

## TÜRK MEDENİ HUKUKUNDA 1926'DAN GÜNÜMÜZE KADIN HAKLARI ÜZERİNE DÜŞÜNCELER

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### Özet

1926 yılında Türk Medeni Kanunu yürürlüğe girmiştir. Bu kanunun yürürlüğe girmesi ile birlikte medeni nikah ilkesi gibi kadın hakları alanında o dönem için önemli sayılabilecek bir çok yenilik kabul edilmiştir. Ancak zaman içerisinde gerek Türkiye’de gerek dünyada kadın hakları alanındaki gelişmeler sonucu dönemi için oldukça yenilikçi olan medeni kanun eskimiş ve yeni bir medeni kanun yapma ihtiyacı doğmuştur. Bu ihtiyaçlara cevap vermek adına 2002 yılında Türk Medeni Kanunu kabul edilmiştir. Bu kanun ile birlikte kadın hakları alanında bir adım daha ileri gidildiğini söylemek gerekir.

**Anahtar Kelimeler:** Kadın erkek eşitliği, kadın hakları

### NOTES ON THE WOMAN RIGHTS GRANTED BY THE TURKISH CIVIL LAW FROM 1926 TO TODAY

#### Abstract

In 1926 Republic of Turkey introduced significant reforms in the field of civil rights effected by the promulgation of Turkish Civil Code. Since then women's rights have undergone an important transformation the significance of which can be appreciated with regard to the historical conditions of the period. The Civil Code of 1926 remained in force for more than seventy-five years, without being supplemented by new articles. In the meantime many changes that occurred in Turkish social life paved the way for the enforcement of new articles in the civil code. In 2002 the new Civil Code Code was enacted which carried the legal system a step further in connection with the legal rights of women.

**Key words:** Equality between man and woman, woman rights, matrimonial system

#### Before 1926

The main theme of this paper is the transformation that the civil law brought about in Turkish legislature. In 1926 the newly founded Republic of Turkey introduced significant reforms in the realm of civil rights effected by the promulgation of Turkish Civil Code. Since then women's rights have undergone an important transformation the significance of which can be appreciated with regard to the historical conditions of the period. As women's status was subject to norms in accordance with the Islamic law during the Ottoman times, the Republican law had to assume a function to ameliorate women's rights.

Before dealing with what the new code introduced into Turkish law, it would be convenient to see the circumstances prevalent prior to the foundation of the Republic. Before Turks accepted Islam monogomy was predominant as an ancient custom among the Turkish communities. Although men were formally head of family, the women also had a respectable position. Women had propriety rights over her own assets and had a right to divorce.<sup>1</sup> As female intelligence and talents were found trustworthy in old Turkish customs women played an important part in governmental affairs too.<sup>2</sup> After Turks accepted Islam, Turkish family life inevitably began to be shaped in line with the Islamic rules and conventions. Under Islam males were dominant in the family and a man could marry four women. Furthermore, women did not have to be present even in the wedding ceremony, they used to be presented by their male representatives who would also declare their intention to get married.<sup>3</sup> Men had essentially a right to divorce their wives but women could get divorced only when certain conditions were met. Although divorce was regarded improper in Islamic conventions, a man did not

<sup>1</sup> Erol Cansel, “Medeni Kanun’da Kadın Erkek Eşitliği İlkesinin Değerlendirilmesi (Mukayeseli Hukuk)”, **Medeni Kanunun 50. Yılı**, Ankara, 1977, p. 36.

<sup>2</sup> Halil Cin, “Tarih Boyunca Kadının Hukuki Statüsü Açısından Türk Kadınının Durumuna Kısa Bir Bakış”, **Jale Akipek’e Armağan**, Konya, 1991, s. 6.

<sup>3</sup> Cansel, s. 37.

have to explain why he divorced his wife.<sup>4</sup> Under Islamic law women had capacity to hold rights and capacity to act and they also had rights to inheritance, yet under Islamic inheritance law females and males could own different, unequal portions.<sup>5</sup> However, these were formal rules given by the law itself, in the case of the Ottoman society rules could find several different practices. Although polygamy was lawful during the Ottoman times, it was not approved of and preferred by the greater part of the population due to Turkish family traditions. Thus polygamy was never widely accepted in the Ottoman family life. In most cases men who could not have children used to prefer polygamy,<sup>6</sup> while others were noticeably wealthy people.

Women's rights actually have a long history. Beginning with the Ottoman *Tanzimat* period one sees a slight movement of improvements in the field of women's rights. According to the Constitution of 1876 (*Kanun-i Esasî*) all citizens were deemed to be equal. In the second half of the nineteenth century modern schools were opened that offered education both for boys and girls. Primary school education for girls and boys was mandatory. During the same period girls' high schools, teacher's training schools and nursing schools were founded. The new legislation also allowed both males and females to have equal shares from the inheritance. By a law approved in 1871 marriages and divorces had to be registered, and forcing into marriage was declared to be unlawful. In 1897 women started to be wage earners, and in 1913 civil servants. However, as Constitutions of 1876, 1908 and even 1924 did not stipulate legislative auditing, forming mechanisms to secure Constitutional rights and liberties, the principle of equality granted to both sexes could not fulfill sufficiently its purpose.<sup>7</sup>

#### After 1926

The role of women in the society had started to improve after the *Tanzimat*, which was long before the proclamation of the Turkish Republic, reached a peak with the Turkish Civil Code. In 4 October 1926 Turkish Civil Code was enacted and via this legislation remarkable changes introduced in the realm of civil rights. This code which was inspired by the Swiss Civil Code of 1907, was based on rules securing fundamental rights and liberties, equality before the law, individual ownership and secularism. As the rule making technique requires, this legislation was certainly abstract and objective and gave the judges the possibilities to interpret and fill in the legal gaps within the limits of statutory authority which precluded arbitrary interference of the judge.<sup>8</sup>

In the field of women's rights and family law, the most important novelty prescribed by the code of 1926 was the introduction of civil marriage. It also legalised monogamy and it became an essential principle of Turkish family law. Thus religious marriages and one man marrying more than one woman were then declared to be invalid. Civil marriage required an oral consent by both parties in front of an authorised civil servant so that the marriage contract may be concluded lawfully and as both partners need to be present during the ceremony, marriage could no longer be acceptable through the consent of a representative. Women were also given a right to divorce; in that respect men and women became equal citizens. A divorce could not be valid with the unilateral decision of the husband, it should be approved by court decision. Islamic marriage rules were thus completely eliminated. Under the new law divorce cases may be filed by either of the parties when certain conditions are met; women could also take custody of her children in cases of divorce; women's right of disposition to property was recognised; daughters and sons of the family were granted equal rights in cases of distribution of inheritance.

When the new legislation is compared with the previous system its advantages can be seen clearly. In the domain of women's rights it was a great improvement. So at the time of its enactment it was a great reform and it reflected the revolutionary nature of the Republic. However, as the time went by women gained various other rights. Universal Declaration of Human Rights (1948) guarantees equality between genders. We should also take notice the Convention on the Elimination of All Forms

<sup>4</sup> Mehmet Akif Aydın, *Türk Hukuk Tarihi*, İstanbul, 2013, p. 286.

<sup>5</sup> Cin, pp. 12-13.

<sup>6</sup> Aydın, ps. 282.

<sup>7</sup> Sibel İnceoğlu, "Türk Anayasa Mahkemesi ve İnsan Hakları Avrupa Mahkemesi Kararlarında Eşitlik ve Ayrımcılık Yasağı", *Çalışma ve Toplum*, 2006/4, p. 47.

<sup>8</sup> Yavuz Abadan, "Tabii Hukukun Medeni Kanunumuz üzerindeki Tesiri", *AÜHFİD*, C.VIII, S.1-4. 1951, pp.309-353.

of Discrimination Against Women (CEDAW). This Convention was accepted in 1979 by the United Nations and took force in 1981. Turkey ratified the Convention in 1985 and CEDAW passed into Turkish law. CEDAW contributed to the removal of legal impediments concerning male and female inequality. Apart from the novelties brought by law, through the improvements in social life women who received education started to work beside men and became more active in social life. Eventually Turkish Civil Code of 1926 was seen to be not extensive enough to meet the requirements of social life as Turkish women's status in society and family remarkably changed.

One of the most debated concepts of the Civil Code was the "head of family", the *paterfamilias*. According to the law of 1926, husband as head of family was responsible for earning a living for the family. The husband was the party who was supposed to establish the unity of family life. As the breadwinner of the family it was his duty to incur all the expenses; e. g. paying of monthly rents of the residence and buying of household furniture, whereas women were entitled only to run into the permanent expenses of the family, e. g. buying groceries, fuel oil, everyday needs. However, even in such cases as the woman carried on the shopping, the husband would be responsible to pay the debts arising from the transactions. In case the wife went beyond the given limits the husband would be authorised to forbid his wife to carry out such transactions. Women could only be responsible for debts when the husband was insolvent and unable to pay his debts. In general a married woman could not be a legal guarantor in favour of her husband without a judge's permission. The law limited married women's capacity to act on her own.<sup>9</sup> As the husband was head of family, his wife could only work with the permission of her spouse. However, in the 1990s this rule was nullified by the decision of the Constitutional Court on the grounds that the related article was contrary to equality principle of stated in the law.

The husband was entitled to choose the family's residence. As the former law stated, "The wife's residence is that of her husband". This rule was problematic because married woman could not have a different residence legally even though she had to leave the family house because she was treated badly by her husband. The married couple would exercise parental rights together but the father's vote would be decisive in case of a conflict. The husband's responsibility as head of family continued even after divorce, he had to support his wife so that she might not become dependent. A woman had to give alimony to her husband only in cases when she is financially well off.

The matrimonial property system received several objections.<sup>10</sup> In Switzerland matrimonial property system was based on union of possessions. However, Turkish law makers did not adopt this system and preferred separation of property. Accordingly, each of the spouses shall hold individually rights to the property acquired whether before and during the marriage, hence the management of the property and its revenue would be separated. But women could leave the management and revenues of her property to her husband, but in a such a case she is deemed to have waived the right to bring her husband to account.

The advantage of separation of property was that its liquidation was easy. When the marriage ended each spouse would take her / his own assets. But this solution was unjust both for the housewives and even for working women because the assets acquired during the marriage were registered in name of the husband. This was certainly due to conventional Turkish family life. On the other hand, housewives who did not work but raise the children and take care of home and thus contribute to the family union with their effort were not protected sufficiently. As a matter fact, working or nonworking (or not having a job) women both financially or with their effort have great role in the maintenance of the family. Giving them nothing at the time of the termination of the marriage was causing extremely unfair endings. Consequently, the wife would walk away with empty hands and the husband would get all of the assets and this would leave the woman financially unprotected. The other matrimonial property systems regulated by the Civil Code, namely community of goods and union of goods, included sections violating the equality principle. For example, in both of the systems a woman's personal property (such as the property she inherited) would be

<sup>9</sup> For the given debates see Selahattin Sulhi Tekinay, **Türk Aile Hukuku**, seventh edition, Filiz Kitabevi, İstanbul, 1990, pp. 324 ff.

<sup>10</sup> Arzu Genç Arıdemir, "*Tarihsel Gelişim İtibariyle Türk Hukukunda Evlilik Birliğinin Sona Erdirilmesi ile Mal Rejimleri Bakımından Kadın ve Erkek Eşitliği*", **Prof.Dr.Ergun Özsunay'a Armağan**, Vedat Kitapçılık, 2004, İstanbul, p.1-25.

managed by her husband and the revenues would be used by him.

In this general picture the woman's role is kept in the background, the active part is played by the man. Throughout the Civil Code of 1926 it can easily be seen that the wife does not have the same rights as the husband's, her role is almost always subsidiary. All of the decisions were given primarily by the husband. The underlying idea was actually that married women were not capable enough to make prudent decisions for the family without the husband's supervision. It was assumed that a woman always needed the protection of her husband as she always needed support by men. Both the provisions in the law and the underlying were clearly contrary to equality principle between the male and female. However, in contrast, there are jurists in Turkey who argue that these regulations were appropriate and relevant because they protected women and provided them with an environment secured by the husband.<sup>11</sup>

The Civil Code of 1926 remained in force for more than seventy-five years, without being supplemented by new articles. However, there were exceptions; one of such exceptions was the Constitutional Court decision made in 1992 which allowed women to work without the permission of her husband. Another example is the regulation which allowed married women to use her maidenname surname if she wants. If we leave such changes aside the Civil Code remained unchanged for along time. In the meantime many changes that occurred in Turkish social life paved the way for the enforcement of new articles in the civil code.

### **Civil Code of 2002**

In 2002 the new Civil Code was enacted which carried the legal system a step further in connection with the legal rights of women. The transformations which was noticeable in modern Turkish society in relation to female life had affected the law. The new law could not have brought to legal and political agenda without the contributions of several public forces: civil organisations, NGOs, women's associations, Bars and progressive segments of the society. But this does not mean to say that there were no debates and objections. Some jurists argued that the Civil Code was better for women in securing enough protection. They argued that such a change in law which makes women equal with men may result in misuse of females by males. For example, as long as the husband is the head of family he will have responsibility for his wife and children, but if we take away this responsibility the man will sit at home and the woman will have to work. They also stated that making women equal with men was suitable for the educated and financially independent women living in big cities and that such equality rules would not be suitable for the average Turkish housewives. Especially the women living in the rural areas indeed needed protection by men. After long debates on the draft bill the advocates of women's rights opinion took primacy. It was clearly the impact of modern developments in Turkish social life.

This objection should not be ruled out with regard to the issue of removing the concept of *paterfamilias*. In today's Turkey, the term "head of family" sounds obsolete; but in the 1920s it was not baseless. During the first of the twentieth century the greater part of the population lived in the rural areas, and the greater portion of the female population were uneducated, or even illiterate women who formally did not have a profession. So, the law of 1926 must have taken the conventional structure of Turkish families at large. However, during the second half of the twentieth century, urban population grew bigger and bigger, and eventually the greater part of today's population live in large cities. Such development radically changed social life, social values, hence family life. The law of 2002 had to consider the changing the social ponorama of Turkey.

What were the changes of the new Civil Code?

The husband is no longer head of family. This status was removed from the civil code. Thus all decisions concerning the family would be given together; the spouses are expected to choose their residence together. As equals both of the spouses would contribute to the family union either financially or with their effort. This is important especially for the nonworking women because their effort would also be valued. Also parental rights over children would be exercised together, equally. In case of a dispute the husband's vote would not precede, in case they could not come to terms they

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<sup>11</sup> see Hüseyin Hatemi - Rona Serozan, **Aile Hukuku**, Filiz Kitabevi, Istanbul, 1993, pp. 178 ff.

may apply court to settle the problem. The *paterfamilias* was then regarded as the sign of patriarchal society which made men solely responsible for the family. According to the new law women do not need their husbands' consent in order to work, and as far as pecuniary transactions are conducted for the permanent needs of the family both the husband and wife are made authorised without the formal consent of each other.<sup>12</sup>

The husband and wife are now free to regulate their pecuniary relationships within the limits prescribed by the law. The application of the former statutory régime had shown that separation of property usually favoured the stronger party, who was in most of the cases the husband. However, in the given cases the wife normally did not work outside home and do not acquire property even if she worked she usually gave her earnings to her husband during marriage. In case of separation, or on the demise of the husband the wife could rarely become the owner of the property. This caused unjust results for women. Thus a new system has been introduced which is known as the system of participation on acquired property.<sup>13</sup> This can be regarded as the most important change. In this system there are two types of property: properties which are acquired by one of the spouses with his or her effort during the marriage and personal properties which belong to the spouse at the time of the marriage and those which are acquired during the marriage by succession or other gratuitous means. Accordingly, possessions owned during marriage that are registered whether in the name of the husband or the wife, each spouse shall be entitled to lay claim for half of the given value of the acquired property. This was a real novelty in evaluating the effort of housewives who cannot directly make a pecuniary contribution to the family yet who do contribute to the sustenance of family union with their labour.

To sum up, several other clauses that were found detrimental to male - female equality were removed from the civil code. Yet, it cannot be claimed that the law text has been removed from all of such clauses. Debates on this matter have not ended and there will be more debates in the future as laws cannot keep pace with real life step by step. One may well ask: To what extent the given law has been effective in real life? How far has it affected family life and social order? Since the law was approved in the recent past, its reflections, its implications remain at present outside the scope of social observation. We need longer time to be able to deal with this aspect of the problem.

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<sup>12</sup> Bilge Öztan, **Aile Hukuku**Turhan Kitabevi, , Ankara, p. 15 and p. 160 ff. ; Turgut Akıntürk, **Türk Aile Hukuku**, eleventh edition, Volume II, Beta, pp. 9; 117; 125.

<sup>13</sup> To see more about the matrimonial system Öztan, pp. 249 ff. ; Akıntürk, pp. 154 ff.