Matching Sharia and 'Governmentality': Muslim Marriage Legislation in the Late Ottoman Empire

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Abstract

Marriage and family were widely debated topics in the final decades of the Ottoman Empire. They were related to the different projects of reform which attempted to save the Empire and restore it to its former glory. In spite of this, major reform of family law did not take place until the very last years of the Empire. Such reluctance had to do with the fact that marriage was traditionally regulated by principles based on the holy texts of each religious community, and any attempt at change meant an open confrontation with the Muslim, Christian, and Jewish religious establishments. It was only after the Young Turk Revolution that a cautious transition from divine law to legislative activity based on reason took place. While the Decree on Family Law of 1917 based its rulings concerning Muslim marriage on Islamic law, it made flexible use of different interpretations of the Sharia. The choice among these different scholarly opinions was justified by reference to the need for change, stemming from the negative experience of previous arrangements, as well as from the recognition that change was also taking place outside the Empire. The more important novelties this short-lived, but highly interesting, legal document introduced included the age of marriage and limits on polygamy.

Manželství a rodina se během posledních desetiletí existence Osmanské říše staly předmětem horečných diskusí. Byly systematicky spojovány s nejrůznějšími reformními projekty, jejichž cílem bylo zachránit Říši a obnovit její bývalou slávu. Významnější reforma rodinného práva se nicméně uskutečnila až na samém sklonku dějin Říše. Tato zdráhavost měla co do činění se skutečností, že manželství bylo tradičně regulováno v souladu se zásadami vycházejícími ze svatých textů té či oné náboženské komunity a jakýkoli pokus o změnu by znamenal otevřený střet s muslimskými, křesťanskými a židovskými náboženskými autoritami. Opatrný přechod od božského práva k zákonodárné činnosti založené na rozumu se tak uskutečnil až po Mladoturecké revoluci. I když Dekret o rodinném právu z roku 1917 zakládal svá nařízení ohledně muslimského manželství na islámském

právu, pružně a inovativně využíval různé sunnitské interpretační školy šaríy. Volba mezi různými názory islámských právníků byla hájena argumenty o potřebě změny vzhledem k záporným zkušenostem s dříve používanými interpretacemi a také vzhledem k nové době a mezinárodním souvislostem. Věk sňatku a omezení polygynie představují nejdůležitější novinky zavedené tímto právním dokumentem, který přes svou krátkou životnost vyniká jako důležitý mezník ve vývoji právního systému nejen na území dnešního Turecka, ale i dalších oblastí, které počátkem 20.století tvořily součást Osmanské říše.

The final decades of the Ottoman Empire, one of the most prominent and long-lasting empires in European history, witnessed a broad debate on the reasons for its declining power and relevance. Both Ottomans and foreigners offered different observations, arguments, and proposals to explain this complex and multilayered phenomenon. During the 18th century, the discourse of *freng* intellectuals (European foreigners, especially from Catholic and Protestant countries) on the one hand, and internal Ottoman debates on the other, advanced along different paths, though there existed contacts between the two. In the 19th century the intensification of interaction contributed to a lively circulation of knowledge, interpretations, and arguments[1]. The fact that the *question* was articulated in many different ways makes its analysis extremely difficult. Debates about Ottoman 'decline' had radically different motives and implications inside and outside the Empire. Even on a purely internal level the *question* had a different meaning for – let us say – liberal and conservative Ottoman Greeks, religious communities in Lebanon, Egyptian dignitaries striving to pursue independent policies, or Ottoman bureaucrats in Constantinople. Taking into consideration such complexity, the chapter focuses on the interpretative community of Turkish-speaking Ottoman Muslims[2]. It treats in particular the issue of family and family law as they appeared in discourse that centred around the idea of saving the Empire.

The debate, which had started as an attempt to explain and remedy Ottoman military failures and the serious difficulties in controlling the Empire in the 17th and 18th centuries, broadened as time went by. The initial debate about military issues expanded to include questions of technological knowledge and production, state finances, and the political and legal system. A particular boom in this respect took place during the last fifty years of the Empire, that is, approximately from 1870 to 1920. During this period the debate extended beyond senior members of the state bureaucracy to involve lower-level officials and civil servants, as well as liberal professionals. A growing consensus held that a reform of state institutions was necessary but insufficient and that a profound economic, social and moral revolution had to take place in order for the realm to be saved and its former glory recovered. Commerce, education, science, health, and family became prominent topics in newspapers, essays, theatre, novels, as

well as in private and public debates in cafés, secret societies, and educational institutions. Paradoxically, the strict censorship imposed during the absolutist regime of Sultan Abdülhamid II (1878-1908) focused attention on certain topics, including family and health, while it severely restricted the possibility of discussing explicitly political issues. On the other hand, social reform was not perceived as a matter of individual well-being but as a highly public issue closely connected with the state of the Empire. Therefore, this kind of debate continued to flourish even after the Young Turk Revolution of 1908, which limited censorship and fostered public discussion of political issues under a constitutional guarantee of the freedom of the press.

This chapter deals with one of the issues over which the battle to create a new Ottoman society was fought: marriage. Marriage represented a social institution which was universally considered as fundamental to the family, the community, and to mankind in general. Beginning in the 1870s, Ottoman Muslim intellectuals systematically linked the wellbeing of the realm to an alleged crisis of the Muslim family. The authors who eventually contributed to this debate differed radically in identifying the reasons and solutions for this crisis. Thus the discussion help define ideological positions – with all the necessary nuances – along the general lines of Westernists, conservatives, Ottomanists, or Turkish nationalists. However, it can be said that a gap separated those who interpreted the alleged crisis as a consequence of external contamination from others who identified it as mainly an internal problem and did not hesitate to propose new, original remedies. The state, the principal motor of change in some areas, adopted a rather passive attitude in this matter for reasons that will be discussed below. During the 19th century state intervention was limited to attempts to place marriage under the control of the public authorities and to issue a number of decrees regarding specific questions. Systematic legal reform materialized only in the very last years of the Empire in the form of a Decree on Family Law (*Hukuk-i Aile Kararnamesi* [HAK]). This was passed in 1917 during the Young Turk regime. A product of the difficult task of reconciling Islamic law and new ideologies such as populationism or the defense of individual liberty, the decree was rather short-lived. Strong conservative opposition led to its revocation in 1919. A civil code inspired by the Swiss *Code Civil* – needless to say, this meant a radical break with Islamic law – replaced it during the first years of the Turkish Republic. This chapter gives pride of place to analysing the question of marriage in this extremely interesting Decree on Family Law. It interprets the document in the normative and historical context of Islamic law, as well as within the framework of previous and contemporary ideas and debates on marriage among the Ottoman Muslim elites. Its overall approach concentrates on government policies and public debate, not on the application of legislation, nor on the social and demographic dimensions of marriage patterns in the Ottoman Empire.

Marriage in the core centuries of the empire (16th – 18th centuries)

In the middle centuries of the Ottoman Empire, when the remnants of the Central Asian tribal way of life were giving way to the basic patterns of eastern Mediterranean urban civilization, marriage was seen as extremely important for maintaining and reproducing the social order[3]. Research on marriage patterns indicates that there existed strong social pressure on single people to get married, and even the divorced or widowed were expected to remarry, with the exception of the very old, who lived in their children's household[4]. People who remained celibate, both men and women, were seen as a potential threat to the social and moral order. Single men were perceived as potential sexual predators, dangerous for women and young boys, as well as rioters and trouble-makers, and their energy had to be controlled and directed towards socially acceptable ends such as warfare. Women of fertile age were considered as vulnerable beings – lacking both physical force and the capacity for self-control – who desperately needed male protection and supervision[5]. The construction of male and female sexuality in Muslim thought has been subject of ongoing debate. On the one hand, it is generally accepted that there existed a consensus around the idea of an active man who requires legitimate sexual satisfaction in order not to disrupt the established order by seeking it outside the home. There is less agreement over the question of female sexuality. Some specialists, such as Fatima Mernissi, argue that there existed a fear of the disruptive and threatening potential of female sexuality, which was seen as aggressive and hard to control[6]. Others, like Leslie Pierce or Shahla Haeri, contend instead that such fear did not necessarily attribute an active sexual role to women, but rather referred to their capacity to generate undesirable behaviour in men[7]. Though the latter hypothesis strikes me as more convincing for the period under discussion, there are certain indications that – unlike in 19th-century Europe – the notion of marital duties in Islamic law did not imply a vision of a needy husband and an acquiescent dutiful wife. Some legal arrangements actually highlight the importance of the satisfaction of the wife's needs in marriage: for example, the right of women in a polygamous marriage to an equal distribution of nights in the household of each spouse. Also, the woman had the option to ask for an annulment of the marriage if her husband was unwilling or unable to have sex with her[8]. Other measures, such as the 'cuckold tax' the Law Code of Sultan Süleyman (1522 -1566) imposed on the husbands of adulterous women, might indicate that worries about the disruptive potential of female sexuality existed, leaving aside the issue of whether it was perceived as active or passive. The law held the husband responsible for controlling it, either by supervision or even confinement of his wife, as well as through the satisfaction of her needs[9]. In my opinion, the sexual act was charged with gender-power interpretations in the popular imagination, and as such it represented a sort of ritual of reaffirmation of the patriarchal order inside the family[10].

In this general world-view, having children, especially sons, constituted a key aspect of both male and female identity, a final confirmation of one's adulthood. Children

represented continuity of the lineage, as well as a useful labour force and a guarantee for their parents' security in old age. Marriage was the accepted and legitimate means of achieving sexual satisfaction and offspring. Men had another option, which consisted in taking in a slave-girl: sexual relations with one's own slave woman was not considered adultery and the children born of such a union were legitimate heirs according to Islamic law. However, not everyone could afford such a luxury and there existed other reasons why it did not become an alternative to marriage, but rather a complement to it practiced by the well-off. One reason was the fact that marriage constituted an important means of creating or strengthening the links between families or between different branches within a single kin group. Networks had a key importance during the core centuries of the Ottoman Empire[11]. A strong and extensive web of kinship provided its members with mutual aid in hard times or in the case of migration, as well as constituting a means of obtaining various advantages. Extending or strengthening a network of such vital importance was considered too essential to be left to the individual choice of a young man, let alone a woman. Moreover, due to the growing physical separation of the sexes in urban areas from the 16th century on, especially among higher-status families, it became difficult for young people to get to know each other[12]. Therefore, selecting a suitable partner and marrying out the children was understood as one of the most important tasks of the family as a whole.

The importance of marriage as the constituent bond of a household was recognized by Ottoman Muslim writers who created, perpetuated, and modified a hybrid image of the ideal household as a fundamental unit of mankind. This vision was derived from diverse sources, including the different Turkish tribal customs, concepts and practices incorporated through contact with the Persian and Byzantine Empires and Balkan kingdoms, and the long tradition of Muslim literary production on this subject. From the 16th century onwards, Ottoman Muslim intellectuals of Anatolian and Balkan origins were directly inspired by the works of Arab and Persian Muslim scholars such as Avicenna or Nâsiruddîn Tûsî, who drew on ancient Greek philosophers and incorporated in their work Aristotle's and other Greek theorists' notions of *oikonomia*, which they translated as *ilm-i tedbir-i menzil*, or "management of the household"[13].

The fundamental role ascribed to marriage did not entail, however, direct intervention by the public authorities. Until the last decades of the Ottoman Empire the state's role was very limited. Every religious community had its own rules related to marriage that believers were supposed to follow. In the case of Ottoman Christian communities, this autonomy involved direct oversight by religious authorities based upon the understanding that marriage was a sacred bond that should be sealed in the presence of a priest. Among Muslims and Jews marriage was a verbal or written contract based on an agreement between two families, between a man and a future wife's tutor, or between the man and the woman themselves. It was regulated by Islamic and Jewish law respec-

tively. In the case of mixed marriages between a Muslim man and a Christian or Jewish woman, Islamic law applied.

The state's intervention in this contract in the Ottoman Empire was indirect, as it consisted in supervising the semi-autonomous religious establishment (*ulema*). The system worked in the following way: the *ulema* as *müftis* (juriconsults, persons who dictate legal opinions or *fetvas*) created the legal framework of Muslim marriage by interpreting the sources of Islamic law. The *müfti*s dictated *fetvas* with respect to all aspects of marriage and married life which were related to the teachings of the Qu'ran; sunna, hadiths, and other authoritative oral traditions; or even the common law (*örf*). The *ulema* also held the office of *kadı* (a judge in the Sharia court) and thus resolved disputes relating to marriage. The *kadı* intervened in cases of dispute over the validity of marriage and about its functioning or dissolution in conformity with Islamic law. Thus, religious authorities regulated marriage without its becoming a religious institution itself, in contrast to the Catholic and Orthodox Christian Churches, where the conversion of marriage into a sacred bond or sacrament took place. In theory, every scholar of Islamic law could act as a *müfti*, so the state did not necessarily play any role in creating a legal framework for marriage. However, the sultan's administration managed to establish a monopoly over higher religious education and to tie the religious establishment to the state and make it serve the ruling dynasty. The most important *ulema* were actually men in the service of the Sultan, especially in the post of *şeyhülislam*, that is, the supreme authority in the interpretation of Islamic law in the Ottoman territory[14]. The judges at the Sharia courts were also linked to the Ottoman state as they were appointed and dismissed by the *şeyhülislam*. By subordinating religious authorities and integrating them into the bureaucracy the Ottomans actively influenced their activity; the willingness of the secular authorities to pressure the religious establishment became clear in issues like land ownership or crimes against the state. However, there was no significant pressure on jurists and judges to interpret the Sharia flexibly in the case of marriage, so traditional Arab sources were applied to elaborate its legal context. Although there were some attempts during the Classical period to introduce an obligation to ask the permission of the *kadı* to get married and to register the marriage in a court, unregistered marriages sealed without previous permission were never considered invalid and the attempts to place marriage under the control of the courts failed[15]. Ottoman Muslim men and women often made use of *imams* and of the Islamic courts in matters related to the sealing of marriage contracts, but in these cases the role of the judge and his helpers was limited to writing, revising, and registering the marriage contract in order to prevent or help resolve future disputes. Their intervention can be compared to the tasks of a notary in Christian Europe.

The *fetvas* explained which rules had to be followed for a marriage contract to be valid. Moreover, they offered solutions to disputes in accordance with Islamic law, serving as guides for the decisions of judges. The following are some examples:

Case: The closest legal tutor of the little Hind is her mother Zeynep. If Zeynep's mother, Hatice, marries Hind to Amr without Zeynep's permission, is such a marriage contract valid?
Answer: No, it is not [16].

Case: If Zeyd repudiated his wife three times when he was out of his mind after he had eaten henbane [a poisonous plant that can create hallucinatory trances] and drunk boza [a beverage made of slightly fermented millet], should such divorce be taken seriously?
Answer: If he could not distinguish between the sky and the ground, it should not[17].

Case: If Zeyd's divorcee Hind says after Zeyd's death: "he owed me 5,000 filori of mehr" basing her proof on Zeyd's verbal declaration, and Zeyd's heirs say "your mehr is 5,000 aspers" proving it, whose proof is more convenient?
Answer: Hind's proof is more convenient[18].

Unfortunately, the state of research on this matter makes it impossible to confirm whether the *müftis* actually pursued a specific policy in their *fetva*s, or whether there existed schools of interpretation inside each *mezhep* that differed by period and territory. Analysis of the production of fetvas on marriage in the Ottoman Empire seems to indicate that the *müfti*s tended to simplify the material produced by Hanefi Islamic jurists in previous centuries, omitting some questions and reducing the number of legal categories they used[19]. In general, the image we now have of the Ottoman *müftis*' interpretation of Sharia in relation to marriage is rather static, while the research focusing on judges' decisions seems to indicate the existence of a more varied panorama.

People approached the *müftis* with doubts about how to live according to Islamic law or in order to find out whether they had sinned. The *kadı* was expected to intervene in Muslim marriage only in the case of a conflict, that is, if an accusation was brought up related to it. Sometimes Christians and Jews – especially women – went to the Sharia court when they thought Islamic law was more favourable to their interests than the rules that governed marriage in their own religious community. Muslims also tried to negotiate the boundaries of the Sharia by choosing the most favourable interpretation among the four Sunni schools (*mezhep*) of Islamic law (Hanefi, Shafi´i, Maliki and Hanbali). However, if everything went smoothly, no contact with the authorities was actually necessary, either for getting married or for getting divorced, and then applying to a *kadı* of that school.

This statement should not lead us to conclude that marriage was a wholly private matter. Such an interpretation would wrongly assume a modern division of private and public, neglecting the fact that the separation of spheres that existed in the Ottoman Empire was construed in a rather different way[20]. Marriage was certainly not a private matter. It was public in the sense that it was connected to a series of ritualized proceedings, centred around matchmaking and the wedding itself, which were meant to gain public recognition for the bride and the groom. It was not the presence of any state or religious authority that gave legitimacy to a marriage but that of the witnesses, who attended the closing of the marriage contract, and of the neighbourhood, which acknowledged and accepted the new *status quo* through its participation in the wedding. The customs linked to matchmaking and the wedding varied greatly, depending on re-

gion, ethnic group, wealth, and other factors. In general, they had hardly any relation to Islamic law, though some included religious elements or were interpreted in a religious way. Among these customs was the invitation of an *imam* to give his approval to the marriage contract and to participate in the ceremony.

Among the main features of marriage in Islamic law, the power attributed to words has to be emphasized. A marriage contract (*akıd*) became real when people, in the presence of witnesses, pronounced the words that expressed their will to marry or, in the case of legal tutors (*veli*), to marry their tutees, when there existed no legal impediments to the two people being married and when an adequate *mehr* ('dower') was transferred from the husband to the wife. In the interpretation of the Hanefi *mezhep*, the dominant school in the Ottoman Empire, a marriage contract was valid even if the words of consent were pronounced under threat. On the other hand, a man could find himself divorced by pronouncing certain formulae in a heated quarrel with his wife or by swearing on his marriage and then not fulfilling the promise[21].

Marriage was generally not a contract between two individuals but rather between two families. Arranged marriages were common, many of them being contracted between children. The children were married by their legal tutors (*veli*) and women needed a tutor to get married even in their adulthood, except in certain specific situations[22]. Even adult men were helped by their female relatives to choose an adequate wife. As is well known, the Sharia authorized men to marry up to four women. However, they were obliged to pay their wives the *mehr*, treat them equally, and provide each one with a house, or at least with a separate room. Such regulations made polygamy quite rare in the cities[23].

Islamic law recognized some impediments to marriage, especially certain kinds of religious difference, as well as links of consanguinity and fosterage. Islamic law also acknowledged a principle of equality (*kafa'a* or *kuvuf*) between the spouses. Certain kinds of inequality constituted an impediment to the marriage, while others offered grounds for annulment if a party requested it. The principle of equality protected the woman, but at the same time was interpreted in a gender-biased way to imply that the man's dominant position in the marriage was a desideratum. For example, a woman or her tutor could ask *kadı* to annul a marriage to a man of inferior status as such a bond could be considered humiliating for both spouses. On the other hand, there was no shame involved when a man married a woman of lower origin[24].

> *Case:* Is the ignorant shopkeeper Amr equal to [compatible with] Hind, a daughter of Zeyd of the *ulema* [the religious establishment]?
> Answer: No, he is not[25].

The young age of a bride or groom was not an impediment to marriage, although consummation was postponed in such cases. Married children remained with their parents

until they reached maturity or, in the case of girls, until they were considered "carnally desirable" (*müşteha*). Only then could the married couple begin their life together.

In many cultures marriage served as a space wherein to produce legitimate heirs and transmit property to the next generation, and such was the case in the Ottoman Empire. More remarkable is the fact that according to Sharia law, marriage did not mean the fusion of property, nor the wife's property passing to her husband. On the contrary, the husband and wife preserved their own personal property and had no right to dispose of that of their spouse. Men were obliged to pay a certain sum of money (*mehr*) to the bride as a part of the marriage contract, as well as her maintenance (*nafaka*) during the marriage. However, the right of women to inherit the property of their husbands was strictly limited, although research on the 18th-century Ottoman Empire shows that husbands sometimes managed to secure the administration of their property after their death by their widows through charitable foundations[26]. Children were considered the property of their father and his family and women were granted only a temporary right of caretaking (*hızanet*) in the case of divorce or the husband's death. Only if the husband designated his wife as legal tutor for their children in the case of his death could she keep them in her custody and make important decisions in their name until they were adults[27].

Islamic law permitted divorce and archival documents from Ottoman Sharia courts show that it apparently was quite widely practised[28]. The rules Islamic law imposed on the practice of divorce assured masculine hegemony; for a man, divorce by repudiation (*talak*) was extremely easy, at least in theory, as it was enough to express aloud three times the will to divorce. For a woman, however, divorce was difficult if the husband refused to collaborate. Hanefi *mezhep* was particularly restrictive on the possibility of annulment or judicial divorce. There existed an option, widely used in the Ottoman Empire according to Madeline C. Zilfi and Svetlana Ivanova, of divorce by mutual agreement (*hul*)[29]. The research on *hul* divorce shows that the wife often exchanged a sum of money or the right for the maintenance of the children in her care, for the husband's consent to divorce. Although, in principle, divorce legislation favoured men, especially among poor people where no important property was in question, it has to be pointed out that in the Ottoman Empire practice differed slightly from theory as families found ways to protect their daughters from being repudiated by their husbands. The bride's family could introduce barriers to an easy divorce into the marriage contract, for example through fixing a delayed *mehr* or *mehr-i mueccel*, which was a dower paid in the case of divorce and was usually much higher than the one paid at the beginning of the marriage. Moreover, divorcing a woman from an influential family could mean losing important kinship ties or even gaining influential enemies, which was another factor that could discourage men from repudiating their wives.

It can be safely concluded that the legal framework of marriage was designed to guarantee the husband's authority. In this respect it was more 'androarchal' than 'patriarchal', in the sense that it was not fathers but husbands as individuals who had the main say in

the majority of cases. This differed from Turkish tribal traditions which granted more power to family elders, thanks to which the father of the bride had an important influence and could effectively protect the position of his daughter by, for example, marrying her to a poorer man who depended on the clan[30]. These traditions also included a more egalitarian notion of compatibility, expressed in the idea that the spouses should be close in age and physical beauty[31]. The introduction of classical interpretations of Islamic law to urban Turkish Muslim communities transformed or eliminated many of the remnants of these traditions. Also, the advance of urban life itself promoted a 'nuclearization' of family units by the 16th century which ended up shattering the clan structure. To counter all this, a series of mechanisms based on Islamic law were applied in order to protect women against their husband's arbitrary use of marital authority. Ottoman women were ready to benefit from them, as is evident from the active use they made of Sharia courts in the case of disputes[32].

The winds of change: marriage as a matter of state

The thorough transformation of the Ottoman Empire in the 19th century raised questions about many established truths and posed new challenges. In this context by the early 20th century a broad consensus emerged among those Ottomans who were active in public debate that the Muslim family was in crisis. This opinion was shared by many representatives of the traditional religious elites, as well as by reform-minded bureaucrats and officials. Furthermore, the notion of crisis was vigorously defended by men and women who constituted the emerging urban, middle classes that included liberal professionals, lower-level officials, and civil servants and their families. However, these men and women radically differed in identifying the causes of the crisis. The corrosive effects of Westernization upon Ottoman Muslims, the oppression of women, poor education, the lack of paternal authority, or its opposite, the mindless imposition of such arbitrary power, child marriages, frequent divorce, the lack of respect for Islamic law or, on the contrary, the adoption of the Arab interpretation of it while giving up Turkish 'democratic' traditions: all these and many other alleged causes jostled together in the discourse of Ottoman authors. Many of the writers, journalists, and activists who contributed to the debate were ambiguous in their attitudes. For example, while they defended the Ottoman family from the negative comments and prejudices of the not always well-informed *frengs*, they did not hesitate to criticize different aspects of the Ottoman Muslim family when they wrote for domestic readers.

Despite numerous attempts at reform in other areas, the state was conspicuously silent regarding this lively debate on marriage. The first important impulse came from playwrights and writers, who not only introduced new literary genres into Ottoman literature but also seduced their public by reshaping concepts such as love, freedom, and harmony. Journalists and essayists helped disseminate a sense of Ottoman back-

wardness in contrast with Europe, as well as opening space for a systematic discussion of solutions, including reform of the family. The reformers based their efforts on the notion of *muasırlaşma*, that is, catching up with modern times. *Muasırlaşma* did not only mean the adoption of 'modern manners'. It also consisted in breaking with traditional family structures and reorganizing personal relations around the principles of individual liberty, social responsibility, and forward-looking education. In particular, marriage as partnership, freedom of choice, and a harmonious home where children could be provided with attention and education, occupied a prominent position in this vision of a better future[33].

In general, these authors did not fight against arranged marriages as such. Rather, they argued for flexibility. Above all, they insisted on the right of the bride or the groom to refuse the candidate proposed by their family. This implied the prohibition of child marriages, which were incompatible with the principle of consent based on free will, and which tied men to an undesired partner through material obligations (*mehr*). Moreover, reformist intellectuals defended the right of the couple to meet and come to know each other before they got married so that they could find out whether they were compatible. The intervention of a matchmaker or family member was an acceptable option provided that the young people had the right to step back if they realized their incompatibility. Furthermore, the case of people choosing their partner themselves was also discussed and the authors generally agreed that families should give their approval to the marriage if the partner was suitable and honourable. The opinion of the family was considered legitimate, but many authors were convinced that families had to have strong reasons to refuse a union desired by two people in love.

The notion of (in)compatibility played a fundamental role in redefining discourse on marriage. The idea that the partners should be compatible was rooted in the vision of marriage as partnership that appeared in this period. According to 'modern manners', the husband and wife were supposed to spend more time together, not only at home, but also socializing in public[34]. Moreover, the idea of love as a prerequisite for a marital relationship was a seductive vision introduced by foreign and local novels, which were widely read among the growing literate population. The vision of the home as a shelter for men from the whirlwind of modern urban life combined with the idea of the domestic sphere as a centre of instruction and patriotic education, wherein new generations could be trained to compete with foreigners in order to restore the Empire to its former importance in a changing world[35].

Two intertwined arguments can be identified in the texts written by the advocates of change. The first developed around the notion of individual liberty and the right to pursue happiness. These key principles of the Enlightenment had been accepted by a growing number of people all around the world, including within the Ottoman Empire. The authors stressed the suffering, or even illness and death, that forced marriage wrought on young people[36]. Parents, both fathers and mothers, were denounced for

obliging their children to marry a person chosen at whim. Particular emphasis was placed on the lack of liberty and the helplessness young women suffered, and the often tragic consequences of parents' arbitrary decisions were underlined. Change implied enlarging the space for the interaction of both sexes so that young people could meet and get to know each other. Moreover, the authors argued for greater female access to education in order to increase mutual understanding between husband and wife[37].

The second line of argument connected the compatibility of the couple with the stability of the household, and in so doing raising the question of social responsibility. The reformers maintained that the marriage of two people who hardly knew each other, who disliked each other, or who were unable to decide for themselves, was actually a socially irresponsible act that threatened the stability of the entire Empire. An unhappy marriage led to an unhappy home, or even to divorce, which meant the disintegration of the household, quarrels and lawsuits between the families, and a damaging environment for children. The authors drew a parallel between unstable family life and the chaotic situation of the realm:

> The households in a realm (*mülk*) are like rooms in a house; will there be peace in a house if all its rooms are shattered by permanent hate and everyday quarrels, will it flourish, will it reach happiness[38]?

Moreover, in keeping with the new importance attributed to the education of children from an early age, parents were urged to devote maximum attention to their sons and daughters. It was believed that the ignorance and immaturity of parents jeopardized this process. As the education of new generations was considered a fundamental part of the project of social reform, neglecting it meant threatening the future of the Empire itself.

The growing influence of the liberal professions is evident in the medical and hygienic references which marked the discourse on marriage and family. These were rooted in the tactic of appealing to the authority of experts in order to make arguments more convincing. Thus, young women were considered too weak and immature to give birth and bring up children. Therefore, forcing teenage girls to marry meant putting in danger not only their physical integrity, but also the health and education of future generations. Furthermore, both young men and women had to be given a suitable education before they got married in order to perform well as parents according to the principles of modern hygiene. Thus, early marriage was not only an imposition on young people but also a menace to the health of individuals and of society as a whole. It threatened the success of demographic and hygienic policies promoted by the state and the reformers. The latter typically identified their interests as physicians or civil servants with those of the Empire, not only in a search for greater credibility but also as a means of enlarging their professional field of action and influence.

Proponents of reform of the Ottoman Muslim family defended a vision of marriage which included the idea of partnership based on free will. This did not entail full equality between wife and husband; the man was supposed to lead and guide the woman and act as the head of family. Nevertheless, partnership included emotional closeness amid compatible morals, character, and interests. The ideal marriage would be formed by adult, educated people, capable of producing and raising healthy children and providing them with discipline and a suitable education[39]. Achieving this ideal rested on the education of women, as well as the maturity of the bride and the groom. Moreover, the reformers pleaded for a relaxation of the norms of sexual segregation, so that men and women could meet, get to know each other, and find out whether they were compatible. One may even observe how marriage began to be seen as a sort of "sacred bond" in the sense of its being understood as a long-lasting emotional relationship charged with tasks that surpassed the confines of a single family[40].

Research based on oral history and demographic data confirms that urban elites and the middle classes absorbed these new attitudes to marriage. However, there was hardly any change in the legal system, which in the case of family law remained based on the Sharia, the exclusive domain of the *ulema*[41]. Even a major legislative reform such as the introduction in 1876 of the Civil Code (*Mecelle-i Ahkam-i Adliyye*) omitted family law. There was no single codified legislation regarding marriage. Instead, each religious community continued to apply its own internal norms in this area as had always been the case in the Ottoman Empire. In the case of Muslims this meant that judges continued to base their decisions on *fetvas*. However, the state renewed its efforts to place marriage under its control, trying to tie it to the previous permission (*izinname*) of the *kadı* or a corresponding religious authority for Christians and Jews. This effort is expressed in article 33 of the Regulations on the Register of Population (*Sicilli Nüfus Nizamnamesi)* of 2 September 1881. This law also obliged an *imam*, who had to be present at the closing of the marriage contract, or a rabbi or cleric who celebrated the wedding in case of minorities, to inform the Department of Population of the marriage within 15 days. Religious leaders who did not fulfil this obligation could be penalized. In the case of divorce, those involved had to inform the religious authority so that he could pass on the information to the same department. Such measures thus institutionalized the role of the *imam* at the marriage, as well as entitling religious leaders in general to act as civil servants, collecting and conveying information to the state. Nevertheless, these novelties did not alter the hegemony of Islamic law, as a marriage (among Muslims) was still valid even if it was concluded without prior authorization. In order to force obedience to the regulations the state had to increase the punishment for people who married without the *kadı*'s permission and for the *imams* who ratified the agreement, replacing fines with imprisonment in the early 20th century. It is clear that the state had to face the fact that the legitimacy of any legal measure that did not have support in the Sharia remained questionable.

The art of the possible: the Decree on Family Law of 1917

Beginning in the reform period of *Tanzimat* (an attempt at thorough reform from above, undertaken by the Ottoman sultans and high bureaucrats and articulated in two major decrees dated to 1839 and 1856) the Ottoman government did not hesitate to promote radical changes in the legal system. These included the introduction of French-style mercantile law and of new regulations concerning land tenure. Moreover, the *Tanzimat* decrees proclaimed the equality of all subjects before the law, a principle that directly contradicted the Sharia. Furthermore, special courts, *nizamiye mahkemeleri*, were created to deal with cases issuing from the new codified legislation of 1871 and a Civil Code was introduced during the first constitutional period in 1876, although it did not include personal and family law. Thus, the Sharia courts' field of action gradually shrank, and was restricted to questions of family law, inheritance, and the like.

The passivity of the state regarding the question of family law can be explained in several ways. The Sharia courts remained one of the last reserves of the religious establishment, the *ulema*. These influential families, closely tied to the dynasty through their monopoly on the interpretation and application of Islamic law, were losing ground during the 19th century as a consequence of the growth of a secular bureaucracy. Depriving them of the Sharia courts would have certainly sparked off furious opposition. But not only did the Muslim religious establishment cherish its hegemony over personal and family law: the Christian and Jewish religious establishments also considered these areas as their exclusive domain and were not ready to give up powers they had held for centuries. Still, it is important to ask why it was that family law, in particular, was left out of a legal reform that was considered essential in other areas of social life. I would argue that the family was perceived as a space where "authentic" values were cherished, shaping the very identity of the People, and Muslim identity was still understood as fundamental. Hence, this space more than others needed to be preserved from pollution by foreign influences that might have been accepted, even by conservatives, as inevitable in other domains.

Nevertheless, the idea of a codification of family law received wide support beginning in the early 20th century. As Halil Cin points out, an important number of Islamic reformers defended the codification of Islamic law, while the so-called Westernists supported the adoption of a European-style family law and its incorporation into the *Mecelle*. Turkish nationalists maintained that the legislation on family in European countries was closer to original Turkish family values than the interpretation of Islamic principles that prevailed in the Ottoman Empire[42]. Although the debates on family, women's status, polygamy, and 'premature' marriage were very intense during the Second Constitutional Period, no major legislative change actually took place until 1917. On 25th teshrin-i evvel 1333 A.H., a Decree on Family Law (*Hukuk-i Aile Kararnamesi*, HAK) was adopted. This was the first systematic codification of family law in the history of the Ottoman Empire.

The reform took place in the context of the Great War, which brought important changes to the lives of many Ottoman women. The massive mobilization of Muslim men left the Empire with many jobs open and the state tried hard to convince women to work outside the home. Women engaged in patriotic activities such as serving as nurses or sewing clothes for soldiers. Through this experience urban, middle-class women gained self-confidence and political consciousness. Furthermore, many reformers were convinced that the state of the *patria* depended on the wellbeing of women and that there could be no real progress if they were kept in a position often compared to slavery and which prevented them from being good mothers of healthy, educated, and well-bred children[43]. In this view, the legal status of women had to be improved in order to remedy the deplorable state of the realm.

The most revolutionary aspect of the Decree on Family Law was its codifying a single interpretation of Islamic law, a principle which clashed with centuries of tradition. In former practice, the *müftis* prepared their *fetvas* by basing themselves on the compendia that the principal authorities of their *mezhep* had elaborated during the Middle Ages out of the basic sources of Islamic law (Qu'ran, Sunna, hadiths, and common law). The judges adopted decisions by choosing among the *fetvas* of the contemporary *müftis* or by appealing directly to the medieval sources of their *mezhep*. In the HAK, the authors combined the four schools of Sunni Islamic law at their convenience. The final result was a single, original interpretation of the Sharia. Moreover, this codified interpretation was not justified as the one closest to the fundamental sources of Islamic law, which would be traditional argumentative logic based on reference to authorities. Instead the reformers justified it on the grounds of utility and by appealing to the use of reason, to *raison d'état*, and to negative experiences with the application of existing rules.

The Decree on Family Law did not introduce a single, unified law for every Ottoman citizen. On the contrary, since its authors had decided to anchor the Decree in religious tradition, it would have been unacceptable to impose it on Ottoman Christians and Jews. Therefore, the HAK included separate sections for Muslims, Christians, and Jews, each based on their respective religious tradition. Thus for example, while the regulations for Muslims and Jews permitted polygamy, it was strictly prohibited for Christians.

As this chapter deals with Muslim marriage the following paragraphs will focus primarily on the implications of the HAK for the Muslim community. The HAK introduced the obligation to make public the decision to marry, so that anyone who objected to the union had time to speak up. This measure was a novelty and lacked precedents in Islamic law. Moreover, the marriage contract had to be sealed in front of a judge or his deputy. Muslims were supposed to appeal directly to the judge, while a Jewish or Christian religious leader notified the court so that the judge could be present at the ceremony. The judge was obliged to register the marriage, and to provide specific information regarding the spouses. However, as was the case in earlier legal measures that attempted to establish state regulation of marriage, the contract was held valid even

if no judge was present, and it was only through punishment by imprisonment that the law was imposed. Such measures reveal an attempt to standardize legal procedures and register information in accordance with the policies of the Young Turk regime. To paraphrase Michel Foucault, the Young Turks regarded the *population* as an economic and political problem, and realized that they were not dealing with "subjects", nor even with "people", but rather with a "population", with its "mortality", "marriage patterns", "birth rates", housing quality, health, and hygiene[44].

Marriage was to be based on the principle of free will[45]. The authors of the HAK refused to accept the Hanefi interpretation that considered valid the marriage contracts agreed to under coercion, and opted instead for the Shafi'i interpretation that dismissed such contracts as invalid. They were also careful to emphasize that the will to marry should be expressed in unambiguous language. The HAK maintained the possibility of polygamy for Muslims, in accordance with traditional interpretations of Islamic law. However, it introduced an important novelty in this respect: it permitted a woman to impose a condition in the marriage contract that prohibited her husband from taking another wife without her consent. If the husband did marry a second woman despite the prohibition, either the first or the second wife would be divorced automatically. The introduction of such conditions to the marriage contract represented an area in which the four *mezheps* differed in important ways. The authors of the HAK opted again to leave aside the more restrictive Hanefi version, traditionally dominant in the Ottoman Empire, which considered such conditions invalid, and adopted instead the more liberal opinion of Hanbali *mezhep*.

Another measure designed to strengthen the position of the wife was divorce negotiated in a family council. The authors defended it as a measure that protected women from the misbehaviour of their husbands. It appeared as article 130, based on the point of view of Maliki *mezhep*:

> If there appears a conflict and incompatibility between the spouses and one of them appeals to the judge, the judge appoints one arbitrator from each family. If an arbitrator cannot be found in one or both families, or if the person does not have the required qualities, then the judge designates suitable people from outside of the family. The family council created in this way examines the explanations and defence of both sides, trying to reconcile them. If it is not possible and the fault is the husband's, the couple separates. If it is the wife's fault, they are divorced and the wife returns a part or all of the mehr [dower]. If the arbitrators do not agree, the judge either appoints another family council of suitable people or a third arbitrator who has no relation to either side. The decision of the arbitrators is irrevocable and no protest is accepted.

The authors justified the introduction of this measure as follows:

> The fact that in this paragraph the point of view of the Maliki mezhep has been adopted and article 130 has been written according to this principle is due to the fact that it will serve to remove and eliminate much inappropriateness present in the families in our coun-

> try, according to the opinion that it will end the unfair treatment of wives who do not have any other possibility to act than to give up their maintenance, especially when [husbands] oppress and do injustice to their wives and the right of divorce by repudiation is in their hands.

The novelty of article 130 consisted in the fact that the husband had to accept the separation proposed by the family council if he was held responsible for the marriage's problems. In particular, the authors of the law had in mind the problem of mistreatment of the wife. Undoubtedly, this measure widened the possibility for women to divorce and placed serious limitations on the husband's authority in the marriage. On the other hand, the right of decision was not given to the wife but to the family council: social consensus had preference over the free will of the individual.

The most important change the *Hukuk-i Aile Kararnamesi* introduced was the prohibition of child marriages. This reasoning behind this was rooted in the notion of marriage as a contract based on free will and was supported by a new social category which introduced the notion of adolescence to the legislation. While the traditional interpretation of the Sharia established a single division between childhood and adulthood, the HAK fixed the age of maturity for marriage at 17 years for women and 18 years for men. A new category of *mürahik/a* was introduced for young people who reached maturity according to Islamic law, that is, when signs of their reproductive capacity appeared, but who were considered too young to be considered adults by the criteria of the authors of the HAK. These adolescents needed the permission of a judge to get married (in the case of women the permission of the legal tutor was also required). As for girls below nine years of age and boys below twelve, article 7 firmly prohibited marriage.

The authors of the HAK were conscious of the break with existing practice it posed and devoted many lines to justify the more controversial articles:

> Although the authorities in Islamic law approved the marriages of children arranged by their tutors and they took place until now, the necessity of another attitude has become evident in our era, because times have changed. In every period, and above all in this one when a hard struggle for life is being fought, the first obligation of parents to their children is to educate them and to bring them up to be people who will be able to triumph in this world of battles and to form an orderly family. However, in our country parents often neglect the education and instruction of their children, betrothing them in the cradle in order to see them married and with rights to an inheritance, so these poor children who know nothing about the world are married and thrown to catastrophe. Families created in this manner, composed of children who have not seen school, who do not know how to read and write, nor the commands of the faith, are like a dead-born faetus, condemned to decomposition in the very first months of their existence. This is one of the causes of the instability of families in our country[48].

Not only child marriages were denounced, but also the fact that girls were married too young, even if they were already considered adult and able to start married life according to Islamic law. Particular emphasis was placed on the damage early motherhood wrought on the physical and psychological health of young women and their children:

> The wife and husband constitute a family and they should collaborate in its management. While the boys spend their time playing in the street. ...girls of the same age are burdened with the greatest obligation in human society, that is, to be the mother of a family and the one who manages its affairs. Poor girls, whose physical constitution has not yet developed fully, suffer nervous problems all their life due to maternity, they get chronically ill, the child that is born is fragile and nervous ... these are some of the reasons for the degradation of the Islamic element[49].

A radical change in the understanding of law and in the perception of time can be observed in the reasoning of the authors of the HAK. They cautiously refused the timelessness of a legal measure, pointing to the negative experience of the existing interpretation of Islamic law, as well as to the changing times that require the adoption of new regulations. In this respect, the HAK can be interpreted as a transition from the notion of eternal and immutable divine law to legal measures based on negotiation and reason within a changing historical context.

Reform was justified by references to the well-being of the families, endangered by the instability provoked by the incompatibility and immaturity of the husband and wife. Moreover, the damage to the mental and physical health of the population early maternity caused was considered a further impediment to the widely accepted necessity of raising healthy, educated and well-bred new generations. The instability of families and the poor health of mothers and children were believed to constitute an important threat to the survival of the Empire. Finally, the new legislation was supported by scientific arguments derived from medical discourse, as well as by references to the common good.

Still, the authors could not base their proposals solely on reason and modern science. They had instead to anchor the prohibition of child marriages in Islamic law. For that reason, they appealed to the authority of medieval Muslim religious leaders who expressed doubts regarding child marriages:

> ... ibn Shubruma and Abu Baker say that the guardianship over small children has to be undertaken for their benefit. For example, a child does not need a tutor to receive presents, nor in any other case when he is clearly of no use. Since children do not need marriage as there is no important natural reason for it nor because of the offspring, [ibn Shubruma and Abu Baker] come to the conclusion that as a child does not need marriage until he/she is adult, it is not valid to arrange it in his/her name. In principle, marriage is not a temporary matter, but a lifelong contract. These two scholars add: in the case of the validity of a marriage contract closed by the tutors in the name of a child, it is supposed that the contract continues even in adulthood. However, nobody has a right to act in a way that imposes on a person a commitment that would limit his action in adulthood. The opinion of the above-mentioned is confirmed by the catastrophes that have continued for centuries, so their point of view has been adopted and article 7 has been settled in this way[50].

The new marriage legislation introduced in 1917 was a cautious reinterpretation of Islamic law that strove to enhance the principle of free will and the status of women, according to the vision of marriage as a partnership. Greater importance was given to aspects such

as the "stability of families" or the quality of the population, revealing the demographic concerns of the Ottoman state during the Young Turk regime. In conclusion, the *Hukuk-i Aile Kararnamesi* could be interpreted as a particular reading of Islamic law based on individual liberty and *raison d'état* defined as the protection of population ultimately aimed at the survival of the Empire.

Conclusion

Despite the fact that the HAK actually introduced only minor modifications to existing practice it immediately provoked a wave of opposition and it had to be revoked in 1919[51]. The conservatives accurately identified the threat that a codified version of Sharia constituted for the *ulema* as interpreters of Islamic law. Moreover, they were particularly sensitive to any restriction of male authority, as is clear from the hostile reaction to the article that empowered the wife to refuse to share her husband by introducing the condition of monogamy into the marriage contract. The conservatives denounced it as an un-Islamic attack on the concept of polygamy[52]. In general, they refused to accept the union of the four *mezheps* of Sunni law and dismissed the very idea of codification as a dangerous novelty.

For their part, the Christian and Jewish minorities interpreted the new legislation as limiting their autonomy through an imposition of the Ottoman state upon their traditional right of self-administration. In this respect, the Ottoman government found itself in an extremely difficult position: on the one hand, it was supposed to modernize a "backward" system, bringing it up to date with other continental European countries, a step that demanded the introduction of a codified legal system in which all individuals would be treated equally. On the other hand, the Ottoman state was under constant pressure from the European powers to protect the minorities and respect the autonomy they preserved from the Classical Era. This constituted one of the key dilemmas of reformist activity in the Ottoman Empire, and one that was to remain unresolved.

When they overturned the *Hukuk-i Aile Kararnamesi* in 1919 the conservatives did not suspect that only a few years later (1926) they would have to swallow a much more bitter pill: a full-blown civil code. The republicans, led by Mustafa Kemal, did not mind hurting the *ulema*'s feelings. On the contrary, the republican project of modern Turkey questioned the very existence of a religious establishment. The new legislation on marriage and family was not the cautious compromise of the recent past, but rather a revolutionary statement[53].

Notes

1 N. Berkes, *Türkiye'de Çağdaşlaşma*, Istanbul 1978.

2 I use this term in preference to 'Turks', as the category in question included a great number of people of different origins, especially from the Ottoman Balkans, or even political immigrants from Hungary or Poland.

3 Such changes can be observed by comparing for example Keykavus, *Oğul Terbiyetin ve Beslemeğin Beyan Eder*, in O.Ş. Gökyay (ed.), *Kabusnâme*, Istanbul 1974, pp. 172-181 (a popular book written in Persian in 1082, translated into Turkish several times since the 14th century) with Kınalızade Ali Çelebi, *İlm-i Tedbirü'l-Menzil*, in *Ahlâk-i Alai*, Istanbul 2007 (a text written in the 16th century).

4 Research on the period prior to the late 19th century is severely hampered by the lack of adequate sources. Some long-term trends can be elucidated from the data obtained for the final decades of the Ottoman Empire or from studies which concentrate on elite families. See A. Duben, C. Behar, *Istanbul Households. Marriage, Family and Fertility 1880-1940*, Cambridge 1991; M.L. Meriwether, *The Kin who Count: Family and Society in Ottoman Aleppo, 1770-1840*, Austin 1999.

5 L. Pierce, *Seniority, Sexuality, and Social Order: The Vocabulary of Gender in Early Modern Ottoman Society*, in M.C. Zilfi (ed.), *Women in the Ottoman Empire*, Leiden - New York - Cologne 1997, pp. 169-196.

6 F. Mernissi, *Beyond the Veil: Male-Female Dynamics in a Modern Muslim Society*, Bloomington 1987.

7 Pierce, *Seniority* cit., p. 195; S. Haeri, *Law of Desire: Temporary Marriage in Shi'i Iran*, Syracuse 1989.

8 In this respect it is important to emphasize that while the Maliki *mezhep* acknowledged this option for a woman at any time during the marriage if the husband refused to or was unable to have intercourse, the Hanefi *mezhep* limited it to a situation when intercourse between the husband and wife never took place. H. Cin, *İslâm ve Osmanlı Hukukunda Evlenme*, Ankara 1974, pp. 181-182.

9 On the cuckold tax see Pierce, *Seniority* cit., pp.169-196. On reclusion see C. Imber, *Women, Marriage, and Property: Mahr in the Behcetü'l-Fetâvâ of Yenişehirli Abdullah*, in Zilfi (ed.), *Women* cit., pp. 81-104.

10 The fact that the husband's impotence or refusal to have intercourse was one of the very few legitimate reasons for the wife's demand of judicial annulment or divorce might be one of the arguments to support such a hypothesis.

11 For a valuable case-study on this subject see Meriwether, *The Kin* cit.

12 Although it is certainly correct to state that the presence of women on the streets or at the court was much higher than has been traditionally supposed, the interaction of the sexes was indeed becoming strictly regulated and there are examples of cases dealing with "illegal mixing of the sexes" found in the Ottoman court registers. See Pierce, *Seniority* cit., p. 192.

13 Sabri Orman, *İlm-i Tedbir-i Menzil. Oikonomia ve İktisat*, in *Sosyo-kültürel değişme sürecinde Türk ailesi I*, Ankara 1992, pp. 265-310.

14 I.M. Lapidus, *State and Religion in Islamic Societies*, in "Past and Present", 1996, 151, pp. 3-27.

15 Cin, *İslâm* cit., pp. 283-284; G. Jäschke, *Türkiye'de İmam Nikahı*, in *S.Ş. Ansay'ın Anısına Armağan*, Ankara 1964, pp. II-34.

16 This is a *fetva* of a 17th-century Ottoman *şeyhülislam* Çatalcalı Ali Efendi (from his work *Fetava-i Ali Efendi*, 1685), published in G. Art, *Şeyhülislam Fetvalarında Kadın ve Cinsellik*, Istanbul 1996, p. 62.

17 A *fetva* of the distinguished 16th-century Ottoman *şeyhülislam* Ebussuud, published in M.E. Düzdağ, *Şeyhülislâm Ebussuûd Efendi Fetvaları ışığında 16. Asır Türk Hayatı*, Istanbul 1983, p. 45.

18 Another *fetva* of Ebussuud, *ibid*., p. 43.

19 Cin, *İslâm* cit., p. 151.

[20] On the construction of the private and the public see for example D. Rizk Khoury, *Slippers at the Entrance or Behind Closed Doors: Domestic and Public Spaces for Mosuli Women*, in Zilfi (ed.), *Women* cit., pp. 105-127.

[21] See the *fetva*s of Ebussuud in Düzdağ, *Şeyhülislâm* cit., p. 49.

[22] The Hanefi *mezhep*, the principal school in the Ottoman Empire, permitted a man and a woman to get married under certain circumstances without the intervention of the bride's legal tutor.

[23] M.C. Zilfi, *'We Don't Get Along': Women and Hul Divorce in the Eighteenth Century*, in Zilfi (ed.), *Women* cit., p. 268.

[24] Such legal figures attempted to protect a pious woman from being married to a man of low morals. See Imber, *Women, Marriage* cit., in Zilfi (ed.), *Women* cit., p. 87.

[25] A *fetva* of Çatalcalı Ali Efendi, in Art, *Şeyhülislam Fetvalarında* cit., p. 81.

[26] M.L. Meriwether, *Women and Waqf Revisited: The Case of Aleppo, 1770-1840*, in Zilfi (ed.), *Women* cit., pp. 128-152.

[27] J. Tucker, *The Fullness of Affection: Mothering in the Islamic Law of Ottoman Syria and Palestine*, in Zilfi (ed.), *Women* cit., pp. 232-252.

[28] Zilfi, *'We Don't Get Along'* cit., pp. 269-271.

[29] *Ibid*., p. 290; S. Ivanova, *The Divorce Between Zubaida Hatun and Esseid Osman Ağa: Women in the Eighteenth Century Sharia Court of Rumeli*, in A. Sonbol (ed.), *Women, the Family, and Divorce Laws in Islamic History*, Syracuse 1996, pp. 112-125.

[30] Although no longer defended by distinguished writers and despite its serving as a possible cause of the invalidity of marriage according to Hanefi law, the custom among Ottoman elite families of marrying female family members to clients of lower status survived for a long time. Daughters, granddaughters, sisters, and aunts of an important dignitary were often married to men of humble origin. The ruling dynasty also adopted the practice, as the Sultan's closest female relatives were married to high bureaucrats who were actually *kul,* that is, the sultan's slaves. In theory, Ottoman Muslim scholars did not see the action of a bride's father in this respect as logical and positive and opted for defending the husband's authority in the marriage, considering it humiliating for a man to accept a marriage that would leave him in a subordinate position. In practice, however, Ottoman families continued to opt for what Keykavus openly defended in the 11th century and accepted the agreements, which certainly strengthened the position of the wife, while offering the husband a means of upward social mobility.

[31] Keykavus, *Oğul Terbiyetin* cit., pp. 172-181.

[32] R.C. Jennings, *Women in Early 17th-Century Ottoman Judicial Records – the Sharia Court of Anatolian Kayseri*, in "Journal of the Economic and Social History of the Orient", 1975, 18, pp. 53-114; H. Gerber, *Social and Economic Position of Women in an Ottoman City, Bursa, 1600-1700*, in "International Journal of Middle East Studies", 1980, 12, p. 233; F.M. Göçek, M.D. Baer, *Social Boundaries and Ottoman Women's Experience in Eighteenth-Century Galata Court Records*, in Zilfi (ed.), *Women* cit., pp. 48-65.

[33] This section is based on the analysis published by the author in *La pareja – el Nuevo ideal del matrimonio en el Imperio Otomano*, in "Awraq", 2008, 25, pp. 75-107.

[34] N. Meriç, *Âdâb-i Muâşeret: Osmanlı'da gündelik hayatın değişimi (1894-1927)*, Istanbul 2007.

[35] J. Malečková, *Úrodná půda. Žena ve službách národa*, Prague 2002; D. Martykánová, *Láska, disciplína a udoucnost. Diskurz osmanských intelektuálů o dětech v rodině (1870-1918)*, in "Historický časopis", 2008, 56, 2, pp. 249-266.

[36] The playwright and writer Namık Kemal in *Aile*, in *Sosyo-kültürel değişme sürecinde Türk ailesi III,* Ankara 1992, pp. 1017-1019, (first published in 1872). The playwright İbrahim Şinasi in *Şair evlenmesi*, Istanbul 1860.

[37] See for example the essay of the writer, lexicographer, and journalist Şemseddin Sami, *Kadınlar*, in *Sosyo-kültürel değişme sürecinde Türk ailesi III*, Ankara 1992, pp. 1026-1032 (first published in 1879/80).

[38] Namık Kemal, *Aile* cit., pp. 1017-1019.

[39] See for example the contrasting vision of the "Europeanized" and "oriental" family construed by the editor and essay-writer Tüccarzade İbrahim Hilmi in *Avrupalılaşmak, Felaketlerimizin Esbabı (Aile Hayatımızda Avrupalıla Avrupalılaşmanın Tesiri)*, in *Sosyo-kültürel değişme sürecinde Türk ailesi III* cit., pp. 1073-1079 (first published in 1916).

[40] Şemseddin Sami spoke about a "honourable and chaste girl who finds a heart to tie her heart to in a sacred bond of marriage", in *Kadınlar* cit., pp. 1026-1032.

[41] Duben, Behar, *Istanbul Households* cit.

[42] Cin, *İslâm* cit., pp. 289-290.

[43] Malečková, *Úrodná půda* cit.

[44] M. Foucault, *Governmentality*, in G. Burchell, C. Gordon, P. Miller (eds.), *The Foucault Effect: Studies in Governmentality,* Chicago 1991, pp. 87-104.

[45] However, the HAK, in concordance with the traditional interpretation of Hanefi law, did permit the marriage of mentally disabled people.

[46] *Hukuk-ı Aile Kararnamesi. Münâkehat-Müfârekât*, book II, paragraph 130, in *Sosyo-kültürel değişme sürecinde Türk ailesi III* cit., p. 1134.

[47] *Münâkehât ve Mufârakât Kararnamesi Esbâb-ı Mucibe Lâyıhası*, in *Sosyo-kültürel değişme sürecinde Türk ailesi III*, Ankara 1992, p. 1149.

[48] *Ibid*., p. 1141.

[49] *Ibid*., p. 1141.

[50] *Ibid*., p. 1142-1143.

[51] However in Syria, which was part of Ottoman Empire in 1917 when the Decree was passed, it remained in effect for 25 years.

[52] Cin, *İslâm* cit., p. 305. The possibility of imposing conditions on the marriage was limited according to the Maliki, Hanefi and Shafii mezheps. The Hanbali mezhep was the most liberal in this respect and permitted any condition which was not against the fundamental principles of marriage (as would be a condition to live as a celibate) and which was in favor of the wife. The measure introduced by the HAK, which permitted the wife to refuse polygamy, is used nowadays in several countries where Sharia applies in family law.

[53] At this point, it is worth mentioning that in recent years there have appeared attempts to lower the legal age of marriage in Turkey to fourteen. Welcomed as a recognition of the *status quo* in some rural communities, such proposals have received criticism not only from Turkish human rights and feminist organizations, but also from a wide spectrum of Turkish press and society.

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