Research Article

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A Critical Assessment of Turkey's Positive Obligations in Combatting Violence against Women: Looking behind the Judgments

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Abstract: After almost two decades in power, R. T. Erdoğan and his Justice and Development Party (AKP) have established authoritarian and Islamist governance in Turkey, which has adversely affected gender equality and women's rights. So much so, that in 2009 the European Court of Human Rights acknowledged that there is a climate conducive to domestic violence in Turkey (Opuz v. Turkey). Despite Erdoğan withdrawing Turkey unconstitutionally from the Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), the government cannot withdraw from the state's duty to protect its citizens from the criminal acts of private individuals. By using international and regional organisations' approaches to positive obligations and due diligence as a measure, the article addresses whether Turkey is fulfilling its duty of protecting women from the violent conduct of others. It is concluded that the government is failing in its positive obligations and instead, is reinforcing the climate through its discourse and practices that strengthen a national tolerance of violence against women and the national authorities' reluctance to address it, thus allowing for impunity of its perpetrators.

Keywords: positive obligations, Opuz v Turkey, due diligence, violence against women, impunity; gender-based violence; Turkey

1 Introduction

As an outcome of historically unequal power relations between women and men, violence against women (VAW) allowed men to dominate and discriminate against

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women (United Nations 1993). Moreover, throughout their lifetime, many women face serious short- and long-term physical, mental, sexual and reproductive health problems as well as social and economic costs due to violence against them (World Health Organization 2017). States must recognise women's right, as equal citizens, to live free from violence, and embrace their responsibility in providing women with lives with equivalent legal, social, economic, cultural, and political rights to men.

In this respect, the Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention – IC) has been a turning point. The IC is a legally binding international convention aimed at eradicating VAW, with a clear plan on how to achieve this goal systematically. Contrary to the opposing claims of the so-called anti-gender movements, the IC does not explicitly raise LGBTIQ+ rights; it only requires protection of victims' rights without discrimination on sexual orientation and gender identity, among other grounds (Council of Europe 2011). Conservative and Islamist circles, cults and congregations in Turkey are against gender equality, LGBTQ+ rights and the IC. They have publicly declared that their support for R. T. Erdoğan depends on the withdrawal from the IC (Kronos News 2021a). Erdoğan is also against gender equality and supports the Islamic notion *fitrat* (purpose of creation), which is built on biological differences and complementarity between sexes (Doğangün 2020). Against this background, he withdrew Turkey unconstitutionally from the IC on 20 March 2021 – four days before the seventh ordinary congress of the AKP, where he was re-elected its leader.

Given this political context, the current study involves exploring the obligations of Erdoğan and his Justice and Development Party (AKP) to combat VAW within the scope of positive obligations and due diligence deriving from the European Convention on Human Rights (ECHR) and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). Whilst these concepts stem from the ECHR and CEDAW, the IC expands on these obligations vis-à-vis combatting VAW, mandating additional commitments, and, as abovementioned, setting out as a systematic plan to eliminate it. However, this study does not analyse the impact of the withdrawal from the IC per se. Rather, the focus is on the IC's connection to the concepts of positive obligations and due diligence, the untapped potential of the IC to amend the problems in domestic law, and the interpretation and enforcement of the law. Prior to withdrawing from the IC, the government did not instrumentalise or implement it so as to improve the ineffective domestic law and hence, it is not surprising that the majority of the cases described in this study took place while the convention was still in force.

Law no 6284 came into force in 2012 following the ratification of the IC, but even its title was reflective of the government's pro-family discourse: "Protecting the family". Hence, the ways it has been interpreted, implemented, and (un) enforced have not been consistent with the government's positive obligations. The

problems in Turkey lie deeper and require the political will to transform. During the short period the IC was in force, it did not resolve the deeper issues with the current law – severe complications in its interpretation and enforcement – because these are grounded in the problems with the gender climate in Turkey. This climate was perhaps the root of the concerns with the judiciary's interpretation of the law and police forces' enforcement of the law. In sum, these issues predated the IC and continued during the nine years that it was in force.

The objective of the current study is to use positive obligations and due diligence as a measure to delve into the actual stories; what is happening on the ground in terms of the gender climate. The findings of the European Court of Human Rights (ECtHR) and the Committee of Ministers on the Supervision of the Execution of the ECtHR's Judgments and Decisions (henceforth "the Committee"), and the CEDAW Committee are considered, with the details of what the national courts heard and what they decided being reviewed. By doing so, the study reveals that the current government systematically ignores its duties; that there is a strategic, systematic pattern in the national authorities' actions that denies women gender equality and equal citizenship. The upcoming findings discussed in this article, therefore, draw attention to the amalgamation of doctrinal problems and the gender climate: The patterns in the conduct of the national authorities and how impunity is built in for perpetrators of VAW within the gender climate, which reinforces these patterns.

This introduction is followed by a short section elaborating upon the gender climate, followed by a section on the theoretical framework and research design. Subsequently, the findings are discussed under two main headings. First, the national authorities' reluctance to act and deliberate actions that reinforce the status quo are considered. Second, how the national authorities generate impunity for perpetrators in VAW cases is discussed. The core of this section looks at the stories, details, and facts, without which it is impossible to understand how grave the situation is; how extraordinary some of the interpretations and enforcement of the law have been in VAW cases. Finally, the conclusion summarises the findings and emphasises the importance of monitoring positive obligations and due diligence in the absence of the IC.

2 Considering "Gender Climate" from a Legal Perspective

The judiciary interprets the law in a particular socio-political context. Coming from a specific social background, their prejudices, biases, own ideas are part of the interpretation of the law. Likewise, law enforcement is also not disconnected from

the socio-political context. Hence, the interpretation and enforcement of the law cannot happen in a vacuum; it happens within such a context, because judges, prosecutors, and police forces are also members of society. By creating a specific gender climate, the government reinforces gender biases and national tolerance towards VAW, which is also reflected in the judiciary's misinterpretation of the law. This grave problem evidently could not be fixed in the brief period that the IC was in force and now, the withdrawal gives another incentive for the Government to continue deeper down the path of tolerating VAW.

Kay (2000) defines gender climate as the attitudes and opinions promoted by popular discourses and mass media that shape how it is acceptable to speak about gender. Building on Kay's work, Güneş-Ayata and Doğangün define gender climate as "discourses and practices on gender relations that are accepted, prevalent and/or dominant in private and public life and that determine the modes of thinking, acting and morality regarding gender relations" (2017, 611). Thus, gender climate not only encompasses patriarchal values of daily practices and hegemonic praxis and discourses, for it also reflects the management of social perceptions regarding gender identities and relations at local governmental, societal and national levels (Güneş-Ayata and Doğangün 2017). The authors further conclude that Erdoğan and his AKP government have reinstated an extremely "religio-conservative gender climate" in Turkey (2017). This religio-conservative gender climate is built on family and sacred motherhood, which indicates the restoration of an underlying patriarchal gender order and trivialises legal advances. It has been unleashing traditional forces that define women and motherhood within the territory of religion, tradition and custom (Güneş-Ayata and Doğangün 2017). By creating this religio-conservative gender climate, the government has shifted women's rights from the axis of human rights to "traditional religious values framework and a conservative patriarchal family and social order axis" (Turkey Shadow Follow-up Report n.d., 3).

The concept of the religio-conservative gender climate, therefore, becomes critical when analysing the judgments of the ECtHR that refer to the creation of a "climate that is conducive to domestic violence" (Opuz v. Turkey 2009, para. 198). This is because the religio-conservative gender climate becomes the context within which the national authorities interpret and enforce the domestic law. Their discourse, reluctance to take action and deliberate contra-actions in VAW cases reinforce the religio-conservative gender climate and vice versa, since the gender climate and the conduct of the national authorities exist in perfect harmony.

Consequently, a misogynistic social environment takes shape where women's rights to life, to live free from violence, to privacy and physical and mental integrity, to be equally protected by the law and to be provided with equal citizenship are disregarded or violated. Moreover, in such an environment, the

concepts of positive obligations and due diligence are easily overlooked when interpreting and enforcing domestic law. So much so, that in 2016, the ECtHR reiterated that national authorities' attitude reflects "wilful denial" vis-à-vis the prevalence of VAW in the climate authorities had created (Halime Kılıç v. Turkey 2016, para. 120). This misogynistic social environment, brought on by the combination of the religio-conservative gender climate and the national authorities' conduct, is precisely what the ECtHR identifies when referring to the climate in Turkey as conducive to VAW.

3 Theoretical Framework & Research Design

3.1 Theoretical Background

For this study, international and regional organisations' approaches on positive obligations and due diligence are drawn upon as a measure to ascertain whether Turkey is fulfilling its duties to protect women from violence. Accordingly, it is necessary to explain the meanings of these concepts, their scope, as well as how they are used by the ECtHR in its case law.

As a concept, due diligence has gained more significance in an international context, so much so that some consider it to have reached to the status of customary international law (Bailliet 2012; Ertürk 2006; Grans 2018). The due diligence standard stems partly from international law on state responsibility, when there is an internationally wrongful act of states against a non-national person (Chinkin 2010). In particular, the general recommendation 19 of the CEDAW Committee underlines that, states might be considered responsible for private acts, if they do not act with due diligence to prevent breaches of rights or inspect and penalise acts of violence (CEDAW 1992). The United Nations (UN) obliges states to act with due diligence to prevent, respond to, protect against and provide remedies for cases of VAW, irrespective of whether the crime was committed by the state or private individuals (Ertürk 2006).

For a long time, due diligence was significant only when state actors caused injury to individuals. Eventually, it came to encompass private individuals, when there is apparent damage caused by a state's failure to prevent it (Crawford and Olleson 2003). In 1988, the Inter-American Court of Human Rights (IACHR) became the first human rights body to acknowledge that states must exercise due diligence in their territory to prevent attacks on life, physical integrity or liberty of people. They must punish perpetrators, restore the rights violated, and provide compensation for the damages caused (*Velásquez Rodríguez v. Honduras*) (Manjoo 2013). The IACHR's approach paved the way for feminist politics to claim that states are responsible for

failing to prevent VAW effectively in their territory - particularly violence in the private sphere by private individuals (Garcia-Del Moral and Dersnah 2014).

Regarding state obligations in international human rights law, these are generally classified into two categories: negative obligations and positive obligations. While negative obligations require states not to intervene in the enjoyment or exercise of rights, positive obligations pertain to national authorities having to take all necessary measures to guarantee individuals' rights (Directorate General of Human Rights 2007). The concept of positive obligations covers various responsibilities under the ECHR, such as protecting an individual's life (article 2) and effective investigation of allegations of torture (article 3). The ECtHR monitors states' conduct in trials and assesses whether national authorities meet different positive obligations, of which due diligence is one aspect. Despite the ECtHR not comprehensively using the due diligence standard, it does acknowledge that acting with due diligence is one of states' positive obligations, and those failing to display due diligence cannot be considered to have exercised their positive obligation (Opuz v. Turkey 2009, para. 149).

Opuz v. Turkey constitutes the foundation of the study because it is a groundbreaking judgment in applying the ECHR to a VAW case. In the case, the applicant and her mother were subjected to systemic violence by the former's husband. The perpetrator beat and stabbed the applicant, among other violent behaviours, and attempted to run the two of them over with a car. Both the mother and applicant had frequently suffered injuries ranging from minor to life-threatening. After reporting the incidents many times to the authorities, on each occasion, they withdrew their complaints under pressure from the husband. In 2002, the husband killed the applicant's mother, while she was helping the applicant to flee. The ECtHR established that Turkey had violated the applicant's mother's right to life (article 2), the applicant's right to be free from torture or ill-treatment (article 3) and that the failure to exercise due diligence in securing these rights stemmed from gender discrimination in violation of article 14 (Opuz v. Turkey 2009).

Furthermore, the ECtHR highlighted the general and discriminatory judicial passivity and the impunity enjoyed by aggressors (Opuz v. Turkey 2009, paras. 198 and 200). Moreover, it underlined that, intentional or unintentional, the failure of the Turkish state to protect women from VAW breached the women's right to equal protection under the law (Opuz v. Turkey 2009, paras. 191 and 198). Consequently, in *Opuz v. Turkey* the ECtHR confirmed that domestic violence was derived from the power imbalance between women and men. The Court recognised states have positive obligations to protect women's rights under articles 2, 3 and 8 ECHR against private individuals' actions and threats (Abdel-Monem 2009), declaring, for the first time, that domestic violence constituted discrimination under article 14 ECHR (Murphy 2019).

States have the positive obligation to protect the right to life (article 2 ECHR) "by putting in place effective criminal-law provisions to deter the commission of

offences against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions" (Opuz v. Turkey 2009, para. 128). When examining whether positive obligation arises, the ECtHR follows the "Osman test" (Osman v. United Kingdom 1998, para. 129):

> The authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.

However, the "real and immediate risk" in the test is not a unanimously supported idea at the ECtHR. In some recent judgments, dissenting judges emphasised that positive obligations on national authorities might be triggered too late in VAW cases and that when there is a there is immediate risk to the victim then the national authorities should be required to intervene.[1] They urged that there is the need for a more rigorous standard of diligence in particular societies and that the due diligence standard is stricter than the ECtHR's current risk assessment of VAW cases as it gives national authorities the duty to act when the risk to the victim is already present, but not imminent (Valiulienė v. Lithuania 2013; Volodina v Russia 2019). This article will not deal with the more stricter standard of due diligence or the weaker one of positive obligations separately as what follows will demonstrate that Turkey fails to meet what could be considered the lower of the two standards in any case.

3.2 Methodology

To answer the doctrinal question of whether Turkey fulfils its duties to protect women from VAW, the approaches of international and regional human rights organisations are chronologically examined and comparatively analysed in the post-Opuz period. The primary source of the study is the ECtHR's judgments on VAW against Turkey between 2009 and 2020: *Opuz v. Turkey (2009), Durmaz v. Turkey (2014), Civek v. Turkey (2016),M.G. v. Turkey (2016), Halime Kılıç (2016), G.U. v. Turkey (2016), Paşalı and Others v. Turkey (2020)*. The judgments are selected according to two criteria: Turkey is the respondent state and the cases concern violence perpetrated against women by private individuals, where the ECtHR considered positive state obligations. The selected judgments are analysed from a gender perspective, by focusing specifically on the national authorities' attitudes and actions to understand how the national authorities interpret and enforce the domestic law within the religio-conservative gender climate.

1 See, for example, Judge Pinto de Albuquerque's separate opinion in *Volodina v. Russia* (2019).

In order to follow the execution of the ECtHR's judgments, the Committee's supervisory decisions, meeting notes and annual reports are included in the study. In addition, reports sent to the Committee from various NGOs are added as subsidiary information sources. The CEDAW constitutes the second source of the study: Turkey's national reports and shadow reports from NGOs sent to the CEDAW Committee, the CEDAW Committee's reports on Turkey, its follow-up questions and Turkey's responses between 2009 and 2020 are analysed.

However, examining judgments and reports is not sufficient in and of itself to understand whether positive obligations are met and why this is (not) the case. The problem of insufficient resistance to VAW results from legal inadequacies, wrong interpretations, the national authorities' reluctance or contra-actions and/or inadequate training, all of which take place in the religio-conservative gender climate. Some judgments in local jurisdictions are also included in the study as they illustrate the continuity of the patterns in criminal proceedings on VAW and strengthen the article's argument. It is indispensable for fulfilling the research objective to look for details about what is happening behind the judicial scenes, stories, and facts to unveil the magnitude of the problem concerning VAW, in particular and gender equality, in general.

The national authorities' approaches in VAW-related cases are not isolated incidents; they interplay with the religio-conservative gender climate in which gender roles, biases and stereotypes are strengthened. In return, the climate influences the interpretation and enforcement of the law. That is why the patterns in the national authorities' conduct and the religio-conservative gender climate that the government has reinstated in the last two decades are not two separate concerns; instead, they occur in harmony and they interact with each other. Consequently, the doctrinal question is deeply connected to the religio-conservative climate, so they are analysed together in the discussions below.

4 Patterns in the Conduct of the National Authorities

The government does not keep detailed data on femicides and many other areas covered by CEDAW (CEDAW/C/TUR/Q/6 2009; CEDAW/C/TUR/CO/6 2010; CEDAW/C/SR.1416 2016). However, it is known that there is structural VAW in Turkey and extremely high numbers of women are killed by their partners/husbands, former partners, ex-husbands or family members (CEDAW/C/TUR/CO/7 2016, 8). This section first focuses on the government's reluctance – its lack of willingness – to improve the domestic law regarding gender equality and VAW,

because it does not support the promotion of gender equality. The focus of the section then shifts beyond this reluctance to revealing the government's deliberate, problematic and incompetent actions in combatting VAW. Then, the following section focuses on the consequences: how the legal frameworks are used to generate impunity for perpetrators in VAW cases within the religio-conservative gender climate.

4.1 Reluctance to Improve Domestic Law on Gender Equality

The analysis in this part starts by broadly focusing on the lack of willingness of the government to improve domestic law in terms of gender equality and combatting VAW. Owing to the EU accession agenda and the feminist advocacy, domestic law was enhanced in the early 2000s (Gülel 2021), albeit there is still no equality and anti-discrimination legislation in line with article 1 and 2 of CEDAW. Domestic law is full of shortcomings regarding women's rights, with the Penal Code not criminalising domestic violence as such and not including clauses on the prosecution or punishment of perpetrators. However, Turkey has a positive obligation to establish and operate a system that adequately punishes and provides victims with necessary protections (Committee of Ministers, Meeting Notes 1280th Meeting 2017a).

Furthermore, the government has failed to ensure that the Penal Code and the Civil Code align with CEDAW and the ECHR. A concrete example of its reluctance to do so is the surname imposition on married women. Turkey is the only member of the Council of Europe that obliges women to use their husband's name after getting married (Ünal Tekeli v Turkey 2005, para. 61). In 2013, the Constitutional Court decided that married women have the right to keep their pre-marriage surname (S.A.E. 2013). Despite the ECtHR and the Turkish Constitutional Court acknowledging women's right to keep their birth surname in marriage, the government has not repealed the corresponding article 187 in the Civil Code since 2005. Instead, it claims that article 187 has been abolished in light of the constitutional court's ruling (CEDAW/C/SR.1416 2016, 27). In reality, women must individually resort to court proceedings to fight to reclaim their birth surnames, which means they have to struggle with red-tape, waste time and money as well as face countless wearisome practical difficulties during application to benefit from a right already many times acknowledged (*Leventoğlu Abdulkadiroğlu v. Turkey* 2013*; Tanbay Tuten v. Turkey* 2014*; Tuncer Güneş v. Turkey* 2013*; Yavuz Nal and Others v. Turkey* 2017). The extent to which the attitudes and practices of the national authorities and public servants may be deemed systemic mobbing to make women have their husbands' surnames, which conflicts with the State's duty to provide women with equal citizenship and equal protection by the law.

Concerning the Penal Code, articles 82 and 287 also illustrate the government's reluctance. Article 287 directly violates women's rights, because it allows genital examinations and virginity tests when a judge or prosecutor requests it, even in the absence of women's consent. The CEDAW Committee has insisted that this article be revoked, because it violates privacy and physical and mental integrity (CEDAW/C/TUR/CO/6 2010; CEDAW/C/TUR/CO/7 2016). Still, the government avows that it is only applied, if authorised by a judge (CEDAW/C/SR.1415 2016), which means that violation of women's privacy and integrity is tolerable when a judge says so.

Secondly, the CEDAW Committee has urged the government explicitly to include honour killings in article 82 of the Penal Code and to treat them as seriously as other crimes in terms of investigation and prosecution, although they are labelled as a "part of custom" (CEDAW/C/TUR/CO/6 2010; CEDAW/C/TUR/Q/7 2015). Even if a crime is not considered an "honour crime", motives like an ex-wife remarrying or a sister having a relationship without marriage originate from honour, yet still invoke abatements for offenders (Sade 2019; DIHA 2015). Despite the demands and reports from women's NGOs demonstrating a social need for the amendment of this article, the Government claims that the national authorities attach importance to these crimes and that perpetrators are subject to aggravated life sentences, without providing satisfactory judicial statistics (CEDAW/C/TUR/Q/7/Add.1 2016).

Overall, the Penal Code does not aim to make VAW evident or inspect, prosecute, and punish, but several articles have been used to penalise it (Istanbul Convention Monitoring Platform on Turkey 2017, 57). Article 86, for instance, defines the penalty for minor intentional injury and asks for its increase if the injury is committed against a direct antecedent/descendent, spouse or sibling without a requirement for a complaint of the victim (Article 86 Turkish Penal Code). However, Opuz and many other cases indicate that if women's injuries result from separate violent behaviours, they are not considered together. In *M.G. v. Turkey*, the victim was married to the perpetrator who kidnapped, raped and forced her to get married (M.G. v. Turkey 2016, paras. 7 and 45). The public prosecutor's indictment stated that the injuries M.G. had could be cured by simple medical treatment in line with article 86. The prosecutor, therefore, decided on non-prosecution for insult/degrading treatment, threat and sexual assault – almost six years after the first complaint of the victim for rape, intentional injury, torture, deprivation of freedom, threat, insult as well as physical, sexual, emotional and economic violence (M.G. v. Turkey 2016, paras. 7–34). The story of A.E. in the latest report of Mor Çatı Women's Shelter Foundation is very similar to the Opuz case. It illustrates how the reluctance of the national authorities affects women's right to life and right to live free from torture/ill-treatment (Committee of Ministers 2020, 17–19).

To avoid such inconsistencies, the Penal Code must become more sensitive to VAW, keeping it outside the scope of reconciliation, defining it as a crime, and penalising it accordingly (Turkey Shadow Follow-up Report n.d.). These endorsements were already deemed necessary by the IC, which identified states' responsibilities and explained how to eradicate VAW by preventing, investigating, punishing and providing reparation. Hence, the withdrawal from the IC and the articles discussed above demonstrates the lack of political will to respond to the social need to reform the constitution, civil code and penal code.

4.2 The Specific Measures Designed to Combat VAW

Before *Opuz v. Turkey*, the law in force, Law no 4320, was the first measure designed to combat VAW and came into being in 1998. However, it had a minimal scope and did not offer protection to divorced women. In its report to CEDAW Committee and the action plan sent to the Committee, the government claims that law 4320 was amended in 2007, which had broadened its perspective to offer protection to family members, married, living separately, or having received a court decision for separation (CEDAW/C/TUR/6 2008, 7; Committee of Ministers 2011, 15; Halime Kılıç v. Turkey 2016, para. 110). However, protection for divorced women was, in fact, left up to judicial discretion. Despite the government assuring both the Committee and the CEDAW Committee that the amendment allowed protection for divorced women, whether a divorced, unmarried or religiously wedded woman could benefit from the law was still up for debate. In 2009, the Court of Appeals established that protection measures laid down in Law 4320 could not be extended to divorced women (Judgment no 2009/170-9441 2009). This judgment had given rise to many cases where unmarried or divorced women were not protected, contrary to the government's claim in its international reports. In 2020, in *Paşalı and Others v. Turkey*, the government admitted, but only to defend itself, that Law no 4320 has never covered divorced women, contrary to its previous stance (2020, para. 5). Thus, the government's approach in this context went beyond reluctance to being a deliberate action, whereby it described the circumstances differently from reality in its reports to the Committees until 2020.

Women who get divorced are the highest risk group, being subjected to the most severe violence in Turkey (Hacettepe University 2014, 38 and 40). It is vital to highlight here the link between divorce, domestic violence and political discourse. The government's discourse is family-oriented, glorifying the Islamic lifestyle, patriarchal gender relations and regressive gender norms, thus focusing on protecting the family and preventing divorces at all costs. The government's discourse is also one of the main pillars of the religio-conservative gender climate. It opposes

the understanding women as individuals and draws away from the European human rights regime towards establishing an understanding built on Islamic precepts and concepts like *fitrat*, complementarity, and so-called "gender justice".[2] The government's discourse, accordingly restricts women and women's rights to within the "family", surrounding women with gendered Islamic precepts, patriarchal traditions and customs, which, in return, reinforce the misogynistic social environment (Gülel 2020). This is so much so that, in 2009, the Ministry of Justice announced that femicides had increased 1400% since 2002 (when the AKP came to power) (Grand National Assembly of Turkey 2010). By 2020, one out of every five femicides happened because women wanted to end their marriages/relationships with the perpetrators (Kepenek 2021b), with the "family" continuing to be glorified by the government's discourse and protected under Law 6284.

Law 6284 is designed to protect the family and combat VAW, being the direct result of the ratification of the IC in 2012. However, despite being more comprehensive than its predecessor, this law prioritises family life over women's rights and reflects the government's family-oriented discourse on the combat against VAW. As Law 6284 is shaped and applied in ways to protect the family in line with the government's religio-conservative gender climate, the numbers of femicides have escalated even more since 2009 (see Chart 1). The ways in which this law is implemented are essentially not in line with positive obligations, but rather, show how it is used to produce impunity for perpetrators by the national authorities, which is discussed in the following section.

4.3 Efficiency of the Training of Public Servants

The previous subsections have shown that the problems with the law originate from the lack of political will of Erdoğan and the AKP to amend laws and regulations from a gender equality perspective. This subsection examines the government's actions in providing training to the public servants who work in the religio-conservative gender climate. Despite the government rejecting gender equality and the fundamental link between gender equality and eliminating VAW, it has been assuring the CEDAW Committee for years that it provides training and awareness-raising activities on VAW for various audiences (CEDAW/C/TUR/6 2008; CEDAW/C/TUR/Q/6/Add.1 2010; CEDAW/C/TUR/Q/7/Add.1 2016; Committee of Ministers 2011; CEDAW/C/TUR/7 2014; Committee of Ministers 2015; Committee of Ministers, DH-DD(2017)16 2017). Yet, there is not sufficient public information on the criteria used for

2 The concept of "gender justice" rejects equality and focuses on equity as the Vatican did at the Beijing Conference in 1995 (İlkkaracan 2015).

training, no rules ensuring their continuity, no data showing whether the trained personnel work with women subjected to violence as well as no monitoring procedure or guidelines covering implementation (Human Rights Joint Platform [IHOP] 2015; Istanbul Convention Monitoring Platform on Turkey 2017). However, what is known is that a religio-conservative gender climate has been reinforced, the concept of gender equality dismissed, and gender roles and biases having been made part of political discourse over the last circa 20 years. In the absence of sufficient information on training in the religio-conservative gender climate, it is not far-fetched to say that training does not focus on gender equality, but rather, on the so-called gender justice concept and protecting family in collaboration with GONGOs.[3] NGO reports stress the superficial approaches, disrespectful treatment and discrimination towards women at state institutions to illustrate their reservations on the effectiveness of training (Human Rights Joint Platform [IHOP] 2015).

4.4 Effective Investigation & the Role of Public Officials

Whilst lengthy procedures are a common problem across many jurisdictions, in VAW cases, they can interfere with women's right to life, right to physical and mental integrity as well as their right to live free from torture, fear of ill-treatment and attacks on physical integrity. It is very difficult for women even to be taken seriously at state institutions and initiate proceedings against perpetrators, because public officials often do not record women's complaints, discourage them from doing so or they blame the women themselves (Sakallı et al. 2017). This, of course, contradicts the duty to provide women with equal protection under the law and equal citizenship. In *M.G v. Turkey*, there was no proof of documentation of the victim's initial complaint to the public officials (M.G. v. Turkey 2016, para. 87). When M.G. finally lodged a complaint against her husband, the criminal proceeding was not concluded for long time and she was forced to hide and live in fear for years (M.G. v. Turkey 2016, paras. 66, 68 and 98). By 2020, M.G.'s ex-husband had still not been detained (Committee of Ministers 2020, pp. 3–4).

Regarding *M.G. v. Turkey*, the ECtHR criticised the public officials' lack of due diligence, their passive attitude and questioned the good faith in the investigations, which appeared to endorse the climate conducive to VAW (M.G. v. Turkey 2016,

3 "GONGOs" is the abbreviation used for non-governmental organisations established by ruling regimes. They are loyal to the regime and promote its agenda at the local level. Compared to NGOs, GONGOs receive immense support and funding so they can reach a wider audience via nationwide campaigns, conferences, etc.

paras. 92, 97, 116). Whilst the ECtHR did not acknowledge the reluctance of the officials as an administrative practice in VAW cases, it did rule again that Turkey had not met its positive obligations (M.G. v. Turkey 2016, paras. 80, 82, 85 and 107). In *G.U. v. Turkey*, the trial of rape and sexual assault of a minor by stepfather, the ECtHR heavily criticised the authorities' approach in the investigation, because the judges who had decided that the testimonies of the applicant and her mother were not sincere or credible, did not attend the only trial where the women's testimonies were heard. The absence of effective investigation, considerable delays and particularly, the adopted approach of the Assize Court led to the ECtHR concluding that the investigation had not met the requirements inherent in positive obligation concerning the enactment of the Penal Code and its effective application (G.U. v. Turkey 2016, paras. 71–82).

The adopted approaches in *M.G v Turkey* and *G.U. v Turkey* are not unusual practices. Dysfunctional state institutions – the institutions that are supposed to prevent, monitor, and respond – are the most significant challenge to eliminating VAW and gender discrimination (Bailliet 2012, 43–44). The engrained biases of the judiciary and of law enforcement in interpretation and enforcement of the law validate the religio-conservative gender climate along with the misogynistic social environment. As a result, the majority of victims of violence do not go to state institutions (Hacettepe University 2015) and most women who file a complaint cite negative experiences at police stations, prosecution offices, family courts, bars and legal assistance offices as well as with civilian authorities (Sakallı et al. 2017).

Many other cases before the ECtHR illustrate further the role of public officials in creating a climate conducive to violence. In *Halime Kılıç v. Turkey*, the applicant lodged a complaint against the prosecution, claiming breach of duties and asked for the identification and prosecution of the officials who did not investigate effectively, despite the many complaints of the victim, thereby contributing to her death via their negligence (Halime Kılıç v. Turkey 2016, para. 51). The public prosecutor discontinued the proceedings and the applicant challenged this decision too, but this time the assize court rejected her objection (Halime Kılıç v. Turkey 2016, paras. 53–56). In *Civek v. Turkey*, the ECtHR held that the authorities did not take appropriate practical action (Civek v. Turkey 2016), and in *Durmaz v. Turkey*, it recognised the prosecutor's serious failures as part of the pattern of judicial passivity in VAW cases (2014, paras. 64–65). The approaches of these officials are yet further examples showing that women do not have access to equal protection of the law and equal citizenship. In particular, in *G.U. v. Turkey*, the ECtHR strictly underlined that states must never appear as if national authorities wish for impunity for violations (G.U. v. Turkey 2016, para. 81). All things considered, it is clear that it is essential in combatting VAW to hold public officials liable for their reluctance, discriminatory conduct and ineffective investigations, such that states

fulfil positive obligations. However, despite the government being asked to hold the officials in VAW cases to account, there is no evidence of there being the will towards taking such measures (CEDAW/C/TUR/CO/7 2016; MK/follow-up/Turkey/71 2018).

For the reasons above and the others analysed in the previous subsections, one part of the problem of failing positive obligations derives from the government's lack of political will and deliberate contra-actions that reinforce the religio-conservative climate. The other rests in the gender-biased interpretation and enforcement of the law in such a climate. The following section focuses on the consequences of what has been discussed in this section: the impunity that perpetrators obtain in VAW cases and how this comes about.

5 Building Impunity for Perpetrators

Impunity for perpetrators is not a direct outcome of one practice. Instead, it emerges through the consolidation of all the issues discussed in the previous section: lack of political will, the government's reluctance and deliberate actions, insufficient domestic law (e.g. inadequate preventive operational measures) as well as discriminatory interpretation and enforcement of the law in the religio-conservative gender climate. Altogether, they create a misogynistic social environment where women's rights are violated or disregarded, and the equal protection of the law is negated. The following subsections elaborate further upon how impunity takes place. The discussions on law enforcement and the legal framework take up the doctrinal question of whether the positive obligations are fulfilled through consideration of the extraordinary personal stories of women and the authorities' conduct towards them. By doing so, the article shows the necessity for an interdisciplinary study to grasp the magnitude of the VAW problem in Turkey.

5.1 Role of Law Enforcement

In Turkey, 89 per cent of women subjected to violence do not apply to any state institution, and among the few who do, the police are their first choice (Hacettepe University 2015, 162). The law enforcement forces' treatment of women plays a critical role in such high numbers. The same report shows that police did not take a statement from 81 per cent of the women who applied to them, directed 40 per cent to various other institutions, and reconciled 29 per cent with their husbands (Hacettepe University 2015, 167). For instance, M.K. (who was forced to marry at the

age of 13 and constantly subjected to domestic violence) was murdered by her husband when she was just 19 years old. On the day of the murder, police arrived at the household but left without any intervention. Later that day, her husband stabbed M.K. 47 times (Turkey Shadow Follow-up Report n.d.). In another example, E.Y. applied to the police for protection, because her husband was threatening her, but she was not afforded protection. Her husband committed arson when E.Y. was at home, and the police took no action; he attacked E.Y. at the police station and the police did nothing. They sent E.Y. back home every time she applied and on 12 November 2012, E.Y. was murdered (Human Rights Joint Platform [IHOP] 2015, 22). Recently, A.T.A. and S.Ş. were murdered, despite the fact that the former filed a complaint 23 times (Uludağ 2019), whilst the latter did so 60 times (Evrensel 2020). If the examples discussed here, as well as many other femicide cases, were to be brought before the ECtHR, the Court would most probably question whether national authorities have discharged their positive obligations and their obligation of diligence in investigations.

Moreover, police pressure women not to make a complaint; force them to tell the incident repeatedly; keep them waiting at stations for hours; say that there is no adequate legal remedy as the legal mechanisms are overwhelming; and claim that shelters are not appropriate for "good women" (Istanbul Convention Monitoring Platform on Turkey 2017, 53). Even in cases of death threats or severe injuries, police use the advantage of their posts to help offenders. Their attitudes result from the belief that VAW is a "family matter" that should be dealt in the family, and that it is not as crucial as other violent acts, which aligns with the Government's pro-family discourse and the religio-conservative gender climate.[4] For example, when a woman left her house to go to a shelter, her husband's police friends used security and surveillance cameras to find out where she was (Sakallı et al. 2017). These examples illustrate the biased view of the law enforcement that does not take VAW seriously, thus playing an active role in creating impunity for perpetrators.

5.2 Protective & Preventive Measures

Within the scope of Law 6284, the national authorities can take protective and preventive measures to protect women. However, the measures are not efficiently carried

4 Bekir Bozdağ's, the then Ministry of Justice's viewpoint to VAW shows explicitly how the government's pro-family discourse has a link to disregarding positive obligations, and impact on combatting VAW: "We should seriously reconsider how appropriate it is for the state to come between husband and wife with all its police and soldiers and judges and psychologists and social workers and experts […]. We need to address this seriously. We need to do it irrespective of the criticisms of women's organisations" (CNN Turk 2016).

out (Bianet 2017) and frequently lead to impunity for perpetrators, because of *how* they are (not) applied. Whilst there is no information on how many women applied and were rejected, despite a real risk of assault, the Government's latest report confirms an increase in the numbers of "protective and preventive measures"[5] taken to protect women (CEDAW/C/TUR/7 2014; CEDAW/C/TUR/Q/7/Add.1 2016; Committee of Ministers – DH-DD(2018)997 2018a; Committee of Ministers, Decisions – 1331st Meeting 2018c). When Law 6284 was first adopted, almost all protection measures were given for six months (maximum period), but the recent trend is approximately one or two months and sometimes as short as 10 days (Human Rights Joint Platform [IHOP] 2015; Istanbul Convention Monitoring Platform on Turkey 2017).

Moreover, judges ask for new evidence for applications instead of extending the period (Istanbul Convention Monitoring Platform on Turkey 2017). When measures are taken, they often take excessive time to notify perpetrators, which effectively shortens the period of protection orders and forces women to apply for new ones repeatedly. For instance, in *Halime Kılıç v. Turkey*, informing the perpetrator took 19 days for the first order and eight weeks for the second (Halime Kılıç v. Turkey 2016, para. 96). Furthermore, following the announcement of the withdrawal from the IC, police stations and family courts have already started rejecting women's requests for protective measures, even though Law 6284 is still in force (Bursalı 2021; Kronos News 2021b). Such deliberate actions in the implementation of this law depict the national authorities' contra-actions that neglect their positive obligations and due diligence in protecting women's rights.

In addition, sanctions are usually not enforced against perpetrators in the event of non-compliance (Committee of Ministers, Decisions – 1280th Meeting 2017b). Measures are hardly implemented or monitored; violence continues even after women report it, and it frequently ends in femicide (CEDAW/C/TUR/CO/7 2016; GREVIO 2018, 22). In *Civek v. Turkey*, the victim was left without adequate protection, even though her husband could lawfully have been arrested for failing to comply with court orders (Civek v. Turkey 2016, paras. 61–65). In *Halime Kılıç v. Turkey*, the time between *Fatma Babatlı*'s first complaint and the day that she was murdered was three and a half months – during which she complained five times to the authorities (Halime Kılıç v. Turkey 2016, para. 84). When *Babatlı* was murdered, the first protection order for six months was still in force, but the court did not effectively penalise the perpetrator for violating the orders; instead, it ruled for two more ineffective orders and crafted impunity for the perpetrator (Halime Kılıç v. Turkey 2016, para. 99). In A.T.A's case, who filed a complaint 23 times,

5 There are various protective and preventive measures that can be taken, such as restraining orders, banning perpetrators from reaching out women on the phone and social media, changing women's ID credentials, changing their workplaces, moving women to an unknown place, etc.

several protection orders were issued; however, her ex-husband had never been put in coercive imprisonment when he violated the orders or faced any other deterrent sanction (Uludağ 2019).

The examples from local jurisdictions and the ECtHR's judgments depict how these measures are (or not) carried out even when there is a real risk of assault and how they leave victims alone with no proper protection. For this reason, these cases and many others counteract the ECtHR's warning to Turkey that perpetrators' rights cannot supersede victims' human rights to life and physical and mental integrity (Opuz v. Turkey 2009, para. 147). What is more, the ways the measures are (not) taken deny women equal protection of the law and equal citizenship. Hence, they generate impunity: they do not discourage men from committing crimes against women, as they know there will be no adequate retribution.

5.3 Abatements & Acquittals

A requirement of promptness and due diligence is implicit in the positive obligations deriving from article 2 ECHR (right to life) (Halime Kılıç v. Turkey 2016). The main objective of investigating VAW is to guarantee the effective implementation of domestic law to protect women's rights to life and to live free from violence. Along with investigating and punishing violent conduct appropriately, exercising due diligence also encompasses systematically reviewing and considering the risk of re-victimisation by applying adequate measures to protect victims from any further violence (GREVIO 2018, 112).

However, the adopted approaches of the national authorities concerning mitigating provisions, such as unjustified provocations and good conduct of perpetrators, and deferment of verdict announcements, have been playing significant roles in creating impunity for perpetrators. To illustrate, the perpetrator in *Opuz v Turkey* was released twice pending trials for the events preceding the murder. Additionally, during the murder trial in 2008, the court ordered again for his release based on unjustified provocations, good conduct and the time spent in pre-trial detention (Opuz v. Turkey 2009, paras. 17, 31 and 92). In its recent reports, the government claimed that the criminal courts do not reduce or suspend sentences in VAW cases anymore and provided nine sample judgments to the Committee (Committee of Ministers, DH-DD(2018) 997 2018a). However, when examined, in five of the judgments, judges had ruled on abatement, because of the perpetrators' good conduct or the potential negative effect of the judgment on his future (Committee of Ministers, 1331st Meeting 2018b).

The judiciary's adopted approaches take place in the religio-conservative gender climate, and the Government's discourse and practices reinforce this climate, resulting in gender-biased justifications for abatements and acquittals that further strengthen the status quo. Judges apply mitigating provisions when

perpetrators express remorse or sometimes even after they have threatened victims, their lawyers and/or family members during proceedings (Bianet 2017). Judgments that apply unjustified provocation and good conduct usually cite women's sexual life or accept perpetrators' statements like, "my wife wasn't taking care of me", "she humiliated my masculinity", "I loved her, I'm sorry" and so on (Sade 2019; DIHA 2015). In 2015, a man who murdered his wife got abatement, because his wife slapped him and a second reduction for unjustified provocation, because he thought that the victim had cheated on him (Bianet 2017).

The trend of impunity in VAW trials illustrates that the religio-conservative gender climate has permeated the judiciary and is part of its sense of justice. These discursive examples and the judiciary's conduct to accept them as mitigating causes, therefore, cannot be considered as being separate from the government's discourse that continuously reinforces this climate. The examples below of the government's discourse further illustrate this correlation: women and men are not equal (The Guardian 2014), the secret to a successful marriage is the obedience of women (Bia News Desk 2016), women should not laugh in public (Huffington Post 2014), women without children are deficient (The Guardian 2016), asking women who seek employment "isn't your housework enough?" (Yadav 2021, 262), and so on.

What is more, the leniency of judges does not cut both ways. The ways the judiciary applies unjustified provocation and good conduct favour men and confirm that women are not provided with the same abatement, even when they act in self-defence (Istanbul Convention Monitoring Platform on Turkey 2017). For example, *Nevin Yıldırım*, a woman who decapitated the man who sexually assaulted, raped, impregnated, blackmailed and slandered her, had faced aggravated life imprisonment for "planned wilful murder with atrocious feelings" (Bia News Desk 2019). The court ruled for life imprisonment and decreed that there was no grounds for unjustified provocation or legitimate self-defence. In 2019, the Court of Appeals upheld this judgment (BBC News [Turkish] 2019). *Yıldırım*'s statement about rape and sexual assault has never been investigated, but she gave birth, against her will, to a baby whose DNA test proved that the father was the rapist (Kepenek 2021a).

Hülya Halaçkay had suffered from physical, sexual, psychological and economic violence throughout her marriage. When she filed complaints and requested protection order, her husband violated the order and continued to live in the same household. She informed the authorities, but her husband did not face any sentence for non-compliance. On the evening of the final assault, he dragged her onto broken pieces of glass. While he was strangling her, she reached for a knife and waved it to defend herself (Bia News Desk 2020a, 2020b). *Halaçkay*, an illiterate woman, who killed her husband who systematically assaulted her, was sentenced to 15 years in prison (Bia News Desk 2020b; Kepenek 2020). It is up for debate

whether the national authorities' reluctance to apply effective sanctions played a role in the events leading to the murder of the perpetrator.

5.4 Lack of Data

The government stopped providing statistics following the announcement of a 1400% increase in femicides in 2009. The chart below shows the numbers of femicides that were recorded by three different organisations between 2009 and 2020. These organisations follow the mass media to keep records, but such an approach cannot reflect the actual figures, as clearly, they only include femicides that are publicised. This problem itself depicts the government's reluctance to spare resources to gather and disclose detailed statistics on VAW, its investigations and the sanctions imposed. Furthermore, the increasing numbers of alleged suicides, suspicious deaths and unsolved murders of women also imply that the national authorities still do not engage with their positive obligation of effective investigation and diligence to solve these crimes.[6]

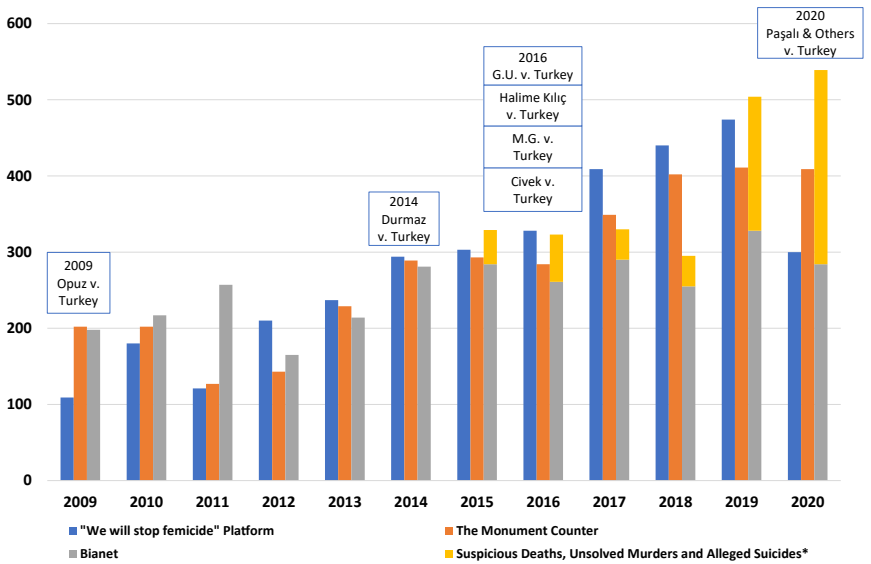

Chart 1: Numbers of Femicides & Suspicious Death of Women.

6 For example, there have been alleged suicide cases that were only reopened by the authorities due to pressure from women's NGOs and social media campaigns, e.g. #ŞuleÇetİçinAdalet.

In line with the ECtHR's arguments on national tolerance, the authorities' wilful denial, and discriminatory judicial passivity, the chart above provides evidence that the numbers of femicides have increased even further since *Opuz v. Turkey*. The ever-increasing numbers of femicides and suspicious deaths/suicides of women also constitute the epitome of a state failing its positive obligations and diligence in investigating VAW cases. It is, therefore, not possible to ignore the potential contribution of the national authorities' reluctance and deliberate actions as well as the government's religio-conservative gender climate to the escalating numbers.

Despite the government claiming that measures are taken immediately when a woman is considered high risk even if she does not demand them (GREVIO 2017, 52), there is insufficient data to support this claim and the real stories of what is happening on the ground demonstrate the opposite. This study has further uncovered that even when the national authorities have prior knowledge of a woman's exposure to violence, this rarely leads to adequate protection of women's rights to life, to live free from torture, and to a private life, including the right to physical and psychological integrity.

Furthermore, in 2014, the Ministry of Justice stated that the government did not keep statistics on investigation, prosecution and sentencing in VAW cases (Bianet 2017). Hence, due diligence, swiftness and deterrence in investigating and sanctioning VAW cannot be accurately examined due to lack of data on such matters as criminal charges, indictments and convictions. However, when the actual stories on the ground and the lack of data are considered together, it is not far-fetched to conclude that many VAW cases can be attributed to the national authorities' failure to discharge their positive obligations to protect women as equal citizens. Correspondingly, due to the authorities' tolerance of VAW, the criminal law system itself and its implementation still lack sufficient deterrent and protective effects (Committee of Ministers, 1331st Meeting 2018b).

6 Conclusion

States have a positive obligation to protect the right to life, and the ECtHR holds the national authorities responsible for protecting individuals whose lives are at risk owing to the criminal acts of private individuals (Opuz v. Turkey 2009). States must also take measures that effectively deter any further breaches of women's physical and psychological integrity, in particular, preventing the occurrence of successive episodes of violence in women's lives (Munteanu v. the Republic of Moldova 2020, paras. 61–64). Hence, they should be held accountable, if they fail to act with due diligence to prevent, control, investigate, correct and/or punish violent conduct of

private individuals. In the case of Turkey, in this study, evidence has been provided that shows how the Government has failed to take necessary steps to fulfil its positive obligations in combatting VAW. The government has been reluctant to improve domestic law from a gender equality perspective and to put in place effective criminal-law provisions to combat VAW and guarantee their implementation. Also, by crafting a religio-conservative gender climate, the Government has strengthened national tolerance of VAW, in particular, in terms of the interpretation and enforcement of the law.

The analysis of the post-Opuz period revealed that the national authorities accommodate, tolerate and excuse VAW through discourse, policies, legislation and law enforcement processes that consider women as part of the family and do not see it as being severe as other crimes. They, therefore, systemically violate their positive obligations in combatting VAW regarding the right to life, prohibition of torture or inhuman treatment, prohibition of discrimination, right to an effective investigation and remedy, and the right to respect one's private life. In fact, they appear rarely to have implemented, monitored and imposed non-compliance sanctions. Notably, they do not record and maintain data on the investigation, prosecution and sentencing in VAW cases. Consequently, given the national authorities' wilful denial of the magnitude of VAW, and their tendency to provide impunity to perpetrators by interpreting domestic law in way that protects them, it would seem reasonable to conclude that those authorities have failed to meet their positive obligations in the majority of VAW cases across the country.

The study has elicited that the determination of the government to combat VAW is highly questionable, and even more so owing to its unconstitutional withdrawal from the IC. Moreover, even though the IC was in force for almost a decade, the government did not promote its values but rather, the religio-conservative gender climate. As a result, the majority of the cases in this study and the national authorities' actions towards them took place even though the IC was in force. This fact demonstrates the importance of the religio-conservative climate and how effectively it has permeated the interpretation and enforcement of the law. The government's approach to VAW has been reproducing the religio-conservative gender climate, while denying women equal citizenship and equal protection under the law. As a result, a misogynistic social environment has ensued, where women's civic space has continuously shrunk, and their fundamental rights, like the right to life, the right to live free from torture, and right to physical and psychological integrity are easily disregarded or violated. In reality, the ECtHR's finding in *Opuz v Turkey* of the presence of a climate that is conducive to VAW has been intensifying since 2009.

Consequently, the national authorities' reluctance to act, tolerance of VAW, and impunity of perpetrators has reached a level that the Government can be

considered complicit in the ever-increasing numbers of assaults and femicides. In such circumstances, it seems highly likely that there will be more cases before the ECtHR regarding VAW in Turkey. The ECtHR will unquestionably continue investigating, if the Government diligently goes on discharging its positive obligations. However, it is doubtful that the Committee would initiate infringement proceedings against Turkey on these grounds. Nevertheless, given the erosion of the rule of law, democracy and human rights (Amnesty International 2021; Council of Europe Parliamentary Assembly 2017, 2020), imprisonment of the dissenting voices (including the former co-leader of the second opposition party) and violating the ECtHR's rulings on their immediate releases (Kavala v. Turkey 2019; Selahattin Demirtaş v. Turkey No. 2 [GC] 2020), infringement proceedings against Turkey might eventually be initiated.

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