

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 the 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 consent because of her/his age. As a founding member of the Council of Europe, Turkey not only ratified the European Convention on Human Rights (ECHR) in 1954 and Protocol Nr. 1, but it has also ratified many of the core international documents on human rights and the rights of children, 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. Nevertheless, the 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 the forced marriage of children in Turkey, while exploring the current legal background and Turkey's international legal commitments to fight against such practices. Finally, the article suggests the reinforcement of available legal remedies in order to prevent the forced marriage of children.

KEYWORDS

Forced Marriage; Child Marriage; Women's Rights; Consent

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INTRODUCTION

According to the 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 eighteen are expected to be married every year, which means that 39,000 girls marry every day.² Unfortunately, the vast majority of the aforementioned girls marry or enter into a union against their will, in many cases, with men who are much older than them,³ and Turkey is not an exception. In Nevşehir, a city in central Anatolia, the Office of the Prosecutor filed a case against the alleged husband and the father of a fifteen-year-old girl for sexual molestation. The defendants argued that early marriage is a tradition in that part of Turkey and that many people get married in the same way.⁴ Moreover, it was argued that they were not aware of the fact that their actions constituted a violation of the criminal code. The Nevşehir Court of Assize decided that there was no ground for prosecution on the basis that “[i]n the social and cultural atmosphere they live in, many children generally get married before appropriate age and early marriage is not

¹ UNITED NATIONS POPULATION FUND, MARRYING TOO YOUNG: END CHILD MARRIAGES 6 (2012), <http://www.unfpa.org/end-child-marriage>.

² *Id.*

³ See 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 ÜNİVERSİTESİ NÜFUS ETÜTLERİ MUDURLUGU, TÜRKİYE'DE KADINA YÖNELİK AİLE İÇİ SİDDET ARAŞTIRMASI [A STUDY ON DOMESTIC VIOLENCE AGAINST WOMEN IN TURKEY] 76 (2015), <http://www.hips.hacettepe.edu.tr/KKSA-TRAnaRaporKitap26Mart.pdf>, (last visited Oct. 19, 2017) ; see also Geetanjali Gangoli, Melanie McCarry and Amina Razak, *Child Marriage or Forced Marriage? South Asian Communities in North East England*, 23 CHILD. & SOC. 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).

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 of life in Turkey. The problem is that there is sometimes a very thin line between forced marriage and marriage with the full and free consent of the children.⁶ Given the fact that the existence of competent and informed consent is controversial where one of the prospective spouses is a child, the possibility of a forced marriage must be taken into consideration.⁷ The forced marriage of children is commonly seen as a violation of human rights and of the rights of the children.⁸

According to Article 1 of the U.N. Convention on the Rights of the Child (hereinafter UNCRC), a child is defined as a person below the age of eighteen, unless the laws of a particular state set a lower legal age of consent. In the Turkish legal system, the age of majority is set at eighteen⁹. Under the age of eighteen every person is considered as a child.¹⁰ Although Turkey has ratified the UNCRC, marriage of children is still a reality and statistics show that most of the victims are in fact girls.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 (hereinafter CEDAW), also considering 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.”

⁵ Nevşehir Ağır Ceza Mahkemesi [Nevşehir Court of Assize] 2010/142 E., 2012/20 K (Turk.).

⁶ International documents overtly emphasize the importance of full and free consent. See, e.g., International Covenant on Civil and Political Rights, art. 23(3), Dec. 16, 1966, 999 U.N.T.S. 171. (ICCPR), International Covenant on Economic Social and Cultural Rights, art. 10(1), Dec. 16, 1966, 993 U.N.T.S. 3. and Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, art. 1(1), Dec. 10, 1962, 521 U.N.T.S. 231 state that marriage must be entered into with the free consent of the intending spouses.

⁷ See Loretta M. Kopelman, *The Forced Marriage of Minors: A neglected Form of Child Abuse*, 44 J. L., MED. & ETHICS 173, 174 (2016).

⁸ See, e.g., G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR]; see also Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage, Dec. 9, 1964, 521 U.N.T.S. 231; G.A. Res. 68/148, Child, Early and Forced Marriage (Dec.18, 2013); EUR. PARL. ASS. DEB. 29th Sess., Res. 1468 (Oct. 5, 2005); Forced Marriage, TRAVEL.STATE.GOV (2018), <https://travel.state.gov/content/travel/en/international-travel/emergencies/forced-marriage.html>. See also United Kingdom Foreign & Commonwealth Office, the right to choose: multi-agency statutory guidance for dealing with forced marriage (2014), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/322310/HMG_Statutory_Guidance_publication_180614_Final.pdf [hereinafter Commonwealth]; see also Anti-Social Behavior, Crime and Policing Act 2014, c. 12 (Eng.); see also *supra* note 1.

⁹ Türk Medeni Kanunu [TMK] [Turkish Civil Code] art. 11 (2002) (Turk.).

¹⁰ Türk Ceza Kanunu [TCK] [Turkish Criminal Code] art. 6(b) (2005) (Turk.).

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 TÜRKİYE CUMHURİYETİ AİLE VE SOSYAL POLİTİKALAR BAKANLIĞI, TÜRKİYE AİLE YAPISI ARASTIRMASI TESPİTLER, ÖNERİLER [THE STUDY ON FAMILY STRUCTURE IN TURKEY: RECOMMENDATIONS, SUGGESTIONS] 121 (2014), <https://ailevecalisma.gov.tr/uploads/athgm/uploads/pages/indirilebilir-yayinlar/67-turkiye-aile-yapisi-arastirmasi-2013-tespitler-oneriler.pdf>, (last visited Nov. 5, 2017).

There are many factors behind the phenomenon of forced marriages, and specifically in the form it takes in Turkey. First of all, even though the age of majority is stated as eighteen, the Turkish Civil Code, also accepts the minimum age for marriage as seventeen and allows marriage of girls who are just seventeen years old upon the consent of their guardians.¹² In exceptional circumstances, the Turkish Civil Code allows for the marriage of future spouses who are sixteen years old upon a court's approval.¹³ In addition to that, religious, social and economic factors play a key role in the creation of such a drawback. This is in the light of the fact that statistics show that 31% of girls under the age of eighteen got married, mostly with a religious ceremony that is not recognised by the Turkish legal system as a "legal marriage" since marriage ceremonies can be performed only by state officials.¹⁴ Therefore, only the marriages which are regulated according to the Turkish Civil Code are recognised as legal.

It is remarkable that after the wave of Muslim immigration to different countries around the world, this problem tends 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, examining its historical legal background as well as elaborating on certain social facts related to Turkey. Then, the study focuses on the effect of these historical and social facts on the law. Lastly, in order to eliminate the practice of forced child marriage in Turkey, the study suggests a new legal approach to the problem and amendments to the existing laws.

¹² See *supra* note 9, art. 124(1).

¹³ *Id.* art. 124(2).

¹⁴ See Nazlan Ertan, *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 DISASTER AND EMERGENCY MGMT. AUTH., SYRIAN WOMEN IN TURKEY 27 (2014), <https://data2.unhcr.org/en/documents/download/54512> (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>.

1. BACKGROUND

1.1. THE CONCEPT AND TERMINOLOGY REGARDING FORCED MARRIAGE FROM INTERNATIONAL AND TURKISH PERSPECTIVES

It can be argued that reaching a legal definition of forced marriage is rather problematic due to the divergent definitions in different parts of the world.¹⁶ In fact, forced marriage is best defined negatively, with reference to examples of unions that do not constitute forced marriage such as arranged marriage which requires the consent of both parties.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 approaches have been taken for defining forced marriage, one main factor can be seen in all of them: lack of consent.¹⁹ In this context, in the most widely-accepted definition, the Foreign and Commonwealth Office of the United Kingdom 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” (alteration to the original).²⁰

In order to attain an explicit definition of forced marriage, the terms “marriage” and “forced” need to be clarified.²¹ The first definition of marriage is contained in the U.N. Universal Declaration of Human Rights (hereinafter UDHR) which was proclaimed on 10 December 1948 as follows: “[m]arriage shall be entered into only with the free and full consent of the intended spouses.”²² Although various international and regional human rights documents contain provisions regarding basic standards of marriage, such as the equal right to enter into marriage, none of them provides a legal definition of

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

¹⁷ See, e.g., Frances Simmons & Jennifer Burn, *Without Consent: Forced Marriage in Australia*, 36 MELB. U. L. REV. 970, 973 (2013).

¹⁸ EDWIGE RUDE-ANTOINE, *FORCED MARRIAGES IN COUNCIL OF EUROPE MEMBER STATES* 7 (2005).

¹⁹ *Id.* at 17.

²⁰ Commonwealth, *supra* note 8, at 8.

²¹ RUDE-ANTOINE, *supra* note 18, at 16.

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

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 the same in others. In this regard, the 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 an effort to create 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” seems appropriate in terms of dealing with any possible case.²⁸

The second problem with the definition of forced marriage is the notion of consent and its relationship with the issue of duress.²⁹ In other words, girls are required to give their competent and informed authorization willingly.³⁰ Hence, a lack of consent concerns not only those who do not give consent but also those who cannot legally consent because they are underage, disabled, or incapable of giving informed consent.³¹ Consent is lacking where the spouse gives her/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, except in cases where

²³ C.f. IRIS HAENEN, *FORCE AND MARRIAGE: THE CRIMINALISATION OF FORCED MARRIAGE IN DUTCH, ENGLISH AND INTERNATIONAL CRIMINAL LAW* 17 (2014).

²⁴ See, e.g., Sherif Girgis, Robert P. George and Ryan T. Anderson, *What is Marriage?*, 34 HARV. J.L. & PUB. POL’Y 245, 252 (2011).

²⁵ See, e.g., *Schalk and Kopf v. Austria*, App. No. 30141/04, (2010) ECHR 1996, ¶ 62 (2010).

²⁶ See generally David Orgon Coolidge, *Same-Sex Marriage? Baehr v. Miike and the Meaning Of Marriage*, 38 S. TEX. L. REV. 1, 38 (1997); see also Milton C. Regan, *Law, Marriage, and Intimate Commitment*, 9 VA. J. SOC. POL’Y & L. 116 (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 AND ALISON PARK, *COHABITATION, MARRIAGE AND THE LAW: SOCIAL CHANGE IN THE 21ST CENTURY* 81 (2005).

²⁸ HAENEN, *supra* note 23, at 18.

²⁹ See 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 See Kopelman, *supra* note 7.

³¹ *Id.*; ANGELA VIGIL, AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC AND SEXUAL VIOLENCE REPORT TO THE HOUSE OF DELEGATES (2014).

³² See Kopelman, *supra* note 7.

³³ See Amrit Wilson, *The Forced Marriage Debate and the British State*, RACE & CLASS, July 2007 at 25, 32.

duress is 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 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 to that, after marriage, a spouse may realize that she/he may have 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, it is defined as an agreement between man and woman in the Turkish legal system.³⁹ The basic problem which arises in relation to the concept of marriage is where the spouses only conclude a religious marriage that has no legal consequences in the current Turkish legal system.⁴⁰

There is no legal definition of a “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 involves an immediate and serious danger towards her/his or one of the relatives’ lives, health, honour or dignity, she/he can sue for annulment of the marriage.⁴³ In this regard, only the acts which violate the 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 must bring a suit within six months after being subjected to duress, and five years after

³⁴ See Alexia Sabbe et. al., *Forced Marriage: An Analysis of Legislation and Political Measures in Europe*, 62 CRIME, LAW AND SOCIAL CHANGE 171, 173 (2014).

³⁵ See generally Geetanjali Gangoli & Khatidja Chantler, *Protecting Victims of Forced Marriage: Is Age a Protective Factor?*, 17 FEMINIST LEGAL STUD. 267, 269 (2009); see also Simmons & Burn, *supra* note 17, at 974.

³⁶ See Mahmood v. Mahmood, [1994] S.L.T. 599 (Scotland). (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 See Kalwant Bhopal, *South Asian Women and Arranged Marriages in East London*, in ETHNICITY, GENDER AND SOCIAL CHANGE 117, 121 (Rohit Barot & Harriet Bradley & Steve Fenton eds., 1999).

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

³⁹ See *supra* note 9; Evlendirme Yönetmeliği (Evlendirme Yönetmeliği) [The Regulation Regarding Marriage], art. 14 (Nov. 7, 1985) (Turk.).

⁴⁰ See Gotthard Jäschke, *Imam-Ehe in der Türkei [Imam Marriage in Turkey]*, 4 DIE WELT DES ISLAMIS 164, 170 (1955).

⁴¹ Pinar Ilkcaracan, *Law: Access to the Legal System: Turkey*, in ENCYCLOPEDIA OF WOMEN AND ISLAMIC CULTURES: FAMILY, LAW AND POLITICS 383 (Suad Joseph & Afsaneh Najmabadi eds., 2005).

⁴² *Supra* note 9, art. 151.

⁴³ *Id.*

⁴⁴ See Ayşe Havutcu, *Mukayeseli Hukuktaki Gelismeler Isiginda Turk Medeni Kanunu Acısından Zorla Evlenme Probleminin Degerlendirmesi [The Evaluation of the Problem of Forced Marriage in terms of Turkish Civil Code in the Light of Development in Comparative Law]*, 8 E-J. YASAR U. 1341, 1377 (2013).

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 period of limitation, and only the spouse who gave her/his consent under duress can ask for the annulment of marriage. This provision requires critical analysis on two grounds. The first one is regarding the legal understanding of the concept of duress. The Turkish Civil Code defines acts by third parties which directly violate personal rights as duress; but this definition excludes the physiological pressure of the families as well as social pressure.⁴⁶ The second critique targets the annulment claim. After five years from the date of the marriage, the victim of duress can no longer ask for the annulment of the marriage. Therefore, the victim of forced marriage could be subjected to duress during the aforementioned five years in order to continue the marriage which might have become intolerable for her/him.⁴⁷ This is related to the annulment claim which should not be limited over time, this only allows to continue a marriage which may have become intolerable for the other party.

1.2. LEGAL MODERNIZATION OF TURKEY: THE STORY OF WESTERNIZATION

Until 1923, Turkey was ruled by the Ottoman Empire and its legal system was based primarily on Islamic law and the *Hanafi* legal school,⁴⁸ which was the official doctrine in the empire since the middle of the sixteenth century.⁴⁹ Although the Ottoman Empire was based on the Islamic law, the sultans were active lawmakers. The sultans concentrated their attention on criminal, tax and land law, issuing numerous decrees (*Kanunname*) aimed at filling the gaps (while respecting Islamic law) of the legal system of an empire which was composed of a multitude of culturally, religious and ethnically diverse peoples.⁵⁰ These rules were perceived, in Islamic terms, as part of the “customary law” or “common law” of the community (*Orfi Hukuk*). The sultan’s decrees did not concern, however, the establishment of rules in the field of private law, which was instead based on the Millet system, based on the religious affiliation of the members of the different populations of the empire rather than on a territorial basis. In other words, the fundamental classification of private law was based on religion, on the one

⁴⁵ *Supra* note 9, art. 152.

⁴⁶ Havutcu, *supra* note 44, at 1377-1378.

⁴⁷ *Id.*

⁴⁸ *Hanafi* school was one of the four major Sunni legal schools of which composed of *Hanbali*, *Hanafi*, *Maliki* and *Shafi'i*, see CHRISTOPHER MELCHERT, *THE FORMATION OF THE SUNNI SCHOOLS OF LAW: 9TH-10TH CENTURIES C.E.* 156 (1997); see also JUDITH E. TUCKER, *WOMEN, FAMILY, AND GENDER IN ISLAMIC LAW* 14 (2012).

⁴⁹ See Paul J. Magnarella, *The Reception of Swiss Family Law in Turkey*, 46 *ANTHROPOLOGICAL Q.* 100, 101 (1973); see also HALİL CİN & GÜL AKYILMAZ, *TÜRK HUKUK TARİHİ [TURKISH LEGAL HISTORY]* 90 (2011).

⁵⁰ See Carter Vaughn Findley, *The Tanzimat, in TURKEY IN THE MODERN WORLD* 9, 18 (2008).

hand, there was Islamic law that was applied only to Muslims and on the other, there was the specific religious law that was applied to the non-Muslim population⁵¹The Ottoman legal system therefore provided that Islamic law was applied in private law disputes among the Muslim population, while non-Muslims had their own religious and customary law. There was also the aforementioned *Orfi Hukuk* that was set up by the sultans in order to solve the current problems of the empire . Hence, the fundamental classification of private law was generally based on religion, on one hand there was 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.⁵²

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.⁵³ Indeed, the period of *Tanzimat* (reorganization)⁵⁴ from 1839⁵⁵ to 1876⁵⁶, the era of modernisation of the empire,⁵⁷ opened the way for the education of women and the questioning of a repressive system against them.⁵⁸

⁵¹ See Esin Orücü, *Turkey: Reconciling Traditional Society and Secular Demands*, 26 J. FAM. L. 221, 236 (1987); see also Pinar Ilkkaracan, *Customary: Turkey*, in ENCYCLOPEDIA OF WOMEN AND ISLAMIC CULTURES: FAMILY, LAW AND POLITICS 426, 427 (Suad Joseph & Afsaneh Najmabadi eds., 2005); Alan Watson, *The Evolution of Law: Continued*, L. & HIST. REV. 537, 550 (1987); Arzu Oğuz, *The Role of Comparative Law in the Development of Turkish Civil Law*, 17 PACE INT'L L.REV. 373, 376 (2005); RODERIC H. DAVISON, REFORM IN THE OTTOMAN EMPIRE 1856-1876, at 12 (Princeton University Press, 1963) (The main community of non-Muslims were the Orthodox Greeks, Gregorian Armani and Jews).

⁵² *Id.*

⁵³ ERGUN OZBUDUN, *TÜRK ANAYASA HUKUKU [TURKISH CONSTITUTIONAL LAW]* 25 (Yektin, 2010). In fact the treaty called *Sened-i Ittifak* (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. See generally KEMAL GÖZLER, *TÜRK ANAYASA HUKUKUNA GİRİŞ [INTRODUCTION TO TURKISH CONSTITUTIONAL LAW]* 10 (2013).

⁵⁴ The word of *Tanzimat* derives from an Arabic word "order" and means also "reform", see DAVISON, *supra* note 51, at 42; see also Findley, *supra* note 50.

⁵⁵ Sultan recognized the fundamental principles such as security of life, honor and property for the first time in the edict of *Tanzimat*. See BERNARD LEWIS, *THE EMERGENCE OF MODERN TURKEY* 107 (1968); see also GULNIHAL BOZKURT, *BATI HUKUKUNUN TÜRKİYE'DE BENİMSENMESİ [THE ADOPTION OF WESTERN LAW IN TURKEY]* 48 (1996); DAVISON, *supra* note 51, at 40; İLBER ORTAYLI, *İMPARATORLUĞUN EN UZUN YÜZYILI [THE LONGEST CENTURY OF THE EMPIRE]* 99 (2006).

⁵⁶ See ERGUN OZBUDUN, *THE CONSTITUTIONAL SYSTEM OF TURKEY: 1876 TO PRESENT 2* (Springer, 2011). (Even though the *Tanzimat* reforms had no effect on the powers of sultans, it led the way in the first Constitution of Ottoman Empire in 1876. The period of *Tanzimat* ended with the enactment of the Constitution).

⁵⁷ See 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 50, at 13.

⁵⁸ See Zuhâl Yeşilyurt Gündüz, *The Women's Movement in Turkey: From Tanzimat Towards European Union Membership*, 9 PERCEPTIONS 115, 115 (2004); see also Darling, *supra* note 57; Findley, *supra* note 50, at 13.

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 of the Ottoman Empire, both Muslim and non-Muslim.⁵⁹ In addition, the *Islahat Fermanı* (reform edict), enacted in 1856, finally settled that the laws were equal for all without any distinction of religious affiliation.⁶⁰ In this context, a need arose to enact a series of reforms⁶¹ with a special emphasis on contract law and commercial law, to fill-in the legislative gaps in a progressively dynamic world influenced by the increasing trade relations with European countries.⁶² Under this wave of reform, the Ottoman Criminal Code (*Qanun al-jaza' al-Humayuni*), a translation of the 1810 French Code Pénal [C. PÉN.] [Penal Code], came into force in 1859.⁶³ Nevertheless, the translation is a modified version since some Islamic norms and customs were added to the Code. In addition, in later years, more provisions were modelled on Islamic standards.⁶⁴ As a part of this phase of the reforms, a codification entitled “*Mecelle*”⁶⁵ which regulated commercial law, law of civil procedure, property law and contract law was completed.⁶⁶ Nevertheless, *Mecelle* is not considered as a civil code typical of western codifications of the nineteenth century, since the matters regarding law related to individuals, family law and inheritance law were not regulated by it.⁶⁷ The text in question was also criticized for not reflecting the spirit of its time and for having a strong Islamic imprint.⁶⁸

⁵⁹ See BOZKURT, *supra* note 55, at 49; see also OZBUDUN, *supra* note 53, at 26.

⁶⁰ See DAVISON, *supra* note 51, at 55; see also BOZKURT, *supra* note 55, at 49; OZBUDUN, *supra* note 53, at 26; Findley, *supra* note 50, at 18; Darling, *supra* note 57; ERIK J. ZÜRCHER, *TURKEY: A MODERN HISTORY* 51 (3rd ed. 2004).

⁶¹ See Hifzi Veldet Velidedeoglu, *Les Facteurs De Codification Dans L'Empire Ottoman Et Les Causes De La Réception Du Code Civil Suisse Par La Turquie Républicaine*, ANNALES DE LA FACULTÉ DE DROIT D'INSTANBUL, Sept. 1961, at 21, 24-25 (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 Code de procédure civile [C.P.C.][Civil procedure code] of 1807, the Code of Civil Procedure which replaced the decree of the procedure of commercial courts in 1860 was enacted); see also BOZKURT, *supra* note 55, at 357; LEWIS, *supra* note 55, 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).

⁶² For a deep analysis on relations with European countries we refer to, ORTAYLI, *supra* note 55, 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 in September*, ANNALES DE LA FACULTÉ DE DROIT D'INSTANBUL, , at 225, 229 (1955).

⁶³ See Velidedeoglu, *supra* note 61, at 24; see also LEWIS, *supra* note 55, at 109; BOZKURT, *supra* note 55, at 344; ORTAYLI, *supra* note 55, at 179.

⁶⁴ See SULHİ DÖNMEZER & SAHİR ERMAN, NAZARÎ VE TATBİKÎ CEZA HUKUKU [THEORETICAL AND PRACTICAL CRIMINAL LAW] 126 (1997).

⁶⁵ The full name of the codification is “*Mecelle-i Ahkâm-ı Adliye*”.

⁶⁶ The codification was approved between 1869 and 1876 and consisted of 16 books. See LEWIS, *supra* note 55, at 123; Velidedeoglu, *supra* note 61, at 26; BOZKURT, *supra* note 55, at 159.

⁶⁷ 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 55, at 161-162.

⁶⁸ See LEWIS, *supra* note 55, at 123; Seval Yıldırım, *Aftermath of a Revolution: A Case Study of Turkish Family Law*, 17 PACE INT'L L. REV. 347, 353 (2005).

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.⁶⁹ Indeed, this period is of particular importance given the fact that the caliphate, the office of *shaykh al-islam*⁷⁰ and the sharia courts were abolished in 1924.⁷¹ In the same year secular courts were introduced.⁷² Thus, the old system was completely abandoned and the new legal system was established by the reception of the western European codes.⁷³ In 1926, the incumbent government decided to fully adopt⁷⁴ the Swiss SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB] [Civil Code] Dec. 10, 1907,⁷⁵ which revolutionised the lives of Turkish women. Indeed, by the virtue of this code, polygamy was abolished, marriage under the age of fifteen for women and seventeen for men was forbidden, and legal equality of women with men as recognised.⁷⁶ Nevertheless, this code has been criticised for neglecting true gender equality in relation to family law.⁷⁷ 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 rights in Turkey.⁷⁸ Following the birth of the

⁶⁹ It is also claimed to be a very good example of revolutionary and radically reformist social engineering through laws, see Orücü, *supra* note 52, at 222.

⁷⁰ 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, *Juristic Authority vs. State Power: The Legal Crises of Modern Islam*, 19 J.L. RELIGION 243, 253 (2003-04).

⁷¹ See Yildirim, *supra* note 68, at 356; JEAN-PAUL GARNIER, *OSMANLI İMPARATORLUĞU'NUN SONU: II. ABDÜLHAMİT'TEN MUSTAFA KEMAL'E [DISSOLUTION OF THE OTTOMAN EMPIRE]* 312 (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 GÖZLER, *supra* note 53, 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 Tolga Köker, *The Establishment of Kemalist Secularism in Turkey*, 2 MIDDLE E.L. GOVERNANCE 17, 32 (2010).

⁷² The Constitution of 1924 granted to the independent courts the exercise of judicial authority in the name of nation, see Köker, *supra* note 71, at 30.

⁷³ See generally Gülnihal Bozkurt, *The Reception of Western European Law in Turkey (From the Tanzimat to the Turkish Republic, 1839-1939)*, 75 DER ISLAM 283 (1998).

⁷⁴ 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, Velidedeoglu, *supra* note 61, at 33.

⁷⁵ 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.

⁷⁶ The Civil Code of 1926 also outlawed the practice according to which husbands could end their marriages by repudiation. See ZEHRA F. KABASAKAL ARAT, *Women*, in THE ROUTLEDGE HANDBOOK OF MODERN TURKEY 259, 260 (Metin Heper & Sabri Sayan eds., 2012). The Code granted women the right to choose their spouses, initiate divorce, and maintain certain maternal rights after divorce. Orücü, *supra* note 52, at 224; İlkkaracan, *supra* note 52, at 426.

⁷⁷ 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 in charge of the administration of the matrimonial property, see, Yildirim, *supra* note 68, at 359; see also Cengiz Koçhisarlıoğlu, *Aile Hukukunda Eşlerin Eşitliği [Equality of Spouses in Family Law]*, 40 ANKARA ÜNİVERSİTESİ HUKUK FAKÜLTESİ DERGİSİ 251, 254 (1988).

Republic, the first Turkish Criminal Code of 1926, a translation of the 1889 Italian CODICE PENALE [C.P.] [CRIMINAL CODE] Jun. 30, 1889, was adopted and was in force until 2005.⁷⁹ Despite the protective nature of the Code in terms of basic rights, certain provisions were against gender equality.⁸⁰ The new Turkish Criminal Code of 2005 was praised by scholars and lawyers for its innovative perspective in terms of women's rights.⁸¹ 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.⁸² In fact, the male dominant character of the former Turkish Criminal Code was abrogated; however, the discriminatory practice of courts stands as an undeniable fact. It was rightly argued that judges and state officials act under the effect of what is customary within the Turkish society.⁸³

1.3. TURKEY'S OBLIGATIONS EMERGED FROM INTERNATIONAL LAW BASED ON ELIMINATION OF FORCED MARRIAGES OF CHILDREN

Under international law, a number of instruments have been introduced in order to criminalize forced marriage. One of the core international instruments, which demonstrates the European approach against forced marriage, is the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic

⁷⁸ Ilkcaracan, *supra* note 41, at 383; Gül ALDIKAÇTI MARSHALL, SHAPING GENDER POLICY IN TURKEY: GRASSROOTS WOMEN ACTIVISTS, THE EUROPEAN UNION, AND THE TURKISH STATE 93 (2014).

⁷⁹ 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 HAFIZOĞULLARI & MUHARREM ÖZEN, TURK CEZA HUKUKU GENEL HUKÜMLER [TURKISH CRIMINAL LAW GENERAL PART] (2015).

⁸⁰ *See* Gülriz Uygur & Türkan Yalçın Sancar, *Law, Women's Subordination and Changing Face of the Turkish Legal System in the Example of Article 434 of the Turkish Criminal Code*, E. EUR. COMMUNITY L. J., at 30, 34 (2005) (for instance, defloration by promise of marriage was regulated under a special criminal provision based on customs that attached importance to the women's virginity).

⁸¹ *See* Türkan Yalçın Sancar, *Türk Ceza Hukukunda Kadın* [WOMAN IN TURKISH CRIMINAL LAW] 191 (2013).

⁸² *Supra* note 10, art. 3.

⁸³ Uygur & Sancar, *supra* note 80, 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, (2009) Eur. Ct. H.R. 870, ¶ 192 (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 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* Yargıtay [YARG] [TURKISH COURT OF CASSATION] March 31, 2009, 9687/1691.

Violence (Istanbul Convention)⁸⁴ ratified by Turkey on March 14, 2012.⁸⁵ Article 37 of the Convention places State parties under an obligation to take necessary legislative measures to criminalize forced marriage.⁸⁶

In addition, Turkey has ratified various other international human rights instruments, some of which pertaining to women's human rights. On 2 December, 1985, Turkey became a state party to the CEDAW⁸⁷ by means of pertinacious demand of the feminist movement in Turkey.⁸⁸ Article 16 of the CEDAW places state parties under an 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, ratified by Turkey in 1954,⁸⁹ ensures some of the basic rights that may be violated in a forced marriage. It also puts the responsibility firmly on the public officials in terms of preventing such violations. State parties are under a specific obligation to secure the basic rights which are violated by a forced marriage; Article 3 of the ECHR guarantees prohibition of torture, and Article 8 which concerns the right to respect for private and family life could be applicable in such cases.⁹⁰

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”.⁹¹ Nonetheless, the UNCRC significantly requires member states to *abolish* “[t]raditional practices prejudicial to the

⁸⁴ Council of Europe, Convention on Preventing and Combating Violence against Women and Domestic Violence, Aug. 1, 2014, C.E.T.S. 210.

⁸⁵ Approved by the Parliament on Nov. 24, 2011, published in the Official Gazette on March 8, 2012.

⁸⁶ Council of Europe, *supra* note 84. 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.

⁸⁷ United Nations Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13. 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 ANDREW BYRNES ET AL., *WOMEN'S 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).

⁸⁸ See Gündü z, *supra* note 58 at 119.

⁸⁹ 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.

⁹⁰ See 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 PERSPECTIVES* 67, 72 (Aisha K. Gill & Sundari Anitha eds., 2011).

⁹¹ *Supra* note 12, art. 16(2).

health of children” as 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.⁹² The CEDAW and the UNCRC Committees have recommended 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”.

2. TURKEY’S CHALLENGES OF MARRIAGE LAW, RELIGIOUS, SOCIO-CULTURAL AND LEGAL PRACTICES ON MARRIAGES OF CHILDREN

As stated above, prior to the republic, Turkey was ruled according to 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.⁹³ It is remarkable that Islamic family law was replaced by family law based on the SWISS SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB] [Civil Code] Dec. 10, 1907, in a country which had almost 98% of the Muslim population in that time.⁹⁴ Also today, the majority of the society in modern Turkey defines itself as Muslim.⁹⁵ Therefore, being part of the history of the country, Islamic law has also inevitably a large application in people’s daily life at present, and the act of marriage is one of its manifestations.

According to Islamic law, marriage is a legally binding contract that can only be concluded between a man and a woman⁹⁶ who had the capacity of judgement and had reached puberty.⁹⁷ Different schools of Islam established minimum ages of marriage based on gender. According to *Hanafi* school (official legal doctrine of Ottoman Empire)

⁹² See generally *UN CEDAW and CRC Recommendations on Minimum Age of Marriage Laws Around the World*, EQUALITY NOW (2013), <https://www.scribd.com/document/325592767/UN-Committee-Recommendations-on-Minimum-Age-of-Marriage-Laws> (last visited Oct. 18, 2017).

⁹³ See Magnarella, *supra* note 61, at 285.

⁹⁴ *Id.*

⁹⁵ According to a study in 2017, 86% of people calls themselves Muslims, and 92% of population believes the existence of Allahs see MAK DANISMANLIK, MEHMET ALI KULAT, *TURKIYE’DE TOPLUMUN DINE VE DINI DEGERLERE BAKISI* [TURKISH PUBLIC OPINION TOWARD RELIGION AND RELIGIOUS VALUES] 4 (2017).

⁹⁶ See TUCKER, *supra* note 48, at 41; see also Magnarella, *textit supra* note 61, at 294.

⁹⁷ See CIN & AKILMAZ, *supra* note 49, at 378; see also M. AKIF AYDIN, *OSMANLI AILE HUKUKU* [OTTOMAN FAMILY LAW] 52 (2017).

the minimum age of marriage was nine for girls and was twelve for boys.⁹⁸ Under these age groups nobody was assumed to have reached puberty, therefore, could not marry.⁹⁹

The necessity of consent of women who fulfilled the requirements for marriage was also discussed among *Hanafi* scholars. According to some scholars of the *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.¹⁰⁰ Nevertheless, according to the others, the women who had the capacity of judgement and had reached puberty could not get married without the consent of their legal guardians.¹⁰¹ The first interpretation was applied predominantly between 941 and 1544 in the Ottoman territories.¹⁰² 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.¹⁰³ However, the application differed depending on whether the women had previously been married or not. Even though *Hanafi's* school did not let the legal guardians of the bride who reached puberty conclude a marriage agreement without her consent¹⁰⁴, the same religious school would let the legal guardians of the children, boys or girls, who did not reach puberty conclude a marriage agreement without consulting them.¹⁰⁵ 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.¹⁰⁶

At the time, the minimum age for marriage, set at nine for girls and twelve for boys, was regulated under the codification regarding family was the law entitled *Hukuk-i Aile Kararnamesi* (the Ottoman Family Law Ordinance) as part of the codification movement of the *Tanzimat* period. It entered into force in 1917 and remained in force for twenty

⁹⁸ See CIN & AKILMAZ, *supra* note 49, at 378.

⁹⁹ *Id.*

¹⁰⁰ See AYDIN, *supra* note 97, at 53.

¹⁰¹ *Id.*

¹⁰² *Id.* at 54.

¹⁰³ See TUCKER, *supra* note 48, at 60; see also AYDIN, *supra* note 97, at 55.

¹⁰⁴ CIN & AKILMAZ, *supra* note 49, at 381.

¹⁰⁵ 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 Magnarella, *supra* note 49, at 43; CIN & AKILMAZ, *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 & AKILMAZ, *supra* note 49, at 383.

¹⁰⁶ CIN & AKILMAZ, *supra* note 49, at 382.

months in the Ottoman Empire.¹⁰⁷ Accordingly, it was an innovation for Ottoman family law that the aforementioned law banned concluding a marriage agreement under these ages by legal guardians.¹⁰⁸

The fundamental sources of Islamic law¹⁰⁹ stated that a marriage contract should be concluded through the participation of the parties and witnesses. Nonetheless no requirement was stated regarding the participation of legal officers or religious figures.¹¹⁰ 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.¹¹¹ However, in the successive centuries the practice varied in different parts of the Empire. For example, in Rumelia, the local *imam* (religious representative) generally concluded the marriage without recourse to the court.¹¹² Yet, *imams* could not conclude the marriage without an authorization of marriage, which was given by the court upon a request by the prospective spouses.¹¹³ 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 authorization to *imams* to conclude a religious marriage ceremony.¹¹⁴

In the contemporary Turkish legal system, marriage is defined as an agreement concluded upon mutual and verbal declaration of wills of the prospective spouses (*consensus facit nuptias*).¹¹⁵ Any other kind of union (*de facto* unions) has not been legally recognised in the Turkish legal system, thus has no legal effects.¹¹⁶ After the legal reform of 1926, the civil marriage ceremony became compulsory and the religious marriage ceremony lost its legal effectiveness.¹¹⁷ Thus, in order to conclude a marriage agreement, the prospective spouses are required to declare their own intentions in

¹⁰⁷ *Id.* at 370. It must be underlined that *Hukuk-i Aile Kararnamesi* 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 97, at 53.

¹⁰⁸ AYDIN, *supra* note 97, 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).

¹⁰⁹ 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 TUCKER, *supra* note 48, at 12.

¹¹⁰ AYDIN, *supra* note 97, at 61; Magnarella, *supra* note 61, at 294.

¹¹¹ TUCKER, *supra* note 48, at 60.

¹¹² Most of the marriages were registered in Jerusalem but the records of marriages were varied in Syria and Palestines see AYDIN, *supra* note 97, at 65; TUCKER, *supra* note 48, at 60.

¹¹³ AYDIN, *supra* note 97, at 67; Jäschke, *supra* note 40, at 170.

¹¹⁴ Jäschke, *supra* note 40, at 176.

¹¹⁵ *Supra* note 9, art. 142.

¹¹⁶ 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.

¹¹⁷ Magnarella, *supra* note 61, at 103; Orücü, *supra* note 52, at 225; Tugrul Ansay, *Family Law*, in INTRODUCTION TO TURKISH LAW 111, 116 (Tugrul Ansay & Don Wallace Jr. eds., 2007).

presence of two witnesses and the officer of marriage.¹¹⁸ The officer of marriage is the mayor or the officer appointed by the mayor,¹¹⁹ not the religious representative (*imam*).¹²⁰ Consequently, the ceremony, which is performed by an *imam*, is not recognised by the civil law and has only religious significance.¹²¹ Even though the Turkish Civil Code does not recognise the religious marriage as a legal one, Islamic marriage is still performed both alongside a legal marriage and separately from a civil marriage.¹²² While fundamental Islamic sources and the practice of the Ottoman Empire illustrated that the participation of a religious representative was not compulsory in order to conclude a marriage in Islamic law, it became a social practice in Turkey which is still a matter of debate within contemporary society.¹²³ 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 marriage¹²⁴ divided Turkish society into two blocks: religious conservatives in favour of the bill and the secular population against it.¹²⁵ In the Turkish legal system, the capacity to marry requires certain

¹¹⁸ *Supra* note 9, art. 142.

¹¹⁹ However also the Minister of Interior shall appoint officers among foreign representatives of Turkey. The Regulation Regarding Marriage, *supra* note 39.

¹²⁰ Jäschke, *supra* note 40, at 180.

¹²¹ *Id.*; 3 MUSTAFA ALPER GÜMÜŞ, MUSTAFA DURAL & TUFAN ÖĞÜZ, TÜRK ÖZEL HUKUKU: AİLE HUKUKU [3 TURKISH PRIVATE LAW: FAMILY LAW] 74 (2010) (Turk.).

¹²² 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. İstatistiklerle Aile [Statistic on Family], TURKISH STATISTICAL INSTITUTE <http://www.tuik.gov.tr/PreHaberBultenleri.do?id=13662> (last visited Oct. 2, 2017).

¹²³ Orücü, *supra* note 52, at 226; HALİL CİN, İSLÂM VE OSMANLI HUKUKUNDA EVLENME [MARRIAGE IN ISLAMIC AND OTTOMAN LAW] 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:

After 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 61, at 294.

¹²⁴ 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>.

¹²⁵ *See* Mahmut Bozarlan, *Bill Allowing Turkish Muftis To Perform Civil Marriages Stokes Concern Read More*, AL-MONITOR (Aug. 9, 2017), <https://www.al-monitor.com/pulse/originals/2017/08/turkeys-muftis-to-conduct-marriages.html>; *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>.

qualifications¹²⁶ such as majority and capacity of judgement. A person, who has the capacity to choose and has reached the age of marriage *i.e.* eighteen years old, can marry without any consent or court approval.¹²⁷ 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 fifteen years of age and the man seventeen years old, the prospective spouse could not marry upon consent of her/his guardian.¹²⁸ In such circumstances, the guardian could not declare the intention of marriage, only the prospective spouse could do so, but the guardian could only have declared her/his consent for the marriage.¹²⁹ It is only in exceptional circumstances that the woman who had reached fourteen years of age and the man who had reached fifteen years old could get married upon a court's approval.¹³⁰

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 eighteen years of age, *i.e.* the age of consent. Hence, the spouses could only marry when they had reached seventeen years of age upon consent of her/his guardian.¹³¹ 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”.¹³² According to Article 11 (2) of the Turkish Civil Code, a person is then 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 wide discretion to judges.¹³³ The Turkish Court of Cassation, in a recent decision in 2015, reversed the judgement which allowed a marriage involving a sixteen year old girl, affirming that living together as husband and wife did not constitute an exceptional circumstance.¹³⁴ It is regrettable to find that the Turkish Court of Cassation approved marriages - thus evaluated positively the existence of exceptional circumstances - when the girl was under the age of seventeen, and not the boy.¹³⁵ However, sadly, in most

¹²⁶ *Supra* note 9, art. 124-125.

¹²⁷ Gümüş & DURAL & Öğüz, *supra* note 121, at 51.

¹²⁸ See Turk Medeni Kanunu (1926 tarihli Türk Medeni Kanunu) [ETMK] [Turkish Civil Code], art. 88(1), (1926) (Turk.).

¹²⁹ Gümüş & DURAL & Öğüz, *supra* note 121, at 52-53.

¹³⁰ *Supra* note 128, art. 88(2).

¹³¹ *Supra* note 9, art. 124(1).

¹³² *Id.*

¹³³ See, *e.g.*, TURGUT AKINTÜRK & DERYA ATEŞ KARAMAN, TÜRK MEDENİ HUKUKU: AİLE HUKUKU [TURKISH CIVIL LAW, FAMILY LAW] 69 (2012).

¹³⁴ Yargıtay [YARG] [Turkish Court Of Cassation] Second Chamber of Law Division, May 6, 2015, 2015/3626 E., 2015/9331 K. (Turk.).

¹³⁵ *Id.*; see Yargıtay [YARG] [Turkish Court Of Cassation] Second Chamber of Law Division, March 21, 2013, 2012/7078 E., 2015/7749 K. (Turk.).

cases, the Court reversed the judgement due to the fact that the girls concerned did not even reach the age of sixteen, which is required for application for judicial approval.¹³⁶ These cases illustrate the fact that unfortunately the girls under the age of sixteen were already married with a religious marriage ceremony, and thereafter their legal guardians sought the judge's approval for a civil marriage.

Moreover, in Swiss law, the age of consent is eighteen¹³⁷ in contrast to the Turkish law. The prospective spouses must have reached eighteen years of age in order to get married.¹³⁸ Yet it is worth noting that until 1996, the Swiss SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB] [Civil Code] Dec. 10, 1907, used to allow marriage under the age of eighteen based on exceptional circumstances.¹³⁹ Upon the revision of the Swiss SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB] [Civil Code] Dec. 10, 1907, which entered into force on January 1, 1996, both the provisions which allowed marriage under the age of eighteen upon a court decision pursuant to exceptional circumstances and the provision which recognised as of age the person who got married under the age of 18 were abrogated.¹⁴⁰

3. 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 the man chosen for them by their parents because of the societal pressure, even though in certain cases they are consulted for their consent.¹⁴¹ In order to maintain family reputation, a girl has to get married before having the opportunity for

¹³⁶ *Supra* note 135; see Yargitay [YARG] [Turkish Court Of Cassation] Second Chamber of Law Division, May 3, 2011, 2011/4235 E., 2011/7649 K. (Turk.); Yargitay [YARG] [Turkish Court Of Cassation] Second Chamber of Law Division, March 30, 2011, 2010/3710 E., 2011/5584 K. (Turk.); Yargitay [YARG] [Turkish Court Of Cassation] Second Chamber of Law Division, June 7, 2010, 2009/9099 E., 2010/11210 K. (Turk.); Yargitay [YARG] [Turkish Court Of Cassation] Second Chamber of Law Division, Nov. 8, 2010, 2009/16479 E., 2010/18720 K. (Turk.); Yargitay [YARG] [Turkish Court Of Cassation] Second Chamber of Law Division, Apr. 29, 2010, 2009/4262 E., 2010/8639 K. (Turk.).

¹³⁷ See SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB] [CIVIL CODE], Dec. 10, 1907, SR 210, RS 210, art. 14 (Switz.)

¹³⁸ *Id.* art. 94.

¹³⁹ *Id.* art. 94(2).

¹⁴⁰ JEAN-CHRISTOPHE A MARCA, PASCAL PICHONNAZ, BÉNÉDICT FOËX & OTHERS, CODE CIVIL I: ART. 1-359 [C.C.], COMMENTAIRE (COMMENTAIRE ROMAND) [CIVIL CODE I: ART. 1-359 [C.C.], COMMENTARY] Art. 94, N. 15 (2010) (Fr.).

¹⁴¹ See Pinar Ilkcaracan, *Exploring the Context of Women's Sexuality in Eastern Turkey*, REPROD. HEALTH MATTERS, Nov. 1998, at 66, 70.

inappropriate romantic affairs, and hence, be swayed by sexual feelings.¹⁴² According to this, girls are considered marriageable after experiencing menarche, as their virginity is a matter of life and death.¹⁴³ The main reason is that premarital sexual intercourse is a taboo in respect of social norms. Hence, an unmarried woman is potentially placing her family honour in danger since an ingenuous woman could put her decency in danger by making mistakes.¹⁴⁴

Cultural phenomena could emerge in different fashions, although most of them are very rare nowadays. Endogamy is a common practice among Turkish society; official statistics from 2011 indicate that 21,3% of all marriages in Turkey are consanguineous.¹⁴⁵ Within consanguineous marriages, the marriage between cousins¹⁴⁶ is the most common type.¹⁴⁷ The main factor is that a marriage between relatives is considered to be more long-lasting since families share the same values.¹⁴⁸ The economic considerations are also directly related to this tradition. The reason being that the 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 the exchange of brides by two consenting families instead of paying a dowry.¹⁴⁹ By the same token, in terms of economic effects, this is an option for poor families, where 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 marriage agreements in Turkey are reached on the ground of dowry (*başlık parası*).¹⁵⁰ The figures increase up to 43% in rural areas, particularly in the eastern part of the Country.¹⁵¹ 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 the consummation of

¹⁴² See Meliksah Ertem, Gunay Saka, Ali Ceylan, Vasfiye Deger & Sema Ciftci, *The Factors Associated with Adolescent Marriages and Outcomes of Adolescent Pregnancies in Mardin Turkey*, 39 J. COMP. FAM. STUD. 229, 237 (2008).

¹⁴³ See Meliksah Ertem & Tahire Kocturk, *Opinions on Early-age Marriage and Marriage Customs among Kurdish-speaking Women in Southeast Turkey*, 34 J. FAM. PLAN. AND REPROD. HEALTH CARE 147, 149-51 (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 & Gokcececek Yurdakul, *Culture of Honor, Culture of Change: A Feminist Analysis of Honor Killings in Turkey*, 7 VIOLENCE AGAINST WOMEN 964, 975 (2001).

¹⁴⁴ See, e.g., Ertem & Kocturk, *supra* note 143, at 149.

¹⁴⁵ TÜRKİYE CUMHURİYETİ AİLE VE SOSYAL POLİTİKALAR BAKANLIĞI, *supra* note 11, at 132.

¹⁴⁶ According to article 129 of the Turkish Civil Code (2002), "[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".

¹⁴⁷ Ertem & Saka & Ceylan & Deger & Ciftci, *supra* note 142, at 235.

¹⁴⁸ See, e.g., Ertem & Kocturk, *supra* note 143, at 150.

¹⁴⁹ Ertem & Saka & Ceylan & Deger & Ciftci, *supra* note 142, at 235.

¹⁵⁰ *Id.* at 238.

¹⁵¹ *Id.*

marriage. Under this perverse understanding, girls are merely considered as commodities. The economic dimension of forced marriage is that dishonesty on a woman's part induces refund of the dowry as she is bound by the agreement.¹⁵² 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 means of the agreement.¹⁵³ The phenomenon of dowry leads to forced marriages, mostly in the form of child brides. The dowry increases the risk of marrying a child bride to an older man.¹⁵⁴ 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.¹⁵⁵ Lastly, the economic considerations may trigger child marriages since pecunious families force their children (generally cousins) to marry as soon as possible in an effort to keep the wealth within the family.¹⁵⁶

4. SUGGESTION: REARRANGEMENT OF LEGAL REMEDIES AGAINST FORCED MARRIAGE OF CHILDREN

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.¹⁵⁷ In terms of dealing with forced 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,¹⁵⁸ Switzerland,¹⁵⁹ Austria¹⁶⁰ and

¹⁵² See Sever & Yurdakul, *supra* note 143, at 989.

¹⁵³ *Supra* note 139, at 69.

¹⁵⁴ See generally Anita Raj, *When The Mother Is a Child: The Impact of Child Marriage on the Health And Human Rights Abuse*, 95 ARCHIVES OF DISEASE IN CHILDHOOD 931 (2010).

¹⁵⁵ HAFIZOĞULLARI & ÖZEN, *supra* note 79, at 242.

¹⁵⁶ See Ertem & Kocturk, *supra* note 143, at 151.

¹⁵⁷ See generally Teertha Gupta & Khatun Sapnar, *The Law, the Courts and Their Effectiveness*, in FORCED MARRIAGE: INTRODUCING A SOCIAL JUSTICE AND HUMAN RIGHTS PERSPECTIVES 158 (Aisha K. Gill & Sundari Anitha eds., 2011); see Brigitte Clark & Claudina Richards, *The Prevention and Prohibition of Forced Marriages - A Comparative Approach*, 57 INT'L COMP. L. Q. 501 (2008); see Yener Ünver, *Kinderbräute in der Türkei [Children brides in Turkey]*, in STRAFRECHTLICHER REFORMBEDARF: MATERIALIEN EINES DEUTSCH-JAPANISCH-POLNISCH-TÜRKISCHEN TAGUNG IM JAHRE 2015 IN RZESZÓW UND KRAKÓW (POLEN) [CRIMINAL LAW NEEDS REFORM: MATERIALS FROM A GERMAN-JAPANESE-POLISH-TURKISH CONFERENCE IN 2015 IN RZESZÓW AND KRAKÓW] 159 (2016) [Criminal law needs reform: Materials from a German-Japanese-Polish-Turkish conference in 2015 in Rzeszów and Kraków] (2016); Sabbe & Temmerman & Brems & Leye, *supra* note 34; Gangoli & Chantler, *supra* note 35; HAENEN, *supra* note 23.

¹⁵⁸ See generally Schweizerisches Strafgesetzbuch [STGB] [CRIMINAL CODE] Dec. 21, 1937, art. 181(a) (Switz.).

¹⁵⁹ See generally STRAFGESETZBUCH [STGB] [CRIMINAL CODE], May 15, 1871, art. 237 (1871) (Ger.).

¹⁶⁰ See generally STRAFGESETZBUCH [STGB] [CRIMINAL CODE] Jan. 23, 1974, art. 106(a) (Aus.).

Belgium.¹⁶¹ 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.

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.¹⁶² As a result, those against criminalisation state that victims may decide not to come forward.¹⁶³ Although victims seek legal protection, the possible isolation from their social relations may induce them to realign with their families.¹⁶⁴ Another point to consider is that criminal proceedings may be found ineffective on the basis that the higher burden of proof required by criminal prosecution will make civil cases more advantageous. The conviction of offenders seems more unlikely because of the required proof beyond reasonable doubt in criminal cases.¹⁶⁵ 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 means nothing but a symbolic gesture.¹⁶⁶

In order to argue in favour of criminalizing forced marriage, the key argument is that the prosecution could call the attention of not only citizens, but also government officers, on the intolerability of these violations.¹⁶⁷ By doing so, victims would be given the opportunity to question their parents and seek legal assistance.¹⁶⁸ The assumption, based on the unwillingness of victims, could turn out to be inaccurate since some of them may take action for emancipation from the authority of their parents.¹⁶⁹ 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.¹⁷⁰ In fact, the best interest of a child is the primary consideration under Article 3 of the UNCRC.¹⁷¹ 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

¹⁶¹ See generally CODE PÉNAL [C.Pén.] art. 391(e) (Belg.).

¹⁶² Sabbe et. al., *supra* note 34, at 177.

¹⁶³ Gangoli & Chantler, *supra* note 35, at 272.

¹⁶⁴ See, e.g., Gupta & Sapnar, *supra* note 157, at 171.

¹⁶⁵ Simmons & Burn, *supra* note 17, at 994.

¹⁶⁶ Sabbe et. al., *supra* note 34, at 178.

¹⁶⁷ See, e.g., Clark & Richards, *supra* note 157, at 504.

¹⁶⁸ HAENEN, *supra* note 23, at 252.

¹⁶⁹ See Mohammad Shams Uddin, *Arranged Marriage: A Dilemma for Young British Asians*, 3 DIVERSITY & EQUALITY IN HEALTH AND SOC. CARE 211, 214 (2006).

¹⁷⁰ Hilal Oztürk, *Cocuk Gelinler Konusunda Ornek Dava*, SACITASLAN (Jan. 8, 2012), <http://www.sacitaslan.com/cocuk-gelinler-konusunda-ornek-dava-haberi-67482>.

¹⁷¹ UNCRC, *supra* note 8.

another key reason stated by the victims.¹⁷² It may be argued that criminal law has already afforded sufficient apparatus to fight in defence of women as most of the offences are punishable acts under current criminal provisions.¹⁷³ Nevertheless, this argument disregards the fact that a forced marriage violates some of the very basic human rights 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.¹⁷⁴ In this sense, only a special provision could be sufficient to address such a simultaneous violation of numerous fundamental rights.

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.¹⁷⁵ 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.”¹⁷⁶ The present provision had constituted an incentive for a forced marriage, since in many cases the victim was coerced to marry the offender in order to assure family honour.¹⁷⁷ In fact, many women were raped and then forced to marry by families on the basis that marriage is the way to abrogate the disgrace as no one would acquiesce to a defective good other than the offender.¹⁷⁸

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 challenged, pursuant to a list of provisions in the Turkish Criminal Code such as human trade (Article 80), threat (Article 106) and child molestation (Article 103).¹⁷⁹ Turkish criminal scholars and lawyers have criticized the lack of a special provision on the basis that the above mentioned offences

¹⁷² See UNITED KINGDOM HOUSE OF COMMONS, HOME AFFAIRS SIXTH REPORT (2008).

¹⁷³ Clark & Richards, *supra* note 157, at 505.

¹⁷⁴ Geentanjali Gangoli, Khatidja Chantler, Marianne Hester & Ann Singleton, *Understanding Forced Marriage: Definitions and Realities*, in FORCED MARRIAGE: INTRODUCING A SOCIAL JUSTICE AND HUMAN RIGHTS PERSPECTIVES 25 (Aisha K. Gill & Sundari Anitha eds., 2011).

¹⁷⁵ 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. See *Fury at Turkish Bill to Clear Men of Child Sex assault if They Marry Victims*, THE GUARDIAN (Nov. 22, 1990), <https://www.theguardian.com/world/2016/nov/18/turkish-bill-to-clear-men-of-child-sex-assault-if-the-marry-their-victims>.

¹⁷⁶ 1926 TARIHЛИ TURK CEZA KANUNU [ETCK] (Tarihli Türk Ceza Kanunu) [TURKISH CRIMINAL CODE OF 1926], art. 434 (1926) (Turk.).

¹⁷⁷ See Canan Arin, *Turkey*, in 2 ENCYCLOPEDIA OF WOMEN & ISLAMIC CULTURE 409 (Suad Joseph & Afsaneh Najmabadi eds., 2005).

¹⁷⁸ See generally SANCAR, *supra* note 81, at 137.

¹⁷⁹ *Id.*

are not adequate to bring justice for the victims of forced marriage, which violates multiple rights at the same time.¹⁸⁰

In practice, Turkish national courts have, in the past, prosecuted forced marriage perpetrators on the basis of sexual crimes. In many cases, girls under the age of fifteen are married to men over the age of fifteen by the mutual consent of their parents.¹⁸¹ 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 fifteen constitute child molestation. Sexual acts committed against other children (between the age of fifteen and eighteen) 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.¹⁸² Moreover, the Turkish Court of Cassation held that parents of victims and offenders would be subjected to an appropriate penalty to the offence that was committed for incitement.¹⁸³

Sexual intercourse between/with persons who 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 has sexual intercourse with a child who reached the age of fifteen, without using force, threat and fraud is sentenced to a term of imprisonment from two to five years upon the filing of a complaint. This clearly illustrates that, in opposition to child molestation, 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 a 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.¹⁸⁴ 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 dismiss the case, on the grounds

¹⁸⁰ See, e.g., Meral Ekici Şahin, *Ceza Hukuku ve Zorla Evlendirme [Criminal Law and Forced Marriage]*, 2 PROF. DR. NEVZAT TOROSLU'YA ARMAĞAN 395, 425-26 (2015).

¹⁸¹ Consensual sexual intercourse of two children between the age of 15 and 18 is not a criminal offence under Turkish criminal law.

¹⁸² See, e.g., *supra* note 10, art. 103/2.

¹⁸³ See Yargıtay [YARG] [TURKISH COURT OF CASSATION] Fifth Chamber of Criminal Division, Feb. 28, 2007, 2007/29 E., 2007/1609 K. (Turk.).

¹⁸⁴ See generally Yargıtay [YARG] [TURKISH COURT OF CASSATION] Fourteenth Chamber of Criminal Division, Apr. 21, 2014, 2012/6729 E., 2014/5373 K. (Turk.).

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 court of first instance is under an obligation to continue the adjudication if the victim demanded to do so.¹⁸⁵

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 lacks the awareness that he is acting unlawfully since early marriage is not considered illegal or inconvenient in the eyes of the society.¹⁸⁶ In the same manner, some Turkish academics did concur with the conclusion of the court.¹⁸⁷

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, international organisations such as the UNICEF runs training programmes with the collaboration of the Ministry of Family and Social Policies.¹⁸⁸ 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 the illegality of child marriage cannot be deemed reasonable in the modern age.¹⁸⁹ Secondly, the judgement of the Court, which rests on the social and cultural factuality, fails to comply with the developmental effect of the judiciary. Instead of making decisions in line with social narratives, the Court should have served solving social problems by judicial activism. It cannot be denied that social norms are highly influential in formulating criminal law.¹⁹⁰ Crime control becomes possible only if a criminal law contains moral codes reflecting the community it rules.¹⁹¹ However, these norms may also encourage violation of the laws as in the case of forced marriage.¹⁹²

¹⁸⁵ *Contra* Yargıtay [YARG] [TURKISH COURT OF CASSATION] Fourteenth Chamber of Criminal Division, May 7, 2015, 2013/7341 E., 2015/6190 K. (Turk.).

¹⁸⁶ *Supra* note 5.

¹⁸⁷ *E.g.*, MAHMUT KOCA & İLHAN ÜZÜLMEZ: TÜRK CEZA HUKUKU ÖZEL HÜKÜMLER [TURKISH CRIMINAL LAW PRIVATE PART] 319 (2015).

¹⁸⁸ *See Child Marriage*, UNICEF (2020), <https://www.unicef.org/turkey/en/child-marriage>.

¹⁸⁹ *See generally* Fahri Gökçen Taner, *Anayasa Mahkemesi'nin Çocukların Cinsel İstismarına ve Evlenmenin Dinsel Törenini İlişkin İptal Kararlarının Ardından Çok Katmanlı Bir Çözüm Önerisi [A Multiple Layered Solution Proposal After the Decision of Constitutional Court Related to Child Sexual Abuse and Religious Ceremony of Marriage]* TÜRKİYE BAROLAR BİRLİĞİ DERGİSİ [TBB], at 221, 240 (2016).

¹⁹⁰ *See generally* WAYRNE R. LAFAVE, *CRIMINAL LAW* 14 (2003).

¹⁹¹ *See* Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks is Just? Coercive versus Normative Crime Control*, 86 VA L. REV. 1839, 1841 (2000).

¹⁹² 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 PARENTING: SCI. AND PRAC. 257, 265 (2008).

Although criminal law cannot change the acceptance of the community, it can shape social norms and the understanding of individual morality.¹⁹³ The coercive power of criminal law is a key factor in terms of dealing with forcing girls to get married.

Another related point to the subject is the effect of religious marriage performed by *imams* on underage marriages. Although it may be argued that there is no connection between religious rituals and such marriages, statistics indicate the contrary. According to surveys, 62,7% of underage marriages are performed by religious representatives (*imam*) and therefore, have only religious significance but no legal effect, given the fact that the civil law marriage has not been concluded.¹⁹⁴ The main reason is that, as stated above, the Turkish Civil Code states, as a rule, that the age of marriage as eighteen, the age of seventeen upon consent of the legal guardians and the age of sixteen in case of exceptional circumstances upon a court's approval. The victims are mostly under the age of sixteen. Hence, the legal impossibility of a civil marriage under the age of sixteen leads the society to religious marriage and opens the way to sexual abuse.

In terms of coping with early marriages, the Turkish lawmaker introduced 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.¹⁹⁵ Persons who hold a religious marriage ceremony without an official marriage shall, therefore, 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. In contrast, the others can only marry through a religious ceremony.¹⁹⁶ It is worth noting that in the case of polygamy, the other wives do not obtain an official status, hence cannot obtain a certain number of rights such as the right of inheritance.¹⁹⁷ 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.

¹⁹³ Robinson, *supra* note 191, at 1868.

¹⁹⁴ HACETTEPE ÜNİVERSİTESİ NÜFUS ETÜTLERİ MUDURLUGU, *supra* note 4, at 76.

¹⁹⁵ Taner, *supra* note 189, at 240-241.

¹⁹⁶ Ilkcaracan, *supra* note 141, at 69.

¹⁹⁷ See Jenny B. White, *State Feminism, Modernization, and the Turkish Republican Women*, THE NAT'L WOMEN'S STUD. ASS'N. J., Fall 2003, at 145, 156 (2003).

The Turkish Constitutional Court overruled the two clauses of the aforementioned Article on the basis of privacy of private life¹⁹⁸ and freedom of religion and conscience.¹⁹⁹ The Court held that the principle of rationality was violated since, although living together and having children without a civil marriage is not criminalized, the present Article penalizes the right to have a religious marriage.²⁰⁰ The findings of the Court completely disregard the logic behind the codification of such an Article. The legislature has aimed to encourage monogamy and to secure the rights of women under marriage agreements 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* need 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 for marriages under the age of eighteen in Turkey. The first one is Article 124 (1) of the Turkish Civil Code, which sets the minimum age of marriage as seventeen. The second one is Article 124 (2) of the Turkish Civil Code which allows marriages at the age of sixteen upon a court's approval in the case of exceptional circumstances. Considering 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 eighteen, compatible with the age of consent. More importantly and urgently, Article 124 (2) regarding marriage at the age of sixteen in case of exceptional circumstances, should also be amended. Furthermore, Article 11 (2) of the Turkish Civil Code, which recognises as of age the person married under the age of eighteen must be abrogated, due to the fact that this provision puts the married child into the shoes of an adult. As a rule, under the age of eighteen, children may only enter into obligations or give up the rights with the consent of their legal guardians in the Turkish legal system.²⁰¹ However, just after the marriage, Article 11 (2) of the Turkish Civil Code allows a married child of seventeen or sixteen years old 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 eighteen 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 hand it allows a person of sixteen or seventeen years old to marry upon

¹⁹⁸ See *Türkiye Cumhuriyeti Anayasası [TCA] (Türkiye Cumhuriyeti Anayasası) [THE CONSTITUTION OF THE REPUBLIC OF TURKEY]* art. 20 (1982) (Turk.).

¹⁹⁹ *Id.* art. 24.

²⁰⁰ See *generally* *Anayasa Mahkemesi [AM] [CONSTITUTIONAL COURT]*, Official Gazette June 10, 2015 - 29382, 2014/36 E., 2015/51 K. (2015) (Turk.).

²⁰¹ *Supra* note 9, art. 16.

her/his legal guardian's consent or court approval, and assumes her/him as an adult after the marriage ceremony.

If these amendments of the Turkish Civil Code cannot be realised, the second scenario should target the courts. Considering 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.²⁰² Judges determine the conflict between Article 124 (2) of the Turkish Civil Code and international agreements in relation to the fundamental rights and freedoms such as those conferred by CEDAW and UNCRF. Judges must directly apply the international law and must dismiss the cases regarding court approvals for the marriages under the age of sixteen in 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 persons at the age of seventeen because it does not require a judge's approval; the prospective spouses must only submit the legal guardian's written and notarised consent when they apply for the marriage²⁰³ 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 marriages at the age of seventeen and to 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 abrogation Jan. 1, 1996, of the provision which allowed marriage under the age of eighteen based on exceptional circumstances, a Federal Law on Measures to Fight against Forced Marriages also entered into force on July 1, 2013.²⁰⁴ The provisions of the

²⁰² 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.

²⁰³ *Supra* note 9, art. 136.

²⁰⁴ *See, e.g.*, French version is available at <https://www.admin.ch/opc/fr/federal-gazette/2012/5479.pdf>; *e.g.*, German version is available at <https://www.admin.ch/opc/de/federal-gazette/2012/5937.pdf> (last accessed 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. *See Switzerland ratifies the Istanbul Convention*, HUMANRIGHTS.CH, <https://www.humanrights.ch/en/switzerland/internal-affairs/ratifications/switzerland-ratifies-istanbul-convention> (last accessed 26.10.2017).

Swiss SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB] [Civil Code] Dec. 10, 1907, 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 must examine firstly, the age of the future spouses.²⁰⁵ This is the first barrier in order to prevent a marriage of persons under the age of eighteen.²⁰⁶ The civil registrar, secondly, examines whether there are any circumstances that illustrate that the request clearly does not reflect the free will of the prospective spouses.²⁰⁷ Despite this barrier,²⁰⁸ if a forced marriage were to occur, the Swiss SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB] [Civil Code] Dec. 10, 1907, would adopt a new regime of annulment of marriage without time limitation on two grounds.²⁰⁹ 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 eighteen at the time of the marriage.²¹⁰

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 "force" should be redefined, and the psychological and social pressure has to be included and the claim of the annulment of marriage should be off the time limitation.

²⁰⁵ Federal Law on Measures to Fight against Forced Marriages revised also the Swiss SCHWEIZERISCHES STRAFGESETZBUCH [STGB] [CRIMINAL CODE], Dec. 21, 1937 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 SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB] [Civil Code] Dec. 10, 1907.

²⁰⁶ See generally Andreas Bucher, *L'accueil des mariages forces*, AJP/PJA 1153, 1154 (2013).

²⁰⁷ *Supra* note 137, art. 99(1)(3).

²⁰⁸ The civil registrar may have some difficulties in order to understand whether the prospective spouses manifest their free will or not, see Bucher, *supra* note 206, at 1155.

²⁰⁹ According to art. 106(1) of the Swiss SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB] [Civil Code] Dec. 10, 1907 an 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.

²¹⁰ See *supra* note 137, 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 and the forced marriage of children is one of the problems created by this background. Unfortunately, statistics illustrate that most victims are girls.

Forced marriage is considered as a marriage or a union alike which lacks full and free consent of at least one party and 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; the aforementioned union must be considered as a forced marriage. In fact, statistics show that underage marriages are generally performed by religious representatives i.e. *imams* in Turkey.

In cases where a future spouse is a child, her/his consent is contradictory, 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 phenomenon 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 eighteen and does not criminalize forced marriage. In many cases, girls have no choice but to marry the man chosen for them by their parents in order to safeguard the 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 seventeen years old upon the consent of her/his legal guardian and sixteen years old upon a court's approval in exceptional circumstances according to Article 124 of the Turkish Civil Code. Religious marriages are part of the socio-cultural practices and have no legal effect. Granting authorization to *muftis/imams* to perform civil marriages cannot prohibit²¹¹ 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 seventeen with the consent of their guardians or the spouses at the age of sixteen with the court's approval according to the Turkish Civil Code. However,

²¹¹ See Raf Sanchez, *New Turkish Marriage Law Prompts Fear of Child Weddings*, THE TELEGRAPH, (2017), <https://www.telegraph.co.uk/news/2017/11/03/new-turkish-marriage-law-prompts-fears-child-weddings/>.

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 lawmaker must change the Civil Code to forbid marriages under the age of eighteen, without envisaging any exceptions. Secondly, a special criminal provision must be included in the Turkish Criminal Code to prevent forced marriages, as seen in criminal codes in other European jurisdictions. Lastly, perhaps most importantly, the social dynamics on sexual taboos and the position of women in Turkey must be ameliorated through educating society since the problem of forced marriage cannot be prevented merely by passing laws against it.