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RESEARCH ARTICLE

Türkiye's Penal Reform on Domestic Violence: From the Opuz Case to the 2020s

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ABSTRACT

Among the Organisation for Economic Co-operation and Development countries, Türkiye has the highest prevalence of violence against women (VAW). Turkish legislators have had to keep developing their penal regulations regarding VAW and domestic violence in particular. The study has adopted feminist legal theory as its theoretical perspective and aims first to reveal the nature and extent of the phenomenon of domestic violence in Türkiye in light of the cases *Opuz v. Türkiye* (2009) and *Huseyin Pasali and Others v. Türkiye* (2020) that were brought before the European Court of Human Rights. These two symbolic domestic violence cases in Turkish history have triggered a penal reform regarding the issue. Despite Türkiye announcing its withdrawal from the Istanbul Convention in 2021, the international covenants Türkiye has ratified provide significant guidance for Turkish legislators. With the most recent additions to the Turkish Criminal Code in the 2020s, penal regulations have attained a relatively more gender-sensitive character. With the 2021 and 2022 amendments, divorced women and women in general have been well recognized as particular victim groups in the Turkish context. Intentional killing, intentional injury, torment, and deprivation of liberty committed against a divorced spouse have been regulated as aggravating circumstances of the crimes in question. Moreover, prosecuting these crimes does not require a complaint in the current law. Alongside this, the criminalization of stalking and prohibition of mediation in relation to stalking are also significant developments. Intentional aggravated murder of a woman now qualifies this crime to require life imprisonment. New provisions also increase the lower terms of the punishment in relation to the crimes of injury, torture, torment, and threats when committed against a woman. All these reforms seem to ignore some gender dimensions of the problem, namely the gender of the offenders and the motives behind the crimes. However, these are still significant in terms of acknowledging the vulnerable and subordinate status of female victims in Türkiye in relation to such crimes. In light of the costs the Turkish State has paid historically, these relatively gender-sensitive penal regulations are promising for Türkiye's struggle with VAW. Now, the future can be built on the argument that VAW is a gender-based problem that involves not only female subordination or vulnerability but also male supremacy, which Turkish legislators should consider more when enacting penal provisions.

Keywords: Domestic violence, violence against women, penal reform, feminist legal theory, Türkiye

Introduction

Türkiye has come a long way regarding its struggle with violence against women (VAW) and particularly domestic violence (DV) through its legal reforms and international undertakings. However, VAW incidents, whether fatal or non-fatal, are still a worrisome phenomenon in Türkiye. Among the Organisation for Economic Co-operation and Development (OECD) countries, Türkiye has the highest prevalence of VAW. According to the statistics published within the scope of the Gender, Institutions and Development Database (GID-DB) 2019, the percentage of ever-partnered women who have suffered intimate partner physical and/or sexual violence in Türkiye is 38% (OECD, 2022).

This study first touches upon the definitional issues regarding VAW and DV before revealing the nature and extent of DV against women in Türkiye historically. At this juncture, *Opuz v. Türkiye* (2009) and *Huseyin Pasali and Others v. Türkiye* (2020) have been chosen for comparing the former legal regulations with current ones, as these are two symbolic DV cases in Türkiye that have triggered legal reforms on the subject. Because the European Court of Human Rights (ECtHR) rendered final judgment on the *Opuz* case, all data about this case have been gathered from the Human Rights Documentation (HUDOC) database of the ECtHR. Meanwhile, all data about *Huseyin Pasali and Others v. Türkiye* case have been gathered from the case attorneys, who provided

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the official application form to the author of this article. On September 19, 2019 and November 1, 2019 the ECtHR received the friendly settlement declarations signed by the parties of this case. The Court decided to strike the application out of its list of cases in accordance with Art. 39 of the Convention on March 26, 2020. Lastly, the study aims to illustrate how Turkish penal regulations have gradually improved to solve problems and become more gender sensitive.

The study will not deeply entail a discussion of the reasons for and consequences of VAW or DV but will rather seek an effective penal response model in the particular context of Türkiye. Although children and men can also be victims, the study will focus on DV against women, not only to delimit the scope of the study, but also due to women universally being the primary victims of this crime both in Türkiye and beyond.

The study's theoretical approach is predicated on feminist legal theory, which analyzes women's subordination in law, seeks a means to change it, and even occasionally achieves revisions to the very institutions of law in light of feminist insights and arguments (Fineman, 2005, pp. 14–15). Fineman (1992, p. 5), who is acknowledged as the founder of the theory, views law as a "system of allocation of power" and believes that the consequences of this power in society are reflections of legal discourse. Feminists consider gender to be a power-related issue, particularly in terms of "male supremacy" and "female subordination" (Mackinnon, 1987, p. 40). According to Fineman (1992, p. 5), family is the most gendered institution in society and thus requires serious feminist scrutiny.

Feminists argue against the idea that the family is an institution wherein the State should not interfere (Gavison, 1992, p. 12). Family privacy should not be a mask for exploiting or battering family members, nor should it be used to grant perpetrators immunity. Accordingly, the family should be examined, and interventions should occur as needed to protect the vulnerable, namely women and children. This should also be a matter of public concern (Gavison, 1992, p. 12). As Hanna (1997, p. 1511) stated, "Feminism is the primary paradigm that explains why women constitute the vast majority of domestic violence victims." The unequal power relationship between men and women is a vital instrument that has been applied most frequently (Hanna, 1997, p. 1511) and meantime is the motive why this study has been inclined to adopt feminist legal theory while analyzing the effectiveness of Turkish penal regulations on DV against women.

The underlying reason for the inequality between men and women in Türkiye is the traditional attitudes and sociocultural roles that have been imposed on men and women and that also play a significant role in the continuation of DV against women (Ayata et al., 2011, p. 7). Patriarchal norms still prevail in Turkish society, particularly within the family, and have a strong impact on the relations between husbands and wives. A popular local saying reflects how DV is tolerated in society: "After all, he's your husband; he can both love you and beat you" (Kocacık et al., 2007, p. 700). The feminist movement in Türkiye has therefore become determined to prioritize saying, "Stop physical violence against women." Feminist advocates have played a central role in the adoption of many legal reforms in Türkiye regarding the subject of DV among other things.

The study will analyze the related legislation, namely former and current criminal codes, the Family Protection Law (Law No. 4320, 1998), and Law to Protect Family and Prevent Violence Against Women (Law No. 6284, 2012), which replaced Law No. 4320, through the insights of feminist legal theory. The main focus of the study will be how, if at all, Türkiye's legal response considers the unequal power relationship between men and women regarding DV cases, as well as how legal discourse affects women's lives in the face of such cases.

The international covenants Türkiye has ratified also fall within the scope of the study, as they possess the force of law pursuant to the Turkish Constitution (Art. 90 §5). Türkiye should be noted as having ratified the European Convention on Human Rights (ECHR) on May 18, 1954, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) on January 19, 1986, most recently the Council of Europe's (CoE) Convention on Preventing and Combating Violence against Women and Domestic Violence on November 24, 2011, which was the first internationally binding covenant regarding VAW and DV. The convention is called the Istanbul Convention due to being signed in Istanbul on May 11, 2011. Türkiye was the first state to ratify this convention, with Art. 1 §2a of Law No. 6284 (2012) also setting forth that the international agreements Türkiye has ratified, in particular the Istanbul Convention, will be taken into consideration upon their implementation. Although Türkiye announced its withdrawal from the convention in 2021, the study will analyze how the convention influenced national regulations on the issue.

Definitional Issues Regarding Violence against Women and Domestic Violence

This section will seek to define DV using international instruments regarding VAW, particularly the United Nations (UN) Committee on the Elimination of Discrimination against Women (CEDAW) General Recommendation 19 (UN, 1992), the Declaration on the Elimination of Violence against Women (DEVAW) of the United Nations (UN, 1993) and the CoE Convention on Preventing and Combating Violence against Women and Domestic Violence (also known as the Istanbul Convention; CoE, 2011), as well as the contributions from academic literature for explaining elements of the notion of domestic violence. The article

will then reveal the characteristics that make DV a special case. Due to the situation in Türkiye being attached to the relevant paragraphs, this section will follow a structural method that goes from the general to the specific.

The concepts of VAW and DV are often used interchangeably in the literature. However, international and national regulations have amplified the distinction between these two concepts. Art. 2 §a of DEVAW (UN, 1993) defines VAW as "any act of gender-based violence that results in, or is likely to result in, physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion, or arbitrary deprivation of liberty, whether occurring in public or in private life." According to Art. 2 of DEVAW, VAW should be understood to encompass but be not limited to the following:

> *(a) Physical, sexual, and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation, and other traditional practices harmful to women; non-spousal violence; and violence related to exploitation.*
> *(b) Physical, sexual, and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment, and intimidation at work, in educational institutions, and elsewhere; trafficking women; and forced prostitution.*
> *(c) Physical, sexual, and psychological violence perpetrated or condoned by the State, wherever it occurs.*

As another significant international instrument, Art. 3 §a of the Istanbul Convention (CoE, 2011) defines VAW as "a violation of human rights and a form of discrimination against women [which covers] all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life." Art. 3 §b of the Istanbul Convention separately defines DV as "all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim." When considering the international definitions of the terms, DV can be stated as being well-recognized and conceptualized as only one form of VAW.

Domesticity and violence are the *prima facie* components of DV. Dempsey's (2009, p. 105) philosophical analysis on the conceptual structure of DV emphasized another element as patriarchy, as it creates structural inequalities between parties. According to her theoretical account, DV and its related concepts reflect the complex intersections of these three elements. While the intersection of violence, domesticity, and patriarchy is the reflection of its strong sense, the intersection of only violence and domesticity constitutes its weak sense (Dempsey, 2009, pp. 127–128). Paragraph 6 in the Preamble to DEVAW (UN, 1993) also recognizes the inequality between men and women:

> *Violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.*

Art. 6 of CEDAW General Recommendation 19 (UN, 1992) similarly identifies gender-based violence as "violence that is directed against a woman because she is a woman or that affects women disproportionately." Art. 1 of this recommendation points out that gender-based violence constitutes "a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men." The gender-based character of DV should also be noted to become distinctive when violence only targets women, as DV among different generations (i.e., children, parents, grandparents) victimizes both genders (Romkens & Letschert, 2007, p. 4).

Moreover, neither biological or legal family ties nor a joint residence between the victim and perpetrator are a requirement for labeling an incident as DV (CoE Explanatory Report, 2011, p. 7). The inclusion of former spouses or partners is particularly vital, as ending a relationship does not necessarily mean that violence is over. "Research from Australia, Canada, and the USA demonstrates that a significant number of women are killed at or around the time of separation from a violent partner" (Amnesty International, 2004, p. 21). The range of relationships incorporated into the definition of DV holds a particular meaning in terms of protective orders. As a notable example, the UK's Family Law Act 1996 protects a wide range of associated persons and has the widest concept of family in law (Harris-Short & Miles, 2011, p. 228).

> *At one time it was common to talk about domestic violence or "battered wives," but now the violence between those in close emotional relationships is seen as a wider problem, being restricted not just to wives [or] even to domestic situations.* (Herring, 2004, p. 238)

Reece (2006, p. 790) claimed that such expansion of family boundaries damages the specificity of the category of DV that deals with this phenomenon as a problem peculiar to the traditional marital or quasi-marital union and caused partly by women's inferior position within the home and family. She claimed that, depending upon the expansion, intimacy now supersedes inequality as the touchstone of DV law. Burton (2008, p. 19) argued against the idea that structural inequality is just a feature of quasi-spousal relationships. She advocated that the expanded definition of DV may still overlap with Dempsey's conceptualization of DV in its strong sense.

Another definitional issue regarding DV is the types of acts. A common distinction made between violent behaviors is based on three types of violence: physical, sexual, and psychological (Romkens & Letschert, 2007, p. 5). As a striking development,

the Istanbul Convention (CoE, 2011) defines economic violence as a form of DV and in line with Art. 23 of CEDAW General Recommendation 19 (UN, 1992), which considers "the abrogation of their family responsibilities by men" as a form of violence and coercion. In Türkiye, Art. 2 §1b of Law No. 6284, which was legislated in compliance with the principles of the Istanbul Convention, includes economic violence within the definition of DV, along with physical, sexual, and psychological violence.

The literature has also examined the patterns that make DV cases special. Despite the common determinants, Gordon (2000, p. 748) articulated two significant distinctions between DV and other forms of violent behavior. First and contrary to the limited personal contact between parties of violence outside the family, DV occurs between individuals who have an intense, continuing, and interpersonal relationship that gives rise to repetitive violence. "A substantial proportion of domestic violence is not limited to single incidents but develops into patterns of repeated violations" (Romkens & Letschert, 2007, p. 6). Secondly, the interpersonal relationship in question commonly comprises an emotional relationship of attachment, emotional and sexual intimacy, or dependency. The intimate relationship context wherein physical and sexual violence occurs embodies "a history of prior relationship behavior and expectations and goals for the relationship" (Gordon, 2000, p. 748). The features that make DV a special case commonly arise from the very nature of this intimate relationship (Kaye & Knipps, 2000, p. 4). When considering that the battered woman is the only witness in most DV cases, her engagement with the system plays a crucial role. As Hart (1996, p. 99) stated, however, women face significant impediments to safe and effective participation as victim and witness in the criminal justice system. The psychological effects of DV upon battered women, their dependency on the perpetrator, social pressure, and lastly the attitudes of the authorities are particularly determining regarding the fate of a DV case.

DV is a complex phenomenon with destructive and far-reaching effects upon the immediate victims and children who witness it (Harris-Short & Miles, 2011, p. 203). The repetitive character of DV prompts many victims to suffer symptoms of "chronic traumatization" (Romkens & Letschert, 2007, p. 6, as cited in Jones et al., 2001). Owing to this specific psychological and physical health impact, victims generally are reluctant to engage with the criminal justice system by reporting, lodging complaints, and testifying. This is an essential matter that should be taken into account when planning legal measures. Dependency also affects the attitudes of battered women. As underlined in Art. 23 of CEDAW General Recommendation 19 (UN, 1992), "Lack of economic dependence forces many women to stay in violent relationships." Dependency is one of the major problems for Turkish women as well. According to a nationwide study conducted by Altınay and Arat (2007, p. 93), as an answer to the question "How would you currently react if your partner were to chastise you?", 24% of women in the Türkiye sample said they would/could do nothing for various reasons such as the sake of the children and the absence of another place to go. This rate increased to 46% in the sample from eastern Türkiye.

Social sanctions are another obstacle to getting women to engage with justice in DV cases, particularly where sexual violence is involved. Sexual violence is the only crime for which the victim is sometimes more stigmatized than the perpetrator, with women who report such crimes being shunned by their families and communities. Hart (1996, p. 103) observed that battered women, particularly in religious, ethnic, and racial communities, may resist a prosecution if they fear that the community will abandon them or withdraw its support when they pursue the case. As for the situation in Türkiye, national research (General Directorate on the Status of Women [GDSW], 2014, p. 24) showed that 44% of women who had experienced physical or sexual violence from their husbands or partners did not tell anyone about it. In Türkiye where women's sexuality is considered a matter of so-called family honor, women have enormous difficulties, particularly in disclosing sexual violence. If they do so, they may be accused of being shameful for divulging information about private matters and even be regarded as guilty (Amnesty International, 2004, p. 18). Reporting DV is also taboo, especially for married women. According to national research (GDSW, 2014, p. 25), only 11% of all interviewees stated having contacted the police, gendarmes, a lawyer, or a prosecutor.

The last pattern that makes DV a special case is the culture of service providers regarding the DV phenomenon. Since the 1980s, industrialized Western countries have universally acknowledged "that domestic violence is a crime and that legally enforceable safety and protection for victims are to be provided" as a central policy principle. However, criminal justice agencies have been denounced for their insufficient response to the issue (Stewart, 2005, p. 3):

> *Even after statutes and case law had made it clear that domestic violence was against the law, many judges, police officers, and other criminal justice professionals believed that legal intervention was a waste of resources. Many simply didn't take domestic violence seriously—an attitude that was reinforced when many victims dropped charges and returned, seemingly voluntarily, to the arms of the accused batterer.* (Mazur & Aldrich, 2003, p. 5)

Moreover, police, prosecutors, judges, jurors, and probation/parole staff have been claimed to often view battered women as responsible for the crimes committed against them because they may believe that battered women had provoked the perpetrator into violence or had not made an effort to avoid the perpetrator's demands to avoid criminal assault (Hart, 1996, p. 101). Accordingly, the discriminatory attitudes of authorities pose a major obstacle to women's access to justice (UN Women, 2011, p. 59).

The Nature and Extent of the DV Phenomenon in Türkiye

This section will first reveal the nature and extent of the domestic violence phenomenon in Türkiye in light of the statistics. Reliable statistical data have been gathered from studies conducted nationwide. The most comprehensive research on the issue is "*Aile İçi Şiddetin Sebep ve Sonuçları*" [Reasons and Consequences of Domestic Violence] (Prime Ministry Family Studies Institute of Türkiye, 1995), "*Türkiye'de Kadına Yönelik Şiddet*" [Violence Against Women in Türkiye] (Altınay & Arat, 2007), and lastly "*Türkiye'de Kadına Yönelik Aile İçi Şiddet Araştırması*" [Research on Domestic Violence Against Women in Türkiye] (GDSW, 2009, 2014). This section will aim to depict a general framework via the most recent nationwide research, namely the national research conducted by GDSW in 2014, which provides striking findings about the gravity of the DV phenomenon in the 2000s in Türkiye.

According to the national research (GDSW, 2014, p. 7), 36% of women (i.e., four out of 10) reported that they had experienced physical violence at least once in their life at the hands of the men to whom they are currently married, were married to for a period, or were/are living with as if married. While the rate of women who'd experienced either physical and/or sexual violence was 38%, the rate of women who'd reported emotional violence or abuse in any period of their life was 44% (GDSW, 2009, pp. 9, 11). When considering only divorced or separated women, the numbers are even more appalling. According to the national research (GDSW, 2014, p. 10), the rate of physical and/or sexual violence experienced by divorced or separated women was 75%, which is twice the rate of violence experienced by all women.

Bearing these statistics in mind, now domestic violence prosecutions in Türkiye will be examined via two case studies which were brought before the ECtHR. They reveal some common and distinct patterns of the Turkish criminal justice system, thus helping to depict the framework of Türkiye's legal response to DV. Unless indicated otherwise, information about the *Opuz* Case will be deemed to refer to the judgment in the *Opuz v. Türkiye* of the ECtHR. Similarly, information about the *Pasali* Case will be deemed to refer to the official application form of *Huseyin Pasali and Others v. Türkiye* to the ECtHR. These two cases are also very illustrative in showing how domestic violence in Türkiye is a gender-based problem which requires a decisive gender sensitive approach from the legislators.

The Case of Opuz v. Turkiye

Nahide Opuz, the applicant in the case, and her mother had been the victims of multiple assaults and threats against their physical well-being from Nahide's husband ("H.O.") for several years. These acts of violence resulted in the murder of *Nahide*'s mother by H.O. on March 11, 2002. He was sentenced to life imprisonment for murder and illegal possession of a firearm on March 26, 2008. However, the court mitigated the original sentence, reducing it to 15 years and 10 months in prison and a fine of 180 Turkish liras while taking into account the fact that the accused had committed the crime as a result of provocation by the deceased and his good conduct during the trial. In addition, upon considering the time the convict spent in pretrial detention and the fact that the judgment would be examined on appeal, the court ordered his release. After being released, H.O. again began issuing threats, and because the authorities had taken no measures despite the applicant's request, the case was brought before the ECtHR on May 14, 2008. *Nahide* claimed that the ineffectiveness of the system had violated her mother's right to life under Art. 2 of the ECHR and her own right to be free from torture and ill-treatment under Art. 3. She also alleged that the inadequate response of authorities was a consequence of gender-based discrimination prohibited under Art. 14.

On June 9, 2009, the Court held Türkiye accountable in *Opuz* v. Türkiye, which is seen as Europe's landmark judgment on VAW; the Court held the authorities responsible for failing to take adequate measures to protect victims of repeated DV, regardless of any active malfeasance on the State's part (Abdel-Monem, 2009, p. 29). Meanwhile, this was the first time that the Court acknowledged gender-based violence as a form of discrimination under the ECHR. The Court's approach was particularly significant regarding its assessment of violations regarding the prohibition of discrimination: European judges had focused their attention on stereotypes and the disadvantaged position of women in Turkish society instead of looking for a similarly situated person (Danisi, 2011, p. 800).

> *Bearing in mind its finding above that the general and discriminatory judicial passivity in Türkiye, albeit unintentional, mainly affected women, the Court considers that the violence suffered by the applicant and her mother may be regarded as gender-based violence which is a form of discrimination against women. (Opuz v. Türkiye*, Para. 200)

This approach has been evaluated as a precedent and would be immensely useful for future related cases coming before the ECtHR (Danisi, 2011, p. 800).

Nahide and H.O. got married in 1995 and had three children. H.O. was meanwhile the son of A.O. who had married *Nahide*'s mother in a religious ceremony. *Nahide* and H.O. had serious arguments from the beginning of their relationship and eventually

got divorced on an unspecified date after the death of *Nahide*'s mother. Between April 1995 and March 2002, seven incidents were brought to the notice of the authorities:

(1) The first assault by H.O. and A.O. against the applicant and her mother involved death threats and actual bodily harm.

(2) The second assault by H.O. against the applicant involved actual bodily harm.

(3) The third assault by H.O. against the applicant and her mother involved a knife assault.

(4) The fourth assault by H.O. against the applicant and her mother involved threats and assault (using a car), leading to the initiation of divorce proceedings.

(5) The fifth assault on the applicant by H.O. causing grievous bodily harm involved a knife assault.

(6) The sixth incident whereby H.O. threatened the applicant.

(7) The applicant's mother filed a complaint with the public prosecutor's office alleging death threats issued by H.O. and A.O.

As the Court noted, following those assaults, the local authorities, namely the police and public prosecutors, did not remain totally passive. After each application, the applicant and her mother in some incidents were examined by doctors who testified in their reports to various injuries, including bleeding, bruising, bumps, grazes, and scratches, and criminal proceedings were initiated against the perpetrator. He was questioned by the police and prosecuting authorities in relation to his criminal acts, placed in detention on two occasions (second and fourth incidents), and sentenced to pay a fine subsequent to his conviction for stabbing the applicant seven times (fifth incident). However, the Court emphasized that none of these measures were sufficient to prevent H.O. from perpetrating further violence. As an excuse for the situation, the Government criticized the applicant for withdrawing her complaints (first, second, and fourth incidents) and failing to cooperate with the authorities, as the DV provisions in force at the relevant time required the active involvement of the victim for the progression of criminal proceedings. According to the former Criminal Code, criminal investigations and prosecutions of criminal acts not resulting in sickness or unfitness to work for 10 or more days were dependent on the victim pursuing the complaints.

The Government also pointed to insufficient evidence against H.O. (first, third, fourth, and sixth incidents) as the reason why the penal courts had, in most cases, not convicted him. The Government claimed, "The authorities could not be expected to separate the applicant and her husband and convict the latter while they were living together as a family, as this would amount to a breach of their rights under Art. 8 of the Convention" (*Opuz v. Türkiye*, Para. 123). As for the last incident which resulted in the death of *Nahide*'s mother (seventh incident), the Government claimed that the complaint she had filed was similar to the previous ones and general in nature, with her life being in no obvious peril. Furthermore, she did not ask for a protection order, but instead requested an urgent examination of her petition and the punishment of H.O.

In its assessment, the Court remarked that H.O. had a record of DV and the crimes committed by him were sufficiently serious to grant a protection order. A significant risk of further violence was not only possible but also foreseeable. The Court noted that Türkiye's legislative framework in instant cases, particularly the minimum 10 days of sickness or unfitness requirement, fell short of the requirements under the scope of the State's positive obligations to effectively punish all forms of DV and to provide sufficient measures for victims. When considering the seriousness of the crimes H.O. committed, the prosecution should have continued in the public interest regardless of whether the victims had withdrawn their complaints. The Court attributed the reason why the local authorities had repeatedly decided to drop criminal proceedings to their attitude, which perceived the incidents as a "family matter" that should not be interfered with. Furthermore, the Court doubted that the authorities had investigated the reasons behind the withdrawal of the complaints.

> *This is despite the applicant's mother's indication to the Diyarbakır Public Prosecutor that she and her daughter had withdrawn their complaints because of the death threats issued and pressure exerted on them by H.O. It is also striking that the victims withdrew their complaints when H.O. was at liberty or following his release from custody. (Opuz v. Türkiye*, Para. 143)

The Court also argued against the Government's objective of avoiding interference with the private or family life of the individuals in instant cases. The Court reiterated that in some instances, such interference by the national authorities might be necessary in order to protect the health and rights of others or to prevent criminal acts from being committed. Moreover, the Court stated that the applicant could be included in the group of "vulnerable individuals" who deserve State protection, considering that "the violence suffered by the applicant in the past, the threats issued by H.O. following his release from prison, and her fear of further violence, as well as her social background, namely the vulnerable situation of women in southeast Türkiye" (*Opuz v. Türkiye*, Para. 160). Having examined the reports and statistics the Diyarbakır Bar Association and Amnesty International as two leading NGOs had prepared and which were not challenged by the Government at any stage of the proceedings, the Court found that the majority of DV incidents had occurred in Diyarbakir where the applicant was living at the relevant time and that all victims were women who had mostly suffered physical violence. The Court also pointed out that "the great majority of these women were of Kurdish origin, illiterate, or of a low level of education and generally without any independent source of income" (*Opuz v. Türkiye*, Para.

194) and that the general and discriminatory judicial passivity in Türkiye had created a climate conducive to DV which affected mainly women (*Opuz v. Türkiye*, Para. 198). Finally, the Court signified "the overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors" as a reason for the insufficient response of Türkiye to DV, despite the reforms the Government had carried out (*Opuz v. Türkiye*, Para. 200).

The Case of Huseyin Pasali and Others v. Türkiye

With the *Opuz* case still on people's minds, Türkiye faced another femicide committed by an ex-husband. *Ayse Pasali* was just one of the women whose suffering had ended in murder. On December 7, 2010, her former spouse stabbed her to death on her way to her workplace in the morning, despite having applied for a protection order against his death threats just a short time before, an application the court had rejected. She had also filed complaints against him for insults, rape, physical injuries, and threats several times, but these did not deter her former spouse from repeating these acts. The case of *Pasali and Others v. Türkiye* was brought before the ECtHR on March 7, 2011 with the claim that the Turkish government had violated Arts. 2, 3, 8, and 14 of the Convention as read in conjunction with these articles and similar to *Opuz v. Türkiye*.

Ayse Pasali and *Istikbal Yetkin* ("I.Y.") got married in 1988 and had three children before getting divorced in June 2010. Before she was killed by I.Y. in December 2010, she had worked as a secretary in a law office. The day she was murdered was the birthday of her older daughter. Between March 2009 and December 2010, three incidents had been brought to the attention of the authorities:

(1) The first assault involved insults, rape, and bodily harm.

(2) The second assault involved a death threat with an unregistered firearm.

(3) The third assault involved abduction and a death threat.

After each assault, the slain *Ayse* had filed a criminal complaint against I.Y. In the first incident, the public prosecutor issued a bill of indictment against the suspect for insult and physical injury, but decided a judgment of *nolle prosequi* for the accusation of rape without conducting a sufficient and efficient investigation as claimed by the case attorneys. The defendant was acquitted of insult and had a punitive fine imposed for injury.

Ayse filed for divorce against I.Y. in October 2009. Subsequently, she was threatened with an unregistered firearm in November 2009. The defendant again was acquitted of the threat, but sentenced to just 10 months in prison and received an administrative fine for illegal possession of a firearm. However, the court rendered a decision delaying the pronouncement of judgment pursuant to Art. 231 of the Criminal Procedure Code, which regulated that the accused should be subject to a probation term of five years, with the court then able to quash the conviction if no intentional crime is committed during the probationary period.

I.Y. continued his assaults after the divorce. As part of the third incident, he used force and threats to make *Ayse* get into his car while she was going to her workplace. He threatened to kill her if she did not come back to him. I.Y. continued to issue his threats on the following day while *Ayse* was at work. He knocked on her door, and said to their two daughters who were at home, "Let me in, otherwise I will kill your mother." *Ayse*, who was informed by her daughters, called the police. The police officials took I.Y to the station but released him within half an hour. On the same day, he and his two friends came again to *Ayse*'s house. The daughters again informed their mother. *Ayse* called the police one more time, but their response was, "We can do nothing to a person who is waiting at a door." She then went in person to the public prosecutor on duty that night and filed a complaint against her ex-husband concerning the abduction, knocking on the door, and threats that had taken place over two consecutive days. The public prosecutor made no progress in the preliminary proceedings up to the date of her death; she had only been taken to her home in a police car on the day she lodged the complaint.

Before *Ayse Pasali* was killed by her divorced husband, who stabbed her 11 times in the middle of the street, she had also applied to the Ankara First Family Court for a protection order pursuant to Law No. 4320 as a result of the numerous death threats from her ex-husband. The court rejected her request only one day later on the grounds that there was no longer a bond of marriage without making any examination or taking her previous complaints into consideration. After *Ayse*'s murder, her lawyer applied for a protective order for another client who had been subjected to violence by her divorced husband. This application was coincidentally examined by the same family court that had rejected *Ayse*'s application. This time, the court accepted the request and rendered a protection order without regard to the marital status of the parties and by referring to the international conventions ratified by Türkiye. This was a very striking example of how inconsistent judgments can dramatically affect DV victims' lives in Türkiye.

By examining the two foregoing cases together, a range of common problems can be deduced regarding the prosecution of DV in Türkiye. First of all, the state authorities failed to warrant preventive and protective measures in both cases. In the case of *Opuz*

v. Türkiye, Nahide's mother was murdered approximately two weeks after her request to the Public Prosecutor's Office. *Ayse* was similarly murdered one month after her application was submitted to the family court.

Secondly, neither perpetrator received dissuasive punishment to hinder him from perpetrating further violence upon being convicted. At this juncture, imposing a fine or converting imprisonment into a fine in DV cases is observable as a common practice in Türkiye. Moreover, the courts tend to mitigate sentences on the grounds of custom, tradition, or honor (*Opuz v. Türkiye*, Para. 196). One should remember that these practices break the trust battered women have in justice. In a narrative cited by Karınca (2008, p. 28), a senior official woman who had been slapped in her office by her boyfriend with whom she wanted to break up opened litigation in a penal court. Upon the court sentencing the offender to a 300 lira fine, she expressed her disappointment saying, "This man runs the risk of paying 300 lira to slap me again in my office once a month."

Another problem is the unreasonable delays in concluding cases. When *Ayse* filed a complaint against I.Y. on March 24, 2009 regarding the first incident, the court didn't render its verdict until June 2, 2010, namely approximately 15 months later. When the application form was submitted to the ECtHR, the file in question was still pending in the Court of Cassation (*Yargıtay*). In the *Opuz v. Türkiye* case, the court similarly didn't pass its final sentence on the offender until March 26, 2008, six years after the murder.

Lastly, the culture of service providers towards DV incidents is significantly influential in the resulting picture. In the *Pasali and Others v. Türkiye* case, despite "the real and imminent danger," the authorities took an insensitive approach to the issue. The same scenario was experienced in the *Opuz v. Türkiye* case as well:

> *It thus appears 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. Türkiye*, Para. 192)

The situation can be suggested to be more desperate if the victim is a married woman. When they report family violence, they are at risk of being returned to their violent husbands because "law enforcement officers often prioritize preserving family unity, and push battered women to reconcile with abusers rather than pursuing criminal investigations or assisting women in getting protection orders" (Human Rights Watch, 2011, p. 5). Despite the gains Turkish women have made through radical legal reforms, a significant dilemma is still apparent: whether to prioritize the protection of women as individuals from DV or the protection of the family. This approach was experienced one more time while legislating Law No. 6284. Despite the strong countereffortsof feminist activists, the name of the law was initially changed by adding the description "Law to Protect Family' before "and Prevent Violence Against Women". The name of the draft law that had been prepared with contributions from women's associations and sent to the Office of the Prime Minister on January 31, 2012 had been "Law for the Protection of Women and Family Members from Violence" (Moroğlu, 2012, p. 369). The perspective in question is also indicative of the need to enforce laws regarding DV. Many law enforcement officials give precedence to preserving the family as a unit, rather than protecting DV survivors. Many people in Türkiye believe that the rise of women as individuals signifies the decline of the family (Human Rights Watch, 2011, 15).

Finally, when drafting Law No. 6284, the demand was made to explicitly state that no reconciliation or peace-making should be offered to battered women in institutions, but this regulation was not included in the final law. The government cited the legislative drafting of a separate law on reconciliation and peace-making as its reason. This situation reinforced the concerns regarding the practice of delivering battered women and female children back to the perpetrators (Şener, 2012, p. 4). The next section will examine how current penal regulations have addressed the problems mentioned above.

Türkiye's Penal Reform on DV in terms of Gender Sensitivity

Bearing in mind the nature and extent of DV in Türkiye and the costs of this phenomenon to the Turkish State, this section will illustrate how the Turkish penal regulations have been improved over the years.

Early Penal Reforms

The initial efforts to raise public awareness of violence in the private sphere and discrimination against women can be traced back to February 1987, when a judge from Çankırı Province dismissed the divorce case of a pregnant woman who had been subjected to domestic violence (Altınay & Arat, 2007, p. 17). The judge justified his verdict by citing a Turkish proverb which regards women as objects that should be brought under men's control through battery: "One should not leave a woman's back without a stick or her womb without a baby." The verdict in question triggered a range of nationwide protests against DV organized by women's

associations. As one of the most important legal products of this women's movement, Law No. 4320 (Family Protection Law) came into force on January 17, 1998.

Subsequent to the adoption of the law specifying protection orders aimed at preventing DV, reforms to the Civil Code in 2001 and the Criminal Code in 2004 constitute other successful outcomes of the feminist movement in Türkiye. Numerous practices under the former legislative system regarding women's bodies and sexuality as the property and preserve of men, family and society, and legitimizing human rights violations such as forced marriages, marital rape, and honor killings have undergone radical changes with the advent of the Civil and Criminal Code reforms in order to bring the Turkish legal system in line with global human rights (Altınay & Arat, 2007, p. 17).

> *In the new Penal Code, crimes of sexual assault are explicitly named and properly defined under the section "Crimes against Sexual Inviolability". Sexual violence, which was previously regulated as "Felonies against Public Decency and Family Order" under "Crimes against Society", is now defined in crimes against individuals, thereby marking a significant break with the patriarchal notion and discriminatory outlook of the old law.* (Anıl et al., 2005, p. 57)

The classification of the former code had well reflected the State's attitude toward women with the aim of protecting family order and public morality over such things as victim's physical integrity, sexual freedom, and health (Uygur & Sancar, 2005, p. 34). The idea that the legal value sexual crimes protect is sexual freedom has been increasingly supported by academicians (Taner, 2017, p. 66; Tezcan et al., 2021, p. 399; Sancar, 2013, p. 97). While appreciating the new formulation of sex crimes, Centel (2013, p. 6) states that legislators should have taken a step further by categorizing these crimes under the term "crimes against sexual freedom" rather than "sexual inviolability." The author also indicates that sexual inviolability creates a perception that physical integrity, which is already protected under laws against crimes of injury, is the primary legal value protected by laws against sexual crimes (Centel, 2013, p. 7).

According to the current Turkish Criminal Code, committing intentional murder (Art. 82 §d), intentional injury (Art. 86 §2a), torment (Art. 96 §2b) or deprivation of liberty (Art. 109 §3e) against a spouse constitutes the qualified forms of these crimes that require aggravated punishments. Moreover, all these crimes are prosecuted *ex officio*. As seen in the case of *Opuz v. Türkiye*, because the old Criminal Code had required the active participation of the victim for criminal proceedings, the Turkish Government had referred to the withdrawal of complaints by battered women and their failure to cooperate with the authorities as their excuse for not acting. In relation to the crime of intentional injury committed against a spouse, 34 different Criminal Courts of First Instance had questioned this provision in terms of its constitutionality (Constitutional Court Decision No. 2008/37). The applicant courts challenged that, while the investigation and prosecution of third parties in the case of a crime of injury that can be remedied by a simple medical intervention (Art. 86 §2) is prosecuted upon complaint, the crime of injury of the same nature committed against a superior, subordinate, spouse, or sibling is prosecuted *ex officio* (Art. 86 §3). The courts found this situation unconstitutional on the grounds that the accused is punished more severely than third parties; that restraining the right to withdraw the complaint leads to an increase in domestic violence, which in turn disrupts family unity; that equal protection is not ensured due to the injuries that occur between couples living outside a legally valid marriage union and that can be eliminated by a simple medical intervention still being subject to complaint; and lastly that the crime of sexual assault committed against a spouse (Art. 102), which is a more serious crime than the crime of injury in terms of the amount of punishment and its social and psychological impact on the victims, is prosecuted upon complaint, whereas the offence of simple wounding is prosecuted *ex officio*. The Constitutional Court responded to these arguments by referring to the State's obligation to prevent DV incidents and punish offenders effectively. The Court acknowledged that, in order to reduce the number of DV crimes and to prevent the cover-up of crimes committed within the family, the legislator may decide to apply the principle of direct prosecution without the need for a complaint in cases where family members, who have the highest obligation to treat each other with compassion, intentionally injure each other. The Court underlined that differences in the situation of the victim or the perpetrator may require different rules to be applied to them. As the obligations arising from the cohabitation of the persons mentioned in the rule that is subject to objection distinguish them from third parties, applying different rules to them does not contradict the principle of equality. Lastly, the Court rejected the objection concerning increasing the sentence by another half on the grounds that the State has discretion in determining which acts are to be considered crimes, the type and extent of the sanction to be applied to them, and the aggravating and mitigating reasons for punishment (Constitutional Court Decision No. 2008/37). 11 years after the decision of the Constitutional Court, three different Criminal Courts of First Instance brought the rule in question before the Constitutional Court on the same grounds. The Constitutional Court once again rejected the objections, reiterating that the rule that is subject to objection is meant to serve the effective protection of a battered spouse during criminal proceedings (Constitutional Court Decision No. 2020/28). The Constitutional Court's firm stance is also consistent with the approach of the ECtHR, which put forward that domestic violence is still a concern that requires *ex officio* prosecution even in cases of no physical harm (Erbaş, 2021, p. 10).

As for sexual violence against a spouse, the new Criminal Code, unlike the former code, criminalizes marital rape with a prison sentence of up to 12 years upon the complaint of the victim (Art. 102 §2). When Türkiye was still a part of the Istanbul Convention, this provision was found contrary to the requirements of Art. 55 of the Istanbul Convention due to the wording "prosecution upon complaint" (Istanbul Convention's Group of Experts on Action against Violence against Women and Domestic Violence

[GREVIO], 2018, p. 77). The motive of Turkish legislators here could have been to ensure the continuance of the marriage in case the victim forgives the offender (Pakır, 2018, p. 148). Another assumption in this regard is that the legislator respects the victim's will not to want the incident to be known by the public (Taner, 2017, p. 259).

Lastly, Law No. 6284 (Law on Protecting Family and Preventing Violence Against Women) replaced Law No. 4320 and was entered into force on March 8, 2012 as a so-called present for Turkish women (for a detailed analysis of Law No. 6284, see Sözüer et al., 2012). Feminist activists also played an active role in the course of preparing the law. 242 women's organizations conducted a study of the legal text for the first time in Türkiye under the umbrella of a "Platform to Stop Violence" and made their common demands to the Ministry of Family and Social Policy. Although the Law did not meet all of their demands, it did comprise very positive forward-looking steps on the prevention of DV and the protection of its victims (Şener, 2012, p. 2). At the time of Law No. 4320, family members living under the same roof, those for whom a court decision regarding separation has been rendered, and those who have the right to live separately or who are factually living separately despite being married were explicitly listed within the scope of the law. However, in the literature and in practice, whether women who'd been married in a religious ceremony (*imam* marriage) or divorced women could benefit from the law was highly controversial. The ambiguity over who can obtain a protective order can be said to have been eliminated through Law No. 6284. The first article of the law clarifies its objective "to protect women, children, and family members who are exposed to violence or in peril of being exposed, as well as victims of stalking" and "to regulate the procedures and principles regarding the measures that are to be taken to prevent violence against these people." Accordingly, one can claim that all battered women in Türkiye can now utilize the law, including those in an intimate relationship with their abuser and those who've gotten divorced. In the declaration in relation to the case of *Paşalı and Others v. Türkiye*, the Turkish Government emphasized its legal reform as follows:

> *The Government regrets the occurrence of individual cases of death caused by failures to protect life, as in the circumstances of the present case, notwithstanding existing Turkish legislation and the resolve of the Government to prevent such failures. The Government further notes that at the material time, namely in 2011, the legislative framework did not afford the applicants' relative protection from domestic violence as a divorced woman. Accordingly, we admit that the death of the applicants' relative resulting from the failure to provide protective measures did not meet the standards enshrined in Art. 2 of the Convention. The Government recalls that the legislation was amended in 2012 with the adoption of Law No. 6284. We further reiterate their undertaking to issue appropriate instructions and adopt all necessary measures to ensure that the right to life is respected in the future.*

2021 and 2022 Amendments

The most recent penal reforms on DV have been the additions inserted into the Turkish Criminal Code in 2021 and 2022. As illustrated in the cases of *Opuz v. Türkiye* and *Paşalı v. Türkiye*, imposing a fine, converting imprisonment into a fine, or mitigating sentences on the grounds of custom, tradition, or honor in DV cases can encourage offenders to commit further violence. In relation to the protection of married and divorced women, that unjust provocation provisions should not be applied to DV cases has even been suggested in order to make these regulations more functional and effective (Yokuş Sevük, 2022, pp. 92–93). With the 2021 Amendments made by Law No. 7331, intentional murder, intentional injury, torment, and deprivation of liberty committed against a divorced spouse have been regulated as an aggravating circumstance of the crimes in question. Moreover, the prosecution of these crimes does not require a complaint in the current law.

The 2022 amendments made by Law No. 7406 have provided stronger commitment to punishing VAW. First, the intentional murder of a woman has been regulated as a circumstance requiring aggravated life imprisonment (Turkish Criminal Code, Art. 82 §1f). The new provisions also increase the lower limit of the punishment in relation to the crimes of injury, torture, torment, and threat when committed against women. The provision "If the crime is committed against a woman, the lower limit of the penalty cannot be less than six months" has been attached to the provision "where the effect of an intentional injury upon a person is minor and curable with a simple medical treatment then, upon the complaint of the victim, a penalty of imprisonment for a term of four months to one year or a judicial fine shall be imposed" (Art. 86 §2). The provision "If the crime is committed against a woman, the lower limit of the penalty cannot be less than five years" has been attached to the article regulating torture (Art. 94), which is "a public officer who performs any act towards a person that is incompatible with human dignity and that causes that person to suffer physically or mentally, or that affects the person's capacity to perceive or ability to act of their own will, or that insults them shall be sentenced to a penalty of imprisonment for a term of 3-12 years." The provision "If the crime is committed against a woman, the lower limit of the penalty cannot be less than two years and six months" has been attached to the article regulating torment (Art. 96), which states, "Any person who performs any act which results in the torment of another person shall be sentenced to a penalty of imprisonment for a term of two to five years." The provision "If the crime is committed against a woman, the lower limit of the penalty cannot be less than nine months" has been attached to the article regulating threats (Art. 106), which states "Any person who threatens another individual by stating they will attack the individual's or the individual's relative's life, physical well-being, or sexual inviolability shall be subject to a penalty of imprisonment for a term of six months to two years." Noteworthily, these reforms have been questioned by three different Criminal Courts of First Instance and one penal chamber of the Regional Courts of Justice (*Bölge Adliye Mahkemesi*) in terms of constitutionality (Constitutional Court Decision

No. 2023/4). The courts have alleged that the provisions increasing the lower limit of punishment in relation to the crimes of injury and threats committed against woman are incompatible with the principle of equality as protected by Art. 10 of the Turkish Constitution. The Constitutional Court has ruled that legislators have a certain degree of discretion in assessing whether there is an objective and reasonable cause for different treatment of those in similar situations or to what extent different treatment can be applied while also acknowledging that legislators have wider discretionary power when it comes to criminal policy. The court has also referred to the vulnerable status of women in Turkish society when justifying its decision regarding objections (Constitutional Court Decision No. 2023/4):

> *Legislators are understood to have enacted the rules subject to objection in order to solve the problem of violence against women, which is considered to have become widespread in our country, and in this context, legislators are understood to have acted based on the fact that women are more vulnerable in terms of the crimes of intentional injury and threat compared to men. In other words, the concept of violence against women is not used in a technical and narrow sense. The rules are intended to prevent all kinds of violence against women, regardless of the motive, and not just violence against women due to gender perception. In order to fulfill the positive obligations imposed on the State by Art. 17 of the Constitution, legislators' regulations on increasing the lower limit of the punishment for the crimes of violence and threats against women have been evaluated to not exceed the limits of the discretionary power of the State to treat citizens differently in order to meet social needs. In this respect, the rules subject to objection have been concluded to be based on an objective and reasonable basis.*

The Court finally examined whether this difference based on objective and reasonable grounds is proportionate and found no disproportionate aspect of stipulating the lower limit of the punishment to six months instead of four months for the crime of intentional injury nor to nine months instead of six months for the crime of making threats. Accordingly, the Court concluded that the provisions that are subject to objection do not violate the principle of equality before the law (Constitutional Court Decision No. 2023/4). Among all the justifications of the Constitutional Court, the one that considers the problem beyond gender perceptions toward women is worth noting. Although the regulations mentioned above aim to protect women from violence in general, the gendered character of violence against women is an indisputable fact when considering the gender of the offenders and the disadvantaged position women have before men as has been revealed statistically and in the cases of *Opuz v. Türkiye* and *Pasali v. Türkiye*. While these regulations are open to dispute in terms of gender sensitivity because they do not require the offender who commits these types of crimes to oppress a woman to be a man, they might respond to some of the criticisms raised by Turkish academicians. Before the latest amendments, the Court of Cassation (*Yargıtay*) had ruled the aggravating circumstance for punishing an offender who has murdered a spouse to not cover religious or voided marriages (Artuk et al., 2021, p. 152). This judicial practice as adopted by the Court of Cassation was questioned by some Turkish academicians, with some authors claiming that this practice leaves the women who are the unchanging victims of such crimes unprotected and finding it incompatible with the principle of equality as protected by Art. 10 of the Turkish Constitution, the regulations introduced by Law No. 6284, and the motives for legislating the aggravating circumstance that are to be implemented in crimes committed against a spouse (Artuk et al., 2021, p. 152; Koca & Üzülmez, 2022, p. 158). While some authors recognized this argument to some extent, they found the practice the Court of Cassation had adopted to be legitimate when considering the explicit legal requirements envisaged by the Turkish Civil Code (Centel et al., 2017, p. 52; Özbek et al., 2021, p. 129; Tezcan et al., 2021, p. 167; Yokuş Sevük, 2022, p. 92). Although the Turkish Criminal Code has yet to acknowledge the disadvantaged position of women who are religiously married or women whose marriages are not legally valid, the aggravating circumstance implemented for crimes committed against a woman can be seen as a safeguard for the women who fall under these statuses.

Another striking legal reform was inserted into the Criminal Procedure Code in relation to arrest. According to Art. 100 of the Turkish Criminal Procedure Code (2005), if concrete evidence exists showing the presence of a strong suspicion of crime and an existing basis for arrest, an arrest warrant may be rendered against the suspect or accused. No arrest warrant will be rendered if arrest is disproportionate to the importance of the case, the expected punishment, or the measure of security. Art. 100 §2 of the Turkish Criminal Procedure Code exemplifies the instances in which "grounds for arrest" may be deemed present: a) In the presence of concrete facts that raise the suspicion that the suspect or the accused will escape, hide, or flee; b) If strong suspicion exists based on the suspect or the accused's behavior with regard to destroying, concealing, or manipulating the evidence or attempting to exert pressure on witnesses, victims or others. However, in relation to the specified crimes that are known as catalogue crimes, in the presence of strong grounds for suspicion based on concrete evidence, grounds for arrest may be deemed present. With the 2022 amendment, the catalogue crimes have been expanded to include the crime of intentional injury committed against a woman (Art. 100 §3j). This reform is significant in consideration of the cases of *Opuz v. Türkiye* and *Paşalı v. Türkiye*, where the offenders pursued their actions despite the knowledge of the authorities due to not being convicted by the criminal courts.

Lastly, Turkish legislators have enacted a new crime called stalking (Turkish Criminal Code, Art. 123 §A) as follows:

> *(1) Any individual who causes a serious disturbance to another person or causes them to worry about their own or one of their relative's safety by persistently following the person physically or trying to contact the person using telecommunication and communication tools, information systems, or third parties shall be subject to a penalty of imprisonment for a term of six months to two years.*
> *(2) If the crime*
> *a) is committed against the child or the spouse for whom a separation or divorce decision has been made,*
> *b) causes the victim to change schools, workplace, or residences or to quit school or work,*
> *c) is committed by a perpetrator for whom a restraining order or a measure to not approach the person's residence, school, or workplace has been decided, the*

perpetrator is to be sentenced to an imprisonment of one to three years.
(3) Criminal proceedings shall only be initiated upon the victim filing a complaint.

The criminalization of stalking was one of the topics highlighted by GREVIO's (2018) evaluation report, which examined Türkiye's legislative and other measures that affect the provisions of the Istanbul Convention. The report underlined 27% of women in Türkiye to have been subjected to stalking at least once in their lives according to the most recent available prevalence data (p. 76). Although some crimes regulated by the Turkish Criminal Code such as torment (Art. 96), sexual harassment (Art. 105), making threats (Art.106), blackmail (Art. 107), the deterioration of peace and order (Art.123), and violation of privacy (Art. 134) seem to cover the act of stalking, the report stated that "None of these provisions specifically include wording to adequately cover the constituent elements of the crime of stalking as defined in Art. 34 of the Istanbul Convention and reflect the seriousness of this offence" (GREVIO, 2018, p. 76). While appreciating the preventive orders issued in the case of stalking within the scope of Law No. 6284, GREVIO (2018, p. 76) also urged Turkish authorities "to establish stalking as a separate offence and to subject it to an effective and dissuasive punishment, having due regard to its possible manifestations in the digital sphere." Although Türkiye announced its withdrawal from the Istanbul Convention, GREVIO's report is regarded as one of the most influential factors increasing the sensitivity towards the criminalization of stalking (Özar, 2022, p. 1403). Along with the crime of stalking being added to the Turkish Criminal Code, the Turkish Criminal Procedure Code (Art. 253 §3) has also prohibited the path of mediation in relation to this crime. Mediation has also been prohibited for crimes against sexual inviolability, regardless of whether the prosecution has been subjected to a complaint. Mediation is also noted to not be allowed in relation to the crime of intentional injury committed against a spouse or divorced spouse (Turkish Criminal Code, Art. 86 §3a), as well as in the aggravating circumstances of intentional injury listed under Art. 86 §3 of the Turkish Criminal Code as per Art. 253 §1b of the Turkish Criminal Procedure Code.

Conclusion

The eradication of DV has been well established to require more than legal regulations. In fact, criminalizing DV can be evaluated as just one component in the government's project to combat DV. Having every single component be dedicated to duly performing its function will likely paint a promising picture, and the criminal justice system is undoubtedly an important part of this picture. As the cases of *Opuz v. Türkiye* (2009) and *Pasalı v. Türkiye* (2020) have well illustrated, the actors in the criminal justice system should address cases of domestic violence with a gender-sensitive approach. Penal regulations should be designed to actualize this end. In other words, before passing judgement regarding the authorities' attitudes, one should be certain that the available penal regulations are sufficient tools for protecting women against every kind of male violence. As Erbaş (2021, p. 11) rightly pointed out, while criminalization is traditionally regarded as a last resort (*ultima ratio*), the underuse or, more importantly, the misapplication of criminal law can be as problematic as its overuse. While acknowledging that the attitudes of authorities who are insensitive to the dynamics of DV and the lack of coordination between criminal justice agencies may still hinder reforms being put into practice, this study has limited its focus to the penal reforms in Türkiye regarding the issue by employing a feminist legal perspective and avoiding further discussions on the problems regarding implementation.

When considering the legal framework in contemporary Türkiye, one can suggest that both the Criminal Code and Law No. 6284 present a strong commitment to eradicating the DV phenomenon. With the 2021 and 2022 amendments, divorced women and women in general have been well recognized as particular victim groups in the Turkish context. Intentional murder, intentional injury, torment, and deprivation of liberty committed against a divorced spouse have been regulated as an aggravating circumstance of the crimes in question. Moreover, prosecuting these crimes does not require a complaint to have been filed in the current law. The criminalization of stalking and the prohibition of mediation in relation to stalking are also significant developments, as the *Pasalı v. Türkiye* case proved that stalking is likely to be the initial step toward more serious crimes against women. The current criminal regulations have been designed to prosecute VAW and DV cases without needing the victim to file a complaint, while the current formulation of the crimes of marital rape and stalking can be criticized in this sense. As mentioned above, marital rape is subject to prosecution only once the victim files a complaint. This may risk leaving this type of rape unpunished while also jeopardizing the effective protection of married women's sexual inviolability. The basic and aggravated forms of the crime of stalking are also subject to complaint. One of the aggravated forms of the crime of stalking involves circumstances where the victim is a child or a spouse or divorced spouse against whom a separation order has been issued (Turkish Criminal Code, Art. 123 §A2a). That Turkish legislators have not preferred ex officio prosecution for this aggravated form contradicts the legal policy behind the norm (Özar, 2022, p. 1426). Finally, the Criminal Code has increased the lower limit of punishment in relation to the crimes of injury, torture, torment, and threats committed against woman regardless of the gender of the offenders or the motives behind the crimes; this can be questioned in terms of the gender-sensitivity of the new regulations. However, the reforms the Turkish State has undertaken are still a positive step toward acknowledging women as disadvantaged victim groups who deserve better protection through penal laws. In light of the costs the Turkish State has paid historically, these relatively gender-sensitive

penal regulations can be seen promising for Türkiye's struggle against VAW. Now the future can be built on the argument that violence against women is a gender-based problem that involves not only female subordination or vulnerability but also male supremacy, which Turkish legislators should consider more when enacting penal provisions.

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REFERENCES

Abdel-Monem, T. 2009. "Opuz v. Turkey: Europe's Landmark Judgment on Violence against Women" *Human Rights Brief* 17(1): 29-33.

Altınay, A. G. and Y. Arat. 2007. *Türkiye'de Kadına Yönelik Şiddet/Violence against Women in Turkey*. İstanbul: Punto.

Amnesty International. 2004. *Turkey: Women Confronting Family Violence*. London: Amnesty International.

Anıl, E., C. Arın, A. B. Hacımirzaoglu, M. Bingöllü, P. İlkkaracan and L. E. Amado. 2005. *Turkish Civil and Penal Code Reforms from a Gender Perspective: The Success of Two Nationwide Campaigns*. İstanbul: WWHR – New Ways.

Artuk, M. E., A. Gökçen, M. E. Alşahin and K. Çakır. 2021. *Türk Ceza Hukuku Özel Hükümler/Turkish Criminal Law Special Provisions*. Ankara: Adalet.

Ayata, G., S. Eryılmaz, and S. Kalem. 2011. *Ailenin Korunmasina Dair Kanun Kimi ve Neyi Koruyor? Hâkim, Savcı, Avukat Anlatıları/Who and What are Protected by Family Protection Law? Narratives from Judges, Prosecutors, and Lawyers*. İstanbul: Bilgi Üniversitesi Yayınları/Bilgi University Publications.

Burton, M. 2008. *Legal Responses to Domestic Violence*. New York: Routledge-Cavendish.

Centel, N. 2013. "Ceza Hukuku Şiddete Karşı Kadını Koruyor mu?/Does Criminal Law Protect Women against Violence?" in Centel, N. (ed.) *Ceza Hukukunda Kadının Şiddete Karşı Korunması/Protection of Women in Criminal Law*. İstanbul: On İki Levha.

Constitution of the Republic of Turkey. Law No. 2709. Official Gazette Publication Date: 9/11/1982.

Constitutional Court Decision No. 2008/37, Official Gazette Date and Number: 29/03/2008-26831.

Constitutional Court Decision No. 2020/28, Official Gazette Date and Number: 11/09/2020-31241.

Constitutional Court Decision No. 2023/4, Official Gazette Date and Number: 15/2/2023-32105.

Council of Europe (CoE). 2011. Convention on Preventing and Combating Violence against Women and Domestic Violence – Istanbul Convention. CETS No. 210.

Council of Europe (CoE). 2011. *Explanatory Report: Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*. Strasbourg: Council of Europe.

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Adopted and opened for signature, ratification and accession by General Assembly Resolution 34/180 of 18 December 1979, Entry into Force 3 September 1981.

Danisi, C. 2011. "How far can the European Court of Human Rights Go in the Fight against Discrimination? Defining New Standards in its Non-Discrimination Jurisprudence" *International Journal of Constitutional Law* 9(3-4): 793-807.

Dempsey, M. M. 2009. *Prosecuting Domestic Violence: A Philosophical Analysis*. New York: Oxford University Press.

ECtHR, *OPUZ* v. TURKEY, Application No: 33401/02, 9 June 2009. (Available at: http://www.echr.coe.int/ECHR/EN/Header/CaseLaw/Decisions+and+judg

ECtHR, *PAŞALI* AND OTHERS v. TURKEY, Application No: 26029/11, 03/03/2020. (Available at:https://hudoc.echr.coe.int/eng?i=001-202296).

Erbaş, R. 2021. "Effective Criminal Investigations for Women Victims of Domestic Violence: The Approach of the ECtHR" *Women's Studies International Forum*, 86:1-12.

European Convention on Human Rights as amended by Protocols Nos. 11 and 14, CETS No. 5 (1 June 2010).

Fineman, M. A. 1992. "Feminist Theory in Law: The Difference It Makes" *Columbia Journal of Gender and Law* 2: 1-23.

Fineman, M. A. 2005. "Feminist Legal Theory" *Journal of Gender, Social Policy & The Law* 13: 13-24.

Gavison, R. 1992. "Feminism and the Public/Private Distinction" *Stanford Law Review* 45: 1-32.

General Directorate on the Status of Women (GDSW). 2009. *National Research on Domestic Violence against Women in Turkey – Summary Report/Türkiye'de Kadına Yönelik Aile İçi Şiddet Araştırması – Özet Rapor*. Ankara: GDSW Publication.

General Directorate on the Status of Women (GDSW). 2014. *National Research on Domestic Violence against Women in Turkey – Summary Report/Türkiye'de Kadına Yönelik Aile İçi Şiddet Araştırması – Özet Rapor*. Ankara: GDSW Publication.

Gordon, M. 2000. "Definitional Issues in Violence against Women: Surveillance and Research from a Violence Research Perspective" *Violence Against Women* 6(7): 747-783.

Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO)'s (Baseline) Evaluation Report on Legislative and Other Measures Giving Effect to the Provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention): Turkey, Published on 15 October 2018.

Hanna, C. 1997. "Paradox of Hope: The Crime and Punishment of Domestic Violence" *William & Mary Law Review* 39: 1505-1584.

Harris-Short, S. and J. Miles. 2011. *Family Law: Text, Cases and Materials – 2nd Edition*. New York: Oxford University Press.

Hart, B. 1996. "Battered Women and the Criminal Justice System" in Buzawa, E. S. and C. G. Buzawa (eds.) *Do Arrests and Restraining Orders Work*. London: Sage Publications.

Herring, J. 2004. *Family Law – 2nd Edition*. Harlow: Pearson Education Limited.

Human Rights Watch. 2011. *He Loves You, He Beats You - Family Violence in Turkey and Access to Protection*. New York: Human Rights Watch.

Karınca, E. 2008. *Kadına Yönelik Aile İçi Şiddetle İlgili Ulusal ve Uluslararası Yasal Düzenlemeler/National and International Legal Regulations regarding Domestic Violence against Women*. Ankara: KSGM.

Kaye, J. S. and S. K. Knipps. 2000. "Judicial Responses to Domestic Violence: The Case for a Problem Solving Approach" *Western State University Law Review* 27: 1-14.

Koca, M. and İ. Üzülmez. 2022. *Türk Ceza Hukuku Özel Hükümler/Turkish Criminal Law Special Provisions*. Ankara: Adalet.

Kocacık, F., A. Kutlar, and F. Erselcan. 2007. "Domestic Violence against Women: A Field Study in Turkey" *The Social Science Journal* 44: 698-720.

Law on Amending the Criminal Procedure Code and Some Codes. Law No. 7331. Official Gazette Publication Date: 14/7/2021.

Law on Amending the Criminal Code and Some Codes. Law No. 7406. Official Gazette Publication Date: 27/5/2022.

Law on Protection of the Family. Law No. 4320. Official Gazette Publication Date: 17/1/1998.

Law on Protection of the Family and Prevention of Violence against Women. Law No. 6284. Official Gazette Publication Date: 20/3/2012.

MacKinnon, C. A. 1987. *Feminism Unmodified: Discourses on Life and Law*. Harvard University Press.

Mazur, R. and L. Aldrich. 2003. *What Makes a Domestic Violence Court Work? Lessons from New York*. New York: Center for Court Innovation.

Moroğlu, N. 2012. "Kadına Yönelik Şiddetin Önlenmesi, 6284 sayılı Yasa ve İstanbul Sözleşmesi/Prevention of Violence against Women, Law No. 6284 and Istanbul Convention" *TBB Dergisi/Union of Turkish Bar Associations Review* 99: 357-380.

OECD. 2022. *Violence Against Women (Indicator)*. doi: 10.1787/f1eb4876-en (Accessed on 13 September 2022).

Özar, S. 2022. "Israrlı Takip Suçu (TCK m. 123/A)/The Crime of Stalking (Article 123/A of the Turkish Criminal Code)" *Ankara Üniveristesi Hukuk Fakültesi Dergisi* 71(3): 1397-1430.

Özbek, V. Ö., K. Doğan and P. Bacaksız. 2021. *Türk Ceza Hukuku Özel Hükümler/Turkish Criminal Law Special Provisions*. Ankara: Seçkin.

Pakır, Y. 2018. Cinsel Saldırı Suçu/Crime of Sexual Assault. Ankara: Adalet. Reece, H. 2006. "The End of Domestic Violence" *The Modern Law Review* 69(5): 770-791.

Prime Ministry Family Studies Institute of Türkiye. 1995. *Aile İçi Şiddetin Sebep ve Sonuçları/Reasons and Consequences of Domestic Violence*.

Romkens, R. and R. Letschert. 2007. *Feasibility Study for a Convention against Domestic Violence*. Strasbourg: The Directorate General of Human Rights and Legal Affairs.

Sancar, T. 2013. *Türk Ceza Hukukunda Kadın/Woman in the Turkish Criminal Law*. Ankara: Seçkin.

Şener, U. 2012. *6284 Sayılı Ailenin Korunması ve Kadına Yönelik Şiddetin Önlenmesine Dair Kanun Ne Getiriyor?/What's New on the Law No. 6284?* TEPAV/The Economic Policy Research Foundation of Turkey Evaluation Note.

Sözüer, A., A. B. Baytaz and T. Kelep Pekmez. 2012. "Türk Ceza Hukukunda Kadın ve Türkiye'de Kadına Yönelik Şiddetin 6284 sayılı Kanun Bağlamında Değerlendirilmesi/Women in the Turkish Criminal Law and the Evaluation of Violence Against Women in Turkey in the Context of Law No. 6284" *2. Uluslararası Suç ve Ceza Film Festivali "Kadına Yönelik Şiddet ve Ayrımcılık" Akademik Programı/The 2nd International Crime and Punishment Film Festival "Violence against Women and Discrimination" Academic Programme* (255-287). İstanbul, Turkey.

Stewart, J. 2005. *Specialist Domestic/Family Violence Courts within the Australian Context*. Sydney: Australian Domestic and Family Violence Clearinghouse, University of New South Wales.

Taner, F. G. 2017. *Türk Ceza Hukukunda Cinsel Özgürlüğe Karşı Suçlar/Crimes against Sexual Freedom in the Turkish Criminal Law*. Ankara: Seçkin.

Tezcan, D., M. R. Erdem and M. Önok. 2021. *Teorik ve Pratik Ceza Özel Hukuku/Theoretical and Practical Criminal Law*. Ankara: Seçkin.

Turkish Criminal Code. Law No. 5237. Official Gazette Publication Date: 12/10/2004.

Turkish Criminal Procedure Code. Law No. 5271. Official Gazette Publication Date: 17/12/2004.

United Nations (UN). 1992. The UN Committee on the Elimination of Discrimination against Women (CEDAW) General Recommendation No. 19 on Violence against Women (11th Session). CEDAW/C/1992/L.1/Add.15.

United Nations (UN). 1993. Declaration on the Elimination of Violence against Women (DEVAW). General Assembly Resolution 48/104.

UN Women. 2011. *Progress of the World's Women: In Pursuit of Justice*. New York: UN Women.

Uygur, G. and T. Sancar. 2005. "Law, Women's Subordination and Changing Face of the Turkish Legal System in the Example of Article 434 of

the Turkish Criminal Code" *Eastern European Community Law Journal* 1(2): 31-36.

Yokuş Sevük, H. 2022. *Türk Ceza Hukuku Özel Hükümler/Turkish Criminal Law Special Provisions*. Ankara: Adalet.

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