Abstract: Turkey is a land of conflicts, confusion and hopes due to its proximity not only to Europe but also the Middle East. While Turkey has both democratic and secular laws, it also embodies traditions existing since the Middle Ages. This situation naturally is closely related to the legal and social status of women in Turkey. It is necessary to emphasize that a governing approach has paid more attention to traditional practices in recent years; and therefore, this affects women’s position adversely: attempted murders and violence against women have increased. Plus, early marriages on religious grounds but yet on no legal grounds, which leads to early motherhood, have boomed. The policy of seeing a man as different from a woman and the laws that have been and are being passed have weakened the social and legal status of women, and stands against the constitutional principle of equality and secularity. There is a visible feminist opposition against these impositions based on religious morality. This opposition plays an influential role in the acceptance of some laws in some areas where society shows vulnerability. In this paper, the legal gains of women since the foundation of the Republic will be overviewed and the inconsistency stated above will be examined and evaluated through the point of view of a legal sociologist.

Keywords: Women’s Rights, democracy, legal system, development of Women's Rights

Introduction

The foundation of the Republic of Turkey led to the evolution of civil law along with other radical alterations. Such evolution process and its meaning will be the starting point of this article since while this country, where Europe and Asia are geographically tied together, was full of contradictions and confusion, the status of women was radically changed with the new regulations established during the foundation of the Republic of Turkey.

Such changes began with the abolition of the authority of the religious courts in 1924 and, through this, the judiciary system was purged from religious characteristics. This was followed by the codification of the Turkish Civil Code in 1926 of which the model law was the Swiss Civil Code. It is admitted that the codification of this code was the major reform in Turkish law (Vurol Dinçkol, 2001, p. 177).
The women’s position in a family reflects the perception of women in a society. The Ottoman Empire was governed by both the rules of Islam and traditions. The women’s position in this society was secondary to the position of men. Women had no place in social life. Men had the right to make family decisions and the roles of women and men were strictly differentiated. Thus, it was impossible for women to have a social role. Only after World War I, women had the chance to manifest themselves. This has a very understandable reasoning. The men died in the war. Since women had to take over the role previously occupied by men, they became visible in the public sphere. Before this, women continued to live in a world where their men were not at home. After living in such a way during centuries, all at once the Gordian knot was broken and women started to be entitled to the rights they had not requested.

I. Civil Code and Turkish Women

a) Civil Code dated 1926

The interaction between family and society is undeniable. Family’s formation process and structure directly influence societal structure, at the same time that changes in society influence family’s structure. Therefore, a social evolution and the equality of men and women were aimed with the adoption of the Swiss Civil Code via reception right after the foundation of the Republic of Turkey.

This Code abolished the rules accepted in Islamic law regarding the marriage of men with multiple women, rights granted only to men for an easy divorce and child marriage. The Code entitled women to have equal rights in respect of inheritance law and re-defined women’s position in the family in the framework of a laic legal order. From then on, bride and groom had to get married before a civil servant authorized by the state. Hence, marriage by proxy of persons who do not know each other and do not have a will for it became history. Thus, within the sphere of the law, women were released from the tutelage of their fathers and husbands and entitled to not marry someone when they do not have the intention to do so.

From the general perspective of the Civil Code, it can be observed that the status of women was improved and renderd similar to that of men, unlike the regulations during period of the Ottoman Empire (Cansel, 1977, p. 38). The Civil Code, which had brought significant rights in respect of women’s rights that didn’t exist in the Ottoman Empire, was also criticized due to its failure of assuring the equality of women and men. These critics have a point, in a sense, for it should be noted that the
Civil Code, which can be considered revolutionary under the circumstances of the year of 1926, became insufficient while women’s rights were improving in the following years and thus it was revised in 2002.

b) The Amendments of Turkish Civil Code dated 2002 and Women’s Rights

For the purpose of approaching the goals set forth in the road to Europeanisation, the Civil Code was revised and certain amendments in favor of women were implemented. If we look at those changes, we see that women’s associations and non-governmental organizations were very active in the year of 2002 and, based on those amendments, it can be argued that feminist approach was successful in respect of the requests.

The amendments are as follows:

As a principle, women and men could get married at the age of 18; however, pursuant to the previous Civil Code, if there were specific circumstances, a girl at the age of 15 and a boy at the age 17 could get married. Such rule was allowing the marriage of children that are below the required age, through an increase of their age by a court decision, particularly in the rural areas. However, pursuant to the modifications brought with the new code, the general age limit of 18 years for marriage was reduced to 17 years regardless of the sex.

Furthermore, in the previous Civil Code, men were recognized as being the head of the family, placing women in a position where they had to have the permission of their husbands prior to getting a job. In accordance with this regulation, men had the authority to keep women out of the public sphere. In practice, women found having an education unnecessary as they would not be able to work without having the permission of their husband. However, the new code abolished such rule and the concept of head of the family does not exist anymore.

According to the previous code, the residence of the husband meant the residence of the women. The notices to a woman who wished to divorce and had abandoned the home were sent to the house of her husband from which she has decided to divorce. After the revision of the code, we speak of a family residence that is co-determined by them.
According to the previous code, if there was a conflict regarding child, it was the husband who had the final decision (Yılmaz, 1996, p. 93-96). However, now, parents have to make a common decision, in the absence of which, they will apply to a court.

The previous code included provisions in favor of men regarding the assets acquired during the marriage. Since usually the husband was the person earning money and the movable and immovable assets were acquired in the husband’s name, in the event of a divorce, women couldn’t claim such assets. This was causing inequalities. Hence, this rule was revised with the new code. Hereinafter, it is adopted that women and men both have rights on the assets acquired during the marriage and their share was equally split.

As an additional provision, during the process of divorce, women and their children can accommodate in the family house in accordance with a court decision which can be rendered if the woman is economically unable to support the children. In such case, the husband has to leave the house.

Married women can carry their maiden name, but they also have to get their husband’s surname. In the event of a divorce, if the woman wishes to carry her husband’s surname after getting divorced, the judge can decide for this. The only chance for the woman not wishing to carry her husband’s name is to apply to a court on the grounds of a decision of the European Court of Human Rights.

II. Societal Structure Resisting to the Change

The Civil Code is a revolutionary code and it has taken further steps in relation to the women’s rights after the revisions performed in following years. However, it is hard to say that the ideal level for the women’s rights has been reached to. The underlying reasons are the traditional paternalist approach of the legislator and the legislator’s lack of desire for the evolution of legal norms, in addition to the conservative structure of Turkish society. Most of the legislators, judges and prosecutors who are the appliers of the law are men.

According to sociologist Sumner, the attempt to regulate attitudes which do not originate in custom, as is the case of an order of law, is historically bound to result in failure. Laws relying on custom do

not constitute problem, as the sanction of both society and state exist. The sanctions support each other and people obey the rules because they abstain from both (apud Topculoğlu, 1961, p. 218).

When the process of family formation is analyzed, it is seen that social obedience to the traditionally accepted marriage rules is considered important. Besides societal rules, there are other factors in the formation of the family such as economic (production method: whether there is land ownership or not, income level), education level and legal factors, characteristics of the population (Timur, 1972, p. 56-62). Even if society’s rules regarding marriage are in contradiction with legal norms in that regard, these rules may still be applied as they are approved in terms of society’s moral standards. Since traditions are values that are strictly respected in conservative societies, objecting to the legal regulation does not constitute a moral problem. When the topic is sociologically analyzed, what is valued is not the rule of law, but traditions.

Family is an institution that cannot be easily affected and changed. The problems due to conflicts in the family are generally tried to be solved within the family (for instance, senior members of the family get involved) and the family applies to the court when all of the solution methods are tried and exhausted (Rouland, 1990, p. 71).

It is possible to see that the Civil Code changed the picture of society significantly; but it is also necessary to observe the resistance to this change. In fact, when a conservative institution like family is tried to be changed by law, it is certain that the institution will resist. However, although this is true to a limited extent, by looking at the period our country has lived, we may conclude that the social engineering will produce results in the long run with citizens mostly obeying legal norms as time passes, despite the resistance.

The main reason of this resistance is the existence of traditions which are outside the scope of and against the Civil Code. This is why the reception of the Swiss Civil Code is not sufficient by itself. Measures that will lead to the adoption of the main principles by the whole society are necessary. It is a known fact that people, especially women, are not aware of their rights and obligations and the provisions related to the equality that the code granted to them (Gürkan, 1996, p. 173). The low level of literacy, the persistence of old-fashioned beliefs and traditions without any change, beliefs and attitudes that the patriarchal order creates prevent the implementation of the existing legal order and cause both societal and legal problems. For instance, it is a fact that the Code of Obligations is applied in order to fill the gaps caused by the Civil Code’s inefficiency in regulating traditions (as in bride price and
betrothed in cradle) which are the source of concrete legal problem\(^3\). In these topics, it is not possible to apply customs, because these rules regarding traditions are “contra legem”.

If secondary law sources are applied, going against the revolutionary character of the new provisions, it is possible to have a decision\(^4\) which goes against the “general principles of law, legal security, social justice, balance of interests, the principle of protection of vulnerable ones, public interest and public order” (IŞİKTAÇ, 1999, p.81) Thus, the court examines the case as a technical problem and reaches a decision by the application of other rules, by analogy, without taking societal reasons into account. Here, in order to reach a fair decision, judges should be aware of social development issues (such as the case having traces of another territory’s traditions due to immigration despite taking place in a big city), traditions applied for centuries, social habits and social pressures.

### III. Solutions Related to Breaking the Social Resistance

It is possible to say that tradition has been broadly approved by society and that this tradition has been also accepted as a moral norm. Traditions and moral norms may become law in time, with the support of government. However, it is necessary to make constant effort to remove the traditions which go against the logic of the rule of law and human rights. The State should focus on this topic. Not relying only on the non-governmental organizations will show that the state is governed by the principle of the rule of law.

These norms appear explicitly as a societal phenomenon. It is possible to observe that these norms do not bear individual consciousness, but impose themselves on individuals from the outside. Social pressure occurs when there is resistance. The norms which are enforced for the sake of escaping from such pressure and living in harmony with society, “acquire some kind of consistency causing separation and isolation from the particular events that reflect themselves” (DURKHEIM, 1994, p. 39-40). Additionally, these norms, both as collective and as traditional, gain an authority through the education in the family, which teaches respect for these norms (Durkheim, 1994, p. 44). Acceptance of the broad application of all of these norms, despite being against our legal order, is supported.

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\(^4\) According to Rosanvallon (2004), no other grouping models that can operate apart from companies or associations exist in Turkish Civil Code which centers the state as family concerns the society, and centers the individual as it relates to the private sphere. See Pierre Rosanvallon, 2004, p. 96. In this respect, tribes which have different structure from state have no place in this legal order.
These norms which are fundamentally in contradiction with the legal regulations are so strong that they may be deemed sociologically as legal norms because “if the socio-economic balance that the social norms in the society holds, despite being non recognized legally, is supported by certain government and if sanctions are imposed, then these norms are – not as a part of positive law but rather as sociological-legal norms” (Özcan, 1998, p. 37). The referred government is not the government of the state. There are local, regional powers in addition to the historical past that lead to such long-established application of these norms.

The common characteristics of these applications which are outside the scope of the legal system are as follows: their requirement of patriarchal family structures, being broadly seen in the rural areas (Tuğac, 1974, p. 314), not giving value to people especially to women as being individuals, low education level, implementation in the areas not reaching equal economic wellbeing.

Our country started to use technology in production and it is seen that migration to urban areas from rural areas which is spread to the wide areas where rural life can be lived in urban areas; however, the changes that those factors bring do not affect the process of change of the traditional norms related to the family structure and, even when they affected, this process was still slow-going. Considering that the construction of illegal housing started in 1950s, modern family structures in these areas are not encountered, almost disproving the thesis suggesting that the family in the transition process will be modernized (Türkdoğan, 1993, p. 24). Since the modern institutions that will foster the transition and the regulations regarding urban life are deficient, immigrants coming from rural areas to urban areas bring their habits and relations they learned/established in the country to the forefront (Kıray, 1999, p. 367). This should be taken into account in the efforts to change the social structure, for the family is an institution contained inside four walls and it is hard to get into a family.

The State should focus on and take action in relation to the fact that the individuals’ attitude to each other becomes a non-codified law and such law contradicts the codified law. While taking measures in this respect, the subject should be analyzed from multiple perspectives and in detail. Otherwise, the existence of bride exchanges, inbred children due to marriage between relatives, uneducated children who were married very young through religious marriages and died while giving birth, children who do not have social security because of not having civil marriages, unhappy married people who could not chose their partners will continue. This situation is not limited to the family. There are lots of topics in

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the Civil Code that are similar: the issue of how to exclude girls from their inheritance right, for example, is still being discussed.

Although much progress was made in a period over 80 years, certain parts of society continue to live outside the scope of the application of the Civil Code. Legal norms create burdens but also grant rights. If a life is lived outside the scope of the legal norms, it is not possible to benefit from the rights. Not benefiting from these rights as an individual choice does not constitute problem. However, if people, especially women and children, have not made such a choice, they become victims due to obeying traditions outside the scope of the law.

**Conclusion**

Of course, the law may be used as an instrument and certain changes in society can be achieved through the law. However, expecting an overall social change through the law may mean too high an expectation. It is not possible to remove the above mentioned traditions only legally. In order to resolve the problem, the contradictions between the lived (non-codified) law and the codified norms should be addressed. Of course, the effective application of the legal norms is significant for the state governance in terms of filling the existing gap. Regularly applied norms create the impression of the necessity to obey the rules and that sanctions will be applied otherwise. However, there are other measures to be taken. Everyone knows these measures. Politicians, non-governmental organizations, governments of all time, and Turkish intellectuals have been talking about these for a long time. Gürkan (1969, p. 485-487) listed the factors preventing societal change as back as 1969. It is sad to observe that these problems have not been overcome in certain parts of society, after such a long time.

On the other hand, Turkey did obtain a more westernized law with the 2002 amendment of the Civil Code. The effort of intellectual women also affected the change, although it is not possible to say that all Turkish women have similar demands. In fact, it is possible to classify Turkish women in three groups: there are women who are aware of their rights and use them when necessary. Although very few, there are also educated, intellectual and conscious women who live beyond these rights. Additionally, there is a huge women population who live without the rights recognized by the Civil Code and who do not know their rights and have not used their right to education, having remained illiterate. It is the traditional women who are the target of the change through modernization. The traditional female image reflects the women who have no participation in production, do not have right
to decision, have a low social status, are illiterate, have concerns with regards to the future, are attached to the traditions and afraid of change.

The need, of course, is to create a legal order where people know their rights and obligations. Otherwise, social engineering will mean a bona fide but uncompleted effort. In order for reception of the Swiss Civil Code to reach its aim, laic education should not be given up, patriarchal understanding should be broken, the education of men should be addressed from a different perspective, women should be educated, micro-credit opportunities to women should be increased, the media should be used effectively, economic investment should be performed in less developed regions, terror should be terminated, a reform should be established for land distribution in East and South East Anatolian region, measures in relation to drought should be taken, migration should be terminated, infrastructure like roads, internet, telephone that would increase the communication opportunities should be established, the understanding that all humans beings should be considered as individual should be implemented. Only then will social change be expected to reach its aim.

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Abstract: Turquía es un país de conflictos, confusiones y esperanzas debido a su proximidad no sólo a Europa, sino también a la Medio Oriente. Donde Turquía tiene derechos democráticos y laicos, también incorpora tradiciones existentes desde la Edad Media. Naturalmente, esta situación es fuertemente en relación con el estatuto jurídico y social en Turquía. Hay que acentuar que un punto de vista gobernante muestra más atención a las tradiciones en los últimos tiempos. De ahí, esto afecta adversamente la posición de las mujeres: intentos de asesinato y violencia contra las mujeres han aumentado. Además, los matrimonios tempranos por razones religiosas sin fundamentos legales que conduce a la maternidad temprana, han explotado. La política de ver a un hombre diferente de una mujer y los derechos que han sido y están siendo aprobadas ha debilitado el estatuto social y jurídico de la mujer y se opone al principio constitucional de la igualdad y laicidad. Existe una oposición feminista visible contra estas imposiciones basadas en la moralidad. Esta oposición juega un papel influyente en la aceptación de algunas leyes en algunas áreas donde la sociedad muestra vulnerabilidad. En este trabajo se analizarán...
los logros jurídicos de la mujer desde la fundación de la República y también la inconsistencia que se afirma será examinada y evaluada desde el punto de vista de sociólogo legal.