

September 2005

Aftermath of a Revolution: A Case Study of Turkish Family Law

Seval Yildirim

Follow this and additional works at: <https://digitalcommons.pace.edu/pilr>

Recommended Citation

Seval Yildirim, *Aftermath of a Revolution: A Case Study of Turkish Family Law*, 17 Pace Int'l L. Rev. 347 (2005)

DOI: <https://doi.org/10.58948/2331-3536.1151>

Available at: <https://digitalcommons.pace.edu/pilr/vol17/iss2/8>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace International Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

AFTERMATH OF A REVOLUTION: A CASE STUDY OF TURKISH FAMILY LAW

Seval Yildirim†

I. Introduction	347
II. Modernization in the Ottoman Empire	351
III. Turkish Republic and Kemalist Reforms	355
IV. 1926 Civil Code: Turk Kanunu Medenisi	357
V. 2002 Civil Code: Turk Medeni Kanunu	363
A. Reform Attempts	363
B. The New Civil Code: Mix of Gender Equality and Threatening Female Sexuality	365
VI. Conclusion.....	368

I. INTRODUCTION

In a speech delivered in the early days of the Turkish Republic, Mustafa Kemal Atatürk declared: "Gentlemen and Great Nation! Know it well that the Turkish Republic cannot be a country of sheikhs, dervishes, disciples and lunatics. The correct road is the road of civilization."¹

Atatürk's declaration distills the Kemalist Revolution's message at large: the Turkish Republic must make a decisive break with its Islamic past in order to modernize and belong to the league of civilized nations. This message continues to be delivered in Turkey today. In fact, for every child in Turkish schools, education begins with learning the six Kemalist principles: republicanism, nationalism, populism, statism, revolutionism and secularism.² These principles and all other reforms of

† Assistant Professor, Whittier Law School. I would like to thank Professor William Nelson for his invaluable guidance and support for this paper. I would also like to thank Professor Vincenzo Varano for his comments, and my friend, Sasha Govindacharya Rao for her tireless editorial efforts. I would also like to thank the editors at the Pace International Law Review, especially Nicole Feit and Noelle Picone.

¹ SADI BORAK, ATATÜRK VE DİN [ATATÜRK AND RELIGION] 7 (Toplumsal Donusum) (2002).

² These principles are discussed in depth in the nationally used elementary school book on Turkish revolutionary history. See generally NESET CAGATAY &

the Kemalist Revolution are incorporated into the Preamble of the Turkish Constitution. In particular, Article 174 of the Constitution mandates: "No provision of the Constitution shall be construed or interpreted as rendering unconstitutional the Reform laws . . . which aim to raise Turkish society above the level of contemporary civilization and to safeguard the secular character of the Republic."³

After their victory in the independence war against the occupying European powers at the end of World War I, the Kemalist nation-building elite emphasized the revolutionary nature of their project.⁴ The Kemalists changed the nature of governance from monarchy to democratic republic, and administered reforms to systematically change the very meaning of what it meant to be a "Turk." Given that the Ottoman Empire was socially, politically and legally defined by Islam, its official religion, the Kemalist elite found one of the core definitions of its character in denouncing religion as a source of social, political, economic and legal organization. The Kemalist revolutionaries wanted the new Turkish nation to be a democratic republic, free of religion.

Today, Turkish students, from first grade until senior year in college, have a mandatory course on the revolutionary history of Turkey. In the first grade textbook, used nation-wide, the Kemalist principle of revolutionism is defined as follows: "Revolutionism is to demolish the institutions that have left the Turkish nation in a backward state, and to build new institutions that will enable the nation to evolve according to the requirements of civilization."⁵

From a student's first school textbook to the highest law of the land, the Constitution, Turks are taught that the Kemalist Revolution was a complete and clear break with their Islamic Ottoman past. As explained below, however, this alleged

MUHSIN KAYA, *TÜRKİYE CUMHURİYETİ İNKILAP TARİHİ VE ATATÜRKÇÜLÜK* [TURKISH REPUBLIC'S REVOLUTIONARY HISTORY AND KEMALISM] (1998).

³ *Türkiye Cumhuriyeti Anayasası* [Constitution] (Turk.) [hereinafter *TURKISH CONSTITUTION*]. The official English translation of Turkey's Constitution is available at <http://www.byegm.gov.tr/> (follow "The Constitution of the Republic of Turkey" hyperlink).

⁴ See NİYAZI BERKES, *THE DEVELOPMENT OF SECULARISM IN TURKEY* 431-78 (1998), for a general discussion of the Kemalist nation-building project.

⁵ CAGATAY & KAYA, *supra* note 2, at 202.

"break" is complicated in two major ways. First, some Kemalist reforms, especially the legal ones, were a continuation of earlier Ottoman reforms. Second, the Revolution was not so revolutionary in certain respects. Although the Kemalist Revolution changed many significant aspects of Turkish life, ghosts of beliefs, norms and laws of the past continue to lurk in present-day Turkey, as evidenced by the evolution and the current substance of Turkish family law.

The following analysis of family law provisions contained in the Turkish Civil Codes, past and present, demonstrates that although significant progress has been made toward gender equality, certain Islamic laws dealing with female sexuality survive in their entirety, and in contradiction to the general spirit of gender egalitarianism of the codes. This is not anomalous considering that revolutions often have failed to completely eradicate the past.⁶

⁶ In the Chinese case, although the Communist Revolution radically altered many aspects of Chinese life, some cultural features, such as family structure, have survived to this day. See generally Janice A. Lee, *Family Law of the Two Chinas: A Comparative Look at the Rights of Married Women in the People's Republic of China and the Republic of China*, 5 CARDOZO J. INT'L & COMP. L. 217 (1997) (discussing how Confucian values on family and gender relations still persist despite the revolutionary efforts). See generally Wallace Johnson, *Symposium on Ancient, Law, Economics & Society Part II: Ancient Rights and Wrongs: Status and Liability for Punishment in the T'ang Code*, 71 CHI.-KENT L. REV. 217 (1995) (arguing that the T'ang Code of 653 still informs current Chinese criminal law on issues such as trial procedure and emphasis on confession); Pamella A. Seay, *Law, Crime, and Punishment in the People's Republic of China: A Comparative Introduction to the Criminal Justice and Legal System of the People's Republic of China*, 9 IND. INT'L & COMP. L. REV. 143 (1998) (arguing that the Confucian concepts have survived in Chinese culture to this day and continue to influence the evolution of Chinese law); Robert Bejesky, *Political Pluralism and Its Institutional Impact on Criminal Procedure Protections in China: A Philosophical Evolution from "Li" to "Fa" and from "Collectivism" to "Individualism,"* 25 LOY. L.A. INT'L & COMP. L. REV. 1, 1 (2002) ("traditional cultural influences remain strong in China today [and they] currently provide a framework for societal conduct that survived turbulent, revolutionary, and chaotic moments . . ."); PHILLIP M. CHEN, *LAW AND JUSTICE: THE LEGAL SYSTEM IN CHINA 2400 B.C. TO 1960 A.D.* (1973) (arguing that underlying notions of justice, such as communal application of justice and reliance on small community leaders rather than official authority, have survived the Maoist revolution). See CRANE BRINTON, *THE ANATOMY OF A REVOLUTION* (1965), for a similar discussion on the impact of the Bolshevik Revolution in Russia. Brinton argues that in revolutions, including the Bolshevik Revolution, "some institutions, some laws, even some human habits . . . clearly changed in very important ways; other institutions, laws, and habits . . . changed in the long run but slightly, if at all." *Id.* at 237. He specifically points out that despite the reforms legalizing abortion and

To situate the Kemalist Revolution among others of its kind, in Part II, I look at the Ottoman Empire on the eve of World War I. I focus specifically on the *Tanzimat* period (1839-1878) when certain reforms were introduced in an effort to modernize some Ottoman institutions. Then I briefly look at the codified personal laws of 1917, the *Mecelle*. In Part III, I analyze the period immediately following World War I. I look at reforms introduced in this period, focusing specifically on those aimed at eradicating religious influence on everyday life. In Part IV, I discuss the Civil Code of 1926 (hereinafter "1926 Code"), adapted from the Swiss Civil Code of 1889. I discuss the changes instituted by the 1926 Code, comparing them with the preceding era. In particular, I show that the 1926 Code retained certain principles of Islamic family law.

In Part V, I discuss legislative attempts to reform the 1926 Code, ultimately leading up to the realization of the new civil code, which took effect on January 1, 2002 (hereinafter "2002 Code"). The new code introduced significant changes towards gender equality in marriage because individual freedom and gender equality were main concerns of the drafters. Nevertheless, the same Islamic law concepts in the 1926 Code survive unchallenged in the 2002 Code.

In the conclusion, I argue that while the Kemalist Revolution and its reforms have significantly altered the everyday reality of Turks, the current code still carries Islamic remnants from a time considered long gone. The 2002 Code's unquestioning acceptance of inequalities arising from perceived gender differences rooted in Islamic law shows that at least some Kemalist reforms are not as revolutionary as have been accepted.⁷ Both the proponents and the opponents of the Kemal-

making divorce almost effortless, sexual norms were not drastically altered. He asserts that "the Christian monogamous family has survived the old Bolsheviks in Russia." *Id.* at 245. See generally HEDRICK SMITH, *THE NEW RUSSIANS* (1991), for a discussion on how some aspects of life remained the same in the Russian and Central Asian parts of the Soviet Union.

⁷ Here, I do not make the argument that Islam inherently leads to gender inequality. Rather, Islamic law as it has developed through jurisprudence has led to legal precepts, some of which result in gender injustice. For a critical inquiry on the development of Islamic law see generally KHALED ABOU EL FADL, *SPEAKING IN GOD'S NAME: ISLAMIC LAW, AUTHORITY AND WOMEN* (2001). See also ASMA BARLAS, *BELIEVING WOMEN IN ISLAM: UNREADING PATRIARCHAL INTERPRETATIONS OF THE QURAN* (2002).

ist Revolution and its reforms have accepted the premise that there is a clear and undeniable break between the Ottoman period, when religion dictated law, and the secular Turkish Republic period, where only nationalism, modernity and rationalism based on liberal democratic principles dictate law. This paper shows that the lines between the past and the present, the old and the new, the depth and reality of change pre and post-revolution are not as clear or definite as the Kemalist hegemonic narratives may suggest.

II. MODERNIZATION IN THE OTTOMAN EMPIRE

The Ottoman Empire was an Islamic empire. The Ottoman emperors derived their power and legitimacy from religion and justified their invasions by religious mandates.⁸ The Ottoman legal system, based on the Islamic law, the *Sharia*, was centralized. In the Ottoman Empire, Islamic judges became state employees and the office of the *Sheikh-al-Islam* was founded. The *Sheikh-al-Islam* was the chief judge and Islamic scholar who consulted with the Ottoman emperor on the legality of matters.⁹ The *Sharia* consisted of provisions listed in the *Quran*, Islam's holy book, sayings and acts of Prophet Mohammed as reported through the centuries, and the interpretations of Islamic jurists over the centuries, often in the form of treatises. Although the *Sharia* covered most areas of personal relations, a centralized state required more expansive and detailed laws in other areas of life. Thus, the Ottoman state created another kind of law, *qanun*, mainly introducing agrarian and criminal regulations where the *Sharia* was silent.¹⁰

Qanun was unmistakably positive law, though it could not contradict Islamic principles.¹¹ Although the concept of positive law was a revolutionary concept, *qanun* had a diminished effect because it was consistent with, and inclusive of, Islamic principles. Moreover, "*qanun* penalties were rarely if ever applied."¹²

⁸ See generally HAIM GERBER, *ISLAMIC LAW AND CULTURE: 1600-1840*, 50-54 (1999), for a discussion of law in the Ottoman Empire. See also TURGUT AKPINAR, *TURKLER'IN DIN VE HUKUK TARİHİ* [TURKS' HISTORY OF RELIGION AND LAW] 181-215 (1999).

⁹ See GERBER, *supra* note 8, at 18.

¹⁰ See *id.* at 29; see also AKPINAR, *supra* note 8, at 184-85.

¹¹ See AKPINAR, *supra* note 8, at 184-85.

¹² GERBER, *supra* note 8, at 29.

Regardless of the substance of *qanun*, the very existence of a law not directly derived from the *Sharia* was very important for further reforms in the period following the mid-nineteenth century. Significantly, the early nineteenth century was "the last historical moment when the traditional Islamic legal system may be said to have been still undiluted by Western cultural penetration."¹³ By the mid-nineteenth century, Ottoman intellectuals had begun to engage with Western intellectual ideas, most notably those on democracy and secularism.¹⁴ These engagements coincided with the continuing decline of Ottoman power and the continuing rise of Western European empires. The Ottoman state apparatus needed to be reformed and updated in order to compete with Western Europe. The Western ideological influence, coupled with the demands of the Ottoman reality, led to Western-influenced reforms during the *Tanzimat* period.¹⁵

The main instrument of the *Tanzimat* reforms was the *Gulhane* Charter, a written code applicable to all subjects of the Empire. The *Gulhane* Charter was revolutionary because it made no distinction between the Muslim and the non-Muslim subjects of the Empire.¹⁶ The reforms introduced with the *Gulhane* Charter aimed to reform the military, the educational system and other failing state apparatuses, but could not contradict Islamic principles.¹⁷ Despite its substantive reformative character, the main significance of the *Gulhane* Charter was its codified nature, its treatment of all subjects alike, and its willingness to construct a non-religious legal space.¹⁸ This new realm opened by the *Tanzimat* spirit led to further legal reforms, mainly evidenced in codification efforts.

Codification was a major instrument in legal reform. The act of codifying existing laws involves a process of selection, and

¹³ GERBER, *supra* note 8, at 1.

¹⁴ SERIF MARDIN, *THE GENESIS OF YOUNG OTTOMAN THOUGHT* 8-9 (2000).

¹⁵ See BERKES, *supra* note 4, at 137-44. Berkés also adds that although European powers had no direct advisory role in reforms at this point, they were instrumental in pushing for reforms in their advocacy of Christian minorities in the Ottoman Empire. See *id.* at 143-44.

¹⁶ See *id.* at 145. See also MARDIN, *supra* note 14, at 154-68 (discussing the individuals behind the *Gulhane* Charter, the political dynamics leading to its enactment, and international reactions to the new law).

¹⁷ *Id.*

¹⁸ *Id.*

consequently, eradication of laws. When the existing laws are religious, the codification process increases and highlights the positive nature of the new codified law.¹⁹ In other words, codification is a secular act. The *Tanzimat* era efforts of codification involved this level of secularism.²⁰

The move toward a secular outlook was especially relevant in the drafting of the first civil code, the *Mecelle*. Even though the Ottoman lawmakers accepted foreign sources in other areas - like the commercial code based on its French counterpart of 1807 - they insisted on a civil code based on the *Sharia*.²¹ Thus, the *Mecelle* was drafted based on Hanafi jurisprudence, one of four main Sunni Islamic schools of law.²² Consequently, the Ottoman state affiliation with the Hanafi school of Islamic law was also codified.²³ This attempt to shift the boundaries of religious and secular law did not find favor with the *Sheikh-al-Islam*, and he persuaded the Ottoman Sultan to disband the commission drafting the civil code.²⁴ The commercial law portion of the code, however, had already been completed and went into effect. To administer these new codes, new secular courts were established. These courts followed new procedural guidelines, such as accepting testimony from non-Muslim witnesses.²⁵

There was significant resistance within the Ottoman Empire to modernization efforts and the secularization reforms

¹⁹ *Id.*

²⁰ See BERKES, *supra* note 4, at 160-69.

²¹ *Id.*

²² See BERKES, *supra* note 4, at 168. It is noteworthy that Cevdet Pasha, the main proponent and the architect of the *Mecelle*, found support for codification of civil relations and establishment of secular courts in an Islamic law treatise written by Jalal al-Din Dawwani. See *id.* at 165-66. Dawwani argued that "secular courts were not only compatible with Islam but also were necessary to it." *Id.* at 165.

²³ See *id.* at 165-66, 168. The Ottoman state had always preferred the Hanafi school of law for its flexibility in allowing for a centralized state system. However, because the court system was not centralized, the judges had considerable flexibility to apply alternative theories. See generally GERBER, *supra* note 8 (discussing the flexibility of the use of various schools of Islamic law). Through an analysis of four different judges in different parts of the Ottoman Empire during a time span of almost two and a half centuries, Gerber shows that the state's dictate of one school of law was not rigidly applied in practice. See *id.* at 25-28.

²⁴ See Deniz Kandiyoti, *End of Empire: Islam, Nationalism and Women in Turkey*, in WOMEN, ISLAM AND THE STATE 27 (1991).

²⁵ See BERKES, *supra* note 4, at 162.

during the *Tanzimat* era.²⁶ The Islamists resented the secular nature of the reforms, as well as the authoritarian manner in which they were implemented.²⁷ Others believed the reforms had to be accompanied by democratization efforts, because westernizing reforms brought with them the ideals of nationalism and democratic governance.²⁸ After a short-lived attempt at a constitutional monarchy (1876-1878), the Ottoman state continued to implement reforms in the midst of an authoritarian regime.²⁹ This led to the revolutionary overthrow in 1908 of the Ottoman Sultan, Abdulhamit II, by the Young Turks movement.³⁰ A new era of constitutional monarchy began.³¹

Though in an era of reform, the Ottoman Empire was still an Islamic state, the office of the *Sheik-al-Islam* continued, and the Islamists became one of the main political circles that influenced policy and law.³² The other two main circles were the Turkish nationalists and the Ottomanists. Each group hoped the constitution would help their own goals. In this atmosphere, the issue of a codified civil law was revisited, and talk of reinstating the *Mecelle* committee began in the early days of the 1908 Revolution.³³ However, the new family law did not come into existence until 1917 due to disagreements over whether family law could be codified, whether all schools of Islamic law could be included in the code, and whether any or all of these suggestions were un-Islamic and thus a threat to the core of the Ottoman Empire.³⁴

Until 1917, family law continued to be administered under the authority of religious courts. There were, however, changes within the parameters of Islamic law. In 1915, divorce law was modified by two imperial edicts.³⁵ Accordingly, women could now sue for divorce "in cases of desertion or the existence of a

²⁶ See Kandiyoti, *supra* note 24, at 24-28 (discussing the reactions to legal reforms during *Tanzimat*).

²⁷ See generally BERKES, *supra* note 4.

²⁸ *Id.*

²⁹ Kandiyoti, *supra* note 24, at 24-28.

³⁰ See *id.*

³¹ See *id.* at 28.

³² See BERKES, *supra* note 4 at 367-77.

³³ *Id.*

³⁴ *Id.*; see also Kandiyoti, *supra* note 24, at 27.

³⁵ See JOHN L. ESPOSITO & NATANA J. DELONG-BAS, *WOMEN IN MUSLIM FAMILY LAW* 51 (2d ed. 2001).

husband's contagious disease making conjugal life dangerous."³⁶ Although these changes constituted a departure from the traditional Hanafi jurisprudence, they were in harmony with the potential grounds of divorce available to women under other schools of Islamic law.³⁷

Continued discussion of women's social status and the realities of World War I led to the reinstatement of the committee working on the family law part of the *Mecelle* in 1916.³⁸ The Law of Family Rights was enacted in 1917, and became a part of the *Mecelle*.³⁹ Although derived from Islamic family law, the new code brought significant changes, especially in the area of divorce. The husband's absolute right to divorce and polygamy was curtailed.⁴⁰ In addition, for the first time, the personal laws of non-Muslim Ottoman subjects were codified in this family law. Due to strong objections, however, provisions applying to non-Muslims were abrogated in 1919.⁴¹

PART III. TURKISH REPUBLIC AND KEMALIST REFORMS

After the demise of the Ottoman Empire, the new republic, led by Mustafa Kemal, was declared in 1923. A new parliamentary system, with representatives of the people, was formed. A series of reforms aimed at transforming the newly conceptualized Turkish society at all levels followed.⁴²

The Kemalist reforms changed the relationship between religion and the state in two main ways: they eliminated or banned institutions of Islamic influence, such as the *Caliph*⁴³ and Islamic brotherhoods, and they placed all main Islamic institutions, including the mosques, under government control.⁴⁴

³⁶ *Id.*

³⁷ *See id.*

³⁸ *See* SERAFETTIN TURAN, *TURK DEVRİM TARİHİ III: YENİ TÜRKİYE'NİN OLUSUMU* [TURKISH REVOLUTIONARY HISTORY] 218 (1995).

³⁹ *See id.*

⁴⁰ *Id.*

⁴¹ TURAN, *supra*, note 38.

⁴² *See id.*

⁴³ The office of the Caliph, the leader of the Sunni Muslim community.

⁴⁴ To this day, government control of religion has been established mainly by the Office of Chief of Religious Affairs, which operates under the Office of the Prime Minister. This office is in charge of certifying and appointing religious personnel, overseeing the performance of their duties and paying their salary from the treasury. *See generally* <http://www.diyinet.gov.tr/english/default.asp>.

The Kemalist reforms also centralized education, thereby eliminating any religious influence that could be disseminated through educational institutions.⁴⁵ Thus, law was the main tool of the Kemalist Revolution.

The early Kemalist reforms of 1924 abolished the positions of the *Caliph* and *Sheikh-al-Islam* and shut down the religious courts. A year later, in 1925, centers for Sufi orders were shut down.⁴⁶ That same year, a new law prohibited the use of fez and other items of Ottoman male clothing and mandated the use of European style hats.⁴⁷ In 1926, the Christian calendar replaced the Islamic one. Finally, in 1928, the Arabic alphabet used throughout the Ottoman era was replaced with a modified Latin alphabet in 1928.⁴⁸

Legal reform was the central mechanism of the Kemalist Revolution, and codification was the main method of legal reform. The Constitution, first enacted in 1921, was revised in 1924. It was accompanied by the adoption and adaptation of various European codes. For instance, in 1929, the Code of Execution and Bankruptcy was adopted, based on the Swiss Federal Code of 1889.⁴⁹ The Italian Criminal Code of 1889 became the basis for the Criminal Code of 1926. The Swiss Civil Code and the Code of Obligations were adopted in 1926 as the new uniform civil code of the new republic.⁵⁰ To promote the new law and introduce the new tradition of the non-religious civil marriage, an accompanying law was passed mandating that the

⁴⁵ See Act No. 430 of 3 Mar. 1340 (1924) on the Unification of the Educational System cited in TURKISH CONSTITUTION art. 174. Accordingly, even courses teaching the *Quran* are under government supervision.

⁴⁶ Sufi orders are known as the mystical branches of Islam. See Act No. 677 of 30 Nov. 1341 (1925) on the Closure of Dervish Monasteries and Tombs, The Abolition of the Office of Keeper of Tombs and the Abolition and Prohibition of Certain Titles cited in TURKISH CONSTITUTION art. 174.

⁴⁷ See Act No. 671 of 25 Nov. 1341 (1925) on the Wearing of Hats cited in TURKISH CONSTITUTION art. 174.

⁴⁸ See Act No. 1353 of 1 Nov. 1298 (1928) on the Adoption and Application of the Turkish Alphabet cited in TURKISH CONSTITUTION art. 174. See also Nilufer Gole, *Modernist Kamusal Alan ve Islami Ahlak* [Modernist Public Space and Islamic Morality], in ISLAM'IN YENI KAMUSAL YUZLERI [NEW PUBLIC FACES OF ISLAM] 23 (2000) (discussing the Kemalist reforms).

⁴⁹ See Adnan Guriz, *Sources of Turkish Law*, in INTRODUCTION TO TURKISH LAW 1, 9 (T. Ansay & D. Wallace eds.) (1996).

⁵⁰ See *id.*

marriage ceremony be conducted before a competent official.⁵¹ Furthermore, women gained the right to vote and hold office in municipal elections in 1930 and in national elections in 1934.⁵²

PART IV. 1926 CIVIL CODE: TURK KANUNU MEDENISI

During the Kemalist Revolution, legal reform once again took the form of codification. The Swiss Civil Code was selected as the “best fit” for the Turkish society.⁵³ Moreover, although the Swiss Civil Code was kept intact in form, some provisions were substantively modified in accord with the Turkish reality of 1926. Although the new nation was referred to as Turkish, it was the Ottoman reality based on religious identity that governed people’s daily lives. Religion did not become less important in people’s lives simply because the Revolution was hard at work to eradicate it.

It is undeniable that the 1926 Code brought about some revolutionary changes, especially in the area of family law. The age of consent for girls was changed from nine under Islamic law to fifteen. Similarly, for boys, it was changed from eleven to seventeen.⁵⁴ Perhaps one of the most significant articles of the 1926 Code was the abrogation of polygamy, permitted under Islamic law.⁵⁵ Article 93 required that any person seeking to marry must prove that any prior marriage had ended.⁵⁶ Moreover, under Article 112(1), a marriage would be void if either of the spouses were married at the time of entry into marriage.⁵⁷

The 1926 Code also brought significant changes in divorce law. Both spouses were given equal entitlement to divorce, and

⁵¹ See TURK KANUNU MEDENISI [CIV. CODE 1926] (Turk.) also cited in TURKISH CONSTITUTION art. 174 (number 4). Under the Turkish Constitution, one of the reforms that cannot be modified by any interpretation is “[t]he principle of civil marriage according to which the marriage act shall be concluded in the presence of a competent official, adopted with the Turkish Civil Code. Act No. 743 of 17 Feb. 1926, and Article 110 of the Code.” TURKISH CONSTITUTION art. 174.

⁵² See Binnaz Toprak, *Dinci Sag [Religious Right]*, in GECIS SURECINDE TURKIYE [TURKEY IN TRANSITION] 237-55 (1992).

⁵³ See generally, Turk Medeni Kanunu Genel Gerekce (Turkish Civil Code, The General Justification), http://www.belgenet.com/yasa/medenikanun/gerekce_1926.html.

⁵⁴ See CIV. CODE 1926, available at <http://www.hukuki.net/kanun/743.13.text.asp>.

⁵⁵ See CIV. CODE 1926 art. 93.

⁵⁶ *Id.*

⁵⁷ See CIV. CODE 1926 art. 112(1).

the grounds for divorce became the same for both spouses.⁵⁸ Accordingly, the husband's absolute right to divorce was abrogated by allowing for divorce only through the judicial system and based on the enumerated grounds.

Despite the significant changes brought about by the 1926 Code, one of the reasons for its acceptance was that it did not drastically change certain aspects of family law. This was not, however, explicitly acknowledged by the Kemalists. The state rhetoric was that the 1926 Code was a symbol of westernization, the latest of its kind in Europe, and thus proof that Turkey was on its way to becoming a member of the "civilized" world.

This rationale is explicit in "the General Justification for the Proposed Law," written by Mahmut Esat Bozkurt, the Justice Minister of the time.⁵⁹ Bozkurt argued that the *Mecelle*, based on the *Sharia* had to be abandoned in favor of a new law, because laws based on religion were inherently rigid, immutable, stagnant and incapable of meeting the changing needs of society. Depriving the new Turkish Republic of the legal advances of modern civilization could not be reconciled with the goals of the Turkish Revolution.⁶⁰ Bozkurt gave an overview of the evolution of the German, French and Swiss civil codes, and concluded that fundamental to all these laws was the absolute separation of religion and state. He explained that the drafting commission selected the Swiss Civil Code because it could easily adapt to a new society, and had brought together various cantons with different customs and traditions. Moreover, the Swiss Code was the latest of its kind in Europe.⁶¹ Thus, Bozkurt concluded, when the new Turkish Civil Code was enacted, the Turkish nation would be "freed of thirteen centuries of ill beliefs and chaos, close the doors of an old civilization, and enter the modern civilization which [would] bring it life and prosperity."⁶²

⁵⁸ See *id.* art. 129-50, for provisions on divorce (Section Four of the Code addresses divorce). See *id.* art. 129-34, for grounds for divorce specifically.

⁵⁹ Turk Medeni Kanunu Genel Gerekçe [General Justification of the Turkish Civil Code], BELGENET, Oct. 24. 2001, available at http://www.belgenet.com/yasa/medenikanun/gerekce_1926.html (website contains the entire speech presented during a Turkish Parliamentary debate on the proposed Turkish Civil Code of 1926).

⁶⁰ See *id.* at 2.

⁶¹ See *id.* at 4.

⁶² *Id.* at 5.

The official rhetoric that the 1926 code was a complete break with the Islamic past, however, failed to match the substance of the law. Certain provisions of the 1926 Code were harmonious with Islamic legal concepts. For instance, the grounds for divorce provided by the 1926 Code were adultery,⁶³ life threatening or psychologically destructive behavior,⁶⁴ criminal behavior,⁶⁵ abandonment,⁶⁶ mental illness,⁶⁷ and irreparable damage to the marriage union.⁶⁸ These grounds are quite similar to those available to a woman according to some interpretations of Islamic law. Moreover, they are also reminiscent of the grounds provided in the *Mecelle*, according to which a woman could divorce her husband "if he was unable to consummate the marriage, was missing, refused to pay her maintenance . . . suffered from venereal disease . . . or went insane after the marriage."⁶⁹

The 1926 Code also kept intact the patriarchal family structure. Accordingly, the husband was the head of the family,⁷⁰ and his last name became the family name.⁷¹ He represented the family union⁷² and was responsible for the wife.⁷³ The wife's right to work outside the home was subject to the husband's permission. Alternatively, the wife could seek such permission from the courts.⁷⁴ Articles 155 through 160 specifically, and the 1926 Code generally, set up a system whereby the husband had a duty to protect the wife, both in her finances and her social interests, as her main legal representative, and the wife had a right to demand such protection. This brings to mind a verse from the *Quran*: "Men are the full maintainers of women . . . because men spend out of their wealth on them."⁷⁵

⁶³ See CIV. CODE 1926 art. 129.

⁶⁴ See *id.* art. 130.

⁶⁵ See *id.* art. 131.

⁶⁶ See *id.* art. 132.

⁶⁷ See *id.* art. 133.

⁶⁸ See CIV. CODE 1926 art. 134.

⁶⁹ ESPOSITO & DELONG-BAS, *supra* note 35, at 51.

⁷⁰ See CIV. CODE 1926 art. 152.

⁷¹ See *id.* art. 153.

⁷² See CIV. CODE 1926 art. 154.

⁷³ See *id.* art. 155.

⁷⁴ See CIV. CODE 1926 art. 159.

⁷⁵ QURAN, ch. IV, verse 34, as explained by Allamah Nooruddin, in AMATUL-LAH RAHMAT OMAR & ABDUL MANNAN OMAR, TRANSLATORS 85-86 (2003).

All types of property entering the family unit came under the control and management of the husband.⁷⁶ This is not to suggest that the woman did not retain property rights. Rather, the law spoke only of maintaining the property, in harmony with the husband's general duty to protect his wife's interests.⁷⁷ Moreover, the 1926 Code set up an ownership system within the marriage very similar to Islamic law. Even though the Swiss Civil Code recognized a system of shared property, the 1926 Code changed this to recognize a property regime whereby each spouse retained what he or she brought into the marriage.⁷⁸ Under Article 146, upon divorce, both parties keep what they bring into the marriage.⁷⁹ The rest of the property was shared as specified in the marriage contract.

Although official statements of the Kemalists suggested otherwise, the above examples show that not all the provisions of the 1926 Code were drastically different from the previous law. In reality, the 1926 Code held on to tenets of Islamic law in other ways. For example, if one examines the language of the code, Islamic legal concepts reveal their presence in the Arabic terms which entered the Turkish language through Islamic law. For instance, in the 1926 Code adultery was still referred to as *zina*, the Islamic term for illicit sex, and alimony was referred to as *nafaka*, from the Islamic term, *nafaqa*, for maintenance.⁸⁰

Another similarity between the 1926 Code and Islamic Law was the amount of authority granted to a judge. Under Islamic law, the judge decided each case based on the primary sources, the *Quran* and the collections of the Prophet Mohammed's sayings and acts, as well as previous interpretations by the jurists.⁸¹ Thus, the judge had considerable power to interpret the

⁷⁶ See CIV. CODE 1926 art. 196, 212.

⁷⁷ See *id.*

⁷⁸ See "Turk Medeni Kanunu Genel Gerekece" [General Justification of the Turkish Civil Code], BELGENET, Oct. 24, 2001, available at <http://www.belgenet.com/yasa/medenikanun/gerekce.html> (website contains the entire speech presented during a Turkish Parliamentary debate on the proposed Turkish Civil Code of 2002).

⁷⁹ See CIV. CODE 1926 art. 146.

⁸⁰ See CIV. CODE 1926 art. 129, 144-45. The term *zina* is included in Article 129, and the term *nafaka* is included in articles 144-45.

⁸¹ See generally WAEL B. HALLAQ, THE ORIGINS AND EVOLUTION OF ISLAMIC LAW (2005), for a discussion on a judge's authority under Islamic law.

law and apply it to the facts of each case.⁸² The adaptation of the Swiss Civil Code made it possible to keep this system of judicial lawmaking intact. Article 1 of the 1926 Code allowed the judge to consult custom and tradition where there is no written law on point.⁸³ Where there was also no related custom or tradition on point, the judge was then permitted to consider the legislative intent. The judge could also consult scientific opinions and previous decisions. In other words, the civil judge of the Turkish Republic had authority very similar to the judge in the Islamic courts of the Ottoman Empire.

Besides the provisions and characteristics that resembled the denounced Islamic past, some provisions of the 1926 Code kept certain Islamic legal concepts very much the same as before. For instance, Article 95 provided:

A woman who is a widow due to her husband's passing, divorce or the annulment of her marriage, cannot remarry for 300 days following the passing of the husband, divorce, or the annulment decree. The period ends if and when the woman gives birth. The judge can shorten the period if it is established that the woman cannot get pregnant, or in the case of divorce, husband and wife wish to remarry each other.⁸⁴

CIV. CODE 1926 art. 95.

This waiting period related directly to Article 241 which provided that any child born during the marriage or within three hundred days following divorce was deemed to be fathered by the husband.⁸⁵

The divorced man faced no similar prohibitions on re-marriage. The waiting period imposed solely on the divorced woman shows the concern determining paternity. The language of Article 95 leaves no doubt that the concern is with whether the woman is pregnant, and determining the paternity of the offspring.⁸⁶ This concern with determining fatherhood and the need to avoid leaving the determination to the mother is the same as Islamic law's concern with determining paternal line-

⁸² *Id.*

⁸³ CIV. CODE 1926 art. 1.

⁸⁴ The quotes from the Turkish codes are the author's translation.

⁸⁵ See CIV. CODE 1926 art. 241.

⁸⁶ See *id.* art. 95.

age. In fact, all schools of Islamic law require that a divorced woman be kept in seclusion for a period of time, referred to as *iddah*, usually three menstrual cycles, after the divorce.⁸⁷ Similar to Article 95, the main purpose of this law is to determine if the woman is pregnant with the ex-husband's child.⁸⁸

Although the 1926 Code maintained the Islamic concept of the waiting period, it refused to punish its violation. Article 122 stated that a marriage was not void for violating the waiting period.⁸⁹ That the law required a waiting period for the woman but did not punish its violation shows the dilemma of a legal revolution that attempted to adopt foreign laws while trying to maintain social norms informed by religion.

Also related to the determination of paternity is Article 243, which states that any child born at least one-hundred and eighty days after the marriage was deemed to be the husband's, unless he would prove otherwise.⁹⁰ Moreover, under Article 244, if a child was born in less than one hundred and eighty days after marriage, the husband could refuse paternity without further proof.⁹¹ Similarly, under Islamic law, a child born after six months of marriage is deemed to be the husband's, unless otherwise proven, and a child born in less than six months of marriage is considered not to be the husband's, as a matter of law.⁹²

One could argue that in the world of the 1920's, women were generally under male hegemony and that it should not be surprising that even a code from a "progressive" and "civilized" society of Western Europe would not allow for the kind of gender egalitarianism we aspire to today. However, the Turkish nation-building elite specifically selected the Swiss Civil Code. There were a few reasons for this decision, stated in the Justification for the 1926 Civil Code. First, Switzerland was a multi-ethnic and multi-cultural society. If a civil code governing the daily affairs of citizens worked well in such a multi-cultural so-

⁸⁷ See ESPOSITO & DELONG-BAS, *supra* note 35, at 20-21.

⁸⁸ See *id.* See also AHMAD IBN NAQIB AL-MISRI, *RELIANCE OF THE TRAVELLER: A CLASSIC MANUAL OF ISLAMIC SACRED LAW* 566-71 (1994) (for a discussion on the *iddah* period).

⁸⁹ See CIV. CODE 1926 art. 122.

⁹⁰ See CIV. CODE 1926 art. 243.

⁹¹ See *id.* art. 244.

⁹² See AL-MISRI, *supra* note 88, at 572.

ciety, it would certainly work well in the mainly homogenous Turkish Republic.⁹³ Moreover, the Swiss Civil Code was the “newest” and “the most advanced” civil code available.⁹⁴ These reasons were at best vague in that there was never any explanation of which parts of the Swiss Civil Code were better suitable to the new Turkish Nation than those of other available civil codes.

Regardless of what the actual reasons for choosing the Swiss Civil Code were, this choice allowed the nation building elite to convince the representatives of the people to accept the new law. The reality facing the nation building elite was a climate where even the most anti-Islamic minded reformists had to negotiate with the representatives of a people who very much defined themselves around their religion. Thus, the Swiss Civil Code was selected and modified. As the selected model, the Swiss Civil Code allowed the state to keep judicial authority in personal matters. Certain provisions were inserted into the law so as to synchronize the law with mass conceptions about sexuality, its control and institutionalization in marriage and divorce. Although entry into and exit out of marriage were made equally accessible to both sexes, subtle provisions kept the wife in her previous position under Ottoman Islamic law when it came to dealing with other men, or controlling her womb.

PART V. 2002 CIVIL CODE: TURK MEDENI KANUNU

A. *Reform Attempts*

The 1926 Code was amended fifteen times after its enactment, and six of its provisions were abrogated.⁹⁵ Some of these changes arose from efforts to remedy gender inequalities in the Code. For instance, Article 153, mandating that the woman take her husband’s family name, was amended so that the woman could use her maiden name before her husband’s family

⁹³ See “Turk Medeni Kanunu Genel Gerekece” [General Justification of the Turkish Civil Code], BELGENET, 2, Oct. 24, 2001, available at <http://www.belgenet.com/yasa/medenikanun/gerekce.html> (website contains the entire speech presented during a Turkish Parliamentary debate on the proposed Turkish Civil Code of 2002). It is not clear on which statistic the claim of homogeneity was based.

⁹⁴ *Id.* at 3.

⁹⁵ See CIV. CODE 1926. These changes are listed at the end of the 1926 Civil Code.

name.⁹⁶ Moreover, Article 159, which required that the wife receive her husband's permission to work outside the home, was abrogated.⁹⁷

Long before these significant changes, however, the need to revise the 1926 Code was debated. As early as 1951, a revision commission was formed.⁹⁸ This effort, like its successors in 1971, 1974, 1976, and 1984, did not receive parliamentary approval.⁹⁹ The drafting effort that led to the current civil code began in 1994. A new draft was completed by 1998, and it received approval through the various parts of the Turkish law-making mechanism. The General Assembly of the Turkish Parliament began discussions on the proposed law on October 24, 2001.¹⁰⁰

The proposed law was to replace the 1926 Code. The General Justification for the Proposed Law (hereinafter "the Justification") incorporated the Justification for the 1926 Code in its entirety.¹⁰¹ The language was revised to replace Arabic words for Islamic terms with Turkish equivalents. The majority of the proposed changes were in the area of family law, aiming to bring further gender equality.¹⁰²

The Justification focuses on the linguistic changes. In particular, the Justification addresses changes that attempt to accomplish total equality of the spouses in the marriage institution, as well as the married couple's proposed contractual freedom of determining the system of marital property. Throughout the Justification, there is a special and repeated emphasis that the proposed code strives for complete gender equality.

⁹⁶ See Law No. 4248/1, 14/5/1997 (amendment to the CIV. CODE 1926).

⁹⁷ See Turkish Constitutional Court Decision, E.1990/30, K.1990/31, 29/11/1990; see also CIV. CODE 1926 art. 159.

⁹⁸ See "Turk Medeni Kanunu Tarihcesi" [The History of the Turkish Civil Code], BELGENET, Oct. 24, 2001, available at <http://www.belgenet.com/yasa/medenikanun/tarihce.html>.

⁹⁹ See *id.*

¹⁰⁰ See *id.*

¹⁰¹ See "Turk Medeni Kanunu Genel Gerekce" [General Justification of the Turkish Civil Code], BELGENET, Oct. 24, 2001, available at <http://www.belgenet.com/yasa/medenikanun/gerekce.html> (website contains the entire speech presented during a Turkish Parliamentary debate on the proposed Turkish Civil Code of 2002).

¹⁰² See *id.*

B. *The New Civil Code: Mix of Gender Equality and Threatening Female Sexuality*

Under the new Civil Code of 2002 ("2002 Code"), the age of consent is seventeen for both girls and boys.¹⁰³ In marriage, spouses are equal in decision-making capacity and in their responsibility to make the marriage work.¹⁰⁴ Each spouse is an equal representative of the union to third parties.¹⁰⁵ In terms of ownership within marriage, the married couple is free to contractually choose a form of ownership as provided by the law. Joint ownership is among the forms provided by the new code.¹⁰⁶ Both spouses can initiate divorce based on the enumerated grounds, which are the same as in the 1926 Code.

In short, the 2002 Code brings a considerable level of gender equality to marriage. The husband is no longer the leader or the representative of the family, as in the 1926 Code.¹⁰⁷ The wife retains all rights as to her property. Marriage is set up as an institution of partnership of equals; rather than complementarily situated spouses. The husband is no longer the protector, and the wife no longer the protected. Moreover, the married couple's freedom to select from various marital property systems allows for spouses to best protect their interests in case of divorce.¹⁰⁸

Despite this significant move towards a more egalitarian family law, the most obvious vestiges of Islamic law found in the 1926 Code survive in the 2002 Code. Article 132 of the 2002 Code retains the waiting period imposed upon the divorced woman:

If the marriage has ended, the woman cannot marry for three hundred days starting from the end of the marriage. This period may end when she gives birth. The court may lift this prohibition

¹⁰³ See TURK MEDENI KANUNU [CIV. CODE 2002] art. 124 (Turk.), available at <http://www.tbmm.gov.tr/kanunlar/k4721.html>.

¹⁰⁴ See *id.* art. 185-86.

¹⁰⁵ See *id.* art. 189.

¹⁰⁶ See *id.* art. 202. See *id.* art. 203-81 (provides the various forms of ownership and the provisions governing them).

¹⁰⁷ Compare CIV. CODE. 1926 art. 152 (which states that "[t]he husband is the leader of the marriage union.") with CIV. CODE. 2002 art. 185-86, 189 (on the new regime of equal spouses).

¹⁰⁸ See CIV. CODE 2002 art. 202 (discussing the new property regime in the marriage union).

upon finding that the woman is not pregnant, or the divorced spouses want to re-marry each other.

Civ. CODE 2002 art. 132.

Similar to the 1926 Code, under Article 154, if a woman remarries during the prohibited time, the new marriage is not void.¹⁰⁹ Moreover, the articles on establishing or disputing paternity survive with no substantive changes.¹¹⁰

Article 287 of the 2002 Code provides that "the child born at least one hundred eighty days after the beginning of marriage, and at most three hundred days after the divorce, is considered to have entered the mother's womb within marriage."¹¹¹ Thus, the husband at the time is the father as a matter of law, unless he can prove otherwise. With this provision, the new code combines Articles 241 and 243 of the 1926 Code. It retains the presumption that the child born anytime from one hundred and eighty days after marriage to three hundred days after divorce is the husband's child. The 2002 Code, however, does not explicitly incorporate Article 244 of the 1926 Code, stating that the husband can refuse paternity without proof if the child is born in less than 180 days of marriage.¹¹² Thus, under the new scheme, two Islamic law concepts from the 1926 Code survive almost untouched: the one hundred and eighty-day presumption concerning paternity and the concept of the waiting period for the divorced woman.

In this age of technology where paternity can easily be determined by medical tests, the aim of prohibiting a woman's remarriage for almost a year can only be explained by the underlying presumptions of female sexuality in Islam. The fact that the law recognizes and solidifies this prohibition, but refuses to punish its violation, shows that the lawmakers recognize the dated nature of the utility of these concepts. Yet, the prohibitions and counting of days as determined centuries ago remain a part of a family law otherwise concerned with gender equality. The unspoken, and perhaps subconscious, underlying

¹⁰⁹ See *id.* art. 154.

¹¹⁰ See *id.* art. 285-300.

¹¹¹ See *id.* art. 287.

¹¹² See *id.* art. 287.

logic seems to be that female sexuality is still questionable and still has the potential to disrupt social order.

In all the discussions and debates surrounding the changes in the new code, there is no mention of the provisions regulating female sexuality and determination of paternity. In the parliamentary debates on the law, fifteen representatives from six parties from across the political spectrum shared their views.¹¹³ The Justice Minister of the time, Hikmet Sami Turk, spoke on the preparation and the substantive changes of the new law.¹¹⁴ In his speech, Minister Turk emphasized the participation of various women's rights groups in the drafting process.¹¹⁵ Yet, nowhere in any of the speeches or discussions was there a mention of the articles on the waiting period for the woman, or the provisions surrounding the determination of paternity.

To the contrary, the rhetoric of the 1926 Code is still clear in the 2001 parliamentary discussions preceding the vote on the proposed code. Not only was the justification for the 1926 Code re-adopted in its entirety,¹¹⁶ but its spirit was repeated by most of the parliamentarians. For instance, Ali Arabaci of the center-right Dogru Yol Party, proudly declared that "with its legal revolution, the Turkish Republic decided to make a decisive break from Islamic legal system."¹¹⁷ On the other hand, Ramazan Toprak of the Islamist AK Party objected to the rejection of Islam and totality of Islamic principles as backward and uncivilized.¹¹⁸ Depending on their political positions, all the speakers made statements along these dichotomous lines. All the speakers agreed that the Kemalist Revolution had brought a clear and complete break with the Islamic past, but they disagreed on

¹¹³ All speeches from the parliamentary debate are available at <http://www.belgenet.com/yasa>.

¹¹⁴ Adalet Bakani Hikmet Sami Turk'un Konusmasi, Justice Minister, Remarks from the TBMM Genel Kurulu Gorusmeleri, a Parliamentary Debate (Oct. 24, 2001) (transcript available at <http://www.belgenet.com/yasa/medenikanun/gorusme-8.html>).

¹¹⁵ See *id.*

¹¹⁶ See *supra* note 101.

¹¹⁷ Ali Arabaci, Member of Dogru Yol Party, Remarks from the TBMM Genel Kurulu Gorusmeleri: Ali Arabaci, a Parliamentary Debate (Oct. 24, 2001) (transcript available at <http://www.belgenet.com/yasa/medenikanun/gorusme-7.html>).

¹¹⁸ Ramazan Toprak, Member of the Islamist AK Party, Remarks from the TBMM Genel Kurulu Gorusmeleri, a Parliamentary Debate (Oct. 21, 2001) (transcript available at <http://www.belgenet.com/yasa/medenikanun/gorusme-1/html>).

whether this break was a historical accomplishment or a sad mistake for which the Turkish Muslim masses continued to suffer.¹¹⁹ None of the speakers questioned the accuracy or the completeness of this break with the Islamic past.

VI. CONCLUSION

Manfred Halpern argued "[i]t is no longer revolutionary to suggest that we live in a revolutionary world."¹²⁰ Yet the task of defining revolution remains. This is partly because the meaning of revolution shifts depending on time and place. One way to seek the meaning of revolution is to question its aim. Does a revolution aim to change the political and economic institutions? How significant should the change be to be revolutionary? Can a revolution impact a society too deeply that even the intimate individual relations change, perhaps to acquire new meaning? Hannah Arendt argued that the modern concept of revolution is "inextricably bound up with the notion that the course of history suddenly begins anew, that an entirely new story, a story never known or told before, is about to unfold"¹²¹ The case of the Kemalist Revolution contradicts Arendt's contention. Although the Kemalists claimed to tell an entirely new story with their revolution, in fact only a part of their story, albeit significant, was unique. The rest was simply re-worded, and told in a new format, with a new voice.

Reforms in the Ottoman Empire significantly restricted the sphere of Islamic law to family law. When the Kemalist Revolution declared the new Turkish Republic as a break from the Islamic Ottoman Empire, there already existed a framework within which the Kemalist reforms could take place. The Kemalist reforms were unique in that they abolished Islamic titles, such as the *Caliph*, *Sheikh-al-Islam*, and outlawed Islamic centers of authority, such as brotherhoods. The might and the importance of the legal revolution, however, were exag-

¹¹⁹ See the discussions preceding the parliamentary vote on the 2002 Civil Code, <http://www.belgenet.com/yasa/medenikanun/indexmk.html>. The statements of different members of the parties in the Turkish Parliament at the time are listed at the bottom of the page under the heading TBMM GORUSMELERI (Oct. 24, 2001).

¹²⁰ Manfred Halpern, *The Revolution of Modernization in National and International Society*, in *REVOLUTION* 178-214 (Carl J. Friedrich ed., 1966).

¹²¹ HANNAH ARENDT, *ON REVOLUTION* 21 (1965).

gerated at best. The codification of Islamic law, and the adoption of western codes was already a part of the Ottoman legal landscape. The only real resistance to change was in the area of family law. As the adoption of the 1917 Law of Family Rights indicates, even this resistance was weakening. After all, the Ottoman legal system never depended solely on religious law, as evidenced by the sphere of positive law, *qanun*, that existed throughout most of the Empire's history.

Thus, the Kemalists came upon fertile ground of legal evolution. The survival of the Kemalist Revolution depended on the myth of the completely religious, and according to their narrative, backward and unjust nature of the Ottoman past. By dichotomizing the Ottoman Empire and the Turkish Republic in all possible aspects, the Kemalists succeeded in constructing a new Turkish identity, and justifying the systematic silencing of any opposition to their reform projects. In this sense, the Kemalist Revolution attempted to create the illusion of Arendt's new story, never told or known before. Their main instrument was the law, and specifically family law because that is the law that remained Islamic in the Ottoman Empire. Thus, the Kemalists gave great importance to the Civil Code and the gender equality it claimed to bring.

The Kemalist rhetoric, as is apparent in the speech of the Justice Minister in 1926, was so powerful that generations of Turkish citizens have lived believing it. This belief has led to some changes, such as continuously striving to achieve a better level of gender equality.¹²² Dichotomous debates and political agendas have formed around the rhetoric that Islam as a politico-legal system was left behind as part of a dark past.¹²³ These debates have served the purpose of shifting the reality of Turkish citizens in that current gender relations in Turkey are perhaps better than they would have been had the citizens not believed that their laws strive for egalitarianism. At the same time, the myth of a complete break with Islam has also led to authoritarian secular measures whereby the Turkish state has

¹²² See Gole, *supra* note 48, at 63-64.

¹²³ See *id.* at 58-60.

created and enforced prohibitive and, at times, oppressive laws such as the ban on headcoverings in public space.¹²⁴

In this paper, I have traced the development and evolution of laws governing the institutions of family, marriage and divorce in Turkey. The laws have changed significantly from women having almost no access to divorce, to gender equality in the family. Amidst these developments hide small vestiges of the preceding era. These remnants survive in the family laws, in the provisions still attempting to control the female body in its reproductive capacity and its sexual potential. In the corners of the law, there still hides the presumption that by controlling the determination of paternity, the woman can affect economic ties, from maintenance of children to inheritance of the man's property.

Today, outside of the former Soviet republics of Central Asia and the Balkans, Turkey is the only majority Muslim country where family law is not based on the *Sharia*. The Kemalist rhetoric has established and maintained a hegemony of knowledge that claims a complete separation of religion and current laws. Yet, a few provisions of Turkish family law show that presumptions from the past that lie in the deepest corners of the social subconscious, in this case, those about female sexuality, are the winners in the evolutionary scheme of surviving revolutions. Despite the vast changes the Kemalist Revolution may have brought, perhaps it has failed to even challenge the most basic and problematic notions it claims to have eradicated.

Revolutions vary in character. They may be an expression of the masses, the elite, an outside force, or even an international intervention. Yet history has shown us that human will is strong and expressions of human will can covertly, but mightily, resist even the most determined revolutions, from Turkey to China.¹²⁵ This covert resistance may come in the form of armed struggles, suicide bombings, peaceful protests, daily habitual

¹²⁴ See generally NILUFER GOLE, *THE FORBIDDEN MODERN: CIVILIZATION AND VEILING* (1996), for a discussion on the headcoverings in Turkey. See generally MERVE KAVAKCI, *BASORTUSUZ DEMOKRASI: TARİH İCİNDE TARİH* (2004) (For a discussion on how the ban on headcoverings in Turkish public space affected a Turkish woman. This is an autobiography of Merve Kavakci, the elected member of the Turkish Parliament who, in 1999, was not allowed to take the Parliamentarian's oath for refusing to remove her headscarf in the Parliament).

¹²⁵ See *supra* note 6.

practices in the privacy of the home, or in carefully hidden provisions in a code defining the officially accepted parameters of marriage and family. A nation-building project that aims to radically alter the social, political, economic and legal landscape of a people must recognize its limits to redefine and reconstruct a brand new nation, or in Arendt's words, to write a brand new story. After all, a good story is one that is true to its context, and speaks to the reality of its audience.