Review Article

UDC: 28:347.628.5:316.36
28-452

THE CONCEPT OF CHILDHOOD FROM ISLAM-OTTOMAN LAW TO TURKISH LAW AS AN EARLY MAJORITY STATE: EARLY AGE MARRIAGES

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Change originates from acceptance.

1. INTRODUCTION

The discovery of early age marriages that has recently been brought to Turkish agenda and its surprising reflection in the press and nongovernmental organizations indicates to the need of reviewing the Turkish roots of these early age marriages which are not a current issue on these lands. When we review the marriage law of our country, the Ottoman Law which is the former law system is the law applied four generations before.[1] 1926 dated Turkish Civil Code (pTCC; No:743/1926)[2] taking effect by means of the adoption of 1907 dated Switzerland Civil Code is a product of the transition of the Westernization adventure commencing with the announcement of Reform in 1839 from Empire to the Republic.[3] The rule with respect to reaching majority or adulthood had religious roots in the Ottoman Law, these rules underwent some changes dur-

[1] Prior to the adoption of the Civil Code in 1926, the dominating and effective law system in our country was the Islamic Law. At the developmental stage of the Islamic Law, four law doctrine (religious sect) appeared as Hanafi, Maliki, Shafii and Hanbali. The doctrine of Hanafi was officially accepted by the Ottoman Empire. Berki, Islamic Law in the History of Law (1955), p. 19; Ünal, "The Regulations with regard to the Turkish Family Law prior to the Adoption of the Civil Code and particularly 1917 dated Decree on Family Law (1977), p. 220.

[2] Official Gazzette 4.4.1926-339.

[3] Within the scope of the modern sense of Turkish Legalization movement beginning with the Reform, only the legislating technique of the West was taken as a model in the first phase and a new content was added through the adaption of French laws at the second pha-

ing the period commencing with the Reform. As was observed in former Laws, reaching to puberty was the fundamental factor of reaching to majority. Majority, on the other hand, was classified as the puberty stage and maturity stage in terms of being able to perform such transactions as marriage and property holding. In such divisions, the capacity of act and marriage was subjected to different rules; it was sufficient to reach puberty in order to reach the marriage maturity (in addition to the capable capacity) while it was required to reach the lawful age for the performance of property holding transactions and to reach puberty again for the management of such properties. Therefore, the development of both majority states was different. The provisions of act capability were included in 1876 dated Ottoman Civil Code (Mecelle).[4] In terms of the marriage capacity, the understanding of Hanafi Law Doctrine of the Islamic Law which was officially accepted by the Empire was implemented until the *1917 dated Decree on Family Law*.[5] Remaining in force for two years, *1917 dated Decree on Family Law* suggested a limit for the increase of marriage age and for the forcing parental power, it is known that the implementation was continued to be applied.[6] Until the proclamation of Republic in the year of 1923 as well as the inurement of the Civil Code in 1926 adopted from 1907 dated Swiss Civil Code (ZGB), the religion-based rules of the law were maintained to be implemented.[7] Upon the adoption of 1926 dated Civil Code, the Law System of Rome-Germen was started to be enforced officially, the provisions of the

se and the most appropriate laws for the social structure among various Western nations were selected and maintained its development at the last phase. Ünal, ibid, p.205

[4] Ottoman Civil Code (Mecelle) is such a work that its roots were predicated completely upon religious and divine Islamic Law; the provisions which had been effective in the Empire until that date but included in various comprehensive books in a dispersed way were prepared by a specialist discipline committee and took their latest from with the disposal of the Ruler. See for the information about Ottoman Civil Code: Onar, Islam Law and Ottoman Civil Code, (1985), p. 580; Karahasanoğlu, The Implementation of the Ottoman Civil Code (Mecelle) and its Significance in Turkish Legal History (2011) ; Berki, Islamic Law in the History of Law (1995), p. 19.

[5] Prior to the adoption of the Civil Code in 1926, the dominating and effective law system in our country was the Islamic Law. At the developmental stage of the Islamic Law, four law doctrine (religious sect) appeared as Hanafi, Maliki, Shafii and Hanbali. The doctrine of Hanafi was officially accepted by the Ottoman Empire. Berki, ibid., p. 19.

[6] See for the preparation process of the Decree which is the last chain of the legalization movement. The reason behind the delay of the Decree is that family law is such a branch of law that law and moral and religious beliefs, traditions and practices are nested most. Ünal, ibid., p. 205; Göktürk, Turkish Civil Law (Family Law) (1955), p.272; Oğuzoğlu, Civil Law (Law of Persons-Family Law) (1963), p. 4.

[7] See for detailed information on this process; Unesco, The Reception of Foreign Law in Turkey (1957) is available as English language in the address below http://unesdoc.unesco.org/images/0002/000245/024596eo.pdf

Swiss Civil Code were predicated upon and normal majority age was agreed to be eighteen and the marriage age specified in Swiss Civil Code was reduced by means of taking into account the facts faced in Turkey. It was also included in the states of early majority as marriage is the result of majority. After seventy five years the effective Turkish Civil Code dated 2001 (TCC, No.4721/2001) accepted with significant amendments in the legal statute of female spouse. However the marriages ages were preserved. The existence of early age actual religious marriage which was down to the age of ten and the fact that marriage age was less than the majority age show that not all children are subjected to the same rules. In both cases, when we predicate upon the fact that the marriages performed below the age of eighteen are regarded as "child marriages" in international literature, this is a truth for Turkey which has both legal and cultural grounds.[8] I hope that reviewing the roots of this truth through the development of majority provisions will ensure that we understand and accept the territorial characteristics of child marriages and have a role in variation. Within this frame, a bridge is tried to be built from the past to the present by means of involving how the completion of childhood was used to be regulated in the former Law and Modern Law.

2. THE CHILDHOOD AND THE END OF CHILDHOOD

While being an adult or major express that an individual is completely autonomous in a legal sense, it also indicates that the status of childhood as well as the protection arising from national and international legal regulations for such period will be lost.[9] Therefore, the determination of the beginning and end of this period is important. 1st article of the1989 dated Convention on the Rights of the Child of the United Nations which is a global document was declared to be the guarantee of childhood.[10] According to such provision, *each individual until the age of eighteen is regarded as child excluding the majority at an earlier age depending on the law applying to the child*. This article defines the

[8] See generally, UNFPA UnitedNations Population Fon, Turkey Child Marraige (2012). http://www.unfpa.org/webdav/site/eeca/shared/documents/publications/Turkey%20English.pdf. (2011) Report on the Psychological Violence on Women dueto the Gender of Children, Bride Price and Traditional Marriages, <http://www.tbmm.gov.tr/komisyon/kefe/docs/komisyon_rapor_no_5.pdf>; The Report for the review of Early Age Marriages by the Committee on Equality of Opportunity for Women and Men (2009) ; (Committee,) p. 4 the Report is available in the following address only in Turkish language: <http://www.tbmm.gov.tr/komisyon/kefe/docs/komisyon_rapor.pdf>.

[9] Van Bueren, The International Law on the Rights of the Child (1998), p. 32.

[10] The Convention was signed by Turkey in 1990, and ratified in 1994. Official Gazzette 11.12.1994-22138.

beginning of childhood in an unclear way,[11] introduces the upper age limit of eighteen for the completion of childhood and allows earlier majority for the child according to the applicable laws. According to this provision, individuals will be protected until the age of eighteen. However, as they are subjected to continuous development, they will be granted certain autonomies in specific areas and thus act on behalf of themselves and make decisions before the age of eighteen as well. The Committee on the Rights of Children thinks that a minimum age limit should be identified for such issues as compulsory education, working age, consent to sexual intercourse, marriage, voluntary enrollment to the armed forces and enlistment, participation to wars, criminal liability and the use of alcohol and other controlled substances. Apart from this, is does not support the introduction of an age limit for such issues as legal or medical consultancy without the consent of parents.[12]

3. MAJORITY IN TURKISH LAW

Due to physical and cognitive insufficiency of human beings, when the period during which special protection and care is needed including an appropriate legal protection will end and the status of the individual at this period is different in terms of children law. In previous law systems, as the birth of people could not be determined and identified officially, each child was associated with physical maturity on the basis of biological development which is different for each child. In modern law systems, on the other hand, the children who reached to intellectual maturity were used to be major and in the event of reaching to intellectual maturity, physiological conditions were eliminated and a fully objective criterion such as age was accepted.[13]

This process has been developed in a similar way in terms of the concept of childhood in Turkey. Within the scope of the implementations of the Ottoman Empire, the period of childhood was divided into two stages as the pre-puberty and post-puberty which express physical majority. Pre-puberty was categorized as fetus stage, mental capacity stage and childhood stage. According to

[11] The first reference for the beginning of childhood on the basis of international law is included in/established by the Preamble of 1959 dated *Charter of Children Rights*; w*hereas the child by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.* Prenatal period was referred in the preamble of the Charter and the determination of the beginning of the childhood was left to the domestic law/countries in the 1989 dated Convention on the Rights of Children. Hodgkin/Newell, Implementation Handbook for the Convention on the Rights of the Child (2007), pp. 1–3.

[12] See Hodgkin/Newell, ibid., p. 5.

[13] Saymen, Turkish Civil Code, Law of Persons (1948), pp. 89–90.

the former Law, end of childhood was associated with puberty and majority was regulated in a different way in terms of property transactions and marriage licence. A pubescent was used to be regarded as liable in terms of religion and in a legal and penal sense.[14]At the age of basic education, on the other hand, the upper limit was the puberty age. Girls and boys should have received the formation to overcome any difficulties in their lifes on their own until the age of 15 and acquired essential information and attitudes on their own genders; minimum level of religious information and basic vital knowledge. The students were granted scholarships to ensure that all children could receive such basic education while the teachers were given salaries for the same purpose.[15] In terms of working age, children did not have to work to meet their *food, clothes and accommodation* needs which were their fundamental rights until they reached puberty.[16]

In the modern Turkish Law, on the other hand, majority is accepted to be reached when children reach to physical, mental and cognitive maturity. Within the scope of Turkish Law, the states of marriage majority and judicial majority are accepted which make reaching to puberty at an earlier age possible through general majority age. In the regime of Turkish Children Law, minimum age limits have been determined in terms of the permission age for compulsory primary education, consent to sexual intercourse, marriage, working, penal responsibility, compulsory military service and drug use.[17] The lower limit for marriage is 17, exceptionally 16 (Article 88 of Turkish Civil Code)[18] whereas the lower limit for consent to sexual intercourse is 15 (Article 104 of the Turkish Penal Code, No:5237/2014)[19] and is 15 for working, 14 for light duties (Article 50 of the Constitution ; Article 71 of the Labour Act No: 4857/2003)[20];

[14] Ekinci, ibid., p. 404; The children did not have criminal capacity until the age of 7; Canan expresses that education measurements were taken by the age of 15 and various educational precautions were applied for understanding the psychology of the child and the act committed rather than a punishment for the capable children at the age of 17. Canan, Children's Right in Islamic Law in the light of the Children's Right Declaration (1980), pp. 47-48.

[15] Canan, ibid., pp. 94–95.

[16] Canan, ibid., p. 112.

[17] See, Usta, Children Rights and Custody (2012), pp. 17–18; See generally for Children Rights in Turkey; 2012 dated Turkish Result Observation Report of the Children's Rights Committee, CRC/C/TUR/CO/2-3; Libal, Children's Rights in Turkey (2001), pp. 35–44. İt is is available in the address below <http://humanrights.uconn.edu/wp-content/uploads/sites/767/2014/06/ChldrensRightsInTurkeyLibal.pdf>.

[18] Official Gazzette 12.10.2014-25611.

[19] Usta, Children Rights and Custody (2012) , p. 17.

[20] Official Gazzette 30.06.2012-28339.

children below the age of twelve do not have penal responsibility. Penal responsibility has been regulated in a different way for children at the ages of 12-15, 16-18 in terms of relevant sanctions (Articles 6, 61 of the Turkish Penal Code). The completion of the ages of 13, 16-18 and 15 have also been required respectively for compulsory education (Article 42 of the Constitution; Article 22 of the Primary Education Act No:5253/2004)[21] and being a founder or member of an association and bequeathing (Article 502 of the Turkish Civil Code). According to the Law on Children Protection, they are defined as "the persons below the age of eighteen despite they reach majority at an earlier age" (Article 3 of the Law on Children Protection 5395-2005).[22] The existence of the capable judgement is predicated upon within the scope of the Civil Code for other transactions and responsibilities (Articles 13-16 of the Turkish Civil Code).

3.1. Majority in the Former Law

Expressing the state of reaching to majority in the former law system, puberty meant the capacity to give birth to a child and it was a biological state varying from person to person.[23]The lower limit of puberty in Ottoman Civil Law (Mecelle) was 9 for girls and 12 for boys whereas the upper limit was 15 for both (Art. 95). Puberty might be reached at any age between these two limits. For puberty, the declaration of individual was used to be predicated upon and no puberty claim was used to be taken into consideration below the abovementioned lower limits and the individuals failed to reach puberty despite of the fact that they completed the age of fifteen were used to be regarded as pubescent (Mecelle, Articles 985-989).[24] If the puberty claims could confirm biological development claims, they were used to be regarded as major by the court. This type is accepted as judicial majority.[25] Reaching to puberty was sufficient for majority and it was a precondition for marriage majority.[18] It was also used to apply to property transactions.

3.2. Marriage Majority

Capable children reaching to the puberty age had the marriage majority but the implementation were applied in a different way. The custody institution

[21] Official Gazzette 12/1/1961-10705.

[22] Official Gazzette 15.07.2005-25876.

[23] Ansay, Islamic Law in Law History (2002) p. 74.

[24] See generally Ekinci, Ottoman Law – Justice and State (2012), p. 403; Aydın, History of Turkish Law (1999), p. 223 vd. Mardin, Family Law Lectures (1934), p. 337; Ansay, ibid., pp. 4–75.

[25] Akagunduz, Comparative Canon of Islam and Ottoman Law (1989), p. 57.

which was founded to protect and guard the personal assets and properties of children and perform relevant legal transactions on behalf of them within this frame corresponds to the custody and training institutions in our previous Law.[26] Training means the protection, cleaning, care and educational activities of the children. Mother and female relatives of her were regarded as commissioned and responsible for menstruating for girls and for being able to perform all these works alone for boys.[27] Custody, on the other hand, was divided into two in terms of the immaterial and property transactions. The custody of children on the property aimed the protection of the assets of the children who had properties but did not reach to puberty. The person exercising this authority was called as custodian, fathers or grandfathers might also a-have this authority.[28] The custody on immaterial properties, on the other hand, used to cover the completion of training, protection as from the puberty period and marriage authorities. Marriage custody granted to father and his male relatives was classified as compulsive custody and non-compulsive custody depending on whether the consents of the individuals to be married were asked or they had the capacity to make a decision or not.[29] The parents of incompetent and competent children used to have compulsive custody.[30] If the incompetent or competent child was engaged or married by his/her father or grandfather, they did not used to have a right to object when they reached puberty. However, if the marrying custodian was uncle or brother apart from fathers and grandfathers, the child might raise an objection for the marriage to be performed by such relatives.[31] With the authority of compulsive marriage fathers and grandfathers used to have the authority to marry their daughters even as from their birth. Non-pubescent children or even babies were used to be married by their parents. The perspective of legal experts on this regard is that the girls who have not reached sufficient physical maturity yet to have sexual intercourse should stay with their parents or be kept apart from their husbands. In fatwa, it was asserted that the girls at the age of 8-9 may not be taken from

[26] Aydın, ibid., p. 281.

[27] Canan, ibid., p. 40; Aydın, ibid., p. 282.

[28] Canan, ibid., p. 43; Aydın, ibid., p. 282; Cin, Marriage in Islam and Ottoman Law (1974) pp. 70–90.

[29] Non-compulsive custody inv anybody on the basis of their own wills, it was expressed that the girls at the same state could only marry with the consent of their parents as from the midst of the sixteenth century. Akif, p. 280; See for more detailed information: Aydın, ibid., pp. 96–99.

[30] Aydın, ibid., p. 283.

[31] Cin, ibid., p. 87; Ebül'üla Mardin, Lectures on Family Law (1934), p. 33.

their families.[32]Seventy eight years after the Tanzimat, a new regulation was adopted through the Decree on Family Law taking effect in the year of 1917 by means of benefiting from the perspectives of other doctrines, and the ages of 17 and 18 were respectively accepted for girls and boys as the upper limit of puberty (Articles 5-6).[33] Within the frame of such decree, marriage licence was accepted as 12 for boys and 9 for girls as a lower limit and it was finalized that parents may not marry the children below these ages (Article 7) to restrict the compulsive custody authority in the Family Law Decree.[34]

3.3. Majority

Being expressed as mental and intellectual maturity, majority is being able to behave as required and be capable in the protection and management of personal property of the individual (Articles 947, 981-982 of the Mecelle).[35] The age of maturity was not determined in our previous law system. However, what is fundamental herein is the research of whether the pubescent has reached to puberty or not in all tangible occurrences. Despite of this, the idea of the Mecelle suggesting that majority can be possible as from the puberty maintains to be the predominating principle in a general sense in the Former Law.[36] Islamic legal experts asserted for majority that a certain age can be set after the puberty if social and economical conditions required so. An example for this is the determination of the age of 20 for majority for orphan children in order for the protection of their properties. *In this way, the properties of the orphans shall be delivered to them as from such age*.[37] Despite of the fact that they were remained as draft laws in that period, the Brief of Ukud and Wajibat Commission should be referred to. It eliminated the principle of the Mecelle which predicated upon puberty and required majority and, just like the European Laws, did not mention the puberty and determined the majority age as 20.[38] Furthermore,

[32] It is expressed that this kind of marriages observed in the Ottoman Empire was not possible; however, there searches put forth that early age marriages were used to be a norm independent from religious belonging. Araz, Being a Child in Ottoman Culture (from 16th century to the beginning of 19th century), (2013), p. 92 footnote 228; ibid., Akagunduz, p. 57.

[33] Through the exceptional provisions included in the Decree, the beliefs of the Empire belonging to three nationality of Islam, Christianity and Jewishness were tried to be combined within the scope of the same "code". Ünal, ibid., p. 210.

[34] Cin/Akgündüz, History of Turkish Law (2012), p. 65; Aydın, ibid., p. 22; Ebru Kayabaş, The Development of Family Law in the Ottoman Empire as from the Reform Period – Family Law Decree (2009).

[35] Mardin, ibid., p. 337.

[36] Aydın, ibid., p. 221 footnote 19; Cin/Akagündüz, ibid., p. 12.

[37] Aydın, p. 222 footnote 21; Cin/Akgündüz, p. 13.

[38] Cin/Akgündüz, ibid., p. 14.

it was decreed that all individuals completing the age of eighteen may request majority through a court decision.[39]

4. THE END OF CHILDHOOD IN TURKISH LAW

The states of end of childhood were regulated in modern Turkish Law System within the frame of the understanding of Convention. The upper limit for the age of majority was determined as the completion of the age of eighteen in the Civil Code (Article 11/I). Besides the general majority age, the states of early puberty were recognized. One of early puberty states is marriage. It does not associate the marriage majority with general majority rules but it suggested separate provisions and marriage was accepted as one of the early majority states through the provision of: "*Marriage makes the individual pubescent*" (Article 11/II). It would be illogical for the legislator not to allow the performance of other transactions after it permits the underage person to fulfill such an important legal transaction as marriage.[40]Another state of majority is the judicial majority offered to children completing the age of fifteen (Articles 13–16).

4.1. Normal Majority Age

As an upper limit and earlier majority states were recognized, majority was classified as normal majority and early majority in the doctrine. Constituting the upper limit for the end of the childhood, majority begins with the *completion of the age of eighteen* according to the previous and effective Civil Code (Article 11/I). It is expressed that the differentiation of civil and political majority was aimed at in the acceptance of the completion of the age of eighteen as the majority age which is 20 in Switzerland.[41]

4.2. Judicial Majority

The judicial majority specified in the previous Civil Code expresses that a child who has not completed the age of eighteen yet shall have the capacity to use his/her civil rights through a court decision, in other words, s/he shall be mature. According to the Civil Code, *a child completing the age of fifteen may be regar-*

[39] Cin/Akgündüz, ibid., p. 14; Akif Aydın, p. 221, footnote 19; Cin/Akagündüz, ibid., p. 12.

[40] Saymen, ibid., p. 92; Oğuzman/Seliçi/Oktay – Özdemir, Law of Persons (2014), p. 63; Dural/Ögüz, Turkish Civil Law-Law of Persons (2014), p. 51; Hatemi, Natural Persons (2005), p. 46; Köprülü, General Principles of Civil Law and The Law of Persons (1979) Civil Law General Principles, Law of Persons, Family Law (1979), p. 208; Arpacı, Natural Persons (2000), p. 28.

[41] Saymen, p. 90.

ded as mature by the court depending on his/her will and the consent of his/her parents (Article 12). In the doctrine, it is suggested as a justification for the end of childhood that "some children in our country as well physically completed the stage of childhood at very advanced ages despite of the fact that they have not completed the age of eighteen yet; in other words, they do not need any protection or assistance and even they earned success, through complete and independent actsor having a legal capacity before the age of eighteen originates from an obligation in such cases as the child maintains the business/work of his/her father in the event of a death when the child assisting his/her father and learning the work well is sixteen years old.[42] In the event that the parents do not consent to this request which is to the advantage of the child without a valid ground, the judge will make a decision on the basis of the opinion and benefit of the child. Based on the fact that this may be deemed in the doctrine as the misuse of guardianship, it was suggested that the judge should abandon the condition of consent[43] in the event that the child has obviously a benefit, and this should be regarded as a justification for the removal of guardianship.[44]

4.3. Marriage Majority and Judicial Marriage Majority

Two early majority states were accepted in the Civil Code on the basis of normal and exceptional marriage. In the previous Civil Code, the marriage and majority age for boys and girls which was respectively 20 and 18 were reduced according to climate and biological characteristics and traditions of our community and normal marriage age was determined to be 18 for boys and 17 for girls whereas exceptional marriage age was determined to be 15. However, the marriage age had to be reduced through an amendment on 3453 numbered Law in 1938 due to the increase in the number of the age increase cases and actual affairs at early ages.[45] According to the new article, the boys and girls may marry at the ages of respectively 17 and 15 and judges may grant the right to marry for boys and girls completing the age of respectively 15 and 14 in

[42] Ali Naim İnan, Children Law, İstanbul (1968) s. 14; Akipek/Akıntürk/Ateş - Karaman, Turkish Civil Code, Law of Persons (2012), p. 63; A similar demand in our implementation which is confused with the judicial majority demand is the correction of a wrong age record or recording an elder age in the birth registration office. Serozan, Child Law (2005), p. 93.

[43] Ataay, Law of Persons (1978) p. 74; Özsunay, The Legal Statute of Real Persons (1979), p. 46; Zevkliler, Aydın/Acabey, Beşir/Gökyayla, Emre Civil Law – Introductory-Preparatory Provisions, Law of Persons, Family Law (1997), p. 262; Arpacı, ibid., p. 29.

[44] Serozan, ibid., p. 93; Egger, Art 15 N. 5; Özsunay, ibid., p. 46; Köprülü, ibid., p. 210, Oğuzman/Seliçi/Oktay – Özdemir suggest that the guardianship serves to the benefits of the parents as well and therefore not to consent to the withdrawal from the right of guardianship would not be deemed to be misuse of rights. Oğuzman/Seliçi/Oktay – Özdemir, ibid., p. 65.

[45] Official Gazzette 15.06.1938-3432.

extraordinary and exceptional cases. In the Civil Code taking effect seventy six years after the previous Civil Code, both early majority state were protected by means of age increase and equality. According to Article 124 of the Civil Code, *males and females may not marry unless they complete the age of seventeen(.), in order for the marriage to be valid, the consent of the parents or guardian is required* (Article 124/I,126).[46] In the absence of the consent of the parents, they have the right to request the cancellation of the marriage (Article 153/I).[47] The parents may not reject the marriage of the child without a justified reason and the children shall not be forced to marry. The court shall make a decision by means of taking into consideration the benefits and opinion of the child.[48] However, a married child without the consent of legal representative reaches to majority when s/he completes the age of eighteen or if the woman is pregnant, marriage cancellation shall not be decided (Article. 153/II).

Being expressed as the judicial marriage majority as well, exceptional marriage, on the other hand, shall be able to be performed in the existence of an extraordinary event or a highly important reason. The exceptional marriage age which was 15 and 14 respectively for boys and girls in the Previous Civil Code was equalized to sixteen for both girls and boys just like the marriage age in the current law and protected in this way; the validity of such a marriage is dependent on the leave of court and hearing of the parents or guardian (Article 24/II).[49]The hearing of the parents was abandoned to be an "*absolute obligation*".[50] As an example for the extraordinary events, such situations that particularly the woman is pregnant, there is a death risk for the man, the engaged girl is orphan, uncared and lives in poverty, she could help her family if she

[46] The judge shall hear the parents or guardian if possible before his decree (Article 124/II of the Civil Code). In other words, the Law finds it sufficient to hear them instead of getting their permit. The decisions involving the hearing of only father, requires cancellation by the Supreme court. For the decisions: 2.HD.28.02.2000-644/2484, RG.29.03.2000-24004; 2.HD. 14.12.2000, 13900/15850, RG. 29.01.2001-24302.

[47] Ministry of Justice, Turkish Civil Code, The Law and Justifications on the Enforcement and Implementation Way of Turkish Civil Code (2002), p. 364.

[48] Supreme Court 2.HD.*E. 2007/19532-K. 2009/2335-T. 16.2.2009; E. 2009/4261-K. 2010/8141-T. 26.4.2010.*

[49] While the number of the age revision cases opened in Turkish courts reached to 34.000 in 1936, it exceeded 60.000 a year laterand the number of the cases opened for the permission to exceptional marriage was 900 in 1935 but it increased to 2085 in 1937. According to there searches performed in metropolitans, more than 80% of the age revision cases had been opened for the assurance of marriage licence. Forthe justification of the law, see Arsebuk (1940), p. 595.

[50] Ministry of Justice, ibid., p. 364.

marries or she marries into a foreign country where the marriage age is lower were provided in the doctrine.[51]

5. A REVIEW FROM PRESENT TO THE PAST

Despite of the fact that upper limit of majority was regulated in accordance with the provisions with respect to minimum age determinations as well as the provisions of international laws[37], it has been one of the most changed and problematic issues in terms of implementation since the acceptance of the Civil Code in 1926 for the legal history of marriage and marriage age and for the former law. Until the acceptance of the Civil Code in the year of 1926, it was a remarkable development in the former law that the majority had been associated with age and determined as 20 in 1921 (1340) dated Ukud and Wajibat Commission Brief and that the age of puberty had been increased to 17 and 18 in the Family Law Decree. Additionally, the introduction of a lower age limit for the sake of restricting the compulsive marriage license before puberty should be regarded as an important step for the modification of the implementation.

Although a new lag regime was adopted through the adoption of the Switzerland Civil Code, the fact that marriage age is below the majority age shows that there is a traditional resistance to a marriage order desired to be introduced through provisions of law and this resistance is "respected" by the legislation. In spite of the fact that the provisions of Switzerland Civil Code are predicated upon, it will not be a discovery to claim that the provisions and understanding of the Decree on Family Law were taken into consideration in the acceptance of the age of 18 for the majority, of the ages of respectively 17 and 18 for marriage of girls and boys and of the age of 15 for both as exceptional marriage in 1926 dated Turkish Civil Code. However, it had to be acknowledged ten years later that these age limits were not approved by all sections of the society the age limits for marriage has to be rearranged in 1938. New ages were accepted as 15 and 17 and 14 and 15 for exceptional cases.

Another amendment in the Civil Code is the replacement of religious marriage with civil marriage.In the former law system, the permission of the woman was used to be got under the title of chief judge and imams perform the mar-

[51] According to the Supreme Court, the courts hould take a decision on the basis of results by means of investigatin gandcollecting the evidences indicating the existence of a highly important reason. HD. 8.12.2004, 12778/14697, Official Gazzette. 9.1.2005-25695; 2. HD. 28.03.2005, 2133/4855, RG. 17.04.2005-25789. Akıntürk, Turkish Civil Code Turkish Family Law, (2006), p. 70; Saymen, Elbir, Family Law (Turkish Civil Code (1960), p. 78–79; Velidedeoğlu, Turkish Civil Law, Family Law. (1960), p. 59.

riage ceremony and have such marriage registered.[52] Through the Civil Code, it was only accepted that the union of marriage shall be established through civil marriage in both Civil Codes. It was also decreed that religious marriage may be performed after civil marriage as an option (Article 143 of the TCC).[53] The performance of the civil marriage before the religious marriage was regarded as a crime in Turkish Criminal Code (Article 230.).[40] However, this obligation was not agreed by all sections of the society. Religious marriage based extramarital relations were allowed to be turned into civil marriages through the Laws concerning the Proper Registration of Children Who Are Born as a Result of Extramarital Relations and Non-Desponsation Affairs introduced in the years of 1933, 1934, 1945, 1950, 1956, 1971, 1981 and 1991.[54]

In the Civil Code taking effect in 2002, seventy six years later the previous Civil Code, the majority age was equalized to the marriage age and determined to be eighteen through an amendment made on the Switzerland Civil Code in1994; early majority states were excluded and normal marriage age was determined to be seventeen; it was increased to sixteen for exceptional situations and in this way it was protected for both genders.[42] In the justification of the article, it was expressed that marrying underage girls would cause both biological and psychological negative effects; *the age of fifteen is low for the establishment of a family life which was an important community by means of taking into account*

[52] Kayabaş, ibid., p. 60; Cin, ibid., p. 282; Despite of the fact that there were religious functionaries who performed the duty of marrying that was the authority of Muslim judges through a letter of permission in Ottoman Empire, the state granted the authority to approve and record marriages to Muslim judges. However, it can be seen that this was breached in implementation. During the performance of the marriage ceremony, civil marriage was regarded as a burden and it was tried to be get rid of as much as possible. Sometimes, Muslim judges received more money than the required amount and then permitted to marriage. The number of the marriages performed without the permission of Muslim judges gradually increased and the implementatino became random. Halime Doğru, Engagement, Marriage and Divorce according to the Religious Rules and Decrees in XVI-XVII. Centuries (1999), p. 46; Cin, p. 282.

[53] According to News Bulletin of Turkish Statistical Institute, While the rate of the people who married both legally and on the basis of religious marriage ceremony in their first marriages in the year of 2011 was 93,7% the rate of the people married only as civil marriage was 3,3% and the rate of the people married only on the basis of religious marriage ceremony was 3%13; When the types of marriages are examined according to the regions, it can be seen that the rate of the ones married only with the religious marriage ceremony without civil marriage is high, the regions involving the highest and lowest rate are respectively the Southeastern Anatolian Region (8,3%) and western Marmara Region (0,9%). May 2013, Number: 13662; is available only in Turkish language in the address <http://www.tuik.gov.tr/PreHaberBultenleri.do?id=13662>.

[54] Kılıçoğlu, Ahmet. Registration of actual relations as marriage as per 2526 numbered Law and the correction of the identities of natural children (1981) pp. 165–207; Tekinay, Family Law (1990), p. 105.

the fact that the awareness of the public have been raised and they have been trained since 1926 and the judge was granted broad rights in order to prevent the objections of legal representatives particularly in rural areas despite of the fact that marriage age was reached to.[55] In such justifications, the girls, public awareness and training and rural areas for exceptional marriages were highlighted. This understanding is predominantly adopted in the doctrine as well.[44]

Courts take a decision to permit the marriage, by hearing the father but ignoring the opinions of the mother[56] and without researching the existence of an extraordinary and exceptional situation[57] as is in the marriage applications below the age of exceptional marriage[58] and hearing the child below the marriage age.[47] The validity of the marriage permit given by the court in any way without taking into consideration the age criterion was discussed in the doctrine. In Turkish Law Doctrine, it is expressed that marriage would not be deemed invalid as it is not regarded as absolute nullity reasons in the law by way of taking into account such aspects of marriage that concern public order as well. There is a consensus for the fact that Article 153 of the Civil Code which regulates the right of action for legal representatives may be applied by analogy.[59] Therefore, marriage shall not be cancelled in the event that the child reaches to majority until the court takes a decision or the girl is pregnant.

Besides the early age marriages allowed by the laws, there are some girls at or under the age of fifteen who are forced to actual marriage. According to the child statistics of Turkish Statistical Institute for the year of 2013 which stands for one of the studies conducted on this regard, it is asserted that there are 39.347 married children in number at the age group of 16-17 which was the legal marriage age and 1866 of them are male whereas 37.481 of them are

[55] Ministry of Justice, ibid., pp. 364–365.

[56] See the decisions of Supreme Courts: 2.HD.28.02.2000-644/2484, RG.29.03.2000-24004; 2.HD. 14.12.2000, 13900/15850, RG. 29.01.2001-24302; 2.HD. 26.5.2003-6480/7586, RG. 27.5.2003- 25151, s. 53 (Kazancı Jurisprudence Bank).

[57] E. 2003/6480-K. 2003/7586-T. 26.5.2003**;**E. 2003/8318-K. 2003/9831-T. 30.6.2003; E. 1999/13645-K. 2000/1032-T. 2.2.2000.

[58] See the decisions Supreme Courts of 2.HD; K.2014/5005- T. 10.3.2014; E. 2011/4235-K. 2011/7649T. 3.5.2011;E. 2009/16479-K. 2010/18720-T. 8.11.2010; E. 2009/7461-K. 2009/15299-T. 9.9.2009; E. 2011/16683-K. 2012/29409-T. 6.12.2012; E. 2007/16490-K. 2009/1354-T. 4.2.2009 ; E. 2007/13559-K. 2008 /14119-T. 27.10.2008 ; E. 2007/16487-K. 2009/1771-T. 9.2.2009 ; E. 2006/3187-K. 2006/10108-T. 26.6.2006 E. 2005/1635- K. 2005/4300-T. 21.3.2005; E. 2004/16808-K. 2005/2507-T. 21.2.2005 ; E. 2003/6480-K. 2003/7586-T. 26.5.2003E. 2003/4256-K. 2003/5646-T. 17.4.2003; E. 2003/4257-K. 2003/5579-T. 17.4.2003 ; E. 2003/6480-K. 2003/7586-T. 26.5.2003; . 2003/1085-K. 2003/2492-T. 26.2.2003 ; E. 2003/4256-K. 2003/5646-T. 17.4.2003(Kazancı Jurisprudence Bank).

[59] See Dural/Öğüz/Gümüş, ibid., p. 54; Akıntürk, ibid., s. 215; Hatemi, ibid., p. 39; Tekinay, ibid., p. 146; Oğuzman/Dural, ibid., p. 70.

female.[60] Depending on 2009 dated Early Age Marriages Report established within the scope of the Committee on Equality of Opportunity for Women and Men of the Grand National Assembly of Turkey (GNAT), the data obtained from Turkish Statistical Institute do not reflect the truth; early marriages can officially include the age group of 16-17; the marriages performed on the basis of religious rituals do not have any formality and record; they conflict with the data and information obtained during the preparation process of the report and there is not sufficient database available; however it is known that one of each four marriages across Turkey and one of each three marriages in some regions – east and South East Anatolia - involve the children below the age of 18 which is the majority age.[61]

2012 dated Turkish Observation Report of the Children's Right Committee associated minimum marriage age with the definition of child and traditional harmful applications.The Committee draws attention *to the fact that the minimum marriage age cannot be followed particularly in rural areas and remote regions of the Party State and early and forceful marriages are frequently encountered especially in poor and less trained groups in the Eastern and Southeast regions although social norms have gradually changed* (Paragraph 26) *and expresses that bride price can be encouraging for early and forceful marriages in monetary sense and these kinds of marriages cause worries as they are performed as a result of non-physical methods such as social and psychological pressures* (Paragraph 56*)*.[62]

As a result, the first Civil Code of the Republic which was proclaimed after the Ottoman Law which had been implemented for centuries can be regarded as a result and beginning of a Westernization process commencing with the Reform in 1839. It is possible to establish such a sustainability between the past and present in terms of the historical development of majority that marriage licence used to be applied to girls whereas legal transaction majority used to

[60] Turkish Statistical Institute, Statistics on Child 2013 (2014), p. 22.

[61] <http://www.tbmm.gov.tr/komisyon/kefe/docs/komisyon_rapor.pdf>; Among there as on sunder lying early age marriages of girls, such factors can be suggested as financial difficulties, domestic sexual assault, extra marital pregnancy and the understanding that obedience to husband should be established at an early age. General tendency of Turkish society on this regard is that boys should receive education at a certain level and perform their military services and have a job and then marry. On the contrary, the satisfaction of emotional, sexual and economical needs of the girls in compliance with religious ethics through marriage give srise to early age marriages according to the traditional understanding. Ras-Work, Berhane. (2006). The Impact of Harmful Traditional Practices on the Girl Child, Elimination of All Forms of Discrimination and Violence Against the Girl Child, UNICEF Innocent Research Center Expert Group Meeting, 25-28 September 2006, Florence-Italy, p. 13.

[62] Committee on the Rights of the Child, CRC/C/TUR/CO/2-3 (2012), p. 6, 13.

be applied to boys in the former Law system. The examples given for judicial majority in terms of the current law concern boys; when the rates of early marriage or forceful actual marriage are reviewed, marriage majority is seen as a problem particularly for girls. In fact, in terms of Turkish Children Act, if the child is forced to early marriages or actual affairs, this stands for a breach of the life and development right of the child. This is a breach for the life and development right of children which are among fundamental principles of the Children's Right Act.

According to the Civil Code and Children Protection Act, supportive precautions or alternative measurements for the family will be able to be taken (pTCC articles ; TCC articles, articles of the Child Protection Act). Also, actual affairs below the age of fifteen or non-consented actual relations over the age of fifteen constitute a sexual abuse crime in terms of Turkish Criminal Code as the former is below the age of consent to sexual affair.

The completion of the primary education by the child, on the other hand, is a right for the children; an obligation for the parents and non-performance of it is a crime requiring imprisonment whereas it is a duty for the government (The Constitution art. 41; The Primary Education and Training Law, art.). Briefly, the existence of these provisions does not mean that these rules are applied to all children. As specified in the report of Committee on Equality of Opportunity for Women and Men (KEFEK), *early marriages have never been regarded as a problem by the majority of the society despite of the fact that they have been observed in Turkey for many years as a phenomenon. Patriarchal and traditional society structure has normalized and legalized early age marriages*. From the perspective of today's awareness, the truth of child marriages of being forced to actual marriage is one of the intersection points of the discrimination of modern/traditional and peasant/civic. The surprise created by the existence of child marriages and actual marriages is indeed a means for the combination of modern and traditional and its peace with the past, in other words, with itself.

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Pregledni znanstveni članek

UDK: 28:347.628.5:316.36
28-452

KONCEPT OTROŠTVA OD ISLAMSKO-OTOMANSKE DRŽAVE DO TURŠKEGA PRAVA KOT DRŽAVE ZGODNJE POLNOLETNOSTI: ZAKONSKE ZVEZE V ZGODNJI STAROSTI*

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V obdobju otomanskega prava je vstop otroka v puberteto, torej z izkazovanjem objektivnih telesnih znakov zrelosti pomenil konec otroštva in s tem vstop v pravno odraslost, vključno s pravico sklenitve zakonske zveze. Pravna ureditev zrelosti je tudi uradno temeljila na t. i. Hanafi doktrini islamskega prava. Zakonske zveze je bilo tako mogoče sklepati že z desetimi leti starosti.

V ureditvah, kjer zaradi množične nepismenosti ter siceršnje nešolanosti prebivalstva in odsotnosti zanesljivih javnih evidenc o rojstvih ni bilo mogoče množično zanesljivo ugotavljati starosti ljudi, je zaupanje v znake telesne zrelosti pri posamezniku edini delujoči sistem določanja odraslosti v pravnem smislu. S puberteto je nastopila odgovornost v verskem in pravnem smislu, vključno s kaznivostjo. Šele postopno in razmeroma pozno se je razvila dogmatika ločenih fizičnih, duševnih in miselnih zrelosti otroka, s tem pa se jasneje diferencirajo tudi pogoji posebej za obvezno šolanje, soglasje v (vaginalno) spolno občevanje, zakonsko zvezo, delo, vojaško službo, uživanje drog in sklenitev zakonske zveze. Posebej se začne razvijati dogmatika mejne starosti za kazensko odgovornost.

V otomanskem pravu je začetek pubertete označeval sposobnost zaploditi oziroma roditi potomca in je bil za posameznega otroka individualno določljiv. Po splošnih pravilih je nastopil glede na konkretne okoliščine, a za dekleta ni mogel šteti za podanega pred devetim letom starosti in za dečke ne pred dva-

* Povzetek je delo prof. dr. Damjana Korošca s Pravne fakultete Univerze v Ljubljani.

najstim letom starosti (pri čemer, kot rečeno, pogosto ni bilo preprosto ugotoviti datuma rojstva), vselej pa je štel za podan vsaj ob petnajstem letu starosti otroka, če je starost le bilo mogoče določiti.

Otomansko pravo je poznalo institut prisilne zakonske zveze in dolgo časa ločevalo absolutne upravičence do take zahteve (oče in stari oče otroka) in relativne (brat in stric otroka). Za razliko od absolutnih je otrok ob pogoju ustrezne zrelosti lahko nasprotoval sklenitvi zakonske zveze, če so jo zahtevali relativni upravičenci.

Posebna pravila glede določanja polnoletnosti so veljala za sirote: v korist varovanja njihovega premoženja je pri njih polna polnoletnost nastopila šele z dvajsetimi leti starosti, če je ta le bila določljiva.

V sodobnem turškem pravu se pod vplivom tradicije ločeno pojavljata splošna polnoletnost in t. i. zgodnja polnoletnost. Splošna je v različnih zakonih postavljena na 18 let starosti, zgodnje pa so posebej za sklenitev zakonske zveze od leta 1938 s Civilnim zakonikom Turčije najprej postavljene na sedemnajst let za fante in petnajst let za dekleta, vendar lahko sodišče fantu dovoli sklenitev zakonske zveze s petnajstimi leti starosti, dekletu pa s štirinajstimi. S sklenitvijo zakonske zveze nastopi polnoletnost v vseh vidikih, torej polna polnoletnost.

Pozneje turška država izenači zgodnjo polnoletnost za sklenitev zakonske zveze za oba spola na sedemnajst let (in za veljavnost take zakonske zveze zahteva soglasje staršev oziroma skrbnika).

Zanimive povezave so ugotovljive v turškem pravu med minimalno starostjo za sklenitev zakonske zveze in starostjo, ki utemeljujejo obvezno šolanje, vključno s kazenskopravno regulativo obveznosti različnih subjektov na obeh teh področjih. Laicistično šolanje kot ustavna pravica in dolžnost otroka, pa tudi njegovih staršev, ki morajo predvsem otroku tako šolanje omogočiti, naj bi zagotavljalo med drugim tudi seznanitev otroka z lastnimi pravicami, prednostmi ustrezne zrelosti ob zasnovanju družine ipd. Starši so v Turčiji kazensko odgovorni, če ne omogočajo šolanja v ustrezni starosti otroka, represivno pa je urejeno tudi siljenje v zelo zgodnje zakonske zveze oziroma oviranje svobode sklenitve zakonske zveze. Področji šolanja (zlasti deklet na podeželju) in svobode sklepanja zakonske zveze sta kriminalitetnopolitično očitno povezani.

Pregledni znanstveni članek UDK: 28:347.628.5:316.36
28-452

USTA, Sevgi: Koncept otroštva od islamsko-otomanske države do turškega prava kot države zgodnje polnoletnosti: zakonske zveze v zgodnji starosti

Pravnik, Ljubljana 2015, let. 70 (132) št. 11-12

Prispevek obravnava pravni razvoj koncepta polnoletnosti, ki izraža zaključek otroštva v prejšnjem, versko utemeljenem otomanskem pravu, segajočem nazaj štiri generacije, in sodobnem turškem pravu. V okvirih študije je obravnavan pravni razvoj koncepta polnoletnosti tako v starem turškem pravu, kot v sodobnem turškem pravu, upoštevajoč definicijo otroštva v konvenciji o otrokovih pravicah. Pravni in kulturni razlogi za zakonske zveze v zgodnji starosti so v središču te študije.

Review Article UDC: 28:347.628.5:316.36
28-452

USTA, Sevgi: The Concept of Childhood from Islam-Ottoman Law to Turkish Law As an Early Majority State: Early Age Marriages

Pravnik, Ljubljana 2015, Vol. 70 (132), Nos. 11-12

The study deals with the legal development of the concept of majority which expresses the completion of childhood in the former, religion-based Ottoman Law dating back to four generations and modern Turkish Law. Within the scope of the study, legal development of the concept of majority which express the end of childhood both in the previous Turkish Law and Turkish Modern Law is dealt with by way of predicating upon the definition of childhood in the Children's Right Convention. Legal and cultural grounds of early age marriages constitute the focus of this study.