

OTTOMAN FAMILY LAW AND THE STATE IN THE NINETEENTH CENTURY

Prof. Dr. İlber ORTAYLI*

Dedicated to Professor
Ercüment KURAN for his
pioneering scholarship in
late Ottoman Studies.

The nineteenth century was an era of reform in the Ottoman Empire, not only in the administrative and military, but also in legal and cultural spheres. Compared to previous centuries, the nineteenth century Ottoman witnessed changes in every aspect of life- and private life and family relationships were no exception. Put another way, the Ottoman citizen and the Ottoman family were much more affected by state initiated changes in legal codes and their application than ever before. The increased incidence of legal proceedings during that time is one measure of this. It is difficult to say whether or not traditional family structure and its legal status underwent the same density of change in every region of the empire, but the formulation of codes concerning the family and the mode of their implementation began in that century to lose many features they had acquired during the classical period, features which had persisted until the nineteenth century. Religious communities, which previously had followed their own socially and legally circumscribed lives and traditions, now came to be composed of family units which were required to adhere to laws promulgated by an increasingly penetrating state, were obliged to follow standard administrative procedures, and were themselves subject to a bureaucratic administrative recording system. These changes mark a transition to life in a modern state and a modern society, one based on a single universalistic legal code.

The reforms which took place during the reign of Sultan Mahmut II in the 1830s had begun the process of decreasing the jurisdiction of religious foundations (*vakıfs*) and religious (*qadi*) courts. However, despite the restriction in function, the actual volume of cases heard in

* Ankara University, Faculty of Political Sciences (Ankara Üniversitesi, Siyasal Bilgiler Fakültesi Öğretim Üyesi).

such institutions had increased. During the reign of Sultan Mahmut II, changes were made in areas of concern to institutions such as the family and the inheritance system by reorganizing the pious foundations. The bureaucrats of the Tanzimat period attempted to implement a number of direct reforms of laws concerning inheritance, land, and the family. These developments finally bore fruit in the last years of the Ottoman Empire when the governmental Decree on Family Law, a statute considered the predecessor of the modern Republican Civil Code, was put on the books. While the *Hukuk-ı Aile Kararnamesi* of 1917, as it is known in Turkish, was a legal document which contained many contradictory provisions, it was, nevertheless, one which for the first time embraced all the subjects of the Ottoman Empire regardless of religious affiliation.

There are interesting parallels to be noted between certain changes in the family and in the law during the Tanzimat period. Changes in such institutions as marriage, divorce and inheritance oftentimes were surprisingly farreaching. The essential importance of these changes lies in the presence behind them of a modernist ideology and of a debate supporting that ideology. In Ottoman society, one not only encounters debates about the proper lives for modern men and women to lead, but also witnesses deviations from the moral values created by the closed environment of the traditional family. An examination of the *seyahatnames* (travelogues) of this period bear witness to these issues¹.

In nineteenth century Turkey, the institution of marriage gradually became the focus of legal proceedings throughout the country, not just in the capital and the major cities. From that time on proceedings of that sort became subject to the knowledge and the registration of legal representatives. The fixing of marriage, divorce and guardianship and the recording of inheritance proceedings increased consistently in the Shari'a court registers of the nineteenth century. Furthermore, these registers were not solely restricted to Muslims; beginning under the reign of Mahmud II, non-Muslims were also included in them. Even in the remote cities of Anatolia registration increased severalfold. By the end of the nineteenth century this increase had become especially striking. The impact of Tanzimat reforms was also very strong in a

¹ See, for example, a German travelogue from the sixteenth century: Salomon Schweigger, *Eine Reyssbeschreibung aus Teuschland Nach Constantinopel*. Graz, 1964; İ. Ortaylı, "16. Asır Alman Seyahatnamelerinde Türkiye." *Tarih ve Toplum*, 2. p. 50.

number of related areas: in the modernization of the legal system, in the transition to a fully monetary economy, in changes in land administration and in the development of a system of title deeds. In inheritance proceedings the increasing frequency with which registration of family-related proceedings took place was due in large part to the predominance of entries for assets such as vineyards, gardens and fields. We shall give examples of this below.

In the Shari'a Court registers for Ankara and Kayseri of both the early and late nineteenth century which I have studied, the number of Muslim marriage contracts shows an increase. These developments are very clearly connected with the beginnings of the practice of mandatory marriage registration. Previously, although marriages had not been registered as a matter of course, when necessary, witnesses to the marriage ceremony from the community, or the imam of the village or quarter were summoned, and the nuptial event was admitted to the court registers. Let us give an interesting instance of this practice. In this case a certain woman did not want to continue living with her husband. Because no record of her marriage had been made, she was able to declare to the judge that the man who claimed to be her husband had never been married to her. Her husband contested this and brought to court two people who he claimed were witnesses to the marriage ceremony, and was therefore able to have their prior married state recorded in the registers².

In almost every area of nineteenth century life the traditional social fabric of Ottoman society had to some extent begun to unravel. Such changes in social structure were to be reflected in the mechanisms of governance, and in an increasing penetration of civil authorities into the everyday and family life of its citizens. For example, the government came to accept prostitution as a reality in the big cities; it founded hospitals for victims of venereal diseases, and organized squads of morals police. Not infrequently were cases involving the abandonment of children born out of wedlock. When these children were found, they were usually delivered to the appropriate state institutions and had an allowance assigned to them. There exist many examples of this for various times and places. One or two will suffice here. In 1851, an allowance was awarded by the Meclis-i Vala' to a child who had been aban-

² *Kayseri Şer'iyye Sicili*, No. 194, p.9, 17 C, 1242/January 1827 (the cases of Ali and Emine bint-i Hasan).

done in the courtyard of a mosque in Mosul. In April 1854, in the Silivrikapi neighborhood of Istanbul, a child who had been left in the street was handed over to the care of a woman named Hatice and had an allowance allotted to it. In a similar case occurring two years previously, a child named Ferhad who had been abandoned in the street was given an allowance of 25 kuruş. There is no shortage of additional examples of this kind. In Rebiyulevvel 1268 (January 1854) a *ferman* (edict) was issued concerning the giving of allowances to children of this sort in Manastir (Vitola), Istanbul and in other cities³. Such allowances were even assigned for bastards. In September 1854, an allowance was awarded to one Gulhiz Hatun because she gave birth 26 months after her husband's death⁴. In addition to orphaned or abandoned children, allowances were granted to aid families with twins, triplets or handicapped infants. In 1851 in a place called Etropol near Sofia, a man named Hristos was given government money to help support his triplets. Such decrees are encountered frequently⁵.

The transformation of family law was a natural outgrowth of the other financial and administrative reforms and the social and legal changes initiated by the Tanzimat bureaucracy. In the centralized administrative system that Ottoman Turkey was becoming, the family was to be considered a financial unit in need of inspection and control by the state. In particular, this meant that the state needed to be informed of family events such as births, deaths, and marriages. As a consequence, in the nineteenth century, references to marriage, inheritance, and guardianship, found earlier only in the *kadi* registers also came to be enscribed in the population registers. The result of this bureaucratic imposition is the possibility of charting trends in this area to a degree not possible in earlier periods of the Ottoman Empire. It is the nineteenth century have, by and large, not yet been classified, and are therefore not available for detailed investigation.

We shall see that at the end of the nineteenth and beginning of the twentieth centuries, regulations were promulgated which made mandatory the registration of such events as marriage and divorce with the Population Office (*Nufus Idaresi*). A number of government decrees were issued in this period in order to protect the rights of families and

³ Başbakanlık Arşivi (hereafter BA). *IMV* No. 6682 and *IMV* No. 11567 (18 Safer 1270) and *IMV* No. 7822 (16 RA 1268) and *IMV* No. 8108 (2 C 1270).

⁴ BA, *IMV* No. 13199 (23 Z 1270/August-September 1854).

⁵ BA, *IMV* No. 7764 (28 Sefer 1268).

wives. In a document entitled *Sicill-i Nufus Nizammesi* (Regulation on Registration) dated 2 September 1881 (8 Shawwal 1298), it is stated that weddings of both Muslims and non-Muslims must be performed with the permission of the leaders of their spiritual communities and that these leaders as well as those registering their marriage must inform an official of the Population Office of that event. On December 18, 1884, a judgment was obtained mandating the punishment of an imam who had performed a marriage without receiving permission from the State Council Court. It seems clear that in circumstances where marriage did not follow legal prescriptions the state preferred that the legal authorities not intervene in such cases, but merely be cognizant of them. A decree dated 1881 impels local religious leaders, but more importantly male heads of household, to inform the Population Office in the case of a death or divorce. And finally, in the *Sicill-i Nufus Kanunu* of 27 August 1914, some even more protective restrictions were imposed. According to this law, a husband was obliged to inform the Population Office in the event of his divorce. Likewise, the Population Office was to be informed of marriages⁶. By means of these procedures the state attempted to prevent the occurrence of marriages solely performed in the traditional fashion without the knowledge of a legal or governmental office. As a consequence, government offices took over from the religious establishment the control of the registration of the population. An important change was brought about in the penal code on 1; March 1914, according to which the legal guardians of women under twenty years of age had to be present when a marriage permit was sought from the court. What is important is that for the first time, the ruling gave women older than twenty years of age the right to apply for such a permit without approval⁷. Finally, two imperial decrees issued in 1916 increased the opportunities of women applying for divorce. As is well known, in previous times these opportunities had been extremely limited⁸.

The social upheavals and reforms of the nineteenth century also had their impact on the status women. As is already wellknown educational reforms led to the opening of girl's schools, and women began to enter society for the first time as teachers. Fatma Aliye, one of the

6 M.A. Aydın, *İslâm Aile Hukuku*. İstanbul, 1985, 136-148.

7 *Ibid.*, 140-141.

8 G. Jaeschke, *Yeni Türkiye'de İslamlık*. Ankara, 1972, 55; M.A. Aydın, *İslam Aile Hukuku*, 145.

first Turkish feminists and female writers was the daughter of the conservative Cevdet Paşa whose roots extended back into the *ulema* class. Upper class women did not just follow European culture by learning to play the piano or speak foreign languages. Education had also begun to change their life style and world view. The issue of female emancipation concerned Ottoman intellectuals of all religious persuasions, indeed all Middle Eastern intellectuals. Intellectuals of all sorts, from the Azeri Mirza Fethali Ahudov to the Islamic modernist Namik Kemal, and from the Arab Muhammed Abduh to the Albano-Turk modernist Semseddin Sami take up this issue, and it also found place in the first novels. We even know from his personal letters that the conservative Cevdet Paşa was violently opposed to polygamy⁹. Actually, what we know of the pasha's behavior *en famille* reflects a rather modern-minded approach. An interesting example exists, of the bureaucracy's attitude towards family life and women's rights in this period. In 1849, a session of the Meclis-i Vala (The Imperial Council of Judicial Affairs) punished a high-ranking bureaucrat, one Alaeddin Pasa-zade Celal Bey, for reprehensible acts against his wife¹⁰.

The state bureaucrats of the Tanzimat realized that the existing family law and marriage traditions were out of step with the world of the nineteenth century, and they attempted to work fundamental legal innovations on them. Mehmet Emin Ali Pasa even favored adoption of the French civil code, but the Islamic party under the leadership of Cevdet Pasha blocked this proposal. In spite of this, Cevdet Pasha was legislatively inactive in the field of family law, and one must point out that even in the Islamic civil code that he prepared, only the laws of goods and obligation were included; family law was entirely left out. Actually, his work was not a code at all in the modern sense of the word; it was a casuistically written legal document and did not attempt to codify and impose a standard system for all communities in the Empire. As we have indicated, it excluded the subject of family law. This work carries the name "*Mecelle-i Ahkâm-i Adliyye*." It has been characterized as an intellectual monument of the last century of the Ottoman Empire and the last great work of Islamic law by partisans of Cevdet Pasa and even by some contemporary legal scholars (including the famous Italian scholar Giorgio del Vecchio¹¹). Since it was promul-

9 M. Kutukoglu, "Cevdet Paşa ve Aile İçi Münasebetleri." *Ahmet Cevdet Paşa Semineri*. Istanbul University Faculty of Arts and Sciences, 1986, 199-222.

10 BA, *IMV* No. 4234 (1265 H).

11 Giorgio del Vecchio, *Hukuk Felsefesi* (trans. S. Erman). Istanbul, 1952. 247.

gated in reaction to the French Civil Code, it must be seen as a document whose essential defect lies in its lack of courageousness in attempting to prepare a standard family code addressing all the peoples of the Ottoman Empire. It is this failing that drove progressive intellectuals in Turkey to attempt to find a modern solution to the problem of family law by continuously bringing onto the governmental agenda proposals for the adoption of a secular civil code. There was, of course the unsuccessful "Decree on Family Law" ("*Hukuk-i Aile Kararnamesi*") of 1917. These efforts to find a solution to this problem continued unabatedly until the Swiss Civil Code was adopted in 1926.

Despite the lack of success in preparing a general and secularized family code, the bureaucrats of the Tanzimat showed concern for the ordering of family affairs potentially via edicts (*ferman*) and admonitions (*tebhîh*) concerning family formation, that is, relating to marriage and the protection of family institutions. One of the goals of these edicts and admonitions was to do away with traditions viewed as having a negative effect on marriage. Serafettin Turan has studied these *fermans*. He tells us that one dated May 1844 states that young girls may marry of their own free will, and that no brideprice should be paid (the word *tekalif* [taxfee] is used in the original).¹² Research that I have undertaken suggests that attention was indeed given to the implementation of this *ferman*. Decrees written for Bolu and Ankara in January 1865 state that spending moderately for a wedding strengthens a marriage, than an Islamic dowry (*mehr*) should be fixed separately for the for classes of society and orders conformity to these strictures¹³. Turan mentions another *ferman* dating from 1863 in which the Islamic, for the poor, another for the middle class, and one for the rich, tehs being 100, 500, and 1000 kuruş respectively¹⁴. Were the strictures of these *fermans* actually complied with? Except for a very restricted segment of society it is very difficult to say. But in the event of a dispute, the dictates of these *fermans* were binding in court. It is significant that for the first time, a topic directly concerning the Shari'a was reordered by subjecting it to the control of the civil authorities, that is to imperial decrees which were both binding and implemented in a standardized fashion. It is important to note that standardized norms were set forth without taking into consideration the differences between

12 S. Turan, "Tanzimat Devrinde Evlenme." *İş ve Düşünce Dergisi* (22) 182 (1956), 14-15.

13 BA, *Cevdet - Dahiliye*, No. 11586 (29 Z 1261/January, 1845).

14 Turan, *op. cit.*, 15.

the norms and codes of the four schools of Islamic jurisprudence (Shafi'i, Maliki, Hanbali and Hanafi). Furthermore, in 1850 two imperial decrees were issued which stipulated severe punishments for a kind of "marriage by abduction" (*kiz kacirma*), a practice still prevalent in parts of Anatolia¹⁵.

Developments in Inheritance Law

During the Tanzimat, one is struck by the tendency toward creating a standardized legal structure in matters of family law concerning inheritance. It would not be an exaggeration to state that particularly in inheritance matters the law had begun to become both standardized and secularized. There were two essential stages to this process in relation to Ottoman law. The more important stage was the standardization of the codes themselves; the second began when both Muslims and non-Muslims showed an actual preference for utilizing the same legal institutions for matters of inheritance. A turning point in the Ottoman inheritance system came with the Land Decree of 1858 (1274). O.L. Barkan, who undertook the first detailed study of this decree, emphasizes this aspect of its significance¹⁶. The purpose of the decree was the development of a liberal system of land ownership in the Tanzimat period, one which would replace the antiquated *timar* system of landholding which dated from the classical Ottoman period. This law increased the distribution of titled land and in many places encouraged the development of medium and small-sized land holdings. The institutionalization of private land ownership certainly reordered inheritance procedures in a way quite different than they had been in the past.

One important feature of the law was that in comparison with the past, it placed men and women on an equal legal footing with respect to the inheritance of land. Accordingly, daughters of the deceased were to receive the same share as sons, and even if there were no sons, they were to receive shares as if they were males, despite the existence of other more distant male heirs. In actuality, cases recorded in nineteenth century *kadi* registers do not adhere to this law, and female offspring continued to receive only half shares, following earlier Islamic precepts. In practice a double standard for female heirs persisted into the twentieth century with respect to matters of inheritance.

¹⁵ BA, *IMV*, No. 5470 (16 Za 1266/September 1850), and *IMV* No.4758 (22 Ra 1266)/March 1850).

Starting at the beginning of the nineteenth century, some non-Muslim groups seem to have adopted the standardized inheritance procedures as much as did Muslim groups. Here, it was not a case of everyone being forced by legal *ukaz* to conform to the same procedures. Particularly in cases involving land inheritance, non-Muslims also began to apply to *qadi* courts and thereby divide their inheritances according to the same system as that of the Muslims. In studies I have undertaken in the Ankara and Kayseri *qadi* registers from the beginning to the end of the nineteenth century, one witnesses Greeks, as well as Protestant, Catholic, and Gregorian Armenians applying to the *qadi* courts for the settling of estates. This was not, however, the case for the small urban communities of Jews in those regions of the country. With the exception of Jews, all land-owning Ottoman subjects, regardless of religious affiliation, adopted the same system of inheritance. Let us list a few cases from the Ankara court registers from the reign of Mahmud II. There are many examples of the division of estates among Armenians. One of these even belongs to the famous zengin and Amira Düzoğlu Kirkor¹⁷. Also in this era one notes that female trustees received inheritance shares in preference to small children who were also heirs, and in the family women were appointed as guardians in preference to uncles and grandfathers of the deceased¹⁸.

By the end of the nineteenth century, we observe an increase in cases concerning the division of estates of non-Muslims. To give a few examples: there are records of the division of the estate of one *Artin* in Kayseri in January 1888 (CA 1305), in January 1891 (CA 1308) for the Greek Orthodox *Karakuşoğlu Simon*¹⁹ in the village of Kerim near Kayseri, and in the village of Nence for Serkis, son of the Gregorian Armenian Hacı Serkis in March 1888 (CA 130). In the same register, the estate of Artin, son of the Armenian *Circiroğlu Kirkor* of Kayseri was assessed at 42,440 kuruş. In February 1888, this estate, valued at 41,080 kuruş after the deduction of legal expenses, was divided as follows²⁰:

16 O.L. Barkan, "Turk Toprak Hukuku Tarihinde Tanzimat ve 1274 (1858) Tarihli Arazi Kanunnamesi." in O.L. Barkan, *Türkiyede Toprak Meselesi*. İstanbul, 1980, 353-355.

17 *Ankara Ser'iyye Sicili*, No. 226, p. 136.

18 *Kayseri Ser'iyye Sicili*, No. 194, 7 Za 1242/June 1827, p. 38; another case from (15 Za 1242/June 1827), p. 41.

19 *Ibid.*, No. 241, pps. 7-8.

20 *Ibid.*, pps. 10, 15.

His Wife	:	5,135
His Son Artin	:	14,378
His Son Karabet	:	14,378
His Daughter Samnaz	:	7,189

As can be observed from these figures, the estate was divided in complete accordance with Islamic laws of inheritance (*feraiiz*), with the daughter receiving a half share.

The same *defter* records the case of one Kirkor, of the Tus quarter of Kayseri, whose estate was divided along similar principles. In this case, the division of the estate of the deceased also included an assessment of his land holdings.

Shares of Cash Assets		Shares in Landholding	
His wife	4.722 kuruş		3.644 kuruş
His son Kirkor	7.439 "	6.378	2.160 "
His son Sevan	7.439 "	6.378	2.160 "
His daughter	4.219 "	3.189	1.030 "
His daughter	4.219 "	3.189	1.030 "
His daughter	4.219 "	3.189	1.030 "

In the Ankara *kadi* court records (number 306) one notes that the *qadi* received applications in inheritance saces from Armenian Protestants from Ankara itself, but especially from the district of Zir. As we have seen, the implementation of inheritance law in the nineteenth century runs parallel with the application of standardized procedures to law concerning land tenure and to the development of a monetary economy. These developments encompassed Ottoman subjects of all religious persuasions²¹.

Conditions Preventing Marriage and Related Legal Procedures

In contrast to contemporary Turkish law, during the Ottoman period the state was not concerned with regulations requiring medical examinations prior to marriage or with other situations which might potentially prevent marriage from occurring. Indeed, Ottoman law had very few regulations which might prevent marriage. Only as late as March 23, 1916 did a decree allow courts to try divorce cases in which

²¹ *Ibid.*, p. 17, and Ankara Ser'iyye Sicili No. 306.

the wife had contracted certain specified illnesses from her husband²². According to classical Islamic law, only the marriage of a Muslim woman to a non-Muslim man could be prevented. This rule also applied to the marriage of non-Muslims of different religions, so that a Christian and a Jew were not permitted to marry. Indubitably, this was a situation that the non-Muslim communities would themselves have restricted. The essential principle of Ottoman law involved was that of preventing a female Ottoman subject of whatever religion from marrying a man of foreign nationality.

The origin of this principle lies in Ottoman law of the classical period, which forbids men who are not Ottoman subjects from marrying Ottoman females whatever their religion. This regulation was also adhered to in the nineteenth century, and even if they were Muslims, marriage to Iranians was forbidden. In other words, this was a requirement of Ottoman personal law which was applied without exception to all Ottoman women. For instance in accordance with the law, an imperial decree sent to the vilayet of Nis in eastern Serbia in January 1851 (25 RA 1267) outlawed marriage of the women of this region to men of the Principate of Serbia²³. Again, a decree issued in December 1853 forbade the marriage of the daughter of a Greek orthodox sea captain named Anderliyo (?) to a doctor of Greek citizenship. Another decree dated August 1850 outlawed the marriage of Jewish women of Salonica to Tuscan Jews resident in that city. This same document orders the commissioner of nationality (*teba tefrik memuru*) Ahmet Rasim Bey to investigate and pursue any such cases²⁴. As we have just indicated, this law also applied to Muslim women. For example, a woman who had married an Iranian man in Tire in the Izmir region had to have her marriage annulled²⁵. The ban on Ottoman women marrying Iranian men remained on the books up until the last days of the empire²⁶, and was, as we have seen, part and parcel of the Ottoman state legal structure.

In the last years of the Ottoman Empire, a codified document on family law, the *Hukuk-u Aile Kararnamesi*, was issued. This document legally encompassed all subjects of the Ottoman Empire. As a docu-

22 M.A. Aydin, *op. cit.*, 148.

23 BA, *IMV*, No. 6185.

24 BA, *I. Har.* No. 5109 and OMV No. 5129 (17 Shawwal 1266/August 1850).

25 A.M. Armagan, *Batı Anadolu Tarihinde İlginç Olaylar*. İzmir, 1984, 15.

26 M.A. Aydin, *op. cit.*, 141.

ment of family law it is far from perfect²⁷. Indeed, like the nineteenth century adoption of French commercial, penal and administrative law codes, this law was the end product of a broader mentality which resulted in the Europeanization of many aspects of Ottoman law. Despite claims to comprehensive jurisdiction for Ottomans fall religions, it is a document full of contradictions and exceptions that violate the general principles it lays out. This law was short-lived, lasting only from its promulgation in 1917 until June of 1919. Its importance lies in the fact that it laid much of the groundwork for the Republican Civil Code of 1926. The religious leaders of the non Muslim communities, as well as fanatical Muslims, opposed the family law on the grounds that it deprived them of their jurisdictional authority over members of their religious communities.

Conclusion

The nineteenth century did not produce a secular and uniform family code law in the Ottoman Empire. However, the course of events during that century necessitated certain legal changes, palliative though they may have been. Though of an Islamic nature, such legal developments were open to the influences of European law. Numerous projects emerged during the century to provide all religious communities in the Empire with uniform marriage, divorce, and inheritance codes. Given the reception accorded to European procedure, criminal, and commercial law, there clearly was a leaning toward the acceptance of such a family code. There certainly was, at a minimum, a movement in the direction of a uniform code encompassing all the communities with respect to inheritance and the registration of marriages. The various regulations and family law projects of the period never were actually implemented in full. And their eclectic structure, a dualism of traditional Islamic law and of European jurisprudence, was carried into the Republican period as part of the Ottoman legal heritage. The 1926 Republican Civil Code attempted to produce a radical solution to the various problems resulting from that dualist structure. Changing family structures in twentieth century Turkey provided impetus for the increasing influence of the new law and for its widespread implementation and acceptance.

²⁷ For a study of the 1917 Family Law, see S. Sakir Ansay, *Medeni Kanununun 25. Yıldönümü Münasebetiyle Eski Aile Hukukumuzun Bir Nazar*. Ankara, 1952; M.A. Aydın, *op. cit.*, 151-239.