

Family Law, Human Rights and Gender: An Examination of Turkish Comparative Rectitude

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Abstract

This article is an examination of Turkish jurisprudence of comparative rectitude in divorce cases, in terms of human rights and gender. I will focus on the cases in where one spouse (usually the wife) has been adulteress while the other spouse (usually the husband) has committed violence against his spouse. The decisions of the courts claiming the adulteress and violence perpetrator are equal at faults or sometimes violence perpetrator at a lesser fault will be criticized. Critics will be brought on 'fidelity' as a marital duty, which is a vague concept, and its sexist interpretation in legal disputes. Another legal framework in marital duties that does not shape moral or sexual behaviours of the spouses but avoids human rights abuses will be proposed as concluding thoughts.

Keywords: Family law, gender, fault based divorce system, comparative rectitude, fidelity, domestic violence.

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Aile Hukuku, İnsan Hakları ve Toplumsal Cinsiyet: Kusur İlkesi Uygulaması Üzerine Değerlendirmeler

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Öz

Bu çalışma, yargı kararlarından hareketle boşanmalardaki kusur tespitini insan hakları ve toplumsal cinsiyet bağlamında değerlendirmektedir. Özellikle kadının sadakat yükümlülüğünü ihlal ettiği, erkeğin ise kadına karşı şiddet uyguladığı davalardaki kusur tespiti ele alınacaktır. Mahkemeler kimi zaman kadının sadakate aykırı davranışı ile bir insan hakları ihlali olan erkeğin kadına yönelik şiddetini eşit ve hatta bazen sadakat ihlalinin daha ağır bir kusur olarak değerlendirmektedir. Bu yaklaşımın problemli yanları belirtilecek ve bu hususların önüne geçebilecek farklı bir yasal çerçeve tartışılacaktır.

Anahtar Kelimeler: Aile hukuku, toplumsal cinsiyet, kusur ilkesi, sadakat yükümlülüğü, aile içi şiddet.

Introduction

Turkey with its mixed ground divorce system allows one spouse to sue for divorce on grounds of adultery. According to the Turkish Civil Code fidelity is not only a ground for divorce in case of its breach but also a conjugal duty. However ‘duty of fidelity’, which is a gender-neutral rule for both spouses but a vague concept can lead to unjust results in a sexist climate. This article will examine the Court of Cassation of Turkey’s decisions on comparative rectitude where one spouse (usually the wife) has been adulteress but the other spouse (usually the husband) has committed violence against the other spouse. The Court’s judgements claiming these parties are at equal faults or sometimes violence perpetrator is at a lesser fault will be evaluated in terms of human rights and gender. After the methodology section, there will be a short description of Turkish family law in order to give an idea about the legal frame, and then explanation of the jurisprudence on comparative rectitude, which will be evaluated in the subsequent titles. Critics will be brought on ‘fidelity’ as a marital duty, which is an unclear concept, and its sexist interpretation. Finally, another legal framework in marital duties will be proposed as concluding thoughts.

Methodology

This article aims to bring a gender and human rights perspective to Turkish family law application. Feminist studies on family law have a significant place in Turkish literature as they have a critical approach to mainstream family law tradition¹. As a contribution to this critical approach, this article aims to point out a human rights issue related to a gender problem in Turkish legal application. The Court of Cassation of Turkey’s decisions will be the main data to address this problem. The Court of Cassation of Turkey (the Court) is an appellate court on civil and criminal cases that reviews the local courts’ decisions. As the Court’s decisions are taken into account by local courts they have a great impact in legal practice. Beside this importance also the facility of access was the reason to use the Court’s decisions. The cases are open via the Internet and easy to access by using special data search engines².

This study aimed to analyse the Court’s cases with the use of sociological methods of document analysis. Court cases could be considered as ‘texts’ from a social scientific view and texts, can be indicators of various institutional and organizational properties³. Analysis of these cases with a gender perspective does give cues about the picture of “legally drawn” wife/husband relationships and some concepts as ‘fidelity’ in Turkish legal practice⁴. In this regard I have searched on engine ‘fault in divorce’, ‘spousal fidelity’ or ‘domestic violence’ of 79 decisions of the Court between the dates 2002 and 2018 (as the new Turkish Civil Code was came into force in 2001). In this article I will not give all these analysed decisions within the texts, but only the significant samples that clearly address the stated problem will be quoted.

Short Glance at Family Law in Turkey

Family law in modern Turkey has been very much influenced by social, cultural, historical and religious development of the society. End of the Ottoman Empire period and establishment of the Turkish Republic had also impacts on legal regulations. The Republic's revolutions have brought sharp changes and developments on legal rules, albeit there have still been footprints of the Ottoman Empire that was politically, socially and legally ruled by Islam (Yildirim, 2005: 347-349). Although transition from Islamic law to western law had started in Ottoman Empire period, it was the Republic that had the reception of the Swiss Civil Code in 1926. The Swiss Code was chosen because it was the most recent one in Europe and also the most appropriate model for Turkish society, declared Mahmut Esat, the Ministry of Justice then (see *Türk Kanunu Medeni Lahiyası*, 1926, 239-241) This reception is accepted as an example of "social engineering through law" because it was a reform of religious society into a modern one (Orucu, 1987-1988: 222). Changes in other legal areas have also taken place, but the change in family law was symbolic. Family-oriented modernisation was the main focus in the establishment of the new society (Sancar, 2012: 191-199). Although the patriarchal family structure was kept, secularization of marriage and divorce, and change in spouses' role were significant.

In the first version of the Civil Code of 1926, there were provisions based on gender inequality, such as the husband was defined as the head of the union, and the wife had to take her husband's permission to work or she had to carry her husband's surname. Although there have been amendments in the Civil Code of 1926 over time (for example the Constitutional Court have annulled the provision seeking the husband's permission for a wife working outside⁵), substantial amendments have occurred with the adoption of new Civil Code of 2001 (coming into force in 2002) due to the harmonization of Turkish laws into European ones. Two important Constitutional changes in 2001 have paved the way to these amendments (Orucu, 2004: 470). Both article 10 'equality before the law'⁶ and article 41⁷ 'the protection of the family' has emphasized equality principle. The new Civil Code has also been harmonized with the equality principle in the Constitution. The head of the family is no longer the husband, the wife can work outside without her husband's permission and improvements in marital property were noteworthy. However, there are still unequal provisions in terms of gender. For example the Code does not allow women to use their own surnames alone after marriage (Article 187). Also there is a "waiting period" for women only. It requires women wait 300 days to remarry after a marriage has ended (Article 132). This rule was introduced in order to secure genealogy. However since medical science has progressed considerably, this regulation stays as a clear discrimination against women (Çağlar Gürgey, 2016, 377). Furthermore according to Seval Yıldırım this provision is an indicator of the woman sexuality being related to social order (Yildirim, 2005: 365-367). Divorce system of the new Civil Code had almost stayed the same after the changes of the Code 1926 in 1988 and 1998 (Orucu, 1991-1992: 431-433; Orucu,

2004: 477-479). The Civil Code of 2001 has mixed-grounds system with the specific grounds (such as adultery, threat to life, extreme cruelty and serious insult, committing a humiliating crime, leading a dishonourable life, desertion, incurable mental illness) and irretrievable breakdown (Orucu, 2004: 477). Mutual consent upon irretrievable breakdown has also been introduced in article 166, with the condition of at least one-year marriage duration. So the divorce system is a mixed one with the specific grounds of fault and with no-fault divorce only upon mutual agreement of the parties (Akıntürk/Karaman, 243). Fault is considered not only in divorce, but also in determination of alimony and material or moral compensation (Articles 174-175; Kılıçoğlu, 15-19). Deciding whether an act can be considered as a fault (stated for a ground for divorce in the Code) or to determine whose fault is the heavier, if both parties are at fault, is the job of the judge. However, a gendered perspective of a judge can be an obstacle in seeing the injustice in a case (Uygur, 2016: 138-141). In the following titles I will emphasize these injustices and by using court cases on two different grounds for divorce: adultery and threat to life, extreme cruelty or serious insult.

Jurisprudence on Comparative Rectitude: “the act of infidelity has a more devastating effect on the marriage union than the act of violence”

The Civil Code of 2001 that had patriarchal roots does still have few gendered articles as explained in the previous title. However in legal application even the gender-neutral articles can become a tool to control woman body and reproduce gendered serotypes. This could be traced in divorce cases where irretrievable breakdown of marriage is specified (Aydın Şafak, 143-148) or compensation cases where sexuality of the spouses is treated differently (Aydın Şafak, 149-157). Similar attitude of the Court can also be seen in domestic violence cases where women/wives are discriminated (Aydın Şafak, 158-160) and this discrimination also appears as a human rights problem. However the Court’s reasoning gives the impression that this crucial problem was not recognized enough or domestic violence was even deemphasized. We trace this deemphasizing from the reasoning of comparative rectitude. When deciding on parties’ fault, the Court makes unjust comparisons. I will especially focus on the Court’s assessment of the breach of fidelity duty and violence.

Turkish Civil Code draws limitation on extra-marital sexual behaviours of both sexes. According to the Civil Code the spouses are under a duty to live with one another, show fidelity and help each other (article 185 in ‘the general provisions of marriage’). In addition to fidelity, the Turkish Civil Code, inter alia two grounds for divorce are ‘adultery’ and ‘threat to life, extreme cruelty and serious insult’. These grounds are regulated as follows:

I. Adultery: Article 161-

If one of the spouses commits adultery, the other spouse can sue for divorce. This ground must be used within six months of knowing the adultery and in any case within five years of the adulterous act. If a spouse forgives the adulterous, then s/he has no right to sue for adultery.

II. Threat to life, extreme cruelty and serious insult: Article 162-

Each of the spouses can sue for divorce if the other spouse treated to life or acted extremely cruel or insulted seriously. This ground must be used within six months of knowing the act for ground and in any case within five years of the act for ground. The forgiving spouse does not have right to sue for divorce.

Thus, two grounds for divorce, the breach of the duty to fidelity is regulated in article 161 and the violence against one's spouse is regulated in article 162. What if one spouse (usually the husband) has committed violence while the other spouse (usually the wife) has been adulterous? Within the scope of the decisions analysed, it is seen that the Court in general, has the tendency to determine that the male spouse who committed violence is at fault to a lesser degree. For example in one of the decisions the Court held that:

In the case of divorce, the plaintiff, who is unfaithful to her husband is seriously at more fault compared to the defendant who committed violence against her" 2HD, E. 2010/4778, K. 2011/5429⁸.

In this decision, the court claims that an unfaithful wife's fault is much graver than the husband's violence against her. Married woman seems to give the control of her body to her husband and it seems that if she was unfaithful then she "deserved" the husband's violence. The dissenting opinion of the same decision points out this reasoning and holds against the majority's view as follows:

The infidelity of one of the spouses does not entitle the other to commit physical violence and neglect of marital union duties. Otherwise, the person who carries out these actions is entitled to commit physical violence as well as a right to receive moral compensation. The party who has been cheated should sue for divorce, not commit physical violence. It is not a general rule that physical violence is less likely against to the human dignity than unfaithfulness is. The parties are equal at fault.

Although the dissenting opinion considers the damage of violence on human dignity, it seems that it confuses two concepts when by assuming that human dignity can be damaged by unfaithful act as well. I suppose this assumption mistakes the concept of honour with the concept of dignity⁹. Dignity is much more related to violence or human rights while honour can be related to value judgements on adultery. In another decision the Court compares infidelity to physical and emotional violence and states that these acts are equal fault:

It is understood that the defendant has violated her fidelity obligation, and she said the joint child was not from Turgay, the plaintiff has also acted against to fidelity obligation, he has subjected his partner to physical violence and insulted his wife as "stupid, idiot." Considering these situations, the parties have equal faults in the event of divorce." 2HD, E. 2013/19857, K. 2014/2614.

In the decision above, the wife has claimed that the child was not from her husband Turgay, and according to the evidence the woman has been unfaithful. However, the husband as well has acted against to duty of fidelity, he has engaged in physical and verbal violence against his wife also. We understand from the decision that the local court has even found that the wife had more

fault than the husband. However the Court has reversed the judgement and decided that they were equal at faults. An unfaithful woman is seen equal to an unfaithful and violent man. Moreover the dissenting opinion claimed that the fault of the wife was even more:

The evidence collected indicates that the plaintiff has committed violence to his wife, insulted her and it is understood from his words and acts that he had an affair with another woman, so he acted unfaithfully; and that the defendant has assaulted the mutual child, claimed that the child was not from the husband, and she was seen under the stairway, and in the coalhouse making love with a man called A., it was understood that she was sexually infidel.

When we compare the faults of the parties, as the (local) court claimed, the defendant's fault is heavier. For this reason, I cannot agree with the opinion of the respectable majority. I think the decision of the local court should be upheld. In one of the similar decisions, the husband committed violence against his wife; he insulted and threatened his wife who has betrayed his trust. The local court claimed that they are equal at faults, while the Court reversed the judgement and decided that the husband's fault was heavier (2HD, E. 2011/20690, K. 2012/29077).

But a dissenting opinion to this judgement has been given as follows:

According to the collected evidence, it is understood that the plaintiff made telephone calls very frequently to another man during non-regular hours, including days when she was on leave. I believe that the parties are equal at fault as it is in the (local) court's acceptance of this situation. (2HD, E. 2011/20690, K. 2012/29077)

We understand from the dissenting opinion that the woman has betrayed the trust of her husband by her telephone calls to another man, even in the period of when she was off duty (indicating that these calls were not related to business). In this regard, the duty of fidelity was breached by these "frequent" calls and the husband's committing violence against her is justified by her trust breaking acts. As an indicator of women sexuality defined differently than men's in law, this case gives the idea that women's fidelity is so fragile that could be breached even by telephone calls. Again in another decision, both majority's decision and the dissenting opinion claims are challenging:

Although the court decided that the defendant woman is considered to be seriously faulty and the decision has been given to divorce; the investigating and collecting evidence proves that the defendant woman has insulted her husband and has violated her fidelity obligation; the plaintiff man insulted the woman and constantly subjected her to physical violence. Parties are equal at faults in the event of divorce regarding the situation. (2HD, E. 2015/6809, K. 2015/21108)

In the case above both parties have insulted against each other. If we accept these insults equal at fault then we must look at the other faults of the parties and compare them: the wife's infidelity versus the husband's constantly physical violence. Again, we see that the decision does not recognize the human rights problem and accepts these acts as equal at fault. Even worse than this is the dissenting opinion which is claiming the infidelity of the wife is much graver:

The applicant husband insulted the defendant woman, committed violence against her more than once, the defendant woman also insulted the plaintiff husband by saying "dishonourable" and she did not fulfil the duties of the union, she has made many phone calls during her marriage to her ex-boyfriend, and according to the declaration of the witness, they had sexual relations from time to time, so it was understood that she acted disloyally to the plaintiff husband. The local court also accepts these facts. The woman failure to fulfil her union duties and infidelity is a more serious fault than the plaintiff's husband insulting and violent acts.

The faults of the defendant woman are more weighted qualitatively and quantitatively than the defendant husband's faults.

There is no doubt that the act of infidelity, according to the act of violence and insult, has a more devastating effect on the marriage union.

The plaintiff husband has filed a divorce case after learning his wife's infidelity. However, the defendant woman did not sue for divorce when she claimed (and proved) to have experienced violence more than once.

There is no information reflected in the file that the defendant has sued for divorce until this day. This shows that the act of infidelity has a more devastating effect on the marriage union.

Very clearly, the dissenting opinion, in harmonious with the local court's decision, declaring that infidelity of the wife is severer than the physical violence of the husband. The dissenting opinion even goes further to highlight that "the act of infidelity, according to the act of violence and insult, has a more devastating effect on the marriage union"! Thus the inhuman act of violence and its effect on individual is ignored while assessing the damage on the marriage union by sexual misconduct. It is also stated in the decision that the women who has faced violence did not sue for divorce proofs that she did not have a devastating experience. Depending on a sexist presumption of the judge here ignores the psychology and conditions of the violence victim. This gendered presumption also undermines the impartiality of the judiciary in domestic violence cases (Çağlar Gürgey, 2015, 72).

Those similar decisions¹⁰ of the Court claiming equal fault or sometimes stating that woman's infidelity is more damageable than man's physical violence clearly ignore the domestic violence as a human rights problem. As Uygur and Çağlar Gürgey states, seeing domestic violence as a human rights problem needs a gender perspective (Uygur-Çağlar Gürgey, 45) and these decisions should be examined from this perspective.

Evaluation in Terms of Human Rights and Gender

The reasoning of the decisions gives insights into attitudes towards domestic violence and illegitimate sexual activity of married women. In the analysed judgements of the Court, adultery of a married woman weighed to violence of the husband. The evaluation of the cases above gives a message that a sexual misconduct (violation of fidelity duty) is considered more offensive than violation of a human right (committing violence against one's spouse). And this

attitude of the Court implies two different gender and human rights problems: bias towards woman sexuality and the violence against woman.

Emphasizing Women's Sexual Misconduct as a Gender Issue

Sexuality is a political issue that cannot be thought distinct from the pre-existing social roles and gender hierarchy (MacKinnon, 1991: 129-131). And since male sex is dominant in society, female sexuality is repressed (MacKinnon, 1991: 133). As Catharine MacKinnon highlights, in male supremacist societies, the standpoint of male dominance is reflected also in law. And as the law claims to be objective and legitimate, the social inequality becomes invisible (MacKinnon, 1991: 237-238). In other words, "discrimination in society becomes non-discrimination in law" (MacKinnon, 1991: 238).

Similar to the rest of the world, sexuality in Turkey is a gender issue. The concept of honour and virginity for women has always been a subject in legal and political debates, as essential elements of Turkish identity (İlkkaracan, 2008: 48-52). And in Turkish legal history, there are symbols of the assumption that women bodies and sexualities are the property of men or society, so they are related to public or moral order. For example in the previous Criminal Code sexual crimes were regulated under the title of *Crimes Against Society*, instead of crimes against individuals (İlkkaracan, 2008: 45). Similarly, the main reason of not recognizing marital rape as a crime was the idea that the husband could dispose anything on his wife's body (Sancar, 2013, 107). Also, adultery has long years been a crime and adultery laws prescribed different proofs and penalties for women were historically reflected gender inequality (Orucu, 2006: 469-480). Until recently, the debates related adultery (as public-private spheres, meaning of Turkish values etc.) has engaged in political and legal agenda (İlkkaracan, 2008: 60-62).

In Turkey there is also gender related violence, particularly honour killings. Especially *namus*, is a special concept that presupposes a moral and physical quality that women should have before marriage, during marriage and even after marriage (Sever & Yurdakul, 2001: 973). Thus women sexuality is controlled by social norms and practices. And sexual relations outside marriage are assaults on men's honour, so the female extra-marital sexuality should be controlled through social, political and legal means (İlkkaracan, 2008: 49). Likewise interpretation of 'fidelity', which is a vague gender-neutral concept, can sometimes result in gender inequality as an extension of the social reality where women sexuality is defined differently than men's. The Courts' decisions given in the previous title expresses that extra-marital sexual behaviour of a wife has more devastating effect on marriage than domestic violence is an extension of this legal culture. And this understanding leaves the human rights violation of domestic violence in the shadow. In the following title the deemphasizing of this human right violation will be discussed.

Deemphasizing Man's Domestic Violence as a Human Rights Issue

Feminists have different opinions on many issues of family law (alimony, child custody, divorce rules etc), but there has been a large consensus on domestic violence (Bartlett, 1999: 498). Katharine Bartlett explains this fact on two different grounds. Firstly, the problem of violence is so extensive that urged women find a solution. Secondly, domestic violence did not cause much conflict on gender roles, as other issues feminists debated did (Bartlett, 1999: 499). I assume both of the grounds she gave are related to the fact that domestic violence is a human rights issue. And as Charlotte Bunch highlights, violence is a politically constructed reality and women's bodies are physical territory of this political struggle over women rights as human rights (Bunch, 1990: 491). Thus both the attitude of the Court towards adulteress women and those women as subjects to violence is politically constructed reality.

Domestic violence is widely seen in Turkey. Research show that 36 percent of the married women face physical violence; 12 percent of them face sexual violence and 44 of them face emotional violence at any stage of their lives by their husbands or partners (Türkiye'de Kadına Yönelik Aile İçi Şiddet Araştırması, 2015: 120). Infidelity is one of the reasons men commit violence. According to the same research, men give infidelity as a ground for their violent acts (Türkiye'de Kadına Yönelik Aile İçi Şiddet Araştırması, 2015: 234-235). Dreadfully, 36 percent of married women think that it is right for the husband to beat his wife if the wife has cheated on him (Türkiye'de Kadına Yönelik Aile İçi Şiddet Araştırması, 2015: 108). Thus the society thinks that extra-marital relationship can be punishable by violence and we see a reflection of the society's perception on the cases stated before. The Courts ignoring the gravity of domestic violence is also a gender problem issue. And this attitude of the Court is related to the traditional human rights approach that does not take into consideration of the private spheres infringements. The distinction between public and private spheres creates a misconception that human rights problems are only in the public sphere and related to the state affairs (Uygur-Çağlar Gürgey, 35). And as Bunch highlights, in order to make women's voice heard and transform the traditional human rights approach we need to consider the specific experiences of women (Bunch, 1990: 487). A feminist transformation of the concept of human rights should be more responsive to women's needs and violations of their human rights (Bunch, 1990: 496). Thus human rights violations at domestic spheres need a better scrutiny as violations of women's human rights (based on gender inequality) are occurring in that sphere.

In fact, Turkey has many legal tools against gender inequality and domestic violence. In addition to the national obligations imposed by the Constitution and Civil Code mentioned before, it also has international responsibilities¹¹. Turkey is a signatory of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Besides Turkey became the first country to ratify the Council of Europe's Convention on Preventing and Combating Violence against Women and Domestic Violence (Council of Europe, 2014; the Istanbul

Convention). This Convention is crucial, as it accepts violence against women as a violation of human rights and obliges parties to take necessary legislative and other measures to promote gender equality and condemn all forms of discrimination against women. Based on this Convention, a new Code (Law no. 6284) has also been enacted. This code brought necessary preventions against domestic violence as well. Thus considering all these legal tools judges should use them effectively in their decisions and imply no tolerance to violence. The neutral concepts or rules (such as fidelity) should not be used as a tool to legitimize patriarchal cultural value judgments in the context of domestic violence (Çağlar Gürgey, 2015, 62). As Shazia Choudhry and Jonathan Herring state, although patriarchal structures in culture and society accounts much, the law's response to domestic violence cases has a symbolic importance in combating against violence (Choudhry, Herring, 2006: 96). Also as stated in ECHR *Opuz v Turkey* case, "the domestic violence affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence" (*Opuz v. Turkey*, Application no. 33401/02, par. 198). In order to see the injustice of a domestic violence case, a judge should avoid any sexist perspective that obstructing to pay attention to the peculiarities of the specific circumstances (Uygur, 2016: 140-141). Consequently, the state authorities, especially judiciary should give no tolerance to violence and give stronger messages showing their sincerity in combating against it.

Concluding Remarks

This study has addressed the human rights problem of the Court of Cassation of Turkey's comparative rectitude decisions that needs a gender perspective to recognize. As Aydın Şafak stated before, the Court seems to discriminate against women in its evaluation of faults in divorce cases (Aydın Şafak, 165). However I claim that this gender discrimination also constitutes a serious human rights problem. Turkish family law seems to maintain its discriminatory attitude in spite of the gender-neutral rules in the Civil Code. The application of these gender-neutral rules reflects its patriarchal roots as explained before. Although legal means specific to domestic violence have been introduced, vague concepts of divorce law (such as fidelity) can still pave the way to gender discrimination in a patriarchal legal culture. Then one can ask: what is the appropriate legal frame for avoiding sexist interpretations of gender-neutral family obligations but at the same time lay emphasize on the protection of the victims of domestic violence? The answer of this question will be the concluding thoughts of this article.

John Eekelaar draws different paradigms relating to the relationship between family norms and legal obligations. What he calls as "delegation model", the state prescribes legal obligations related to family life and expects families to obey them as delegates of the state's authority (Eekelaar, 2012: 83-84). We see this model in the Turkish Civil Code imposing fidelity duty to the spouses. As Eekelaar highlights, in contemporary times the use of legal tools to shape of moral and sexual behaviour within marriage came to be seen as unsuccessful (Eekelaar,

2012: 88). They very much depend on the contextual circumstance that is difficult to reflect in abstract legal forms (Eekelaar, 2012: 89). Beside the difficulty to map specific circumstances by general regulations and their enforceability, these gender-neutral abstract rules turn into a sexist interpretation in legal practice if the given culture is suitable for this. Thus, instead of imposing moral or sexual duties to the family members, the law should take another stance. What Eekelaar calls as “purposive abstention” model is a better response for these cases. Abstention here is to refrain from prescribing legal norms that impose moral or social obligations for family members (Eekelaar, 2012: 76, 84). However, the general law is still enforceable for families that will prevent human rights abuses (Eekelaar, 2012: 92). In this case, by eliminating sexual behavioural norms from family law, and using the general law (in Turkish example it is the national regulations and the conventions on violence or human rights) against human rights abuse would be a better option.

Notes

- ¹ For some examples of these studies in Turkey see Ayşe Aydın Şafak, *Feminist Bir Bakışla Türk Aile Hukukunda Kadın Bedeni*, İstanbul: On İki Levha Yayıncılık, (2014); F. Kaya-N.Özdemir-G.Uygur (Eds.), *Kadınların ve Kız Çocuklarının İnsan Hakları: Kadına Yönelik Şiddet ve Ev-içi Şiddet*, Ankara: Savaş, (2014); F. İrem Çağlar Gürgey, “Ev-İçi Şiddet Davalarında Yargıcın Tarafsızlığı”, *Ankara Barosu Dergisi* 2015/4; Özge Yücel, “Medeni Hukuk Açısından Toplumsal Cinsiyet, Şiddet ve Ayrımcılık, Hukuk ve Toplumsal Cinsiyet Çalışmaları içinde”, G.Uygur-N.Özdemir (Eds.), Ankara: Seçkin, (2018).
- ² Beside the database of the Court, private databases such as www.kazanci.com was also used to collect decisions.
- ³ Reza Banakar and Max Travers, “Studying Legal Texts”, *Theory and Method in Socio-Legal Research*, Reza Banakar and Max Travers (Eds), Portland: Hart Publishing (2005): 135.
- ⁴ Although I take the approach of Banakar and Travers in analysing court decisions, writers such as Sanne Taekema & Wibren van der Burg bring a different approach to the method of critical analysis of the cases. They claim that interpreting legal decisions with a critical evaluation and recommendations for law reform is called “doctrinal research in a broad sense”. See Sanne Taekema and Wibren van der Burg, “Introduction: The Incorporation Problem in Interdisciplinary Legal Research”, *Erasmus Law Review*, 2, (2015): 39.
- ⁵ Esas No: 1990/30, Karar no: 1990/31, Date: 29.11.1990, Official gazette no: 02.07.1992-21272. “E” is the abbreviation for Esas (case number); and “K” is the abbreviation for Karar (decision number).
- ⁶ Article 10: “Everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds. (Paragraph added on May 7, 2004; Act No. 5170) Men and women have equal rights. The State has the obligation to ensure that this equality exists in practice. (Sentence added on September 12, 2010; Act No. 5982) Measures taken for this purpose shall not be interpreted as contrary to the principle of equality. (Paragraph added on September 12, 2010; Act No. 5982) Measures to be taken for children, the elderly, disabled people, widows and orphans of martyrs as well as for the invalid and veterans shall not be considered as violation of the principle of equality. No privilege shall be granted to any individual, family, group or class. State organs and administrative authorities are obliged to act in compliance with the principle of equality before the law in all their proceedings.” See the full text on https://global.tbmm.gov.tr/docs/constitution_en.pdf. (Accessed on 16.12.2017).
- ⁷ Article 41: “(Paragraph added on October 3, 2001; Act No. 4709) Family is the foundation of the Turkish society and based on the equality between the spouses. The State shall take the necessary measures and establish the necessary organization to protect peace and welfare of the family, especially mother and children, and to ensure the instruction of family planning and its practice. 19 (Paragraph added on September 12, 2010; Act No. 5982) Every child has the right to protection and care and the right to have and maintain a personal and direct relation with his/her mother and father unless it is contrary to his/her high interests. (Paragraph added on September 12, 2010; Act

- No. 5982) The State shall take measures for the protection of the children against all kinds of abuse and violence.” See the full text on https://global.tbmm.gov.tr/docs/constitution_en.pdf. (Accessed on 16.12.2017)
- ⁸ “2HD” is the abbreviation for Yargıtay İkinci Hukuk Dairesi (Second Chamber of the Court of Cassation on Civil Matters).
- ⁹ Human dignity, as a ground for human rights is “the awareness of the value of the human being”. Honour on the other hand is about value judgements and can change from one culture to another. It is “the esteem paid to the worth or assumed worth of an individual”. Ioanna Kuçuradi, “The Concept of Human Dignity and Human Rights”, in Human Rights: Concepts and Problems, Berlin: Lit Verlag (2013): 99-104.
- ¹⁰ For example see 2HD E. 2014/15361 K. 2014/25613; 2HD E. 2014/4960 K. 2014/14824; 2HD E. 2012/26005 K. 2013/23516; 2HD E. 2012/20537 K. 2013/6624; 2HD, E. 2012/20356, K. 2012/27177; 2HD E. 2012/12694 K. 2012/17520; 2HD E. 2011/20135, K. 2012/16114; 2HD E. 2011/18286 K. 2012/14227; 2HD, E. 2011/13947, K. 2012/10657; 2HD E. 2011/1779 K. 2011/24071.
- ¹¹ According to the Article 90 of the Constitution of the Republic of Turkey, there is supremacy of the international human rights agreements to national regulations: “International agreements duly put into effect have the force of law. No appeal to the 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.” For the full text see: https://global.tbmm.gov.tr/docs/constitution_en.pdf (Accessed on 17.12.2017).

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