the coup d'etats of 1960 and 1980 re-confirmed its place in the system. Now, article 136 of the 1982 constitution provides that the Directorate is directly responsible to the Prime Minister and has no direct contact with daily politics (Shankland 1999: 29).

Soon after the establishment of the Republic, the Directorate of Religious Affairs was established, and all Islamic activities were tried to be placed under the auspices of this organ of the state, with the Prime Minister of Turkey in 'firm control' (Starr 1992: 15). As a result, religious institutions are linked to the state bureaucracy, without any autonomy. As Shankland (1999: 9) portrays it, the Republican elite and especially the army regard their 'ultimate task to preserve the Republic and its borders. This means that, if necessary, it is fully prepared to use orthodox Islam as a bulwark against communism or as a means of achieving harmony in the community'. As was earlier observed 'it is plain that one cannot categorically assert either that the government is favorable or that it is hostile to Islam. The truth of the matter seems to be that it is distinctly opportunist in its attitude' (Allan 1968: 175; see also Kadıoğlu 1998: 11).

Establishment of the Directorate of Religious Affairs with a substantial budget and over 80 thousand employees is a result of this understanding of 'Turkish type of laicite'. It has an extensive organization. The Directorate controls all 86 thousand mosques and employs the *imams*, *muftis* and *muezzins* who 'are the salaried employees of the state who have to follow instructions which are derived from state policy' (Mardin 1983: 149). The *mufti* acts as a local link between the believer and the state; he also administers the *imams* attached to every mosque and distributes sermons and other materials sent to them from above. The *imams* are not just part of an administrative structure; they are also subject ideologically to the decisions made by their superiors in the announcements that they make and the sermons that they preach. This tight supervisory structure leaves '*imams* with little leeway to create their own interpretation of religion' (Shankland 1999: 29). The teachers, textbooks, and curricula of all religious schooling are under the direct supervision of the Director-General of Religious Education, a separate office of the Ministry of Education.

The Republican elite have 'claimed that true expression of religion could be found through the use of Turkish prayer, a language that all could understand, through translating the Koran into Turkish, rather than Arabic. They also drew historical parallels, asserting that their revolution mirrors the Protestant battles against Papism in its dislike of intermediaries and direct access to the faith for all. Thus, it was cleansed religion, without mysticism, without saints, and without independent religious institutions that was aimed at. It was also one closely controlled' (Shankland 1999: 23). As Shankland (1999: 31) concludes, 'the Directorate's role has primarily been to oversee, ratify and steer the massive expansion of Islamic activity within the population as a whole rather than actually provide it'.

The Turkish version of secularism is unique, although the Turkish State defined its attitude toward religion as 'laicism', an intellectual inheritance from the French Third Republic (Başgil 1962; 1991; Yazıcıoğlu 1993: 180; Toprak 1995: 91); there are certainly some elements that make the Turkish application unique. One of the

most conspicuous of these elements is that the Turkish state has assumed a role of a 'secular *mujtahid*' and has been interpreting Islam in the lines of its ideological vision. I will term the outcome of this secular official *ijtihad* '*Lozan Islamı* (Lausannian Islam)' which has been the state Islam or official version of Islam of Turkey. In the state version of Islam, there is no conflict between the religion and Turkish modernity that covers the modern nation-state, secularism, democracy and no public role for religion. To subordinate religion to the political establishment, the state has long tried to create its own version of Islam. The reason d'etre of the Directorate of Religious Affairs has been to create a tailor-made national modern Turkish-Islam, definitely suppressing the transnational links and role, cut off from all international and transnational ties, specific and limited to the nation-state's official borders that were drawn with the Lausanne Treaty of 1924 between Turkey and the European powers. The main task of the Directorate has been to control Islam in accordance with the needs of the secular nation-state to the effect of creating a secular, modern, official, 'Lausannian-Islam'.

Although, it has been claimed that the state in Turkey has tried to make religion a private belief not affecting the public sphere with its adamant secularization ideology, this is not entirely true. The state has tried to made use of religion as a 'helping hand' (King 1995c: 105). This idea of religion has formulated religion in terms of its responsibility for the moral health of the nation (King 1995c: 106). Theoretical foundations of this mentality could be traced back to Durkheim who influenced Atatürk's 'intellectual father' Ziya Gökalp who also translated Durkheim's works into Turkish.

Durkheim's main thesis was that religion plays a significant role in uniting a society together. In his view, any coherent society must be at base a religious collectivity. He conceived the integral nature of religion as the ceremonial and expressive glue that binds any social organization together, or, more boldly put, religion as society's worship of itself, was Durkheim's essential insight. He pointed out that the collective act of worship integrates social institutions. It does this in a special way with 'collective effervescence', which is a dynamic social force produced when people get together. It is the life of the group over and above the lives of the individuals who make up the group.

Gökalp had systematically advocated domination of Turkish culture with forms of western civilization rather than importing institutions as they had developed in the west. His sociological orientation, taking a nation as a political and cultural unity, helped him in his advocacy of Turkism. Atatürk's movement and Gökalp's ideas had a close interaction in that Kemalism was affected by Ziya Gökalp in the formulation of nationalism as a principle, and Gökalp was affected by Kemalism which rejected any ambition beyond the borders of the new Turkey (Kongar 1986).

So, in this Durkheimian mentality, an approved version of Islam, *Lozan Islamı*, could and should play a public role. That is why when a financial crisis erupted in 2001, the Directorate prepared a Friday sermon to discourage the faithful from using US Dollars and this sermon was delivered – as it is obligatory – by *imams* in 86 thousand or so mosques of Turkey.

Prior to the establishment of the Turkish Republic, the Ottoman State had always been focused on Islam. Islam existed as an all-embracing life system,

providing Muslim citizens with a framework of meaning to interpret their lives. However, as seen above, after the establishment of the Republic, Islam was completely disregarded. It was relegated to a matter of conscience, which was left solely to the private sphere. Citizens could be Muslims in their private lives, yet they could not claim any room for Islam in the public arena. The Civil Code is applied in all parts of Turkey and all Turkish citizens and residents are subject to it.

The Republic focused most of its political energies on creating a truly unitary nation-state in place of the pluralistic Ottoman State. The *millet* system was no longer considered as an appropriate system in the eyes of the Republican élite. Personal laws were unified under the title of a modern civil code. Indeed, uniformity attempts in the family law of Muslims had started in Ottoman times. The Ottoman State intervened in marriages and divorces of the people and employed local governments in the process. These units were responsible for the registration of the family law affairs. With this development, the secularization of family law can be said to have started in Ottoman times (Alkan 1990: 89). However, radical changes were introduced after the construction of the new state. The élite hoped that, through the secular legal system, it would gain complete monopoly of legitimate power and not have to share this with religion or custom. Thus, as a dominant element of the state, the élite for whom law-making was the primary tool of social change rather than the product of large-scale demands 'attempted to present one consistent image of justice and one unified legal system. Islam fell under the control of the modern state through laicism, which intended that no Islamic competition could again challenge the secular state's monopoly over law' (Starr 1992: 170). One system of nation-state law framed by the Constitution of the state, entirely secular, and one system of state courts administered by the Ministry of Justice, also secular, constitutes the official legal system in the country. The modern Turkish Constitution takes it for granted that Islam in today's Turkey does not offer a competing legal sensibility to secular law (Starr 1992: xix). Religion as a source of law has been abolished; the Western idiom of state law has triumphed.

Even though Islam has been officially removed from public life, which was firmly based on the theory and practice of the Ottoman State, it is still deeply rooted in the minds and hearts of the people. Although the state has kept an eye on the former religious leaders, their successors and the religious functionaries, they have regained something of their influence in public life by attracting masses into their religious atmosphere (Rosenthal 1965: 61). It is reiterated frequently that 'revolutionary efforts through law have only resulted in partial changes' (Abadan-Unat 1986: 125). The Kemalist ideology, which had national, secular and modern elements, could not fill the gap which Islam was supposed to have forcefully vacated (Mardin 1982: 180-181; Saeed 1994: 164). The state, through its secular policies and programs of westernization, threatened the value system of the Muslim people in the country without providing, at the same time, a satisfactory and all-encompassing ideological framework which could have mass appeal and was capable of replacing Islam (Saeed 1994: 165). Bifurcation between the élite and the masses made it difficult for the Kemalists to carry out their reforms from above (Saeed 1994: 172). Mardin (1982: 181) underlines this: 'neither Kemalism

nor its associated doctrines could replace Islam in the lives of the peasantry, and the provincial and lower-class populations'. Local Islam survived despite all attempts of the state (Öktem 1995: 49). Islam is pervasive in a modern sense in Turkish society, and this exemplifies the failure of the Republican elite's attempts at encapsulating, restricting and imprisoning religion to the individual's consciousness and private realm 'Atatürk wanted to make religion a private concern, but unanticipated social consequences soon caught up with him. As the boundaries of the private have become enlarged in Turkey an unforeseen development has occurred. As private every-day life has increasingly been given new richness and variety, religion has become a central focus of life and acquired a new power' (Mardin 1989: 229).

As a recent study on Turkey reconfirmed '(t)he vibrancy of Islam is remarkable in almost all areas of Turkish life… This Islam is neither a replacement for, nor an alternative to, the modern world: it is an integral part of life' (Shankland 1999: 15, see for detailed data Shankland 1999: 54-61). Shankland (1999: 17) further states that even though the Kemalist system has survived, 'the situation today differs in this, and other ways, from that future envisaged by many of the Republic's founders' (Shankland 1999: 17). It was the introduction of Democracy in the late 1940s that provided the key link between rulers and ruled. As elections campaigning began, despite the repeated emphasis on ensuring that politics and religion were henceforth to be separate, politicians were hardly able to resist the offer to support Islamic mores to attract votes (Shankland 1999: 35).

In the legal field, too, Islam continues to affect people's lives. For instance, as early as in 1955 a group of Turkish and foreign scholars examined the question whether legislation has succeeded in displacing Turco-Islamic traditions with reference to the adoption of Swiss family law and answered the enquiry with a qualified 'no' (Magnarella 1974: 108). Communities, especially in rural areas, regard official law as 'government' law and it has little effect on the life of the village mechanism (Hooker 1975: 366-371). With the passage of time, the expectation that people would learn and follow only the official *lex loci* by entirely abandoning the Muslim law turned out to be untrue. In the mid-1990s, there were still conflicts between the official legal system and the local law (Ansay 1996: 110).

The Civil Code differs from the provisions of the Muslim law (Aydın 1995: 172). Although, it was claimed that the potentialities and possibilities inherent in and derivable from the Muslim canonical law had been taken into consideration before enforcing the new code, the enactment of the Civil Code aimed to achieve a complete separation between religion and law. As Berkes (1978: 522) points out, the Civil Code was perceived by the élite as an instrument of achieving what ought to be rather than regulating what in reality exists.

There exist a number of differences between the secular civil law of Turkey and the Muslim local law. These differences include the secularization of the marriage ceremony. A legal marriage has to be registered with the civil authorities and must be concluded in their presence. Religious ceremony was made optional and carried no legal weight. A religious marriage without official registration was made a criminal offence. The adoption of the principle of monogamy meant that polygamy

was under no circumstances allowed and became a criminal offence. The secularization of divorce proceedings was another key reform. The new law gave both parties an equal right to sue for divorce. *Talaq* was no longer recognized. Divorce could only be granted by an official court.

As a natural result, these differences led to confusion in the lives of the people. They have been faced with a certain dilemma between the unrecognized Muslim law and the official but secular state law. Stirling (1965: 209) had earlier observed that many provisions of the new codes were not being followed. Some segments of the society have been passively resisting abandonment of their traditional practices for the sake of the civil Code (Kruger 1991: 203). Many men and women were marrying without going through a state-recognized civil marriage ceremony and they were remarrying without a 'legal' divorce (Kruger 1991: 203-204, 206). Thus, in the eyes of the official law, some couples were living in adulterous or bigamous relationships. However, according to the local law, only the celebration of religious wedding (*nikah*) can legitimatize the marriage (Stirling 1965: 209).[3]

Muslim Turks have sought other ways to adapt their Muslim law to the modern and so-called secular milieu. Again, as in the more recent British case, they have reconstructed their Muslim laws to meet the demands of both official and unofficial laws, as the subsequent chapters further analyze.[4]

Reconstruction of the Turkish Muslim Law

People in Turkey, after the reception and transplantation of the Swiss Civil Code have had three alternative routes from which they could choose in conducting themselves that relate to the secular law: Avoidance of the official law, following the Turkish state law or following a combination of the requirements of the Muslim law and Turkish law. Evidence has shown that the Turkish populace has preferred the third choice. They have developed a new Muslim law which amalgamates the rules of Muslim law as well as those of the secular Turkish law, as in the British case.

As marriage is such a basic institution of society, it is not a coincidence that

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[3] Actually, the term '*nikah*' is used in Turkish both to refer to the official marriage ceremony and the religious one. To be more precise, Turkish people call the official ceremony '*resmi* (official) *nikah*', and the religious ceremony '*imam nikahı*'. In Islamic law, there is no institution like '*imam nikahı*', since almost every individual adult Muslim male is capable of solemnizing the marriage in the presence of two witnesses. Even the bride-groom or one of the witnesses can perform this function. There is no special formula or required status to do this job, see for example Günenç (1990b: 117). However, in Ottoman times, the state tried to register the marriages and gave this registration duty to *imams* in local units, see in detail Alkan (1990: 89); see also Cin (1974: 287); Abadan-Unat (1986: 183). As a result, Turkish people started to call religious marriage '*imam nikahı*'. In short, this term although not necessarily Islamic, is a product of Turkish culture. In this study, I use the terms '*nikah*' and '*imam nikahı*' to refer only to a religious marriage.

[4] Yet in the Turkish case, the issue is not a minority case. In contrast, it pertains to the majority. Also, in this case, the new-comer is not the immigrant group or ethnic minority, but the transplanted Western law.

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family formation would be the first target of legal penetration. The Turkish Constitution refers to the family as the basic institution of the society. It is considered that if the institution of family is healthy, then the society and the state will be healthy as well. Thus, by protecting and regulating the family, the state protects and empowers itself (Toroslu 1984: 154). To that effect, the legal system imposes upon the state certain 'duties' towards the family. As a result, it is stated in Article 41: '(t)he state shall take... measures and establish the necessary organisation to safeguard the peace and well-being of the family'.

The protection of mothers and children and family planning are especially stated as the duties of the state under the Turkish Constitution. At this point, 'for a considerable part of the population, there has been some contradiction between their traditional social practice and the law' (Ansay 1996: 110). In the case of marriage, the attitude to the Code turns to one of outright conflict between the official law and Islamic rules or, more accurately, what the people regard as rules of Islamic law (Hooker 1975: 367).[5] Thus, a number of problems have arisen between the official law and unofficial Muslim local law. Turkish Muslims have reconciled these conflicting points by employing certain strategies and methods in matters such as solemnization of the marriages, age of marriage, polygamy and divorce. As a result, only a few cases have appeared before the courts.

Solemnization of Marriage: Nikah

Under the official law, only civil marriages performed by authorized marriage officers are allowed and recognized and this is safeguarded by the constitution.[6] Article 134 of the new Civil Code states that the formalities of celebration commence with the submission of the necessary documents by the parties to the marriage office at the place where they are residing at the time. The authorities start inquiries to check whether impediments to the marriage exist. Article 143 of the new Civil Code provides that a marriage may be solemnized in accordance with any religious rites if the parties desire, but registration of marriage preceding such a solemnization is necessary. Only after the celebration of the civil marriage is a *nikah* permitted and the parties should present their marriage document to *imam* before the religious marriage.[7] If a civil ceremony in a register office is followed by a religious one, the religious ceremony does not supersede or invalidate the civil ceremony and is not registered with any authority.[8] The civil ceremony is clearly the only marriage which the official law recognizes. The men and women who perform a religious marriage ceremony without having made the legal marriage contract are considered to be punishable. Article 237 of the Criminal Code states that:

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[5] In order to emphasize that point I use the term 'local Muslim law' which covers the rules that the people consider Islamic, whether they are genuinely Islamic or not.

[6] Article 174/4 of the Turkish Constitution.

[7] Article 143 of the new Civil Code and Article 237/3 of the Criminal Code.

[8] Article 143 of the new Civil Code.

A marriage officer who knowingly solemnizes the marriage of persons who are not legally entitled to marry, parties to such a marriage. and appointed or natural guardians who consent or lead the parties to such a marriage, shall be imprisoned for three months to two years.[9]

A public officer issuing marriage certificates without abiding by legal requirements shall be punished by imprisonment for not more than three months.

Whoever performs a religious ceremony for a marriage without seeing the certificate indicating that the parties are lawfully married shall be punished by the punishment prescribed in the foregoing paragraph.[10]

Men and women who cause a religious ceremony to be performed prior to being married lawfully shall be punished by imprisonment for two to six months.[11]

Despite all the legal measurements such as this article, the authorities will not know of the incident unless a dispute arises. The majority of the perpetrators of these alleged 'crimes' remain unpunished. There is almost no punishment for *imams* who celebrate such marriages unofficially (Kruger 1991: 209). Or, as in many cases, judges would be tolerant with the convicted and would change the punishment from imprisonment to a pecuniary punishment, which shows the perpetuating impact of the legal postulates.[12]

It is a well-known reality that 'many Turkish citizens still prefer the informal or consensual marriage, or *imam nikahı*' (Abadan-Unat 1986: 172; Zevkliler 1995: 705; Kümbetoğlu 1997: 121). Sometimes they marry with *imam nikahı* without registration, which is not recognized under the Civil Code. Marriages are performed by *imams* without prior celebration (Ansay 1996: 113; Kümbetoğlu 1997: 121).

Some 70 years after the transplantation of the Civil Code, the norms which consider a child born only of non-religious (civil) wedlock a 'bastard' are quite dominant (Balaman 1985: 211; Talay 1994: 34), since 'legitimacy for the villagers still rests solely on the *nikah*' (Stirling 1965: 209).[13] In the 1990s, it is an undeniable fact that 'many unmarried couples, and the society they live in, believe that the religious ceremony provides enough evidence for the validity of their marriage' (Talay 1994: 34).[14]

An earlier study (Timur 1972: 92) found that 35.4 per cent of all marriages in

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[9] Y2HD 04. 06. 1985 E 985. 5223 K 985. 5310; Y4CD 09. 12. 1986 E 986. 9510 K 986. 9813.

[10] Turkish Criminal Code, Article 237/3. Y4CD 09. 12. 1986 E 986. 9510 K. 986. 9813; Y4CD 28. 04. 1992 E. 992. 2504 K. 992. 3125; Y4CD 14. 03. 1990 E. 990. 916 K. 990. 1435. Y4CD 09. 12. 1986 E 986. 9510 K 986. 9813; Y4CD 28. 04. 1992 E. 992. 2504 K. 992. 3125; Y4CD 14. 03. 1990 E. 990. 916 K. 990. 1435.

[11] Ansay et al (1965: 85). For some cases which appeared before the Court of Cassation, see Y4CD 06. 06. 1983 E 983. 2664 K 983. 3310; Y4CD 09. 12. 1986 E 986. 9510 K 986. 9813; Y4CD 28. 04. 1992 E. 992. 2504 K. 992. 3125. Y4CD 14. 03. 1990 E. 990. 916 K. 990. 1435; Y2HD 04. 06. 1985 E. 985. 5223 K. 985. 5310.

[12] Y2HD 06. 06. 1983 E 983. 2664 K 983. 3310; Y2HD 04. 06. 1985 E. 985. 5223 K. 985. 5310; Y 4CD 28. 04. 1992 E. 992. 2504 K. 992. 3125.

[13] Y2HD 28. 03. 1968 1366 E. 1984.

[14] A woman journalist in eastern Turkey states that everybody in the region marries by *nikah*, and official marriage is also common, see *Sabah Melodi*, 25 March 1998, p. 2.

Turkey were civil, 49.2 per cent were mixed civil-religious (concluded in the presence of civil authorities and later, an *imam*), and 15.0 per cent were only religious and hence carried no official legal weight. Whereas the percentage of civil marriages was only 54.1 in the three largest cities – Istanbul, Ankara, and Izmir – this figure dropped to 29.8 in the villages. In both urban and rural areas, approximately half of the marriages were mixed civil-religious. Finally, whereas the percentage of religious marriages unregistered by civil authorities was 5.6 in the cities, it went up to 21.3 in the villages. According to another researcher, 15.4 per cent of all marriages in Turkey are celebrated without a civil ceremony at all (Alkan 1981: 80). Balaman (1985: 211) proves that there are a number of people who were married only by religious ceremony. Moreover, according to this author, in the researched population 'no marriages take place without a religious ceremony' (Balaman 1985: 211). Data from the 1990s show that the importance of the religious marriage in the eyes of the people still continues (see table 5.1).

Table 5.1 Percentage of married population by type of marriage

	Total	%	Rural	Urban
Total	25,678,892	100. 00	100. 00	100. 00
Civil	2,455,418	9. 56	5. 11	13. 59
Religious	1,256,980	4. 89	6. 89	3. 09
Both	21,806,832	84. 92	87. 38	82. 70
None	38,525	0. 15	0. 18	0. 13
Unknown	121,137	0. 47	0. 44	0. 50

Source: Adapted from SPO (1992: 42, table 31).

It is also clear from table 5.1 that Turkish people have learnt to combine the official and unofficial marriage. Even in the villages, the ratio of performing both marriages is 87.38 per cent. On the other hand, religious only marriages still occur in substantial numbers, in opposition to the directives of the official law.

Other evidence that proves that people have learnt to combine the rules of the secular and religious laws is the decreasing time interval between the religious and secular marriages (Yıldırak 1992: 22; see table 5.2 below). Again this mirrors the British experience.

Table 5.2 Interval between religious and official marriages by age groups

Time of official marriage	Age group		
	15-29	30-44	45+
At the same time as *nikah*	73	75	62
After *nikah*	10	12	24
After the first child	8	8	5
After two or more children	2	4	2
Ones without official marriage	7	1	5
No answer	–	–	2
Total	100	100	100

Source: Adapted from Yıldırak (1992: 23, table 7).

The table shows that people have realized to a great extent that marrying religiously only has disadvantages, whilst having married secularly in addition to the religious marriage has substantial benefits, especially for the women concerned. Research conducted by Hacettepe University in 1988 and 1993 (HUNEE 1993) also confirms the above-mentioned official research:

Table 5.3 Type of marriage by region (1988)

Region	Civil only	Religious only	Both
Western Anatolia	13. 9	3.2	82.9
South Anatolia	6.8	11.4	81.5
Central Anatolia	9. 9	5.3	84.4
Northern Anatolia	6.3	8.5	85.2
Eastern Anatolia	11.3	20.8	65.7

Source: HUNEE (1993), cited in Kümbetoğlu (1997: 122).

It is worth noting that after five years, the ratio of performing both marriages has remarkably increased. In addition, the ratio of civil only marriages decreased which could be interpreted as a result of the Islamic revivalism in the country:

Table 5.4 Type of marriage by region (1993)

Region	Civil only	Religious only	Both
Western Anatolia	5.4	2.2	92.4
South Anatolia	2.0	7.6	90.0
Central Anatolia	1.9	6.4	91.7
Northern Anatolia	2.7	5.0	92.3
Eastern Anatolia	1.7	22.4	75.9

Source: HUNEE (1993), cited in Kümbetoğlu (1997: 122).

According to recent research conducted by the Directorate of Religious Affairs, 54.8 per cent of the university youth in Turkey want *nikah* in addition to official registration.[15]

People prefer *nikah*, according to Yıldırak (1992: 22), mainly for two reasons: First they need to sanctify their marriages to be happy and secondly, the formalities of official marriage seem difficult to handle. Compulsory medical inspection and a number of documents required make people hesitant about official marriage (see also Kruger 1991: 209; Abadan-Unat 1986: 172).[16] Early marriage is another reason for marriage by *nikah*. It is even argued that the difficulty of divorcing is the main reason for the popularity and widespread practice of *imam nikahı* (Fişek

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[15] See *Hürriyet*, 23 February 1998, p. 12.

[16] Compulsory medical inspection prior to marriage has been imposed by the Public Health Act of 1930, number 1593, see Fişek (1985: 293).

1985: 295).

The state's desire for uniform legal standards is opposed to the religious and cultural diversities of the people. As a matter of fact, as the empirical research shows, social reality is not responding fully to the desires of the secular law. Even the state accepts this phenomenon. In a publication of the State Institute of Statistics, it is stated that in spite of the legal prohibition:

> ...it is assumed that religious marriages (not accompanied by official marriages) often take place, especially in the Eastern and Southeast parts of Anatolia. Therefore the number of marriages appears to be lower than they actually are, since religious marriages are not included in these statistics (SIS 1997a: ix).

In another scenario which exemplifies another kind of *nikah* arrangement, people marry religiously with a *nikah* and count this as an engagement (diametrically opposite of the British Muslim practice of the solemnization of the marriage), and if they agree in all aspects during engagement, they register their marriages and become a 'real' married couple.[17] The reason for this practice can be explained by reference to the modernization of Turkey. As indicated above, most marriages are still of an arranged marriage nature in the country. Generally speaking, there are two types of arranged marriages. The first is the more strict practice, usually more widespread in rural regions with however a receding trend, and is where all arrangements of choosing the bride and groom are handled and determined by the parents with their children given no vote of disagreement. In this case, the bride and the groom often see each other very briefly if they see each other at all and always in the presence of a third party. The second, more popular method is where the parents often select an appropriate candidate for their son, as it is still norm that the man proposes, and the prospective groom then meets with the prospective bride. In this case the first meeting is usually in another room from where all the parents are sitting, in again the presence of a third person. Upon some consideration and as an initial step the couple are often engaged, if they feel comfortable in doing so, in order to be able to have more contact and legitimize this in the eyes of the community. In this case however, the prospective couple are expected and allowed to find out more about each other to ascertain the likelihood of compatibility. However, doing so intrinsically means committing sin. In order therefore to legitimize this meeting in religion and solidify its place in the community, the parents more often insist that the two be religiously married. When the couple are religiously married then they can, in theory, engage in sexual intercourse without this strictly speaking counting as fornication in religion. However, in custom the couple are married for the purposes of being engaged, can only see and meet each other now more comfortably – often with the guardian younger brother lagging behind and checking the moves of his future-brother-in-law – and are expected to use this limited freedom to get to know each other more. This way, the couple are saved from committing sin by the legitimization of the *nikah*, the bride's often unblemished record is kept clean in the eyes of the

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[17] *Kadın ve Aile*, July 1987, pp. 40-45; *Yeni Bizim Aile*, February 1994, p. 20.

community and the parents saved from the scruples of the 'what if' every time their children meet.[18]

In the course of the last decades, changes in marriage patterns and realization of the legal security of civil marriage have led to an increase in the number of civil marriages (Abadan-Unat 1982b: 17). This trend still steadily continues in the 1990s. Even in rural areas, people have started to register their marriages whilst still giving essential importance to the *nikah* (Kongar 1992: 432). According to Turkish Muslim law, Muslims will marry twice with several permutations to satisfy the competing demands of secular law and religious belief (Williams 1982: 163).

In summary, therefore, it can be concluded that there are five different patterns of solemnization of marriage in the Turkish context: Civil marriage, religious marriage, both civil and religious marriages at the same time, civil first without solemnization for a period and then the religious marriage, and finally religious first and after a while the civil marriage.

Age of Marriage

In Ottoman times, there was no minimum age prescribed for marriage; it was up to the parents to decide until the child reached puberty. Later, the Ottoman Family Laws Ordinance (OFLO) of 1917 prescribed a minimum age of 9 for women and 10 for men. Then, in the Republican period, the age of marriage was taken over from Swiss law as being 18 years for males and 17 years for females. However, it proved to be unsuitable for Turkish conditions, which are based upon different biological and geographical facts and was reduced to 17 (15 with the permission of the judge) and 15 (14 with the permission of the judge) respectively in 1938 (Lipstein 1956: 17).[19] Now, with the Article 124 of the new Civil Code of 2001, marriage age for both parties is 17.

Permission is granted as a result of one of the following: Elopement and deflowerment, pregnancy, or living together as husband and wife. For such a permission to be granted, males should have completed their 16th year of age and females their 14th. They should have physical and mental maturity and parental consent is required.[20] With the new civil Code the new limit is the completion of the 16th year of age for both parties.[21] The Court of Cassations has cancelled some decisions of judges if it did not see an exceptional point to allow marriage in the case[22]

This rule is obviously in conflict with traditional Muslim law. In the eyes of the people and Muslim law, when a girl or boy reaches puberty, he or she can marry

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[18] *Kadın ve Aile*, July 1987, pp. 40-45; *Yeni Bizim Aile*, February 1994, p. 20; Kerimoğlu (1989b: 23-26); Vefa (1990: 197-208).
[19] Act No. 3453. 1938.
[20] Act No. 3453, 1938.
[21] Article 124 of Civil Code 2001.
[22] Y2HD 28. 04. 1986, E. 4269- K. 4463.

whatever his or her age is.[23] However, the official legal system never allows this.[24] A number of cases have come before the courts whilst many have not. Especially parents in rural areas or illiterate ones, although rare, tend to marry their offspring just after puberty which may be reached well before the age of 15. In these cases, families at first employ only Muslim law and solemnize marriages according to Muslim law rules. Married only by *nikah*, the spouses' cohabitation is absolutely legitimate for the community. After reaching the age of 15, they can register their marriages with the state.

In a reported case, the judge had allowed a girl who was 11 years old to marry but the Court of Cassation had cancelled that decision.[25] In another case, a boy under the age of 15 took permission from a judge to marry but the Court of Cassation held that the judgement was void.[26] Şahinkaya (1983: 26) mentions a girl married at 12. Another woman married at the age of 13, but the parents officially increased her age and she was married in both civil and religious ceremonies (Şahinkaya 1983: 30). In another case, the court gave permission to a girl aged 11 to marry and it was not appealed. However, the Courts of Cassation overruled that decision.[27]

Statistical data shows that people in many cases do not take into account the provisions of the Civil Code. According to earlier research conducted in 1972, the rate of under-age marriages for women was almost the same in urban and rural areas, 13 per cent and 14.5 per cent respectively. As far as males were concerned, the rate in three big cities was 8.1 per cent and in rural areas 23.3 per cent. About 10 years later, another research conducted in Diyarbakir's central villages showed that 10.87 per cent of the married women were married at the age of 13 (Şahinkaya 1983: 25).

In the late 1980 and earlier 1990s, the State Planning Organization conducted some research which is considered to be representative of the whole of Turkey (SPO 1992). This comprehensive research was done with 18,210 households from urban and rural communities.[28] The sampling data were then generalized to apply to all Turkey. According to this research, the percentage of under-age marriages (under age 16 years) in Turkey is about 9 per cent (SPO 1992: 39).

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[23] According to a recent research, the parents may marry off their daughters when they are 11 and their sons when they are 14, Elmacı (1996: 105).
[24] Y2HD 07. 05. 1985, E. 4496- K. 4385.
[25] Y2HD 28. 12. 1987, E. 11288- K. 10889.
[26] Y2HD 24. 09. 1985, E. 8499- K. 7437. For other such cases see Y2HD 07. 05. 1985, E. 4496- K. 4385; Y2HD 28. 12. 1987 E. 11289- K. 10888.
[27] Y2HD 28. 12. 1987, E. 11288- K. 10889.
[28] Cities and regions included are: Istanbul, Izmir, Bursa, Sakarya, Denizli from Western Anatolia, Gaziantep, Adana, Antalya, Hatay from South Anatolia, Ankara, Eskişehir, Konya, Kütahya from Central Anatolia, Samsun, Zonguldak, Trabzon, Kastamonu from Blacksea, Malatya, Erzurum, Diyarbakır, Sivas, Van, Kars, Şanlıurfa, Adıyaman, Siirt, Ağrı from East and South East Anatolia, SPO (1992: 9).

Table 5.5 Under-age marriages (of all subsisting marriages, 1992)

Marriage age	Total	%	Rural	Urban
-12	93,878	0. 37	0. 46	0. 28
13	231,733	0. 90	1. 07	0. 75
14	562,685	2. 19	2. 33	2. 07
15	1,382,296	5. 38	6. 26	4. 59
Total	2,270,592	8. 84	10. 12	7. 69

Source: Adapted from SPO (1992: 39, table 27).

In another recent research which is also representative of Turkey, Yıldırak (1992: 21) has found that the median marriage age of women is lower than the official figure.[29] Religious/illegal marriages are regarded as one of the causes of under-age marriages (is it conclusive that religious marriages cause under-age marriages or under-age marriages cause religious marriages. Which one comes first? People want to marry under-age and use religion to do so. Or religion allows for under-age marriage and this causes people to take advantage of this), since the couples below the age limit determined by the state law, 15 for a man and 14 for a woman, cannot marry legally (Fişek 1985: 293). Secondly, it is argued that in rural areas people firstly marry with *nikah* and then after two or three years of cohabitation and matrimonial life, they feel a need to register their marriages (Yıldırak 1992: 21). Sometimes, when their child reaches school age, they have to pay a certain amount of fine and register their marriages in order to get the compulsory identity card for their child (Yıldırak 1992: 21).

Even official statistics show the reality of under-age marriages. In a recent publication of the State Institute of Statistics (SIS), it is very clear that even in 1990, some 60 years after the transplantation of the Swiss Civil Code the ratio of marriages in the age group of 12-14 was 0.54 per cent for females and 0.88 per cent for males. Moreover, it must be emphasized that these figures are not reflective of the true proportion of experience since most of the time people are not eager to report such 'illegal' marriages to civil servants.

Table 5.6 Ratio of ever-married population by age group (12-14) and census years

Gender	1965	1970	1975	1980	1985	1990
Female	0. 98	1. 89	2. 02	1. 11	0. 96	0. 54
Male	0. 47	0. 80	2. 22	1. 02	0. 94	0. 88

Source: Adapted from SIS (1996: 20, table 9).

In his research, Yıldırak (1992: 21) found that when a girl and a boy inform the

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[29] This research was conducted in 14 different cities of Turkey, which are from various geographical regions, Yıldırak (1992: 8).

imam about their consent to marry, it is sufficient for the *imam* to solemnize their marriage. Women marry despite being at the age of 10-11. In these cases, *imam* neglects or forgets to ask the bride her age (Yıldırak 1992: 22). Even in some western Anatolian villages and towns, there are many under-age brides. As reported in Daily Milliyet in 12 February 2001, in Acarlar Town of Aydın City, there were 100 girls between the ages 10-13 who were married by their parents in return for 5-6 thousand US dollars. As a precaution, Governor of the town, Kamil Köten, declared that all village weddings celebrated without prior permission from him would be illegal (Ata 2001).

Fieldwork has also shown that in some regions of Turkey, despite what the law asserts or prohibits, people marry off their daughters after the age of 11 and sons after the age of 14 (Elmacı 1994: 105). Turkish culture does not condone marriage before puberty. Thus, it is virtually non-existent. In some statistics, minimum marriage age in practice is taken as 10 years, since marriage below that age is only rarely possible in Turkey's conditions.

These data plainly show that in spite of all the efforts by the state, under-age marriages, although rare, are a part of socio-legal reality in Turkey. In some cases, people have even succeeded to register under-age marriages illegally.[30]

Polygamy

As concerns polygamy, there is an obvious conflict between traditional Muslim law where a man is widely assumed to be permitted to marry up to four wives at any one time and the official law of Turkey. When polygamy was abolished by the Civil Code in 1926, the religious custom justifying polygamy became officially null and void (Güriz 1996: 4). Thus, a marriage in which either party is already married to someone else will automatically be null and void according to the official law. The official law has no flexibility regarding polygamous marriages; that means a person cannot marry polygamously in Turkish law. If a person is a party to a subsisting marriage, he or she cannot validly contract a second or subsequent marriage. Articles 92, 113, 114, 115 of the Civil Code 1926 and Article 130 of the Civil Code 2001 provide that no person shall marry again unless he proves that the earlier marriage has been dissolved by death or by divorce or by a decree of nullity, and that a second marriage shall be declared invalid by the court on the ground that a person had a spouse living at the time of the subsequent marriage. In other words, the second marriage is absolutely void, or *void ab initio*.[31] Parties that knowingly contract such a marriage are seen to have committed a criminal offence under Article 237/5 of the Criminal Code, which states that 'if the man is already married he shall be punished by imprisonment for six months to three years. If the woman knowingly marries such a man she shall be given the same punishment'.[32] However, where a person marries in good faith with

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[30] Y4CD 14. 03. 1990 E. 990. 916- K. 990. 1435.
[31] YHGK 26. 03. 1986, E. 2. 751- K. 287; Y2HD 27. 02. 1986, E. 1729- K. 2054; Y2HD 03. 06. 1990 194. 2546.
[32] Ansay et al (1965: 86).

another person who is already married and the former marriage is subsequently dissolved, the second marriage shall not be declared invalid.[33]

Having noted the above, polygamous marriages have not been totally eradicated in Turkey (Abadan-Unat 1986: 173; Kümbetoğlu 1997: 121). Turkish society is generally a monogamous society. Polygamous marriages are only exceptional. Although it varies from region to region, the ratio of polygamous marriages has been minimal in the history of Turkey. According to recent research, in contrast to legendary stories about the harems in the Ottoman state, in 1885, the proportion of polygamous marriages in Istanbul was only 2.51 per cent (Duben and Behar 1996: 161). In 1907, the figure was 2.16 (Duben and Behar 1996: 162). Moreover, most of the polygamous marriages have been bigamous (Duben and Behar 1996: 162). Now, although the Civil Code abolished polygamy, the polygamous local tradition, in the same proportion in which it existed in the past, is still rife (Coşar 1978: 127; Güriz 1996: 4; Kümbetoğlu 1997: 121).

Social acceptance of succeeding wives is gained by performing *imam nikahı* (Coşar 1978: 127). Numerous first marriages are also only religious but not registered (Coşar 1978: 127). Estimates of the proportion of polygamous marriage in rural areas during the present century ranges between 2 and 10 per cent. According to a study sponsored by the Turkish Ministry of Justice in 1942, almost all polygamous marriages involved two wives (Magnarella 1974: 126). A study based on a survey research found that approximately 2.0 per cent of all marriages in Turkey were polygamous in the early 1970s (Timur 1972: 93). Whereas the percentage of men with more than one wife was 1.6 per cent in the cities, the figure increased to 2.7 per cent in the villages (Timur 1972: 94). In the early 1980s, Şahinkaya (1983: 50), in Eastern Anatolia, found the rate of polygamy to be about 4.4 per cent. According to another research (Gökce 1991: 113 cited in Elmacı 1994: 84), the polygamy rate for the whole of Turkey is approximately 2 per cent.

A religious wedding utilizes polygamy in a particular way. Some polygamists reported that if they had to divorce their wives to remarry, they could not have married, since the issue of divorce is not conceived positively in the community (Elmacı 1994: 109). The two most common reasons given for these bigamous unions were the need for another female helper and the suspected sterility of the first wife. In Turkish society, the most important ground for legitimising divorce was the infertility of the wife. 97.3 per cent of women and 80.4 per cent of men agree that it is appropriate for a husband to have a second wife if he has no male offspring (Başaran 1990: 187). In cases of infertility the perceived problem is thus solved by the polygamous marriage of the husband to a widow or an unmarried woman (Elmacı 1994: 101-104). A third reason for polygamy, according to some research, was the institution of the levirate or widow inheritance by married kin of the deceased (Magnarella 1974: 126). In these cases, polygamy is regarded as a social duty or a pious obligation. However it must be emphasized that there are many polygamists who had neither such excuses nor reasons prior to their second marriages other than those of satisfying their whims and desires.

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[33] Y2HD 25. 05. 1981 E. 2573- K. 4025; Y2HD 29. 12. 1981, E. 7888- K. 8649; Y2HD 25. 03. 1985 E. 2463- K. 2779; Y2HD 02. 06. 1981 E. 2838- K. 4288.

In the Turkish context, it can be contended that the practice of polygamy is customary more than religious.[34] The role of religion in this case is to legitimize the polygamous unions (see Elmacı 1994: 89-90). In that respect, in most cases, Islam is just manipulated and abused by the people (see Tosun 2001; Karlığa 2001). Kandiyoti (1997: 106) goes further to assert that the patriarchal system that transcends the borders of Islam paves the way for most practices in Muslim communities. Most of the time it is not the practising religious people who perform polygamy. Rather, people wish to live with another woman for several other reasons and they try to satisfy social pressures and their minds by employing Turkish Muslim law rules (see for a detailed research confirming this Elmacı 1994, Tosun 2001).

Several studies have shown that polygamy remains socially acceptable in certain situations (see for example Elmacı 1994). In public, the number of males who marry polygamously and defend that state of affairs has been steadily increasing (Kümbetoğlu 1997: 121, 127; Altuntek 1993; Elmacı 1994). However a crucial point should be stressed here: Polygamy, or more generally, survival of the local law is not a rural phenomenon although most writers tend to see it as such. Even in big cities and metropolitan areas, despite the smaller figures, dynamic Muslim legal pluralism is a reality. Sometimes it is easier to continue a polygamous life free from pressure of a *Gemeinschaft* in a crowded metropolitan city (see Elmacı 1994: 105; 108, Tosun 2001). A quick scan in Turkish newspapers would show that polygamous marriages are not only confined to the rural and eastern parts of Turkey (Kümbetoğlu 1997: 123). In that context, one can see in urban areas people who have polygamously married, too. For instance, there are some politicians, businessmen, singers, actors, members of parliament and even ministers of the cabinet who are known to be polygamists, despite the legal systems stance on the issue.[35] A former cabinet minister who was also chairman of a very popular football club, was noted to be freely talking about his second wife in an interview.[36] Earlier research found that polygamous marriages established after 1926 exist under the following two types: The first marriage was with a civil wedding and the *nikah*, while the second was with the religious wedding only due to the impossibility of a civil wedding since polygamy is illegal. In the second type, both marriages were solemnized only by a traditional and religious wedding. However, in contemporary Turkey, one observes more than two patterns of polygamy which is more complex and sophisticated than the findings of earlier

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[34] Local law may or may not contain Islamic elements. Hooker (1975: 366); Stirling (1957: 26-27).
[35] For a recent case concerning a minister of the cabinet, as he then was, a member of the then ruling Welfare Party, which became a controversial issue between European and Turkish politicians with regard to human rights issues in Turkey, see *The Independent*, 17 April 1997, p. 14. For another case regarding another former minister of the cabinet who is also former chairman of a very popular football club, see *Hürriyet*, 7 November 1997, p. 27. In another recent case, the second wife of a polygamist businessman who had a *nikah* only claimed in court that after her husband's death she was given only 3 companies, while the first wife received 23. She claimed that that was injustice and she deserved much more applying for the annulment of the contract left by the husband regarding inheritance. Reported in *Hürriyet*, 20 March 1998, p. 43.
[36] *Hürriyet*, 7 November 1997, 27.

researchers. According to Turkish Muslim law rules, there are at least four patterns of polygamy. However that figure can easily increase depending on the number of the wives concerned. In the first pattern, the man marries two or more wives with only a *nikah* and no registration. In the second pattern, only one of the women is a wife by civil ceremony. If, for instance, the first marriage was civil, the second will be religious as polygamy is illegal according to the code (Elmacı 1994: 108).

Significantly, the first wife then becomes the legal mother of the children born to the second wife. Birth certificates and identification documents are arranged accordingly (Balaman 1985: 211; Elmacı 1994: 109). Yet it is quite possible that a second, third or fourth wife could be the official wife if the husband did not prefer to register the earlier marriage. In this third pattern, the husband takes his first wife without official marriage, then he marries the second one both officially and unofficially. In the fourth pattern, the husband divorces his wife officially but does not pronounce *talaq* so that she is still his wife in religion. He marries another woman both officially and unofficially (with '*imam nikahı*') (Beşer 1993: 162). Thus, it is made sure that the children of the first wife and the second wife are legitimate in the eyes of both Muslim law and the official legal system. These scenarios can be adapted to the cases of the possible third or fourth wives with different permutations.

Whilst one can argue by looking at the empirical reality that legal reform from above has not had an absolute impact on the institution of polygamous marriages, it is also worth emphasising that although the official prohibition of polygamy has not worked effectively, it has created a social sense to a certain extent that polygamy is no longer acceptable, but this is a change in social psychology, a field in which legislation is at best of dubious value (see already earlier Hooker 1975: 366).

Prohibition of polygamy was a radical step in Turkish history. Yet, this was not a great revolution or a big change, since the society was anyway more or less monogamous. Polygamous marriages were already minimal. This minimal ratio has continued to exist in spite of all legal actions against it. One can say that the state did not wish to be tough, probably espousing the saying that 'as you make your bed, so you lie on it', at the expense of women, as is always the case. Thus, many Muslim scholars have been advocating the view that when there is not a state recognition, Muslims should stay away from polygamy (see for instance Tosun 2001).

Divorce

The divorce rate in Turkey has been relatively low.[37] Thus, the case of *talaq* is not a big issue in terms of numbers. People in Turkey generally react negatively to the idea of divorce. It is conceived as an unpleasant experience and it may be

condemned by families and friends (Levine 1983: 339).[38]

Even though in Muslim law divorce can be obtained in a number of extra-judicial ways like *talaq*, in secular Turkish law there is solely one way of divorce, which is through a decree granted by a court of civil jurisdiction on the ground that the marriage has irretrievably broken down. In an earlier case, the Court of Cassation did not recognize the *talaq*, stating that there is only one type of dissolution of the marriage under the Civil Code.[39] Muslim law's prohibition on the marriage after three *talaqs* between the couple was refused on the ground that there is no such rule in the Civil Code.[40]

Marriage may be terminated by the death of one of the spouses or by the declaration of a judge (Ansay 1996: 116). In other words, the Civil Code restricts the incidence of divorce, for, although the right to divorce is accorded to both men and women, divorces can be obtained only through a court decision based on specific and proven circumstances. The judge can either declare the marriage void, if the conditions for a valid marriage do not exist; or grant an annulment; or decide to grant a divorce or separation. The Civil Code 1926 had made divorce by collusion or mutual consent difficult for many years.[41] Now, Article 166 of the new Civil Code 2001 makes a divorce by mutual consent possible.

On the other hand, since marriages are religious, divorces are also made by *talaq* to terminate the religious marriage, the *nikah* (Altuntek 1993: 77). Although statistical records 'do not include the number of dissolved informal marriages' (Abadan-Unat 1986: 177), husbands still divorce their wives with *talaq* and devout Muslim wives have to agree to the official divorce. However, this type of easy divorce is not an easy option in Turkish society where most marriages are still arranged and therefore what in theory appears to be an easy divorce mechanism is in fact more difficult than effectuating an official divorce (Balaman 1985: 214). Effectivity and intensity of the relationships between families make it almost impossible for an individual to reach a decision to divorce so that individual whims and desires cannot easily be put into effect (Balaman 1985: 215). Yet it is evident that with the waning of the institution of the arranged marriages, *talaqs* could become easier in practice as they are in theory. In the cases of 'hidden marriage', for example, *talaq* is always used. Also in urban areas, due to the declining intensity of social pressures and rising individualism, divorce would inevitably become an easier option.

In the final analysis, empirical data and the case law prove that Turkish people have reconstructed their religious law in spite of all the claims of the secular legal system, particularly in the cases of marriage and divorce, manifestly showing that law has its limits. By developing a new Turkish Muslim law, today's Turks, as skilful legal navigators, have met the demands of both the secular Turkish legal system and the Muslim law in a dynamic legal pluralist context.

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[37] The most detailed research on divorce in Turkey is Zwahlen's (1981) study which surveys the issue from ancient Turks to modern Turkish society. Another detailed study on Turkish law is Williams (1982).

[38] As will be analysed below, limping marriages are a matter of concern in Turkey as in the British case, Beşer (1997: 302); Kerimoğlu (1989b: 23-26).

[39] Now, Articles 161-173 of Civil Code 2001.

[40] YHGK 08. 06. 1968 E. 1966. 2-1487- K. 425 T.

[41] Article 150 of the Civil Code 1926.

Unofficial Muslim Legal Postulates in Turkey

The socio-legal reality in Turkey has been noted not only by the general public and scholarship but also by the state officials as well. Yet this does not mean that the state has recognized this reality. On the other hand, it has not been very harsh on the so-called law-breakers, thanks to the Muslim legal postulates.

One can detect Muslim legal postulates regarding marriage issues from the survey research on public opinion regarding relevant phenomena, acts of officials, and responses of legislation to the socio-legal reality and decisions of the judges in the lower courts.

Public Opinion

It is common to come across news in the media about a celebrity who has recently got married by only having a *nikah* with no accompanying negative comment despite the fact that the marriage is religious, unofficial and illegal.[42] As seen above, although many children are perceived as illegitimate by the legal system if they are the offspring of a couple unofficially married, they are not illegitimate in the eyes of the community as the religious ceremony is still regarded as valid in itself. The legalization of the sole *nikah* as a valid form of marriage was an election promise of the Welfare Party.[43] In the columns of the scholars who answer questions of people regarding religion and society, these issues are discussed freely as if these are not 'illegal' in law.[44]

Regarding polygamy, several studies have shown that it remains socially acceptable in certain situations (see for example Elmacı 1996). Social acceptance of succeeding wives is gained by performing only '*imam nikahı*' (Coşar 1978: 127). Successful polygamy can even be a source of prestige (Stirling 1965: 197; see also on this, Altuntek 1993; Elmacı 1996).[45] As noted above, it is possible to come across people in urban areas who have also married polygamously.

Officials

State officials, most of the time, being aware of the socio-legal reality that Muslim legal pluralism is operating in the country, organize special ceremonies where many unofficially married couples get married with the help of the state. They try to encourage the unofficially married people to get married officially. To that effect, in some parts of Turkey, the state organizes big official marriage ceremonies where many unofficially married couples get married with the help of

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[42] See for an example, *Milliyet*, 6 March 1998, p.3.
[43] *Yeni Yuzyil*, 7 December 1996, 8.
[44] It is so common that one can find many examples for this, see for instance, *Zaman*, 11 April 1998, 11.
[45] See for an example, *Milliyet*, 6 March 1998, p.3.

the state.[46] No mention is made at these ceremonies of the Criminal Code or any kind of punishment. In such a recent case, the Secretary of State Responsible for Women and Family started a new campaign: '*Resmi nikahsız aile kalmasın*' (Let there be no family remaining without an official marriage). In the first event of that legal literacy campaign, the Minister and the Director of Religious Affairs bore witness in a state-sponsored official marriage ceremony of 12,000 couples who were married with *imam nikahı* but not with official marriage.[47] A quick scan at the press shows that this practice still continues. For instance, daily *Milliyet* of 19 November 2001 reports that governor, military officers and some students bore witness to the official marriage of 130 already married (unofficially) couples.[48]

Amnesty Laws

The state law needed to come to terms with the socio-legal reality and provided for ad hoc legislation (see Lipstein 1956: 19). As early as 1957, socio-legal scholars noted that 'for even at the present time, when the Civil Code has been in existence only 30 years, it has changed its form and content owing to certain extraneous conditions' (Fındıkoğlu 1957: 13).

As seen, although illegal, there are still some marriages performed by the *imam*s without the prior celebration. This state of marital affairs has given rise to the long-standing problems of couples who are not legally married, but regard themselves, and are regarded in their social sphere, as married, and their children who are illegitimate under the Civil Code (Fişek 1985: 289). These officially 'illegitimate' children face many problems during their lives (Kümbetoğlu 1997: 121).

The response to the great increase in illegitimacy as defined in the law has been the passing of a series of enactments to make legitimization an extremely simple procedure (Hooker 1975: 367; Fişek 1985: 290; Ansay 1996: 119).[49] Thus, 'amnesty laws are almost periodically enacted which allow the registration of "consensual marriages", if a child has been born out of such a relation and if no marriage impediment between the parties exists' (Ansay 1996: 113). The most recent of these laws is dated 8 May 1991 and was valid for five years (Ansay 1996: 113).[50] New draft law legislation on this matter is at the legislative stage at the Grand National Assembly.[51]

Whilst the primary concern in Western societies has been to improve the legal status of the illegitimate child, in Turkey, the legislator has provided for the legitimization not only of the child, but of the extra-marital union from which the

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[46] See for a recent case, *Hürriyet*, 9 March 1997.
[47] *Hürriyet*, 14 November 1997, p. 11.
[48] *Milliyet*, 19 November 2000, p. 21.
[49] Between 1933 and 1965, benefiting from five such bills. 2,739,379 unions were registered as marriages and 10,006,452 illegitimate children were legitimized. Fişek 1985: 292.
[50] Law no. 3716, promulgated on 16 May 1991. Previous laws nos. 2330, 4727, 5524, 6652, 1826, and 2526.
[51] *Hürriyet*, 04 February 2003.

child has been born (Fişek 1985: 291).[52]

According to the Turkish Amnesty laws, the children could be registered as legitimate if they were born to parents who had been living together continuously as husband and wife. The Constitutional Court also espoused the same view.[53] Based on this decision of the Constitutional Court, the Court of Cassation has also followed this reasoning.[54]

Children who were born out of an occasional relation may, however, not be registered as legitimate under such laws (Ansay 1996: 120). This is an extraordinary development since the official law, although covertly, accepts the reality of *imam nikahı* which on its own terms has no official standing.

Decisions of the Judges

As seen above, the public medium does not generally see the existence of unofficial law as a breach of law. Many people in society in one way or another are related to people who are unofficially married. It would be naive to expect that many cases will come before the courts on this matter alone. Only in conflict situations, one of the parties discloses such a thing to the courts. Despite all the legal measurements, the authorities will not know of the standing of the marriage unless a dispute arises. Thus, the majority of the perpetrators of these alleged 'crimes' remain unpunished (Özgen 1985: 315). Kruger (1991: 209) confirms Özgen on this point by stating that there is almost no punishment for *imams* who celebrate such marriages unofficially (Kruger 1991: 209). Or, as in many cases, as will be seen below, judges would be tolerant with the convicted and would change the punishment from imprisonment to a pecuniary punishment which shows the perpetuating impact of the legal postulates.[55]

Thus, a number of cases have come before the courts whilst many have not. In some cases, one can easily detect that judges have taken into account the public opinion and local legal postulates on the matter and have as a result been tolerant.

The judges in the lower courts have tolerated a number of under-age marriages yet the Court of Cassation has cancelled these decisions if it did not see an exceptional reason to justify such an approach in the case.[56] In one case, the court gave permission to a girl aged 11 to marry and it was not appealed. However, the Courts of Cassation overruled that decision.[57]

In another case, a boy under the age of 15 took permission from a judge to marry but the Court of Cassations held that the judgement was void.[58] Only a few

examples of such cases have been noted here that were overruled by the Court of Cassations as these are the only reported cases. The highest court, the Court of Cassations, strictly applies the letter of the law. Presumably, there are a number of unreported similar cases that have never come to the Court of Cassations and have therefore not been overruled.

The tolerant approach of the judges is also the case with *nikah-* only marriages and polygamy. The judges in Turkey have, thus, been accused by some extreme-leftist writers as being tolerant to 'fundamentalist' tendencies and attitudes (see for example Öztemiz 1997: 125).

In some cases, courts treat the second wife with some recognition despite the fact that she was only married unofficially. In one recent case, the judge held that second wife should be paid some compensation from the insurance company because of the death of her unofficial husband at work.[59]

Here again, the legal postulates are in operation. Although unofficial (and illegal), the *nikah* and polygamy were taken into consideration by the judges, since the legal postulates of the society include these practices. These decisions in the lower courts prove that the legal postulates of the society influence the decision and thinking of the judges, making them sympathetic to the demands of local unofficial laws. Since the legal postulates, in this case interwoven classical and local Muslim laws and morality, permit and condone an unofficial marriage, a judge may not consider it as a serious criminal offence or intrusion of the rights of the minor, although a western judge would treat the case differently.

Thus, it might be said that, in the Turkish context, due to the legal postulates, judges are tolerant, understanding, patient and sympathetic toward the local people in the matter of unofficial and under-age marriages and polygamy (Starr 1992: 169). This phenomenon has paramount importance since, '(t)he success of any reform is dependant upon two main factors: the attitude of the public toward it; and the interpretation given to it by judges' (Shaham 1995: 259).

The attempt to change the legal rules concerning family matters is one of the most daring experiments for the modernizing elite in Muslim societies. However, such an attempt was perceived as necessary in the Republic of Turkey in the 1920s after the collapse of the Ottoman State as the family plays an important role in transmitting dominant cultural values to younger generations and the aim of the new modern Turkish nation-state was the cultural modernization of the society.

Although the Turkish state tried to abolish Muslim law by transplanting new secular and uniform laws, the result has been that Turkish Muslims have not abandoned their local Muslim family laws. The plural socio-legal reality of Turkey stems from the tensions between secular, Islamic and customary rules that cohabit in the practical daily lives of the Muslim citizens. This is nothing but a '*sujet de droits*' situation. Yet not surprisingly in the issues of marriage and divorce, evidence suggests that some Muslim people in Turkey have found ways to reconcile the demands of both the secular official law and unofficial Muslim law, and it manifestly indicates the creative capacity of Muslim individuals as skilful legal navigators in daily affairs. This experience provides instructive lessons

[52] This does not apply to polygamous marriages. It is only for unmarried persons.
[53] 21.5.1981, No. 29.22.
[54] Y2HD 1.3.1983, S 1627.18-25.
[55] Y2HD 06.06.1983 E. 983.2664- K. 983.3310; Y2HD 04.06.1985 E. 985.5223- K. 985.5310; Y4CD 28.04.1992 E. 992.2504- K. 992.3125.
[56] See for such an example, Y2HD 28.4.1986, E. 4269- K.4463.
[57] Y2HD 28.12.1987, E.11288- K.10889.
[58] Y2HD 24.9.1985, E. 8499- K.7437. For a similar case, see Y2HD 7.5.1985, E.4496- K. 4385.
[59] Y21HD 21.03.1996, E. 1604- K. 1661.

showing the possibilities and limitations of attempting to reconstruct society by restructuring its law.

The socio-legal reality of Muslim legal pluralism stemming from resistance of local Muslim law has, for many years, been seen as a rural phenomenon in Turkey. However, it is becoming clear that Muslim legal pluralism, especially in family matters, is a reality of urban areas too. The state and the élite expected that by means of education, members of society would learn the rules of the official legal system, and they believed that with the increase of urbanization, which is considered to be the same as modernization and 'development', people would give up their local customs and religious laws and would follow only the official law. However, the Turkish empirical data have not confirmed this expectation. Rather, Turkish people have reconstructed their unofficial religious laws in spite of all the claims of the secular legal system, particularly in the issues of marriage, manifestly showing that state law has limits to shape the society. By developing this new Turkish Muslim law, as skilful legal navigators and law-inventing citizens, which is a result of the interaction of official and unofficial laws, these Turks have met the demands of both the secular Turkish legal system and the unofficial Muslim law in a dynamic legal pluralist context. This is an excellent, culture-specific illustration not only of Ehrlich's 'living law', but of Chiba's intricate theory of the continuous interaction of official and unofficial laws (Menski 2000: 308). It also proves our formulation of dynamic legal pluralism in which hybrid laws are continuously created as a result of the interaction.

Since Turkish Muslims have reconciled these conflicting points by employing Turkish Muslim law rules, only a few cases have appeared before the courts. Even though this book only deals with family law issues, it is also observable in the Turkish society that in other fields such as finance, banking, economy, insurance, and in all sorts of spheres of life, Muslim law is referred to and obeyed by many people despite the non-recognition of the state.[60]

A post-modern legality is visible in Turkey where the traditional Muslim law was totally but only officially abolished and replaced by transplanted secular laws. Local and unofficial Turkish Muslim laws have resisted the unification and assimilation purposes of the modern nation-state. People have not abandoned their

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[60] Contemporary and frequently asked issues in Turkey: working in Europe, *madhhabs*, using amplifier when reading *azan*, Friday prayer and work, *dar al-Islam*, fasting and travelling by train, stock exchange, tax, *halal* meat, marrying non-Muslim woman, *talaq*, court divorce, polygamy, nationalism, unemployment benefit, inflation, interest, customs tax, bribery, depositing money at a bank in non-Muslim countries, selling alcohol in a non-Muslim country, gambling in *dar al-harb*, sterilization, plastic surgery, using perfumes, abortion, *ijtihad*, military service, and so on, see TDV (1999). Beşer (1991), organ transplantation, prayers (*salat*) on bus, VAT, mortgage, European union, gold tooth, alcohol in medication, eau de cologne, life insurance, Kurucan (1998), interest, inflation, insurance, life insurance, feminism, *nikah*, and fertility clinics. *Fatwa* books are bestsellers in Turkey. Moreover, many newspapers have *fatwa* columns. Recently, the number of Turkish *fatwas* sites on the internet has increased. Also, through various popular newsgroups and e-mail discussion lists, Turkish Muslims solicit information about what 'Islam' says about any particular problem.

local and religious laws and customs whether legal modernity recognizes them or not. There have been limits to official laws to shape society from above and resistance to official laws stemming from the challenge of heterogeneity of society and post-modern legal pluralism. Now, secular official and Muslim unofficial laws co-exist in the Turkish socio-legal sphere.

Turkish Muslims not only have challenged the presumptions of legal modernity but have also shown that 'they can become citizens while at the same time retaining their Muslim identity' (King 1995: 112). They retain their Muslim law in even secular and modern contexts in a post-modern way without violating the democratic order although a purportedly uniform legal system wishes to transform society through law, aiming for homogenization with a mentality of the nineteenth century militant positivism. Yet it is now post-modern times and legal pluralism is here to stay where cultural plurality exists. In the final analysis, Turkey continues to be a Muslim country, no matter what changes may have taken place in Turkey's Islam. Islam is pervasive in Turkish public sphere and this shows the partial failure of the Kemalist elite's attempts of making religion a private belief.

As prominent Turkish sociologist Nilufer Göle aptly puts it, Muslim identity is in a process of normalization, transforming from being Islamist to Muslim,[61] showing that 'buzzwords such as "fundamentalism", and catchy phrases such as Samuel Huntington's rhyming "West versus Rest" and Daniel Lerner's alliterative "Mecca or mechanization" are of little use in understanding this reformation' (Eickelman 1998:, 82). Factors such as a desire to join the EU, civil society's growth, independent media, telecommunications technology, globalization, foreign encouragement and support, and the role of religious leaders, are all dynamically interlinked and intertwined in transforming the Turkish society.

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[61] Nilufer Göle, *Zaman*, 4 June 2000.