

## 1917 DATED FAMILY LAW ORDINANCE AS A LAST CIRCLE OF CODIFICATION MOVEMENT AFTER *TANZİMAT* (REFORMS) AND IDENTITY CHANGES IN THE OTTOMAN EMPIRE<sup>1</sup>

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### ÖZET

Osmanlı tarihinde, *Tanzimat* dönemi, yasal, kültürel ve moderleşme anlamında pek çok önemli değişim ve dönüşümün gerçekleştiği bir dönemdir. Osmanlı'nın başlangıcından itibaren *Tanzimata* kadar devam edegelen hukuki (fıkhi) yapı bu dönemde yeni mahkemelerin kurulmasıyla ve kodifikasyonla, ciddi yenilikler ve değişimler geçirmiştir. Kodifikasyon hareketini iki kısma ayırabiliriz. İlki, İslam hukukunun kanunlaştırılması olarak bilinen, fıkıh literatüründen seçme yaparak bir yazılı kanun, kod yapımıdır. İkincisi de İtalyan ceza yasasının aktarılmasında olduğu Batı hukuk kodlarının adaptasyonudur. Bu nedenle Osmanlı tarihi özellikle hukuk tarihi açısından, *Tanzimat* öncesi klasik dönem ve *Tanzimat* sonrası olmak üzere iki dönemde ele alınabilir.

Osmanlı'da en meşhur kanunlaştırma faaliyeti olarak *Mecelle-i Ahkam-ı Adliyye* bilinir. Bu bir medeni hukuk kodudur. Ancak Aile hukukunu kapsamaz ve Hanefi mezhebinin görüşlerinin de dışına çıkmamıştır. Kodifikasyon hareketi son olarak 1917 tarihli Hukuk-ı Aile Karamamesi ile son bulmuştur. Hukuk-i Aile Karamamesi Osmanlı

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hukuk tarihi bakımından çok önemli bir noktadır. Pek çok açıdan yenilikler taşımaktadır. İlk büyük yenilik, kararname fıkhî bakımından sadece Hanefî mezhebinin görüşleriyle kendini sınırlamamış, bazı konularda diğer mezheplerin görüşlerini hatta bazı şâz görüşleri de kullanmıştır. Ayrıca İslam hukukunda ilk defa olarak poligamiye dolaylı bir sınırlama getirmesi, evlilik yaşının alt sınırını belirlemesi ve kadına mahkeme yoluyla boşama hakkı vermesi gibi modernleşmeyle birlikte ortaya çıkan bir çok yeni durumu da karşılamış olmaktadır. Bu kararnamenin en önemli diğer yanı da, yasada müslümanlar, hristiyanlar ve yahudiler için ayrı ayrı hükümler vaz ederek hukukî pluralizmi benimsemiştir. Bütün bu yeni ve önemli değişimlerin, kimlik ve kültür üzerindeki etkileri ve karşılıklı etkileşimi de yoğunlaşacağımız hususlardan olacaktır.

**Anahtar Kelimeler:** Aile Hukuku, Osmanlı Aile Hukuku, Kimlik, Osmanlı Hukuku

#### ABSTRACT

The *Tanzimat* (the political reforms of Abdulmecid in 1839 and period following) period is important in the legal as well as other fields. The ongoing classical Ottoman law from its foundation to the middle of the 19th century initially changed in this period either by establishing new courts or by enacting new laws. We may divide codification into two categories; first, the codification of classical Islamic law, and second, adaptation of Western law. Therefore history of Ottoman law should be examined in two parts; the classical period before *Tanzimat* and the new period after *Tanzimat*.

The most famous codification is the *Majalla*, a civil code, but it does not contain family law. Though some of *Majalla* articles contradict the Hanafi School, in general *Majalla* did not deviate from that school's opinions. The last round of codification led to the 1917 Family Law Ordinance, which introduced many new articles from the legal and cultural points of view. The Ordinance does not restrict itself to the traditions of the Hanafi Schools and it is an example of legal pluralism. For example the Ordinance restricted polygamy. The Ordinance offers separate rules for Muslims, Christians and Jews, as well as state control on marriage and it introduced judicial divorce. Of course, all reforms reflect changes in identity. We should examine the connection between identity and the Family law Ordinance and how they affected each other. Was there an interaction between the two? The paper will focus on reforms which brought about the family law Ordinance and its effect on changes of identity.

**Keywords:** Family Law, Ottoman Family Law, Identity, Ottoman Law

## INTRODUCTION

The aim of the study is not only to explain the Ottoman Family Law Ordinance 1917, but also to show its' historical importance and efficiency on other regions family law codifications like Syria, Egypt and Israel. I will examine the connection between identity changes and Family Law Ordinance which may affect each others. I will also try to figure out the possible reasons for these changes in family law.

The classification of the law is different in Islam then continental Europe. Basically Islamic Law can be functionally divided into three parts as *ibadat*, *muamelat* and *ukubat*. But as we know, Western Law is generally divided into public and private law. Islamic Family Law has been considered in the part of *ibadat* or *muamelat*. It has been considered within the chapter of *ibadat* since some jurists have considered marriage as a pure worship. Thanks to consideration of some other jurists, it is now accepted in the chapter of *muamelat* because according to the jurists, it is a kind of contract between two different people.

In classical fikh literature, the issue has been elaborated under the titles such as *Kitabu'n – Nikah* and *Kitabu't – Talak*. But it has been commonly studied in last century by Islamic jurists in the special works titled as *Ahvalus' - Sahsiyye* or *Fikhu'l- Usru*.

### A. Sources of the Islamic Family Law

We can assert that Ottoman Family Law is depended on Islamic Law which is commonly accepted that its' sources are The *Qur'an*, *Sunnah*, *Ijma* (consensus) and *qiyas*.

*Tanzimat* (the political reforms of Abdulmecid in 1839 and the following period) is important for legal fields as well as other fields. The ongoing classical Ottoman Law is changed first time in this period, from its foundation till the middle of the XVII century, either by establishing new courts or by enacting new laws. We may divide codification into two categories. First one is codification of Classical Islamic Law and second one is adaptation of Western Law. At first glance, we can divide the history of Family Law of Turks into two periods; the period before *Tanzimat* and the period after *Tanzimat*. In Ottoman Empire the source of the Family Law was classical fikh texts. Especially the books of Molla Husrev who was head of religious affairs, operated as official and essential sources of the Ottoman Family Law up to XVII Century. Later on Ibrahim Halebi's book "*Multeka'l – Ebhur*" took places rather then Molla Husrev's book and it was used essentially as an official one until 1917 Ottoman Family Law.

Other than classical texts there is another source of the *padişah* decree which is called *orfi hukuk* (costumart law). Therefore it is claimed that Ottoman Law is not depended on the Islamic Law. But the legislation sphere is more than supposed. Wherever *sharia* is silent, at this point *Padişah* becomes as an authoritative power. It is answered that the power of legislation has been given by *shariah* to head of the state this also continuous with its contradiction to the Qur'an. But this view is another point of the discussion and we will not handle this topic.

The development of Turkish codification can be said to be unique as it was much influenced by *shariah*. The *Majalla* (or the Ottoman Civil Code compiled between 1869 and 1876) was the first codification of Islamic Law in the history. It comprised the law of property and some general principles particularly a number of rules concerning ownership and transaction. However, the code did not touch upon the topics of family or succession which Ottoman Family Law of 1917 dictated upon. The Ottoman Family Law aimed at abolishing the privileged status of foreigners and consolidated the laws governing family regardless of ethnicity or religion. When Turkey became a republic in 1923, the Swiss Civil Code of 1907 was taken up as the model for her civil code. However, because the law was adopted quite suddenly, the judicial system was enabling to adapt and even now there is a gulf between the law and its practice.

### **B. The Place of the Ordinance in Islamic and Ottoman Law**

The movement of codification started after *Tanzimat* with land law and *Majalla* (civil code) ended up with 1336/25 October 1917 Ottoman Family Law Ordinance.

The most famous codification is *Majalla*. It is a civil code. But does not contain Family Law because of some reasons. Though some articles of *Majalla* is based on exceptional opinion of the Hanefi School. But *Majalla* did not enact any rule belong other than Hanefi School.

Although *Majalla* is a civil code it does not contain the Family Law. Again the Family Law unfortunately has got a change to be valid for short time which could not be understood advantage or disadvantages. After enacting the 1917 Ottoman Family Law Ordinance became valid for less than two years about 16 months. It is interesting to note that it is played a big role in modern times' Family Laws more than Ottoman Legal history.

Notwithstanding Family Law valid about one and half year, it has huge influence on the Modern Muslim like Syria, Jordan, Israil and middle eastern countries.

### C. Reasons of the Family Law

There are certain the reasons in three titles;

First is a legal reason, second are like political, economical, social reasons and third one is an ideological and culturel reason.

One of the most important outcome of the *Tanzimat* is *Majalla*. As I mention just before *Majalla* does not contain Family Law. The issues were tried to be solved by Muslims according to the Fikh rules seperated in various fikh books. The cases for non-muslims were to be solved by their own spiritual leaders. But this obviously caused by seperation of jurisdiction power to diffirent authorities. To complete *Majalla* and to join jurisdiction power in the one hand.

As a consequence of *Tanzimat* movement the social-political and economical structure of Ottoman society changed completely and turned to the west and tried to be like them. Then Women commenced to play more and more in social life. The social-political and ongoing the war problems led to preparing a Family Law Code.

Feminism movement have an infulgence in Ottoman Empire as well, some societies and organizations like '*mudafay-ı hukuk-i nisvan*' (defence for women rights) established for maintaining and developing human rights.

On the other hand generally these movements were clashing among Turkists, Westernist and Islamists.

Abdullah Cevdet and Celal Nuri who are the supporter of Westernization and Western life style were insisting on the adaptation of Western Law. Turkists also wanted to have a new Family Law. Because according to them Family Law more shaped by costum. Islamists were challenging those claims as reactionary movement. Consequently even it was due to diffirent reasons for everyone, each approaches wanted to have a new Family Law.

Generally we may mention about demands of Western people. They want that:

Marriage contract should run in front of the *Kadi* with presentation of two sides. Contract must be registereted and there must be a limitation about mininum marriage age. Polygamy must be restricted or banned, divorce without a reason must not be accepted and it must be run by the permit of the *kadis*. Also Women must be given the right to divorce.

#### **D. The Structure of Ordinance and Its Sysyem**

It consists of the two books *Munakahat* and *Mufarakat*. First book consists of six parts, 15 chapters and 101 articles. Second book contains 3 parts, 5 chapters and 56 articles. The number of the article is totally 157.

#### **E. The Renewals of Family Law**

Although some jurists claimed that 1917 Ottoman Family Law is only by its formal structure, indeed it brings many new articles for Muslim world.

##### **a. To be first Codification in the Law of Family**

Ottoman Family Law is the first codification in Muslim world in this field except the draft prepared by Kadri Pasha.

##### **b. Legal Pluralism**

Muslims, Christians and Jews were living together in Ottoman society. This ordinance brought articles for every different part of this society (Muslims, Christians, Jews). That was maybe result of *Tanzimat*. Because the *Tanzimat* movement was not defending uniformity but locality.

##### **c. Eclectic (joint-*telfik*) character**

The beginning of the codification of the movemet was critized in Muslim world by some critics. One of these critics is to be confined only within Hanefi school. This caused many problems in *Majalla*. But the *telfik* methodology is used in the Family Law Code. In codification Family Law comission used not only for main schools ideas but also used the opinion of the jurist who are out of this school.

##### **d. Jurisdiction Uniformity conformed**

The Family Law abolished the jurisdiction by preparing separate chapters for Muslims, Christians and Jews and joint the power of jurisdiction in one hand. Before this ordinance, Muslims, Christians and Jews had their own *kadis*.

##### **e. The Control of State on Marriage and Divorce**

Before 1917 Family Law Code there was no necessity to register for marriage and divorce to the court related places. This was causing problems. It was an obligation for marriage sides that they must announce their marriage decision to see if there is a restriction. After this procces they can run to *nikáh* and register themselves by *kadi* or deputy. Annoncement of marriage is introduced first time to Ottoman Family Law with this Code. Fine punishment imposed on the un-registered marriages. Even then unregistered marriage is not considered as a valid.

#### **f. Juristic Divorce**

The right of the divorce is given to women by the Code. Ongoing dispute between husband and wife is one of the divorce reason. This is the first time for women to have the right that they can make an application to court for divorcing. Here is the interesting point; Family Code suggests that before divorcing they should file their plea to '*aile meclisi*' like arbitrary before the court. This is introduced first time by this code. Some authors have claimed that rule is taken by French's Family Law system. Because France Family law has a family community called '*conseil de familia*'. But there is another approach that when Napolian entered to Egypt his lawyers should be examined Maliki Family Law and has gotten the appliance to their Law system.

#### **g. Restriction of Polygamy**

Ordinance does not restrict for Polygamy directly but it accepts a valid condition in time of marriage a stipulation by women to be divorced if the husband gets second wife. Indeed this restriction is very new for Ottoman Law system. After that some other Family Laws restrict the polygamy by using other methods like second marriage subject to the first wives' permission.

Ordinance abolished by temporary ordinance 20 Ramazan 1337/19 June 1919.

#### **h. Minimum Age limitation to marriage**

This is one of the most prominent newness of this code. Because there is no minimum age for getting married according to the famous four legal schools. In this context the code borrowed the opinion from Ibn Subrume and Abu Bekral'-Asam and forbidden the marrying before virginity (age of majority)

### **CONCLUSION**

The last circle codification movements are done for Family Law Ordinance in 1917. This ordinance introduced many new articles legally and culturally. The Ordinance does not restrict itself by Hanafi School; it does not hesitate to take any other opinion belonged rather than Hanafi School. For example as a result of this Ordinance restricted to the polygamy. It is an example of legal Pluralism. Ordinance offers to separate rules for Muslim, Christian and Jews also State control on marriage, divorce and introducing juridical divorce.

There are many studies on the *Majalla* which is the first Codification but we could not find many studies on this Family Law Code.

Maybe the most important part of mentioning on this topic is that making Law is not only making law. It is also related to culture, history and structure of

society and at the same time it is essential to understand the expectations of society. While the process of legislation is going on the legislator should keep in mind and consider history, culture and has to understand the society. In this context Family Law is a good example. Otherwise adaptation of any code has to face with problems which each or them comes outside.

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