EJIMEL
Electronic Journal of Islamic and Middle Eastern Law



Volume 8, Issue 1 (2020)
EJIMEL Special Issue

Islamic Family Law in Europe and Islamic World: Current Situation and Challenges

edited by Mouez Khalfaoui & Justin Jones

University of Zurich[UZH]

EJIMEL Electronic Journal of Islamic and Middle Eastern Law

Vol. 8, Iss. 1 (2020)

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EJIMEL Vol. 8, Iss. 1 (2020)

Published by
The Center for Islamic and Middle Eastern
Legal Studies (CIMELS), University of Zurich,
Zurich, Switzerland

Suggested citation style
Electronic Journal of Islamic and Middle Eastern Law
(EJIMEL), Vol. 7 (2019), pages, http://www.ejimel.uzh.ch

ISSN 2504-1940 (Print)
ISSN 1664-5707 (Online)

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The normalization *of* Saudi family *law*

Language (written in): English

Author: Mallat, Chibli

Source: *EJIMEL: Electronic Journal of Islamic* and *Middle Eastern Law* 5 (2017): 1-27.

Published: 2017

ISSN: 2504-1940

Classification:
Saudi Arabia & its predecessors Law

Subject Keywords:
Saudi Arabia |

Law - family

Between State Law and Religious Law: Islamic Family Law in Turkey

by Ahmet Temel[*]

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Abstract

This paper considers the history of Islamic family law and its current applications in Turkey. As the heir of the last Muslim empire, the Ottoman Empire, the Republic of Turkey chose an abrupt revolution in its legal system; in 1926, it cut all ties to Islamic law, which was the main law of the land during the Ottoman Empire. Secularization of the law was not uncommon among modern nation states including those, which had Muslim majority populations. However, most of these Muslim majority states allowed Islamic law to govern the private law area, especially family laws. By contrast, the young Republic of Turkey did not allow this to happen and adopted the Swiss civil code including family law with limited revisions. Despite this rushed revolution, practices emanating from Islamic family legal norms did not cease among the people and continued until now. This created a dichotomy in the lives of people between applying Islamic family law and abiding by the secular civil code, which has caused several multi-dimensional legal problems in the areas of marriage and divorce, as well as their legal consequences in the areas of financial support and child custody. For the first time in republican history, in 2017, the government authorized muftīs to solemnize marriages. This is seen as the only direct authority given to muftīs in a legal matter, which indirectly opens a door for applying Islamic family law in modern legal life in Turkey. In addition, family mediation will soon have some presence in the legal system. There is no direct reference, however, to Islamic family law in government official documents congruent with these recent developments. There also is significant potential for incorporating the principles of family mediation and arbitration (taḥkīm) based on Islamic legal principles. This paper first gives a brief history of Islamic family law in Turkey as well as its effect on the civil codes and applications and then evaluates these recent changes. These are preceded by a brief note on the constitutional and legal frameworks currently in force in Turkey.

[*] Ahmet Temel, PhD in Religious Studies at UC Santa Barbara, currently Assistant Professor at Istanbul University, The Department of Islamic Law.

I. Turkey's Constitutional and Legal Framework

Leiden University Press published a book consisting of twelve different papers examining *sharīʿa* in twelve different countries.[1] All papers shared the same title as "*Shariʿa* and National Law in X", with only one exception: The title of the chapter examining Turkey is "Islam and National Law in Turkey". The reason is explained as follows:

> "The main reason is that the secularis[z]ation of the law was largely complete after the declaration of the Republic and the abolishment of the constitutional clause that identified the state's religion as Islam. The rules of shariʿa have not played any role since this process was completed about ninety years ago."[2]

For the argument of the demise of *sharīʿa*, the Republic of Turkey probably is one of the first countries among Muslim majority countries that will come to mind as an excellent example. With its radical and abrupt break from Islamic identity and change to a coercive-secularist identity during its very foundational stages, anti-Islamic rules and regulations such as the ban on *ḥijāb* that have lasted until recently, and its long lasting desire to be known as a part of the Western world rather than the 'backward' Muslim world in founding figures' understanding, Turkey stands as the main example of *sharīʿa*-phobic Muslim majority states.

However, even if there was a significant power to shape the legal system at the hands of the founding fathers of the Republic, these were not able to change the society top–down. Many topics of family law continued to be applied and some of them are still being applied according to Islamic law among the people. At first, since the education of judges and jurists of the time included elements of Islamic law, while the center of their education was the continental European law, they were also taking Islamic law into account. Yet, over time, the courts abandoned Islamic law completely and refrained from making any reference to it in their judgments. This created a gap between people and the applications of court decisions, which aimed to follow state law. The majority of people have been inclined to follow state instructions in order not to face legal difficulties, but they have been giving more importance to Islamic rules governing the family. To the present day, this gap is still there. Despite its long lasting administrative power, the ruling party, in spite of its Islamic inclinations, tends to refrain from making even the slightest reference to Islamic law for any legal topic. On the other hand, it seems that there is a growing public demand for more public appearance of Islam including the realm of laws.

The rest of the paper will investigate this gap by first looking at the historical background of Islamic family law in Turkey, then at the recent developments regarding Islamic family law.

[1] OTTO JAN MICHIEL, Shariʿa Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in the Past and the Present, Leiden 2010.

[2] KOÇAK MUSTAFA, Islam and National Law in Turkey, in: Jan Michiel Otto (ed.), Shariʿa Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in the Past and the Present, openaccess.leidenuniv.nl/bitstream/handle/1887/21170/file221087.pdf?sequence=1 (last accessed 17 January 2020), Leiden 2010, 231–272, at 268.

II. Historical Background

1. An Overview of Ottoman Family Law

Ottoman Empire recognized *sharīʿa* as the main law of the land. Even though there were some codes announced by sultans on certain topics, mostly on taxes and punishments; *qāḍīs* were supposed to apply Islamic law, the Hanafi School of Islamic law, to be more specific, in the court.[3] In addition to applying Islamic law in courts, the culture and the custom of the people were mostly governed by Islamic law. Since Islamic law is not only practiced law in courts, but also a body of normative rules that a Muslim should abide by in his personal and public life, it is not surprising that family issues such as wedding ceremony, ethics in family etc. were governed by Islamic law among Muslims outside of the courts as well.

Pre-modern Ottoman law was mostly based on *sharīʿa* that is the law of jurists. Learned jurists used to decide what law is and to resolve legal matters based on the abundant Ḥanafī legal literature. There was not a codified text to derive law from. The judge was the one who used to issue judgments. There was not even a court house, mostly the house of the judge and sometimes a mosque used to serve as a court house until 1837.[4] However, beginning with the 16th century, a certain degree of evolution from jurist's law to code-based law began to take shape.[5]

The role of state in legislation was a continuous debate in the early Islamic legal history and the jurists strongly dismissed the state authority in legislation during that time. The state's role was restricted to appointing *qāḍīs* (judges). In principle, this appointment should have been regardless of the school of the judges and the judge would issue his judgments independently based on *ijtihād*. Yet, especially after the flourishing of certain schools of law in certain regions, this appointment became an indirect means of state intervention in the overall legal structure. The recent research has demonstrated that Ottoman state tried to keep family law under its control through the power of the *qāḍī*. Historical data can be traced back even before the Ottomans and proves the demand to give the authority to solemnize the marriage to the *qāḍīs*.[6]

2. *Tanẓīmāt* and Codification

Before the codification of the *Majalla*, two different suggestions were competing between adopting European laws and codifying *sharīʿa* in modernizing the legal system. After *tanẓīmāt*, adopting European, mostly French laws and legal systems and establishing new courts in addition to *sharīʿa* courts were occupying increasingly more space in the legal sphere. In 1840, 1851 and 1858 new penal codes were adopted from France.[7] The new Commercial Code of 1850 was based on French Commercial Codes. The code for commercial maritime laws of 1863 was also

[3] In regions where the majority of the population belongs to another school of law, the state used to appoint a vice-*qāḍī* belonging to the same school to take care of their cases.

[4] ORTAYLI ILBER, Hukuk ve İdare Adamı Olarak Osmanlı Devleti'nde Kadı [Kadıs as Legal and Administrative Figures in the Ottoman State], Istanbul 2016, at 60.

[5] AYDIN MEHMET AKIF, Islam Hukukunun Osmanlı Devleti'nde Kanun Hukukuna Doğru Geçirdiği Evrim, Türk Hukuk Araştırmaları, Vol. 1 (2006), 11–21, at 11.

[6] JAESCHKE GOTTHARD, Türkiye'de İmam Nikahı,in: Ahmet Memcu (ed.), Sabri Şakir Ansay'ın Hatırasına Armağan, Ankara 1964, 11–31, at 12.

[7] HANIOĞLU ŞÜKRÜ, A Brief History of the Late Ottoman Empire, Princeton, NJ 2008, at 74.

based on multiple European codes.[8] In 1867, the jurisdiction of *sharīʿa* courts was restricted to family, inheritance, endowments, and punishments for personal crimes. In 1870 *niẓāmiyya* courts were founded and the dual legal system was established officially. In 1876 *niẓāmiyya* courts have taken over all legal jurisdiction except *sharīʿa* personal laws. When there was a strong need for a new legal code for the law of contracts and property, along the same dichotomy, a group of bureaucrats led by Ali Pasha suggested adopting the French code at least for mixed courts, while a group of jurists led by Ahmed Cevdet Pasha suggested making a code based on *sharīʿa*. Consequently, the second group's suggestion was accepted. It is important to observe that adopting a European code was already a major option before the foundation of the Turkish Republic as a means of modernization and Europeanization.

Majalla was codified by a group of jurists in 1876 within nine years. It consisted of 1872 articles including 100 general maxims in the introduction. It covered the law of contracts, property and trial laws.[9] However, it did not contain codes on family law, which was a topic of criticism then.

3. First Islamic Family Code: *Hukuk-i Aile Kararnamesi*

Family law was added to this code with the last attempt of codification based on *sharīʿa* entitled *Hukuk-i Aile Kararnamesi* in the Ottoman history in 1917. This code included 127 articles on family law including 60 articles regulating family laws of Christians and Jews in addition to Muslims. This family law code lasted only for 1 year, 9 months and 11 days and was then abolished in 19 June 1919.

Majalla was a codification of Hanafi law, however, in *Hukuk-i Aile Kararnamesi* (*HAK*) other schools of law also were taken into account, especially for marriage and divorce matters.

By adopting the Swiss code in 1926, *Majalla* was completely abolished and became a topic of historical investigation for Turkey, even though *Majalla* survived in some other countries as a source of law. In 1924, *sharīʿa* courts were completely abolished.[10]

It seems that after abolishing the *HAK*, the main idea was to still codify Islamic Family Law instead of borrowing concepts from a foreign country. There were some attempts to the extent that a body of law already was established. Under the leadership of Seyyid Bey, a representative and high officer in the ministry of justice, a commission actually offered a new code to be accepted in 1923. He had *sharīʿa* courts in mind as family courts, but the government abolished those courts.

Despite the fact that *sharīʿa* courts were abolished in 1924, two more commissions of which one was led by famous scholar Omer Nasuhi Bilmen were set to prepare family law codes according to Islamic family law.

8 ÖZTÜRK OSMAN, Osmanlılarda Tanzimat Sonrası Yapılan Adli ve Hukuki Çalışmalar, İslam Medeniyeti (1973), 34–35, at 35.

9 AYDIN MEHMET AKIF, Mecelle-i Ahkam-i Adliyye, DIA, Vol. 28 (2003), 231–235, at 436.

10 AKGÜNDÜZ AHMET, İslam Hukukunun Osmanlı Devleti'nde Tatbiki: Şer'iyye Mahkemeleri ve Şer'i Siciller, Islam Hukuku Araştırmaları Dergisi, Vol. XIV (2009), 13–48, at 17–18.

A Europeanizing ideology with coercive secularism of the founding fathers of Turkish Republic was the main reason for adopting European laws instead of building on the nearly a half-century old ongoing codification attempts based on *sharīʿa*. The statements of Mahmut Esat Bozkurt,[11] the Turkish supremacist minister of justice at that time, reveal the underlying mindset behind the adoption of foreign laws when he convinced Mustafa Kemal Atatürk: "Only a radical break with tradition would allow society to be refashioned in the image of the new Republic."[12] Kemalist revolutions were not merely aiming at revolutionizing; they also aimed at a complete destruction of what had been there before based on religion.[13]

4. The Effect of Islamic Law on the Family Law of 1926 Turkish Civil Code

After the attempts to codify family law based on Islamic law, the new Republic instead chose the transplantation of Swiss code. However, the influence of Islamic family law was somewhat present in the new code.

One of the obvious articles was the one on milk-kinship. In the article number 92, milk-kinship is accepted as one of the impediments of marriage contract. Despite the fact that this code passed in the national assembly, the government removed it from the code without any decision made by the assembly again. This is hard to fathom for any democratic state, but it did happen. The excuse brought forward was, ironically, aimed at correcting the grammatical and editorial mistakes in the code.

Certain rulings rooted in Islamic family law,[14] yet some of them shared by Western cultures as well remained in the code:

1) Separation of spouses' property was the rule in 1926 code;[15] while in the Swiss code spouses are subject to the provisions governing participation in acquired property provided they have not agreed otherwise in a marital agreement.[16]

2) Grounds for divorce were adultery, life threatening or psychologically destructive behaviour, criminal behaviour, abandonment, mental illness, and irreparable damage to the marriage union;[17] while in the Swiss code the grounds for divorce were living apart for two years and irretrievable breakdown.[18]

[11] Not to be confused with Mahmut Esat Efendi who was the head of codifying committee for *Hukuk-i Aile Kararnemesi*. Mahmut Esat Efendi (1855–1917) was a member of parliament for the city of Isparta and educated in Islamic law, while Mahmut Esat Bozkurt (1892–1943) was among the main actors in adopting European codes for the legal system of the new Republic.

[12] OKTEM KEREM, Angry Nation, London / New York 2011, at 29.

[13] MANGO ANDREW, Ataturk: The Biography of the Founder of Modern Turkey, Woodstock, NY, 2000, 296–312.

[14] Some studies also tried to reveal these articles rooted in Islamic law, but some mistakes occurred. An author, for instance, in such a study says that a 180 days limit for paternity claims was set up due to Islamic law, but it is actually mentioned in the Swiss code article 262 also. See YILDIRIM SEVAL, Aftermath of a Revolution: A Case Study of Turkish Family Law, Pace International Law Review, Vol. 17 (2005), 347–371, at 362.

[15] Türk Kanun-ı Medenisi (TKM), [Turkish Civil Code of 1926], Article 146.

[16] Swiss Civil Code of 1907, Articles 181; and 196–198.

[17] TKM, Articles 129–134.

[18] Swiss Civil Code of 1907, Articles 114–115.

3) The authority within the household is given to men in the 1926 code;[19] while in the Swiss code, even though a head of household is mentioned, the gender of that person is not specified.[20]

4) Women are not allowed to re-marry after the dissolution of the previous marriage for 300 days;[21] while in the Swiss code the time span of 300 days is mentioned only for deciding paternity.[22]

III. Recent Developments and Debates

1. Marriage Solemnization: Authority to *Muftīs*

An attempt to bridge the gap between law and social reality after the transplantation of Swiss code was made by passing four legislations in 1932, 1934, 1945, and 1950 in order to legitimize informal and underage marriages.[23] The same problem with under age marriage created big uproar recently. Around 4000 men were jailed in the last decade with the accusation of underage marriage. The government attempted to pass a law to legalize these marriages and free those men, but the opposing party ran a campaign arguing that in doing so the government will open the door for legalizing underage marriage and child molestation. The attempt was withdrawn. However, there is still a considerable demand to pass this legislation.

Another important and constant problem has been the legal status of religious marriages. After all temporary solutions for about 90 years, the state decided to legalize these marriages by appointing religious officers as marriage officers. The draft amendment to the Population Services Law (2006) was adopted in the Turkish Grand National Assembly on October 19, 2017 as numbered law 7039 and entered into force upon its publication in the Official Gazette dated 3 November 2017. Thus, with the secular civil law taken from Switzerland in 1926, for the first time in 91 years, during which there was not even a reference made to Islamic law or any religious authority, an open authority was granted to the *muftīs* even if it was evaluated within the scope of a civil servant. This situation can be seen as a relatively minor result of the process of increasing public visibility of religion, which started in the 2000s. But it signifies a turning point in the history of the secular Republic of Turkey.

If we take a closer look at the amendment, the second paragraph of Article 22 of the relevant law reads as follows:

> "Marriage officer; in places where there is a municipality, is the mayor or the officer to be assigned to this work; is the *muhtars* in the villages. The Ministry may give the authority and duties of solemnizing marriage contract to the Directorates of Provincial Population and Citizenship, to the Population Directorates and the Foreign Representative Offices, and **to the Provincial and District Mufti offices**.

[19] TKM, Article 152.
[20] Swiss Civil Code of 1907, Articles 331–333.
[21] TKM, Article 95.
[22] Swiss Civil Code of 1907, Article 262.
[23] UNESCO, The Reception of Foreign Law in Turkey, International Social Science Bulletin, Vol. 9, No. 1 (1957), 76–87, at 77.

> In the event that one of the spouses is foreign, the civil marriage officers and the population managers are authorized to marry."

The amendment to the law consists of the addition of four bold words. However, the change that these four words would bring about was enough to wick hot debates at that time. Even though this amendment is interpreted as legalizing religious marriage, the government carefully described it as authorizing *muftī* as any other officer in solemnizing "civil marriage".[24] Furthermore, the will that made this change not only showed an intense emphasis on provincial and district *muftī* offices being a state institution, but also made an effort in order not to provoke possible secular reactions with the statement that the relevant authority **could be** given by the Ministry of Interior. It means, a new minister of internal affairs to be appointed by a new president who wants to maintain a 91-year secular tradition will be able to easily lift this mandate. But still, this relatively small step for other Muslim majority countries is actually a significant step for Turkey whose history proves its coercive secular identity.

The Republican Party took the amendment to the constitutional court for cancellation with the claim that it contradicts the secular principles of the constitution. The court rejected the application on the grounds that it does not legislate a new form of marriage; rather it facilitates the civil marriage solemnization processes.[25]

2. The Presidency of Religious Affairs on Family

A large survey entitled as *The Research on the Religious Life in Turkey*, conducted by the PRA with a group of 21 632 people in 2014, demonstrated that 93.2 % people identified themselves as religious to the extent that they try to shape their lives according to the Islamic norms.[26] Upward of eighty-seven percent (87.1 %) of the respondents said that they train their children based on religious values and 68.9 % of them said that the first priority in selecting their spouse is religiosity. According to another survey conducted by the Turkish Statistical Institute (TSI) showed that 98.2 % of all marriages were contracted according to Islamic laws and accompanied by religious ceremony.[27] These statistics sufficiently demonstrate the effect of religious norms on family institutions. Religious questions directed to religious authorities and to the PRA also prove that point. As an example, I will take the Office of Family and Religious Guidance.

The Presidency Religious Affairs established the *Family Commission* within the Office of Religious Guidance in 2002, and it gradually turned into an independent office with the title *The Office of Family and Religious Guidance* in 2014. In the present time, PRA established these offices in all 81 cities and 304 districts. There, 2801 trained consultants (1859 of whom are female) respond to the questions and disputes both face to face and through telephone calls.

[24] HÜRRIYET DAILY NEWS: Article Allowing muftis to Perform Marriages Passes in Turkish Parliament (19 October 2017), www.hurriyetdailynews.com/article-allowing-muftis-to-perform-marriages-passes-in-turkish-parliament-121108 (last accessed 17 January 2020).

[25] ANAYASA MAHKEMESI KARARI, kararlaryeni.anayasa.gov.tr/Karar/Content/594d6ee8-d368-4bfe-b19f-2832f2c979-cb?excludeGerekce=False&wordsOnly=False (last accessed 17 January 2020).

[26] DİB, Türkiye'de Dini Hayat Araştırması, Ankara 2014, at 33.

[27] TÜRKIYE İSTATISTIK KURUMU, Aile Yapısı Araştırması (2016), www.tuik.gov.tr/PreHaberBultenleri.do?id=21869 (last accessed 10 September 2019).

	2014	2015	2016	2017	2018
Marriage – Nikah – Divorce	2527	3629	1677	3814	5332
Family	2041	2545	1117	2830	4313
Health	481	929	153	799	1393
Children	142	631	291	730	984
Women	76	315	119	359	570
Youth	45	284	153	413	743
Social Situation	315	259	169	388	677

Chart 1: Question/Dispute Topics Directed to Offices of Family and Religious Guidance [28]

Some examples for Q and A's:

> **Q:** "I got married to a man and we broke up but he will not divorce me. Now, I have another marriage proposal from another man. What can I do?"
> **A:** "In order not to face this kind of problems, we advise to youth to be patient and sober and not to make any *nikāḥ* contract until they reach the proper time for marriage. As for the solution, one can be appointed as an arbitrator and he can separate the couple for valid reasons."[29]

> **Q:** "When we got married, *mahr* was not mentioned. My husband did not mention either. Does that affect our contract? What should we do?"
> **A:** "*Mahr* is not a mandatory condition for *nikāḥ*. It is a right of the women. Not mentioning it during the ceremony does not invalidate your *nikāḥ* contract."[30]

> **Q:** "We are senior students at the University. We decided to stay together at the same apartment. In order not to fall in sin, we want to make a *nikāḥ* contract. Could you solemnize this contract?"
> **A:** "We strongly disprove a religious marriage contract without a civil contract for possible adverse legal consequences. Therefore, we do not solemnize a religious marriage contract without a prior civil contract."[31]

[28] I acknowledge the officers in the center of Family and Religious Guidance for providing these statistics.
[29] OFRG, Personal Records, Nr. 1518, İzmir March 2009.
[30] OFRG, Personal Records, Nr. 2086, Manisa June 2009.
[31] OFRG, Personal Records, Nr. 1999, İzmir December 2007.

All these statistics prove the fact that there is a huge demand among people in Turkey for more room to pursue religious norms governing their family life and matrimonial issues. They also seek to solve their marital problems in accord with Islamic norms.

IV. Conclusion: Bridging the Gap

Family law in Turkey has diverged considerably from the Turkish populations' social reality. This created a gap and constant provisional amendments to the family code. On the other hand, the coercive secularism still claimed as the state ideology, despite inclinations toward softer secularism due to the Islamic inclinations of the country's current leadership, is still powerful and unchallenged. This does not enable the authorities to issue rulings in accord with the social reality of the people that is deeply affected by religious norms. Giving authority to *muftīs* for solemnizing marriage was one of the steps made toward bridging this gap. Another possible way to narrow the gap even further might be using arbitrational models in family law matters more efficiently. Family mediation, which will be put into practice in Turkey in the near future, will likely provide an important space by including the *med-arb*[32] model of Islamic family law to resolve conflicts within Turkish families. Instead of transplanting the exact family mediation model of Europe, this type of mediation will help people to solve their problems more efficiently and decrease the tension between social reality and state law.

[32] *Med-Arb* is an alternative dispute resolution model combining mediation and arbitration. Despite having different types of applications in present time, in Islamic family law the first phase is on mediation aiming at reconciliation between the couple in order to perpetuate the marriage, while the second phase is on arbitration where the mediator becomes the arbitrator for the matters remained unresolved after the mediation phase and makes binding decisions on those matters.