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CHAPTER 2

THE RULES OF DIFFERENCE: HONOR AND NATIONAL IDENTITY IN THE COURTS OF TURKEY AND ISRAEL

I. Introduction

As part of their nation-building strategies, Turkey and Israel adopted very different approaches to the manifestation of "cultural difference" by their minority communities. While Turkey denied the existence of cultural differences between Kurds and Turks and sought to eliminate the Kurdish-Turkish boundary through a rigorous assimilation policy, Israel did not attempt to transform the cultural identity of its Palestinians citizens or integrate them into the Israeli polity. Moreover, at the formal-official level, Turkey built a unified legal system, eliminating the *millet* system of the Ottoman Empire, whereby each religious community (*millet*) had separate religious courts in the area of family law (civil law), while Israel continued, with modifications, the plural legal model of the Ottoman Empire.At the local level and in the realm of practice, however, the lines of authority departed from this macro-institutional set-up. In this chapter, I examine court rulings and law enforcement patterns in the area of honor killings and blood murders, to show how authority was renegotiated at the everyday level where state officials came into contact with alternative sources of authority in the minority communities.

Honor killings and blood murders are premeditated murdersaccording to the laws of the state. From the perspective of the perpetrators, however, they constitute legitimate forms of punishment and self-defense to uphold an alternative morality.As the anthropologist Adam Hoebel wrote, "A social norm is legalif its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting," thus de-linking the idea of law from the idea of the state (Hoebel 1954: 28). The crux of a legal system, for Hoebel, was collective sanctioning by a rudimentary authority structure. In this sense, codes of honor according to which women are prohibited from eloping or engaging in pre-marital sex and may be killed by their male agnates if they do so, reflect the existence of an informal legal order. Blood murders—revenge killings by a male member from the patrilineage of the victim—similarly indicate an informal legal sphere.

Courts' treatment of honor and blood killings, then, provides crucial tests of the limits of different sources of authority, as it raises the question of who has the right to inflict violence on individuals, who are simultaneously members of their family, their ethnic group, and the state.The fact that courts are the final arbiters of which sphere of authority is definitive for the individual at hand transforms their decisions from being simply about murder to one about who belongs to what community and who has what sort of authority over whom. The key question of this chapter is, to what extent have Turkish and Israeli law enforcement officials been willing and able to suppress rival spheres of authority in their minority communities? Stated differently, to what extent have officials endorsed *informal legal pluralism* by implicitly acknowledging the validity

of alternative spheres of authority? Conversely, when and why have states asserted *legal centralism*, the singular authority of the state over all members of the polity?

By "legal centralism," I refer to the idea that "law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of institutions" (Griffiths 1986: 3). Legal centralism may take an egalitarian, difference-blind form, based on the idea that all citizens are equal and similarly bound by collective values protected by state law. Alternatively, legal centralism may reflect a colonial style of power in which one community attempts to transform and "civilize" another. By "legal pluralism," I refer to situations in which the state administers or recognizes "different bodies of law for different groups of the population varying by ethnicity, religion, nationality, or geography" (Merry 1988: 871). Legal pluralism, too, can reflect a multicultural vision,[1] as it can reflect a colonial style of indirect rule and exclusion.[2]

Formally, Turkey and Israel both subscribe to a unitary, "centralist" approach in criminal law. However, as Leon Sheleff has written,

> There are few spheres in which social reality so insistently takes precedence over legal dictate as the tenacity with which people adhere to their way of life as forged in the crucible of everyday living; and so, whatever the declared legal situation, cognizance must always be given to the "living law" of the community. This is indeed true of any community, and becomes all the more pertinent when

[1] See, for instance, Sheleff (1999), Barzilai (2003), and Renteln (2004) for strong defenses of legal pluralism, even when the non-state, community law may be illiberal.

[2] For instance, Snyder (1981), Fitzpatrick (1984), and Chanock (1985) have argued that the recognition of customary law is often a manifestation of indirect rule by colonial states and that "the package of tribe, chief, custom and judgment was largely of colonial creation," rather than reflecting indigenous rule systems (Chanock 1985: 20).

> that community, by whatever name known, has some sort of consciousness of its own separate identity" (Sheleff 1999: 121).

Even in formally unitary systems, then, judges have to develop rules and strategies for recognizing or suppressing the "living law" of communities that resist state law. As I will show below, the degree to which courts informally accommodate honor killings demonstrates that there is room for significant variation along the continuum from "centralism" to "pluralism" at the informal level. In this chapter, I examine two indicators in order to assess the level and nature of legal pluralism: sentencing patterns and legal discourse on the justifiability of honor killings.

Sentencing patterns include the length of jail sentences imposed on perpetrators of honor killings,the rate of acquittals, and the frequency with which sentences were reduced based on the provocation defense. These patterns provide a crude measure of the balance between state authority and family authority. As Robert Cover has argued, legal interpretation always takes place in a field of force (1995: 139). "The resistance of a community to the law of the judge," writes Cover, "raises the question of the judge's commitment to the violence of his office" (155). The judge can choose to forcefully impose the rule of the state or articulate a legal interpretation that recognizes the validity of the obligation the defendant professes to a different moral community. The judge's interpretation, then, is simultaneously a statement on which set of rules will prevail and on the boundaries that separate one community from another. In the specific cases at hand, sentencing levels show the degree to which judges have been committed to the official, unitary vision of the law when confronted with the moral authority of extended

families in minority communities that resist state authority. Where sentences for honor killings are lenient, local actors are better able to translate their moral vision into the realm of social practice and social control, at the expense of the state, which, too, seeks to impose its moral order. Lighter sentences indicate a greater degree of legal pluralism—the coexistence of the authority of the state and that of local social forces.

The analysis of *legal discourse* reveals how state officials justify the scope and limits of the state's sphere of authority, construct the state's relation to communities, and enact rules of sexual behavior. As Ronen Shamir has argued, law is "a distinct type of narration, a particular literary genre that tells us who we are by telling the story of others" (Shamir 1996: 238). The analysis focuses on judicial interpretations of the provocation defense, which reflects state officials' assumptions on which set of rules—the official laws of the state or the informal law of the family—constitutes the relevant sphere of authority for minority women. In justifying the limits of their authority, judges simultaneously delineate—or alternatively, erase—boundaries that separate one community from another.They also articulate norms of proper sexual conduct and link these sexual norms with communal identity.

The data for this chapter were collected in the First and Second Criminal High Courts of Urfa in Eastern Turkey (1974-2005)[3] and the District Courts of Nazareth and Be'er Sheva in Israel (1968-2005). All cases in which a woman was murdered by family

[3] The First and Second Criminal Courts of Urfa cover almost the entire province of Urfa, except for the small town of Siverek, which has its own High Criminal Court due to high levels of violent crime in the district. The judges in the Siverek court were unwilling to open the court's archive to research. Since data could not be collected for the same period as Urfa courts, Siverek has been omitted from the aggregate analysis of sentencing. Partial findings from Siverek are discussed in the final section of the chapter on law enforcement.

members or by her husband and which culminated in a criminal suit were included in the analysis.[4] I supplement this data with Supreme Court rulings and rulings on blood murder cases.

Urfa is a highly conservative, mixed Kurdish-Turkish province—with an Arab minority, as well—of roughly 1.4 million inhabitants, the most populous province in Eastern and South-eastern Turkey according to the census of 2000. In recent decades, the politics of the province has been dominated by powerful Kurdish extended families who have allied with the state against the Kurdish guerilla movement. Based on a rough, and outdated estimate, 47.8 percent of the population in Urfa is Kurdish. The jurisdictions of the Nazareth and Be'er Sheva District Courts cover the Northern and Southern Districts of Israel, home to around 62 percent of Israel's 1.3 million Palestinian citizens according to 2002 figures.[5] The city of Nazareth, the largest Arab city in Israel, is located in the Northern District, the only District in which Arabs constitute a majority of citizens (59.9 percent in 2002). Nazareth has historically been a stronghold of secular Palestinian anti-Zionist movements—communism and nationalism. Be'er Sheva is the center of the Southern District, home to about 65 percent of Israel's Bedouins, whose tribal affiliations remain strong, and who have, until recently, refrained from displaying open support for Palestinian nationalism.

The organization of the chapter is as follows. After summarizing Turkish and Israeli laws on murder and provocation, I present aggregate data on sentencing patterns.

[4] This excludes cases in which a dead woman's body was found, but could not be linked to a perpetrator (cases recorded as "under search" in the Turkish legal system) and cases in which a woman was killed, but her body was never found.

[5] Urfa's population was 1,443,422 according to the census of 2000, with around 800,000 of this population living in urban areas and around 600,000 living in rural villages (Turkish Statistical Institute: 2000). This is slightly more than the entire Arab population in Israel in 2002, 1,287,200 according to the Israeli Census (2002). [not a fully accurate measure of the Kurdish population] [72.8 percent of the population in Diyarbakir][Mutlu 1996]

Next, I examine the evolution of Turkish and Israeli case-law, focusing on justifications for reducing or increasing punishment.

II. Sentencing

Murder and Provocation in Turkish and Israeli Law

The Turkish Criminal Code of 1926, which was in force until the adoption of a new criminal code in 2005, defineshomicide as the intentional killing of a person (Article 448). The basic punishment for intentional homicide is a minimum of 24 years and a maximum of 30 years (Article 448). The Code contains various provisions for mitigating or aggravating the basic punishment. First, judges have at their disposal a general mitigating clause, Article 59, by which they can reduce any sentence by one-sixth, to individualize punishment according to the specific circumstances of the accused. The application of Article 59 is entirely within the discretion of the judge, and, in practice, the rule is applied almost automatically in every case of homicide. Judges tend to withhold this reduction only if the accused engages in behavior that disrespects or misleads the court.

Most sentence reductions in both wife murder cases and honor killings rest on the provocation defense.The Criminal Code of 1926defines provocation as "severe anger and grief caused by an unjust act" by the victim and stipulates that the sentence will be reduced by one-fourth under such circumstances (Article 51, Section 1). If the provocation is aggravated, capital punishment is reduced to 24 years, life-imprisonment is reduced to 15 years, and other sentences are reduced by two-thirds (Article 51, Section 2).

The Turkish Criminal Code also contains various provisions, which could aggravate punishment for honor killings. Article 449 states that the punishment for homicide will be increased to heavy life imprisonment if homicide is committed against certain family members.[6] Article 450 states that if homicide is committed against one's parents or children, if it is committed with premeditation, or if it is committed with the motive to seek blood revenge, the sentence will be increased to capital punishment.[7] Together, articles 449 and 450 cover most instances of honor killings, except for those carried out by cousins, uncles and unofficial husbands.[8]

The Israeli Penal Code distinguishes between manslaughter (causing the death of a person "by a prohibited act or omission") and murder.[9]Murder is defined as causing the death of a person with premeditation (Article 300(a)(2) or malicious manslaughter of one's father, mother, grandfather, or grandmother Article 300(a)(1).[10] For a murder conviction, the prosecutor needs to prove an initial intent to kill, preparation for murder (premeditation), and lack of provocation by the victim immediately preceding the killing (Article 301(a)). If the defense can prove the existence of provocation by the victim, the murder charge is reduced to a manslaughter charge, for which the maximum sentence is

[6]The family relations protected by the article include wife, husband, brother, sister, adopted parents, adopted child, step-mother, step-father, step-son, step-daughter, father-in-law, mother-in-law, son-in-law, and daughter-in-law.

[7] Since the mid-1980s, there has been a regular practice of not executing capital punishment, although capital punishment remained on the books in Turkey until a constitutional amendment in 2001, which restricted capital punishment to terror offences and offences in war time. During the 1980s and 1990s, courts allotted capital punishment as the basic sentence before making reductions, but capital punishment was rarely allotted as a final sentence, and where this was the case, it was not executed.

[8] Turkish law requires that all marriages are consummated by designated secular authorities. Religious marriage ceremonies are not recognized as valid marriages by the state. Hence, marriages consummated by only a religious ceremony are considered "unofficial" and do not receive protection from the state. If a man kills his unofficially-wed wife, Turkish judges do not apply the aggravating clauses stipulated in Article 449. See supra note 7.

[9] Manslaughter is defined in Article 298.

[10] Also included in the definition of murder are cases of maliciously causing the death of another person while committing, preparing to commit, or helping to commit an offense (Article 300(a)(3)), causing the death of a person to facilitate flight for oneself or for a participant in the course of committing an offense.

20 years.The penalty for murder is a life sentence, which can be reduced only under three circumstances listed in Article 300(A): diminished mental capacity (a), self-defense, duress, or necessity (b), and "severe mental distress, because of severe or continued tormenting of himself or of a member of his family by the person whose death the defendant caused" (c). The latter clause closely follows the Turkish Criminal Code's definition of "severe provocation," although, in the Israeli Code, this is not what is meant by provocation.

In sum, both the Turkish and the Israeli Codes envision higher punishment when killing occurs with premeditation and when it involves certain family members. Moreover, they both envision conditions under which a sentence for murder or intentional homicide can be reduced, including situations in which the behavior of the victim causes severe mental distress on the defendant.

Legal practice in Turkey and Israel distinguish between subjective and objective conditions of provocation. The subjective criterion involves the psychological circumstances of the perpetrator, namely the loss of self-control under severe grief or anger. The objective criterion in Turkey requires that such anger or pain be caused by an *unjust* act by the victim towards the perpetrator or his or her close associates. The objective criterion elaborated in Israeli Supreme Court rulings requires that a "reasonable person" would behave similarly (Touma-Suleiman 2005: 189-191). Both objective and subjective conditions have to be met for provocation to be granted, i.e., for the court to rule that the murder was provoked. In other words, the subjective state of "severe grief" is not sufficient for granting provocation: the grief must have been caused by an *unjust* act.

Arguably, the provocation defense cannot be used in cases of honor killings under a strict unitary legal interpretation. As I will demonstrate in greater detail in chapter 4, such murders are often planned well in advance of the killing and carried out in cold blood by brothers and paternal cousins serving under the instructions of other family elders. The subjective criterion of provocation, the loss of control in a "heat of passion," therefore, cannot be said to exist in honor killings, although this may be difficult to prove in court. The objective criterion of provocation poses an even greater challenge for honor killings. Given that women are free to choose their marital partners and pre-marital sex is legal as long as it is consensual according to Turkish and Israeli laws, it is difficult to see how premarital sex or eloping with a man not approved by one's family can be interpreted legally as *unjust* acts.

In theory, then, Turkish and Israeli criminal law both allow a wide range within which honor killings can be punished, from capital punishment and life imprisonment at one end of the spectrum to 20 years or less, at the other end, if the court accepts the provocation defense. Interpretations of what constitutes provocation, on the one hand, and law enforcement officials' capacity to collect evidence, on the other, determine where the sentence will fall within this spectrum. The next section summarizes findings on the actual sentencing levels.

A Comparative Overview of Sentencing Practices

Extent of Honor Killings: A total of 181 killings of women by their families were tried in the courts of Urfa between 1974 and 2005, in contrast to 26 cases in the district

courts of Nazareth and Be'er Sheva in Israel between 1968 and 2005. The number of honor killings does not seem to have changed significantly over time in either country.[11] On average, the number of murders in a year in Urfa (5.7) was about eight times as high as that in Nazareth and Be'er Sheva combined (0.7), even though Urfa's total population is lower than Nazareth and Be'er Sheva combined. The dramatically higher rates in Turkey suggest that families exercise much greater authority on the ground in Turkey than they do in Israel.

[11]In Turkey, 80 murders were tried between 1974 and 1989, and 101 were tried between 1990 and 2005. The increase in numbers is more likely to be due to greater state penetration and law enforcement in the villages over the years than to an actual increase in murders. In Israel, 15 of the 26 cases occurred between 1972 and 1989, and 11 cases occurred after 1990. This limited decline in numbers of cases is insufficient to conclude that a downward trend is underway.

Table 1: Courts' treatment of honor killings in Turkey and Israel, 1968-2005

	Turkey	Israel
Total honor murder	181	26
Honor murder per year	5.7	0.7
Killed by family	68 %	65 %
Killed by husband	32 %	35 %
Sentencing		
Avg sentence (yrs)	18.2	28.4
Avg sentence (with acquittals)	13.2	25.9
Life sentence or higher	7 %	67 %
Acquittal rate	20 %	8 %

Note: The data was compiled from the First and Second Criminal High Courts of Urfa, 1974-2005; and the District Courts of Nazareth and Be'er Sheva, 1968-2005.

Sentencing: Sentencing patterns, summarized in Table 1, have varied dramatically between the two countries. The average sentence for cases that resulted in conviction in Turkey was 18.2 years in contrast to 28 years in Israel.[12] The contrast between the two

[12] Life sentences were coded as 36 years, and anything more than a life sentence (capital punishment, two life sentences, etc.) were coded as 40 years. Cases that resulted in no punishment due to mental incapacity

countries is even more striking when cases that resulted in acquittal are incorporated into the average sentence: the average number of years served in jail for every woman murdered is 13 in Turkey, 25.9 in Israel. As much as 67 percent of cases that resulted in a conviction were punished with a life sentence or higher in Israel, whereas in Turkey, the rate of cases that resulted in a life sentence or more was 7 percent. Acquittal rates were also markedly higher in Turkey: 20 percent (45 cases), as opposed to 8 percent (2 cases) in Israel. These findings suggest that, on the whole, Turkish courts have adopted a remarkably softer approach than Israeli courts, implicitly recognizing families' right to punish their members according to their own norms, and greatly decreasing the costs, to extended families, of preserving their informal law.

The most commonly used justifications for sentence reductions in Turkey were the provocation defense and the perpetrator's status as a minor with limited criminal responsibility. In Israel, courts almost never accepted arguments about family honor as proof of provocation, but sentences were reduced under a plea bargain in 19 percent of the cases.[13] Most of these cases were decided during the tenure of an Arab judge, Judge Bahalul, in Nazareth. While the use of plea bargains makes it difficult to interpret the limited leniency displayed by Israeli courts, it is clear that, on the whole, Israeli judges were much less tolerant of competing spheres of authority in their minority community than Turkish judges.

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were excluded from averages for cases that resulted in a conviction, but incorporated as zero years in averages including acquittals.

[13] The findings on Israel are consistent with those of Aida Touma-Sliman, who identified 21 court cases of Arab female murders in different areas of Israel for the period 1984-2000. 71 percent of these cases resulted in a murder conviction with a life sentence or more, while sentences were lower in 29 percent, due to the dropping of the charge to manslaughter, and in one case, to causing death by negligence (Touma-Sliman 2005: 188).

The broad contrast between Turkey and Israel notwithstanding, there has also been significant variation within the two countries. In Turkey, courts' treatment of honor killings changed substantially over time from strong pluralism to a greater level of centralism. For instance, the average sentence length rose from 15.9 years during 1974-89 to 19.7 years during 1990-2005. Concomitantly, acquittals dropped from 24 percent to 18 percent. In Israel, the main contrast was between the centralist rhetoric of courts and the actual practice of pluralism at the level of law enforcement, particularly in relation to the Bedouin community in southern Israel. Although honor killings are believed to be higher within the Bedouin community, which retains a tight clan structure, only five honor killing cases reached the District Court of Be'er Sheva in 38 years. Pluralism and centralism have not been constant, in other words, but have varied within each country. These variations with respect to location and time will be discussed at greater length within the case studies below.

Finally, while systematic data collected in this research included only female murder cases, partial findings on blood murders can shed light on whether courts' treatment of honor killings is over-determined by states' outlook on gender or reveals a broader pattern in state-clan relations. As I demonstrate below, conservative values on female sexuality were pervasive in judicial interpretations in Turkey, whereas in Israel, courts rarely considered women's sexual behavior as relevant for provocation. However, pluralism in Turkey and centralism in Israel were not restricted exclusively to cases that involved male authority over women. While Israeli courts adopted the same centralist approach to blood-murder cases, Turkish courts often allotted low sentences in blood murder cases, consistent with their approach in honor killings. An examination of 94

blood murder cases in the Urfa Second Criminal Court, summarized in Table 2, revealed that the average sentence in cases that resulted in a conviction between 1974 and 2005 was 21 years, only 3 years more than the average for honor killings, even though the Criminal Code of 1926 explicitly stipulated that the sentence for murder with the motive of seeking blood revenge is capital punishment. Furthermore, as much as 30 percent of blood murder cases resulted in acquittal, in comparison to 20 percent in honor killing cases. When acquittals were figured in, the average years served in jail for every man murdered for blood revenge was 11.3, less than that for honor killings, 13.2. Finally, like honor killings, sentences for blood murders rose significantly over time, from 9.96 between 1974-1989 to 14.15 between 1990 and 2005. These findings, discussed at greater length below, show that there were significant parallels between the state's treatment of blood murders and honor killings in both cases. Leniency or toughness in honor killing cases, then, is not exclusively a function of judges' conservative or liberal attitudes on female sexuality but reflects a broader pattern of the state's relationship with extended families in the minority community.

Table 2: Blood murders and honor killings in Turkey, 1974-2005

	Blood murders, 1974-1989	Blood murders, 1990-2005	Blood murders, 1974-2005	Honor Killings, 1974-2005
Avg sentence	18.6	26.6	21	18.2
Avg sentence with acquittals as zero years	10	14.1	11.3	13.2
Acquittal rate	31 %	29 %	30 %	20 %

Note: Data was compiled from the First and Second Criminal High Courts of Urfa, 1974-2005. The third and fourth columns compare courts' treatment of honor killings with blood murders, while the first two columns compare courts' treatment of blood killings over time.

III. Legal Discourse

Family Order and Provocation in Turkish Courts, 1974-1989

During the 1970s and 1980s, Turkish courts routinely reduced sentences in honor killing cases based on the provocation defense without extensive discussion of the practice as a particular or "cultural" crime. In a 1983 case, a 19 year old girl was killed by her brother for eloping with a man her family did not approve of. The sentence for the brother was reduced by one fourth, because the court found that he "committed his act

under unjust provocation when the victim eloped with a man against the wishes of her family."[14] In a series of similar cases on women murdered for eloping or becoming pregnant before marriage, the sentences of the perpetrators were reduced with the following arguments:

> since it was understood that he committed the crime upon anger at the victim who eloped without permission from her family;[15]

> [because] our court has reached a fully conscientious opinion that as identified in the autopsy report, although she was a girl, she was not a virgin, and the accused killed his sister under aggravated provocation as a result of seeing her in illegitimate intercourse;[16]

> because it was established that he killed his sister under the pain and sorrow resulting from her elopement with a man, this unjust act by his sister was accepted as grounds for simple provocation, *considering also the region's characteristics*;[17]

> [because the family] committed the act under the sorrow and pain resulting from the victim's becoming pregnant from an illegitimate relationship;[18]

> because the accused committed the crime upon learning that his sister was pregnant from another man, the court reached the opinion that it would be more

[14] Urfa Second Criminal High Court, A.1982/164, D.1983/132.
[15] Urfa Second Criminal High Court, A.1982/137, D.1983/153.
[16] Urfa Second Criminal High Court, A.1983/211, D.1984/77.
[17] Urfa Second Criminal High Court, A.1984/128, D.1984/191.
[18] Urfa Second Criminal High Court, A.1988/12, D.1988/97.

just to accept this situation as grounds for unjust provocation on behalf of the accused.[19]

In the cases above, unjust provocation was granted almost automatically when women violated the chastity norms of their family and community. Indeed, the provocation defense was accepted in as much as 63 percent of the cases in which the defense was applicable. To evaluate the subjective element of provocation, courts did not look for evidence of actual loss of self-control, even though many times the killings were done long after the woman's "provocative" action. As for the objective element, judges accepted as "unjust" any behavior that breached the rules of a woman's family, regardless of whether such behavior was lawful or not. They did not distinguish, for instance, between adultery, which was a crime punishable by imprisonment until 1991, and lawful acts, such as eloping, pre-marital sex, and pregnancy out of marriage. In so doing, they incorporated the morality of Kurdish extended families—which strictly prohibits eloping and pre-marital sex—as well as their own conservative conceptions of family authority and female chastity into the laws of the state.

There were, however, a few isolated instances in which judges identified the killing of women who elope as a regional custom that should not enjoy protection under the state's laws. In one exceptional case in 1981, for instance, the judges refused to apply the unjust provocation provisions with the following argument:

> [The court] has examined the defense's demand that [aggravated provocation] be applied on behalf of the accused given the region's customs and traditions and in view of the fact that the victim has eloped. Even though it is a reality that a girl's

[19] Urfa Second Criminal High Court, A.1988/38, D.1988/140.

> elopement may be unforgivable within the region's customs and traditions and will not be looked upon well, [the court] does not see this way of thinking, *which does not emanate from the victim herself* …, as grounds for accepting [the victim's act as] simple or aggravated provocation in favor of the accused.[20]

This was one of the rare references, in this period, to "regional customs" in honor killing cases. The framing is significant, since it is one of the earliest hints of "cultural difference" between Kurds and Turks.[21] Beyond framing honor killings as a regional custom, the court implicitly drew an opposition between custom and law, in favor of the latter,by not taking customs into account in its evaluation of the objective element of provocation.In this sense, it is also one of the earliest statements of legal centralism by the courts of Urfa. The court further suggested that as a citizen subject to the laws of the state, the victim was not responsible for the norms of her community. However, this decision was reversed by the Supreme Court on an appeal by the defense, and, in the re-trial, the same panel

> reached the opinion that it would be more just to apply [simple provocation] on behalf of the accused because the victim's elopement with M.S. despite her father's not permitting her to do so, her having intercourse with him consensually and in a way that defiles her, *that all of these were unjust acts that negatively*

[20] Urfa Second Criminal High Court, A.1980/119, D.1981/004.
[21] "Regional," in this context, is a euphemism for "Kurdish," a word which could not be pronounced in official discourse until the 2000s, due to the state's strict denial of the existence of a Kurdish people in Turkey.

> *affected the family order*, and the reasons that triggered the accused…to murder his sister with premeditation were these unjust acts by his sister.[22]

In the second round, the differentiation between state laws—according to which the victim's act was legal—and customary norms—which defined her act as "unjust"—was lost. Accordingly, the reference to "regional customs" was dropped in the later decision, in favor of the encompassing value of "family order." Conservative values on female chastity and family order, which were not specific to the region but shared by judges sitting on the bench, were interpreted flexibly to accommodate different family patterns.

A similar example of wavering between different forms of patriarchy concerned an unmarried girl, aged "upwards of 15" according to the court's estimation, who was killed by her 19 year old cousin when she was discovered to be pregnant. In one of his first decisions after being appointed to Urfa, Judge Şanlılar described the reasons for the murder as "their understandings of morality, honor, and primitive conservative regional customs." These "primitive customs" could not constitute a basis for provocation, argued Şanlılar, and sentenced the accused to life imprisonment with the following words:

> Her establishing a secret and forbidden relationship … and her becoming six months pregnant from this relationship cannot be construed as unjust acts towards the perpetrators in a way that would require the application of Article 51, whether this relationship be by her own will, as a result of her youth, natural impulses, her dreams of establishing a family in the future, and the requisites of civilization, or, the result of an unexpected event that befell on her against her will.[23]

[22] Urfa Second Criminal High Court, A.1981/102, D.1981/69.
[23] Urfa First Criminal High Court, A.1977/211, D.1979/135.

Şanlılar suggested that a woman's engaging in a sexual relationship is not "unjust" but "natural," and possibly a "requisite of civilization," while also hinting that her pregnancy may well have occurred as a result of rape. In neither case, he argued, could her behavior be interpreted as a form of provocation towards her cousin.

The next year, however, in a similar case in which a father killed his 19-year old, unmarried daughter because she had become pregnant, Şanlılar adopted a very different line:

> In our society, especially in small towns and villages, *daughters must live their lives in accordance with the wishes and wills of their fathers and mothers until the day they marry, even if they may be beyond eighteen years old.* A girl's having illegitimate sexual relations and especially her becoming pregnant from such relationships tarnishes the honor of her entire family, especially the honor of her father, and leads him to be despised by other members of society. In such a situation, there can be no doubt that the crime was committed under provocation.[24]

In this case, Şanlılar dropped his earlier reference to "primitive regional customs," suggesting that such customs constitute a part of the nationally protected value of family order.[25] The criterion for a woman's independence was, furthermore, no longer the state-

[24] Urfa First Criminal High Court, A.1979/123, D.1980/066.

[25] See Selda Şerifsoy, "*Aile* ve Kemalist Modernizasyon Projesi, 1928-1950" for an analysis of the construction of the modern Turkish family (2000). Şerifsoy shows that motherhood, carework, obedience to husband, and cleanliness were some of the values inculcated in the new Turkish family as part of the national project. See also Durakbaşa, "Cumhuriyet Döneminde Modern Kadın ve Erkek Kimliklerinin Oluşumu: Kemalist Kadın Kimliği ve " 'Münevver Erkekler'" for a similar analiysis of the construction of the new Turkish woman in the intersection of modernity and nationalism (1998).

defined legal age, but the woman's marital status, which defined her rights and obligations vis-à-vis her family. Judge Şanlılar effectively did away with the relevance of state regulations as they affected female citizens, and delivered authority back to the family. In the absence of further data, it is difficult to explain what caused the change of heart between the two decisions. It appears, however, that a year after being stationed in Urfa, Judge Şanlılar's willingness to impose a strictly centralist interpretation underwent a change.

Şanlılar's formulation of the "balance" between women's freedom and family authority proved to be popular and was repeated almost verbatim in all honor killing cases during the tenure of Judge Özçiçek, who replaced Şanlılar in 1981. In 1982, faced with a situation in which a married woman was killed by her brother upon hearing rumors of an extra-marital affair, Özçiçek slightly revised Şanlılar's formulation, which had restricted family authority to the parents of unmarried girls. Özçiçek ruled,

> In our society, especially in small towns and villages, sisters must live their lives in accordance with the wishes and wills of their fathers, mothers*and brothers*, *even if they may be married*. Married sisters who engage in illicit relations, especially if such a situation becomes known after her marriage, tarnishes the honor of her entire family, especially that of her brothers and leads him to be despised by other members of the society. Under such conditions, there can be no doubt that the crime was perpetrated under provocation.[26]

With this decision, Özçiçek expanded the range of family members with authority over women to include brothers and extended the period during which women remained under

[26] Urfa First Criminal High Court, A.1982/139, D. 1982/117.

such authority indefinitely. In the meantime, Şanlılar's first case, in which he had sentenced the accused to life imprisonment for killing his pregnant cousin, came back to Özçiçek's court after an appeal to the Supreme Court. Özçiçek reduced Şanlılar's life sentence to 30 years of imprisonment with the following argument: "Her becoming six months pregnant [constitutes] unjust provocation towards the perpetrators because they were her uncle's sons and their honor was tarnished from her having sexual relations outside marriage."[27]The possibility, hinted in the first decision, that the victim may have become pregnant from a forced relationship was omitted from consideration.

By 1982, then, judges in Urfa had established that women had to live by the "wishes and wills" of their fathers, mothers, brothers, and cousins, whether they were married or not, and whether they were of legal age or not. Faced with the authority of the family, judges gradually withdrew the rules of the state and confirmed that women were subject primarily to the jurisdiction of their families. The "family," moreover, was imagined in flexible terms, incorporating the extended family structure of Eastern Turkey under a loosely and conservatively defined notion of "family order." Significantly, judges did not distinguish, except in a very few number of cases, between "state law" and "regional customs," or between Turks and Kurds. The few instances in which judges declined to grant the provocation defense to what they described as a "regional custom" were appealed to the Supreme Court, and on remand, the sentences were reduced and the reference to regional customs was dropped in favor of "family order." Where mentioned, "difference" was conceived as pertaining to the "rural" or the "small town" than to a different—Kurdish—ethnic group. The lack of a discourse on "the other" in judicial decisions of this period can be attributed to the continuing sway of Turkey's assimilation

[27] Urfa First Criminal High Court, A. 1981/39, D.1981/17.

ideal. Turkey continued to officially deny the existence of a Kurdish people in Turkey until the 1990s. Furthermore, the Kurdish national movement, which tried to inscribe Kurdish identity in public discourse, did not become a mass movement until the 1990s. It is not surprising, then, that judges did not fundamentally link honor killings to "cultural difference" or Kurdish identity.

The Emergence of "Custom" in the 1990s and 2000s: Between Legal Pluralism and Legal Centralism

During the 1990s, the Kurdish-state conflict rapidly escalated. Violence between the PKK and state security forces increased by almost five-fold from 1984-1991 to 1992-1995 (Kirişçi and Winrow 1997: 126). Moreover, a number of international and domestic developments in the early 1990s made it impossible to maintain the myth that Turkey did not have a Kurdish population. At the international level, the Gulf War (1990-1991) brought unprecendent international attention on the Kurds of Iraq, and a massive outpouring of Kurdish refugees from Iraq to Turkey. Domestically, President Turgut Özal and a coalition government between the True Path Party (DYP) and the Social Democratic People's Party (SHP) took several steps to recognize "the Kurdish reality" and hinted at the possibility of relaxing previous restrictions on the expression of Kurdish identity and culture. Liberalization did not proceed smoothly, but rather, went hand in hand with increasing repression. For instance, the government revoked a law that had banned the speaking of Kurdish, but Kurds continued to be tortured, prosecuted, and jailed for writing about Kurdish rights and demands. Despite increasing repression and state violence, however, the government's attempts to contain the expression of Kurdish

identity failed from the 1990s on as the Kurdish national movement, too, sought to construct a boundary between Kurdish people and Turkish people. As I show below, the increasing politicization of Kurdish identity had repercussions for how judges discussed and punished honor killings.

Beginning with the 1990s, particularly in the 2000s, sensitivity to honor killings increased in courts. Investigations became more detailed and careful, sentences began to rise, and the arguments regarding unjust provocation underwent a notable change. While judges still held conservative values on female chastity, the range of "wishes and wills" by which women had to live was increasingly restricted to the nuclear family and the marital relationship. Rumors of adultery were often accepted at face value, and husbands—official or unofficial—were automatically granted provocation, if they claimed in court that their wife had been unfaithful. The murder, by their brothers, cousins, and fathers, of women who eloped, had a premarital affair, or became pregnant before marriage, however, was increasingly seen as a culturally distinct form of murder, a "regional custom." In other words, legal discourse reflected the emergence of a new boundary between the "state" and "the region," in which the former was identified with civilization and the latter with clans and backward norms.The framing of honor killings as "regional custom" opened the way for both pluralist arguments for mitigating sentences based on the cultural background of the accused, and for legal centralist arguments on the supremacy of state law over custom.

Initially, courts were more likely to endorse culturally pluralist arguments in evaluating the subjective condition of the accused. For instance, in the case of a woman who was discovered not to be virgin at the time of her marriage and who was

subsequently returned to her family to be killed by her brother, the court applied aggravated provocation, "since it was understood that he killed his sister with the belief that, according to regional customs and traditions, it was his responsibility to cleanse his honor when his sister lost her virginity in an illegitimate sexual intercourse."[28] In a similar case, simple provocation was applied because the accused "carried out the act because his sister ran away from home, [and] when the traditional structure of society, its customs and norms are taken into consideration, this constituted a powerful pressure on the family, therefore the accused committed the crime under [simple] provocation."[29]In the case of a 15-year old girl who was killed by her brother for running away from the man to whom she had been forcibly married by her family, the court reached the conclusion that "the existence of social pressure on the accused individuals due to customs and traditions, the increasing magnitude of this pressure, and the fact that the accused individuals were regarded as inferior and excluded in society, [for these reasons,] it was decided that the crime was committed due to social pressure and aggravated provocation."[30] Like the cases from the 1980s, in the above examples, sentences were reduced when the issue involved family honor. Indeed, the use of the provocation defense increased from 63 percent during 1974-89 to 72 percentin the first half of the 1990s. Within the provocation defense, the granting of *aggravated* provocation, which decreases a sentence by two-thirds (as opposed to *simple* provocation, which mitigates the sentence by one-third) also increased from 27 percent to 48 percent between 1990 and 1995. The basis of these reductions, moreover, now included explicit references to

[28] Urfa Second Criminal High Court, A.1994/17,D.1994/26.
[29] Urfa Second Criminal High Court, A.1994/26, D.1994/40.
[30] Urfa Second Criminal High Court, A.1994/089, D.1994/137.

"regional customs and traditions," the official euphemism for "Kurdish culture."[31] Judges did not automatically interpret the woman's act as an unjust one, nor did they invoke vague notions of "family order," but argued that eloping and pre-marital sex had to be considered provocations in the "regional" context where men who did not cleanse their honor were looked down upon by their community. In accepting these arguments, courts implicitly recognized that women *in this region* were bound by the laws of their families and the state could protect them only partially when they breached these laws. They endorsed, in other words, a certain level of legal pluralism, acknowledging the multiplicity of norms in society and granting significant weight to communal norms that contradicted official law. It is difficult, however, to interpret this pluralism as a multicultural turn, for the level of state-violence against Kurds increased greatly during the 1990s. When considered in conjunction with the central government's increasing reliance on Kurdish clan leaders in the military struggle with the PKK, the shift towards greater pluralism can be construed as a reflection of this alliance.

With the framing of honor killings as a regionally specific practice, the way was also opened for legal centralism. Thus in other cases, and increasingly, cultural arguments were weighed against the supremacy of state law and the legal rights of the victim. At the aggregate level, the use of the provocation defense did not begin to decline until the mid-1990s, but the first landmark cases occurred in the early 1990s. In the case of a woman who was killed by her family in 1991 for eloping with her lover, the court stated:

> The criminal law does not recognize traditions and customs. The victim has done nothing to the accused. The victim has, with the feeling of love and romance

[31] See supra note 21.

> characteristic of her age, eloped with the man she loved, returned to her family without having sexual intercourse, indeed the man's family requested that they be married, and proposed giving their own daughter to the victim's brother in exchange, but the victim's family did not accept this offer, and before 24 hours, killed her cruelly following strict regional customs. There is no unjust provocation by the victim to the accused. Nor can customs and traditions be considered unjust provocation in and of themselves ...therefore... no reductions have been applied in favor of the accused.

The court sentenced the accused to thirty years in prison.[32]

The ruling marked a dramatic shift in the state's treatment of customs. To begin with, it put forth a strong opposition between the criminal law of the state and local customs and traditions. Second, it hinted that the state protects women's "natural impulses" to engage in romantic affairs, regardless of the laws of their families. Third, in contrast to earlier rulings, which judged women's behavior according to the laws of their families, the court's interpretation of provocation drew on notions of individual responsibility by placing the relationship between the victim and the accused (rather than their relation to the woman's family) at the center of the discussion. Hence, the court implied that all citizens have to abide by the laws of the state, and not the laws of their family, and this shift towards greater legal centralism included an acknowledgment of the rights women hold by virtue of being subject to the laws of the state. Yet the woman's innocence—and the protection she would receive from the state—rested partially on her returning to her family without having had sex and her desire to be married to her lover.

[32] Urfa Second Criminal High Court, A.1990/27, D.1991/159.

In other words, the denunciation of local customs as "cruel" drew on other notions of female chastity privileging the husband—and the nuclear family—over the woman's agnatic kin and her extended family.

The construction of honor killings as a particular, "regional" custom that contradicted state law took its shape more fully in the mid-1990s. In a 1994 decision, the court stated:

> It is a reality that in the region, families of women who have illegitimate affairs experience social pressure, are looked down upon, and excluded from social circles. Thus, the practice of killing a woman for cleansing honor is endorsed by the society. However, in order that the pressure and consequence of wrong traditions and customs not be seen as legitimate, the punishment for this act should have a deterrent value for future acts of this sort. Wrong traditions and customs should not carry more weight than the law.[33]

Two years later, the same judge expressed the incompatibility of custom with state law more forcefully:

> In the region there is a custom of killing girls who elope. Such a custom is incompatible with all wisdom, reasoning, and logic, and there can be no question regarding its unacceptability. It is a reality that those who do not abide by this custom are excluded from society and regarded as inferior. However, a custom that is contrary to the law cannot be regarded above the law.[34]

[33] Urfa Second Criminal High Court, A.1994/87, D.1994/140.
[34] Urfa Second Criminal High Court, A.1996/27, D.1996/056.

In this decision the court underlined very strongly the tension between "law" and "custom," and indicated, with as much assertiveness, the supremacy of state law. The re-ordering of the balance between law and custom did not take women's sexual freedom as its point of departure but, rather, an emerging notion of civilizational superiority, described in the universalist language of "wisdom, reasoning and logic." These decisions were followed by a landmark ruling in 2004, in which the panel sentenced nine members of a family to life imprisonment for participating in killing their daughter, who had been discovered not to be a virgin at the time of her marriage.[35] The judge argued that the murder was the result of the family's *collective will* and that therefore all members who participated in the decision-making process had to be punished. The court's reference to the "collective will" of the clan suggests that judges approached clans as full-fledged spheres of authority that had to be eliminated to establish state authority, an approach to Kurdish clans that was dominant also in the 1930s, as I will show in the next chapter. Although the ruling was celebrated as a victory for women's rights in major newspapers, the court's message on female sexuality was mixed. The judge rejected the provocation argument with the following reasoning:

> Even if it could be considered that the victim's having a relationship with a man could be a cause for provocation, this can only be considered from the perspective of her [nuclear] family.... The fact that those closest to the victim, her father and brothers, were not overwhelmed by severe pain and anger, but that her uncle and her uncle's sons became provoked, does not fit the natural course of life. Thus, the reason for the crime was not provocation, it was custom as such.[36]

[35] See Case 9, *Altun*, in chapter 4, for a fuller discussion of this case.
[36] Şanlıurfa First Criminal High Court, A.2005/256, D.2005/224.

The court implied that the authority of the nuclear family over its female members can be accepted to a certain degree, while the authority of the extended family is illegitimate and beyond reason. What was increasingly becoming "illegitimate" during the 1990s and 2000s, then, was not violence against women, as much as the extended family structure of the Kurdish community. As Kurds increasingly, publicly, and violently contested the state's forced assimilation paradigm in the 1990s, judges dropped the difference-blind (yet conservative) approach of the 1970s and began to articulate an essentialist and primordial notion of Kurdish cultural identity, one that depicted "the region" as backward and un-deserving of self government.

Table 3 summarizes how these shifts in legal discourse were reflected in sentencing levels. Sentences were lowest during 1974-1989 (11.1 years), increased moderately by about a year-and-a-half in the next five years (12.7), and then, more markedly from 1996 to 2005 (15.7). The question remains whether the trend from pluralism to centralism was caused by greater willingness or capacity, on the part of law enforcement officials, to trample the authority of clans.

An examination of trends in the use of the provocation defense, acquittals, sentence reductions due to the age of the accused, and numbers of women without identity papers sheds light on this question. Indeed, the use of the provocation defense—which is largely in the discretion of the judge, and can therefore be interpreted as a matter of willingness—did not decrease but increased from 63 percent in 1974-1989 to 72 percent in 1990-95. Furthermore, within the provocation defense, the share of aggravated

provocation—again, at the discretion of the judge—increased from 27 percent to 48 percent in the latter period. At the ideological level, then, cultural pluralism in courts was at its height during 1990-95. If courts were more open to arguments about cultural difference, why did sentences rise? Fewer acquittals and fewer age-based sentence reductions account for the moderate rise in sentences from 1974-89 to 1990-95. Both can be read, I argue, as indicators of increasing state capacity. Where the community controls the evidence and testimonies, it is likely that acquittals and age-based reductions reflect state officials' inability to penetrate into the society and collect reliable information.It is quite likely, and has been expressed by many law enforcement officials in interviews, that families attribute the crime to a minor within the family to escape a severe sentence, even when the actual perpetrator may have been someone else. Law enforcement officials often have difficulty in identifying the actual murderer since the testimonies are prepared collectively by the family, and minors are willing to confess to the crime under instructions from their parents.It is also common for families to change the official age records of their sons to secure a lower sentence. This interpretation is supported by the decline, over time, in numbers of murdered women who did not have identity papers. Of eighty women, whose murders were tried in the courts of Urfa between 1974 and 1989, forty of them did not have any official records, including identity cards and marriage certificates. Their births, marriages, and deaths were a matter of local memory, which could be manipulated at will in courts, and state officials relied exclusively on what was said of them by their families in courts. In such cases, there was no way for public officials to even verify whether the woman had been married or not, and if yes, to whom, except by the testimonies of her family and co-villagers. In other

words, state officials were dependent on the community—which remained highly illegible to them—for basic information regarding the case. In smaller districts and villages, where clans exercised greater control, state capacity was accordingly more limited. In Siverek, for instance, a district of Urfa dominated by the Bucak clan, nearly half of all female murder cases tried in courts between 1996 and 2001 (44.4 percent) resulted in acquittal and the average sentence length for every woman murdered was 10.2 years, well below that for Urfa during the same period.[37]What changed during the first half of the 1990s, then, was not the government's willingness to eradicate clan authority, but its capacity to do so.

The trends from 1996 to 2005 reflect a different pattern. Acquittal rates and sentence reductions based on age remained relatively constant, while the use of the provocation defense decreased considerably, from 72 percent to 57 percent. Within accepted provocation pleas, the share of aggravated provocation also dropped. From 1996 to 2005, then, courts were not only more able, but also more *willing* to apply harsher punishments. In sum, Turkish courts shifted from a position in which they had both low capacity and low levels of willingness to interfere in the internal authority of clans in the 1970s and 1980s, to one in which they had greater capacity but weak willingness to interfere in such authority in the first half of the 1990s, and finally, to one in which they had both the willingness and a greater capacity to interfere in the internal authority of clans.

[37] The Siverek Criminal High Court was not incorporated in the aggregate analysis in the first part of this chapter for two reasons. First, data was not available for the same period of time, due to lack of cooperation on the part of judges serving on the court. Second, the stories in the decisions were too incoherent to draw reliable conclusions. That itself shows, however, that official law had a very tenuous hold over the affairs of the town.

Table 3: Changes in courts' treatment of honor killings in Turkey, 1974-2005

	1974-89	1990-95	1996-2005
Avg sentence	15.94	16.93	21.1
Avg sentence w/acquittal	11.06	12.77	15.71
Acquittal rate	24%	17%	18%
No age-based reductions	25	3	6
% aggravated provocation	27%	48%	27%
% simple provocation	36%	24%	30%
% provocation total	63%	72%	57%
Total			

Note: The data was compiled from the First and Second Criminal High Courts of Urfa, 1974-2005

As the preceding analysis has shown, while conservative notions of female chastity have been a constant in Turkish judicial practice, courts' approach to extended families' sphere of authority has changed substantially over time. The analysis of court decisions shows that the state exercised a very thin level of authority in Eastern Turkey during the 1970s and 1980s. While nominally citizens of the Turkish Republic, Kurdish women belonged primarily in the jurisdiction of their families and had to live by the laws of their family. The authority of extended families was reinforced by the outlook of state officials, who noted in their decisions that women had to live by the wishes and wills of

their fathers, mothers, brothers, and cousins. This perspective became more explicit in the early 1990s, when judges began to note a tension between state law and local custom, and, yet continued to concede that women "in this region," unlike citizens elsewhere in the country, had to heed the rules of their families. From the mid-1990s on, however, there was a notable shift in state officials' approach to rival spheres of authority. Judges began increasingly to speak of the incompatibility of customary practices with the laws of the state and to deny families the right to regulate and punish the behavior of their members. The shift coincided with the politicization of the Kurdish-Turkish boundary, as Turkey's repressive assimilation paradigm was increasingly challenged by the Kurdish movement for autonomy from below and European pressure for liberalization from above. Sentences in honor killing cases increased markedly, as the state began to mobilize its coercive power against the commitments that tied Kurdish men and women to their extended families.

The Evolution of Legal Centralism in Israel

Contemporary Israeli legal doctrine on honor killings has its roots in the British Mandate, when the French-inspired Ottoman legal codes were gradually replaced with common law rules and doctrines under British influence. The transition from a predominantly civil law (French) system to common law was significant since civil law systems give greater weight to the subjective element of provocation and are more likely to accept a provocation defense in murder cases, while the "reasonable man" standard of common law jurisdictions places greater emphasis on the objective conditions of

provocation. For the objective condition, it is not sufficient that the suspect felt provoked. He has to prove that a "reasonable person" would have been provoked.

Until 1936, the Criminal law of Palestine was the Ottoman Criminal Code, itself based on the French Criminal Code. During the late 1920s, British officials began to work on a new criminal code that would bring Palestine's criminal law closer to that of Britain and, in 1936, adopted the Palestine Criminal Code Ordinance. The precedents of the High Court on provocation are consistent with the shift from the continental system towards an Anglo-American system. On February 10, 1927, the Court of Appeal under the leadership of Chief Justice Baker delivered the following judgment regarding the murder of an Arab woman by her brother: "In view of the evidence as to the conduct and character of the woman who was the victim of the crime, we hold that the case is not one for which the maximum penalty should be imposed. We accordingly reduce the sentence to one of ten years' servitude."[38] The ruling is strikingly similar to the approach adopted by Turkish judges in the 1970s and 1980s, which did not see honor killings as a particularly cultural crime, but alsodid not hesitate in granting provocation whenever the female victim's chastity was questioned.

Seventeen years later, in 1944, the Supreme Court reversed this precedent under Chief Justice FitzGerald. The case involved an Arab man from Acre, who killed his aunt after hearing from other villagers that she had betrayed her husband. In his appeal, the man asked that his aunt's alleged affair be accepted as provocation and that his charge be reduced from murder to manslaughter. The Court responded to this request with a mixed moral message:

[38]Assize Appeal, 16/26, Abu Jasser vs. Attorney General, 2 Rotenberg 543 (1927).

> It has been argued with intensity before us that "family honour" constitutes a ruling code in the Arab way of life, and any infringement of it is an offence which arouses horror. This is a fact of which we are very well aware, and it is far from the purpose of the Courts of this Territory to undermine this laudable sentiment of Arab culture. But however intensely felt, and however praiseworthy their origin, those sentiments cannot be accepted as justification for the taking away of human life.[39]

The ruling recognized that Arab customs may differ from Jewish or British ones and it certainly made no pretense of endorsing sexual freedom for women in its denial of provocation. Rather, it stated that no matter how "praiseworthy" or "laudable" the *subjective* condition of the accused, it did not justify loss of self-control and the commission of violent crime.

Israeli courts largely followed the British precedents in determining provocation. In 1954, the Israeli Supreme Court set its own precedent on provocation in its *Segal* decision, where it required "reasonableness" as a test of provocation. The reasonable man, the judges argued, would be the average Israeli. In practice, however, courts have operated with a very strict definition of reasonableness, and only twice since then, according to Yoram Shachar, have they allowed the use of provocation in female murder cases, both of which happened to be in the Ashkenazi-Jewish community (1990).[40] The

[39] Criminal Appeal 129/44, El-Majdoub vs. Attorney General in Levanon and Apelbom, *Annotated Law Reports* (1945), pp. 69-70. I am grateful to Assaf Likhovski for bringing these two cases to my attention.
[40] I am grateful to Yoram Shachar for explaining the history of the provocation defense inIsrael. For an overview, see Shahar's 1990 article, "Reasonable Person in Criminal Law."

decisions on honor killings and blood revenge followed the British precedent set in 1944 and the *Segal* precedent of 1954.

In 1955, in an honor killing case, the Supreme Court of Israel evaluated the applicability of provocation when communal norms differ from legal values:

> The appellant has two arguments. The first is that, if we take into consideration the customs of the Muslim villages, we will find that when the appellant discovered for certain that his sister was pregnant he got so angry that he did what he did in hot blood. We do not accept this argument. It has been said many times in verdicts from the mandate period that Arab customs in the Land of Israel and in Israel, such as avenging the family's honor with blood, are not customs that the law can recognize.[41]

The same year, the Supreme Court also handed down a decision on killing for revenge in a blood dispute, in which it reiterated the same principles. The case involved a Bedouin man who murdered a man from a rival tribe, in order to take revenge for the murder of his brother. The Court reached the following conclusion:

> The fact that the appellant's senses were blurred and that he identified a moment in which he could redeem his brother's blood and took this opportunity, does not provide justification for any crime and it will not absolve him from responsibility for murder. If it were to be decided, even once, that the reaction of an avenger of blood is justifiable, or even that the charge for such an action could be lowered

[41] Criminal Appeal 27/55, Kamel Hassan vs. State of Israel.

from murder to that of manslaughter, the land would be filled with avengers of blood and vigilantes.[42]

In comparison to the Mandate courts, which based their reasoning on an argument of self-control, the Israeli Supreme Court placed greater emphasis on conflicts between (Israeli) law and (Arab) custom, accompanied by a claim to sovereignty and more explicit references to identity. The Court stressed that *Arab customs* must bend before the law in the *Land of Israel*. In other words, while Israeli courts applied reasonableness tests inspired by British precedents, they incorporated new arguments about "cultural difference" in their decisions. For instance, the District Court of Nazareth considered reasonableness in 1972 in the case of an Arab man who killed his sister after he heard rumors about her affair. The question was whether the woman's saying "I can do whatever I want with whomever I want" was a provocation to her brother. The judges reasoned: "We think that most people belonging to his ethnic group will not be able to control themselves. But if we consider the entire population of the country, we believe that most of them would have control."[43] In this case, the Court explicitly endorsed the idea that standards of reasonableness vary among different cultures, and asserted legal centralism by implying that Arabs must comply with Jewish standards of reasonableness and by sentencing the accused to life imprisonment.

Two years later, the Israeli Supreme Court underlined once again the conflict between Arab customs and Israeli law in the case of a seventeen year old Arab man who

[42] Criminal Appeal 120/55; Judgments of the Supreme Court, vol. 9, 1955, p.1051.
[43] District Court of Nazareth, 46/72, Hashibun vs. State of Israel.

killed his sister when she divorced from her husband and began to live with another man. The judges stated,

> We know very well that the tradition of the Muslims is to be very strict in the matters of family honor. However, we said it more than once that the tradition of blood revenge and severe violence should be uprooted, even if according to tradition they are justified. The laws of the state protect the life of man and the customs of ethnic groups must give ground before the laws. This court will not take murder lightly just because it has traditionally been acceptable among his community in the past.[44]

While the ruling continued the custom-law opposition in favor of state sovereignty, it also introduced a human rights argument by stating that the protection of life is a paramount value for the state.

Four years later, the District Court of Be'er Sheva similarly underlined the superiority of state law over Arab customs when human life is concerned, adding also a statement about the need for the Arab community to modernize:

> We are aware of the reality among the Arab inhabitants, who are very strict regarding their girls' morality. According to their point of view, the accused did the right thing and acted in a way that is generally accepted in his community. However, we see the actions of the accused severely. These actions caused the death of a young person with her life before her…. There was no justification to

[44] Criminal Appeal 320/74, Sa'id Mahmud vs. State of Israel.

> the actions of the accused, which were wrong, and there is no place for such things in our times.[45]

The opposition between Arab customs and Israeli law became more pronounced during the 1990s and 2000s, as courts increasingly stressed that violence in the name of preserving family honor is a barbaric Arab custom for which there can be no tolerance. The emergence of a human rights discourse centering on the sanctity of life was accompanied, in other words, with claims to superior civilization. In 1985, the Supreme Court ruled, "[W]e are of the opinion…that the deed which the appellant committed is of the utmost gravity, and the social norm of preserving 'family honor' through violent action, which is still acceptable in this sector of society, is a false norm." In 1996, the District Court of Haifa stated,

> As a concluding remark in this judgment, we consider it necessary to state that one should never expect that in the juridical system of Israel we will recognize the issue of family honor as an extenuating circumstance, which could result in mitigating the charge…if the life of an innocent and unhappy person was taken….The defendant committed an act which is most condemnable and for which he deserves no pardon and no mercy. The defendant's use of the concept of an "offence against family honor" as an excuse lacks any justification. It is the duty of the court to subject the defendant to the most severe punishment which the Penal Law reserves for cases when a human life is taken in an act of intentional murder…. Let it be known to every person that the argument of "an offence against family honor" lacks any justification that could explain an act of violence

[45] District Court of Be'er Sheva, 479/78, 'Awadavs. State of Israel.

> of any kind whatsoever, especially the taking of a person's life. We regard the deed of the defendant as an abhorrent and detestable act of murder to be punished with all the vigor of the Penal Law, that is—with nothing less than a life sentence. This punishment should serve as a memorable discouraging example for both individuals and collectives. The sanctity of human life is not an empty concept, and whoever takes a human life should know that he will be punished with the utmost severity of the Penal Law.[46]

In 2001, the District Court of Nazareth stated, "The accused committed a harsh, contemptible, criminal, ugly, disgusting deed."[47] In 2005, the District Court of Jerusalem echoed the Nazareth court: "The satanic plan and its execution…were done by a human without humanity… out of uncivilizedand distortednorms."[48] The same year, the Supreme Court held, "It is unfortunate that this court sees cases of this kind, a phenomenon that is still common among particular ethnic groups even though it is deviant. There are no signs for its disappearance, even in a world where many things have changed."[49]

In sum, unlike Turkish courts, Israeli courts adopted a legal centralist approach since the establishment of the state and judicial discourse was marked by an opposition between Israeli civilization and backward Arab custom from the beginning. Consistent with a discourse on the superiority of Israeli law over Arab custom, the courts subjected perpetrators of honor murders to the most severe sentences envisaged in Israeli penal law.

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[46]Criminal Case No.163/94, State of Israel vs. Hussam Ben Salih and Husam Kinaan.
[47] District Court of Nazareth [missing file number], State of Israel vs. Omar ibn Haled Isma'il [decision date: 14.06.2001].
[48] District Court of Jerusalem, 851/05, State of Israel vs. Maher Shkerat.
[49] Criminal Appeal 5197/05, Mundar 'Isa vs. State of Israel (Tel Aviv).

Conclusion