, 265 (2008).

[191]*Supra* note 189, at 1868.

[192]*Supra* note 4, at 76.

In terms of coping with early marriages, the Turkish legislation enacted Article 230 which penalized having a religious marriage performed by an imam prior to a civil marriage. The main reason for the aforementioned legislation is abrogating backward understanding within the society.[193]In this sense, persons who hold a religious marriage ceremony without an official marriage shall be sentenced to a penalty of imprisonment for a term of two to six months. In other words, couples are required first to marry in a civil ceremony before having a religious marriage. It can be strongly argued that such a precaution was adopted to prevent polygamy as one of the wives can marry in a civil ceremony whereas the others can only marry through a religious ceremony.[194] It is worth noting that in the case of polygamy, the other wives do not obtainan official status, hence cannot obtain a certain number of rights such as the right of inheritance.[195] Moreover, in terms of averting plural marriage, any person who administers a religious marriage ceremony without issuing a document verifying an official marriage which has been concluded in accordance with the law shall be sentenced to a penalty of imprisonment for a period of two to six months. Therefore, religious representatives may also be punished by law, since a religious ceremony is merely secondary and optional.

The Turkish Constitutional Court overruled the two clauses of the aforementioned Article on the basis of privacy of private life[196] and freedom of religion and conscience.[197] The Court held that the principle of rationality was violated since, although living together

[193]*Supra* note 187, at 240-241.
[194]*Supra* note 139, at 69.
[195] Jenny B. White, *State Feminism, Modernization, and the Turkish Republican Women*, 15 THE NATIONAL WOMEN'S STUDIES ASSOCIATION JOURNAL 145, 156 (2003).
[196]TurkiyeCumhuriyetiAnayasasi [TCA] [THE CONSTITUTION OF THE REPUBLIC OF TURKEY] Oct. 18, 1982 art.20 (Tur.).
[197]*Id.* art. 24.

and having children without a civil marriage is not criminalized, the present Article penalize right to have a religious marriage.[198] The findings of the Court completely disregard the logic behind the codification of such an Article. The legislature has aimed to encourage monogamy and secure the rights of women under marriage agreement by stipulating the importance of civil marriage in Turkey. Paradoxically, the law which was recently passed by the Turkish parliament regarding the authorization the muftis to conclude a civil marriage illustrates the intention of the law makers in favour of recognising legally religious marriage but not recognising de facto unions.

As stated above, two provisions of the Turkish Civil Code lead to applications of the marriages under the age of 18 in Turkey. The first one is Article 124 (1) of the Turkish Civil Code which sets the minimum age of marriage as 17. The second one is Article 124 (2) of the Turkish Civil Code which allows the marriages also at the age of 16 upon a court's approval in the case of exceptional circumstances. Reminding the international obligations of Turkey derived from the CEDAW and UNCRC; the first scenario should result in a comprehensive revision of these provisions in the immediate future. Accordingly, the minimum age of marriage must be amended to 18 compatible with the age of consent. More importantly and urgently, Article 124 (2) regarding the marriage at the age of 16 in case of exceptional circumstances should also be amended. Furthermore, Article 11 (2) of the Turkish Civil Code which recognises as full of age the person who got married under the age of 18 must be abrogated due to the fact that this provision put the married child into the shoes of an adult. As a rule, under the age of 18, children may only enter into obligations or give up the rights with the consent of their legal

[198] AnayasaMahkemesi [AM] [CONSTITUTIONAL COURT] May 27, 2015, Official Gazette June 10, 2015 - 29382, 2014/36 E., 2015/51 K. (Tur.).

guardians in the Turkish legal system. [199] However, just after the marriage, Article 11 (2) of the Turkish Civil Code allows the married child of age 17 or 16 to enter into obligations or give up the rights without the consent of her/his legal guardians. On the one hand, the Turkish legal system considers a person under the age of 18 as a minor and protects her/him even from her/his acts such as entering into obligations and requires her/his legal guardians consent to do so, but on the other while allowing a person of 16 or 17 age to marry upon her/his legal guardian's consent or court approval, assumes her/him as an adult just in a second after marriage ceremony.

If these amendments of the Turkish Civil Code cannot be realised, the second scenario should target the courts. More clearly, taking into account Article 90 (5) of the Turkish Constitution which states that in the event of a conflict between an international agreement and the domestic law that regards fundamental rights and freedoms, the judge has the discretion to apply the international agreement[200], judges determining the conflict between Article 124 (2) of the Turkish Civil Code and international agreements in relation to the fundamental rights and freedom such as CEDAW and UNCRC must apply directly the international law and must dismiss the cases regarding court approvals for the marriages under the age of 16 in the event of exceptional circumstances. Yet these cases can be the subject of individual applications before the Turkish Constitutional Court.

In this second scenario judges cannot consider marriages of the persons at the age of 17 because it does not require a judge's approval; the prospective spouses must only submit the legal guardian's written

[199] *Supra* note 9, art. 16.

[200] According to Article 90 of the Turkish Constitution of 1982, *"[i]nternational agreements duly put into effect have the force of law. No appeal to the Turkish Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. (Sentence added on May 7, 2004; Act No. 5170) In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail."*

and notarised consent when they apply for the marriage[201] Therefore the judge cannot determine whether a conflict between the domestic law and the international law has taken place, because the judge in question is not in charge of the application procedure and the marriage ceremony. The only solution is to revise the current law in order to prevent the marriages at the age of 17 and take measures accordingly.
Whilst considering the origins of the Turkish Civil Code, the revision of the Swiss Civil Code against forced marriage can provide a very close model. In Switzerland besides the provision which allowed marriage under age of 18 based on exceptional circumstances was abrogated from Jan. 1 2013, a Federal Law on Measures to Fight against Forced Marriages also entered into on July 1, 2013.[202] The provisions of the Swiss Civil Code in relation to the annulment of marriage and the civil registrar's preparatory procedure for marriage have been revised. In view of that, the civil registrar[203] must examine firstly, the age of the future spouses being the first barrier in order to

[201] *Supra* note 9, art. 136.

[202] French version is available at https://www.admin.ch/opc/fr/federal-gazette/2012/5479.pdf; German version is available at https://www.admin.ch/opc/de/federal-gazette/2012/5937.pdf (last accesses October, 18 2017); Switzerland ratified the Istanbul Convention in May 2017. No legislative alteration is necessary since Switzerland has already met the standards of the Convention. https://www.humanrights.ch/en/switzerland/internal-affairs/ratifications/switzerland-ratifies-istanbul-convention (last accessed 26.10.2017)

[203] Federal Law on Measures to Fight against Forced Marriages revised also the Swiss Criminal Code and inserted a new norm concerned the forced marriage and forced registered partnership into the Code as follows: "[A]ny person who, by the use of force or the threat of serious detriment or other restriction of another's freedom to act compels another to enter into a marriage or to have a same-sex partnership registered is liable to a custodial sentence not exceeding five years or to a monetary penalty. "Consequently, the register authorities are obliged to report to the competent authority the cases of coercion and the other offenses that come to their attention while carrying out their official duties according to article 43 (3) of the Swiss Civil Code.

prevent a celebration of a marriage under the age of 18. [204] The civil registrar secondly, examines whether there are any circumstances illustrate that the request clearly does not reflect the free will of the prospective spouses.[205] Despite this barrier,[206] if a forced marriage were to occur, the Swiss Civil Code would adopt a new regime of annulment of marriage without time limitation on two grounds.[207]The first one is related to the case where one of the spouses did not conclude the marriage with her/his free will and the second is related to such cases where one of the spouses did not reach the age of 18 at the time of the marriage.[208]

Moreover, Article 152 of the Turkish Civil Code regarding the annulment of marriage in case of duress must also be revised. The current provision is problematic on two grounds. Firstly, only marriages which are concluded with the consent of the spouse under duress that creates a serious and immediate danger to directly her/his or one of her/his relatives' fundamental rights such as life, health, honour and dignity can be annulled. Therefore this provision does not outline psychological or social pressure as duress. Secondly, the provision clearly stipulates a time limitation for the annulment of the marriage such as six months starting with the end of duress and five years after the marriage was concluded. In order to protect the victims of forced marriages, the concept of the "force" shall be defined again and the physiological and social pressure has to be included and the claim of annulment of marriage shall be off the time limitation.

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[204] Andreas Bucher, *L'accueil des mariages forces*, AJP/PJA 1153, 1154 (2013).

[205]*Supra* note 135, art. 99(1)(3).

[206] The civil registrar may have some difficulties in order to understand whether the prospective spouses manifest their free will or not, *see supra* note 204, at 1155.

[207]According to art. 106(1) of the Swiss Civil Code: *"[A]n action for annulment is brought ex officio by the competent cantonal authority at the domicile of the spouses; in addition, any interested party is entitled to bring such action. Provided this is compatible with their duties, the federal and cantonal authorities shall contact the authority competent for the action if they have reason to believe that there are grounds for annulment."*

[208]*Supra* note 135, art. 105.

Conclusion

Even though Turkey experienced a radical law reform which represents the move from a legal system based on religious law to a legal system built on secular and democratic values after the foundation of the Turkish Republic in 1923, the country still struggles with its religious and socio-cultural legacy of the society and the forced marriage of children is one of them. Unfortunately the statistics illustrate that the girls are mostly the victims.

Forced marriage is considered as a marriage or a union alike which lacks full and free consent of at least one party and also duress is involved. Even though the union is not recognized as a civil marriage, like religious marriages in Turkey, if one of the party's consent is lacking or she/he is forced to marry; aforementioned union must be considered as a forced marriage. In fact, the statistics show that the underage marriages are generally performed by the religious representatives i.e. imams in Turkey.

In cases that a future spouse is a child, her/his consent is contradictive whether she/he did or could give her/his informed consent to marriage or not. Adopting this approach, the Committees of the CEDAW and the UNCRC have recommended to the member states "[n]ot to allow exceptions to minimum age of marriage even with consent".

The fact of forced marriage of children in Turkey has two faces like a medallion: On the one hand there is a socio-cultural and economic background, and on the other hand there is a legal environment which allows marriages under the age of 18 and does not criminalize forced marriage.In many cases, girls have no choice but to marry with the man chosen for them by their parents in order to safeguard family's honour since a young girl may put her purity in danger by making mistakes.

Yet, the Turkish Civil Code adopts a controversial position by allowing a marriage of a child who is 17 years old upon consent of her/his legal guardian and 16 years old upon a court's approval in

exceptional circumstances according to Article 124 of the Turkish Civil Code. The religious marriages are part of the socio-cultural practises, not the legal one since the religious marriage ceremony has no legal effect.Granting authorization to muftis/imams to perform civil marriages cannot prohibit[209] the underage religious marriages due to the fact that the muftis will be allowed to conclude a marriage which requires at least the spouses at the age of 17 with the consent of their guardians or the spouses at the age of 16 with the court's approval according to the Turkish Civil Code. However, under these circumstances, there is no legal prohibition to conclude religious marriages by the imams.

The present authors are of the opinion that serious measures must be taken in order to fulfil the international commitments of Turkey in terms of civil and criminal standards. First of all, the Turkish Legislation must change the Civil Code to forbid marriages under the age of 18 without envisaging any exception. Secondly, a special criminal provision must be included in the Turkish Criminal Code to prevent forced marriages as in the example of criminal codes in other European legal jurisdictions. Lastly,perhaps most importantly, the social dynamics on sexual taboos and the position of women in Turkey must be ameliorated through educating the society since the problem of forced marriage cannot be prevented merely by passing laws against it.

[209]Raf Sanchez, *New Turkish Marriage Law Prompts Fear of Child Weddings*, THE TELEGRAPH (Nov. 3, 2017), http://www.telegraph.co.uk/news/2017/11/03/new-turkish-marriage-law-prompts-fears-child-weddings/