

Turkey's and Slovenia's Family Law Regarding Marriage

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Abstract

As explained in this article, the family laws of Turkey and Slovenia are affected by their cultures and their past ways of thinking and ideologies; moreover, the development of Family Law has gained tremendous momentum in response to the changes that the institution of marriage and family has undergone in recent years. In light of these changes, if we compare Slovenia, which is at the intersection of Central and South-eastern Europe, and Turkey, which connects the continents of Asia and Europe, regarding Family Law, we will see that there are many differences, although there are similarities in some issues. The simplest example of their distinctions is their structural differences.

While Turkey's Family Law is included as a chapter in the 2nd book of the Civil Code¹ and is under the protection of criminal law, we see that Slovenia treats Family Law as a unique book.

In this study, I wanted to show the differences by comparing these two countries on more specific topics: Marriage, Cohabitation, and Same-sex partnership.

Keywords: Marriage, Engagement, LGBTI partnership, Adoption, Istanbul Contract

1. Family Law

The family is the foundation of law. The healthy development of the society and the peaceful and secure functioning of human relations can only be possible if the family institution is placed on solid foundations and an ideal legal arrangement is achieved.²

One striking feature of Family Law comes to the fore in the ideological dimension of this branch of law. While open to many different ideas and interpretations, in this branch, the conflict between religious law and secular law is seen most sharply. Monogamy and polygamy, marriage in a purely religious ceremony and civil marriage, the position of the woman against the husband and the child against the father, the situation of extra-marital relations and the children who are the products of these relations have always been the subjects of this ideological discussion. Moreover, Family Law has another sensitive dimension that extends to the field of morality (ethics): sensitive issues such as extra-marital cohabitation, surrogacy for hire, and similar. Differences of opinion in these areas also largely depend on people's morals. All these features turn Family Law into a unique branch of law, the like of which is not easily encountered in the Civil Code.

It should not be assumed that the Family Law has remained unchanged throughout history, as it is now regulated in the Civil Code. Family Law is constantly changing with the structure and function of the family.

If we look at the historical change in Turkey's family law, we see that the Ottoman emperor, who is the origin of Turkey, had the best legal order of his time. At that time, there were family law and marriage rules under the influence of Islam.

Courts were run by religious teachers called 'kadis'.

The feminism movements that emerged after the 1830s with the aim of protecting women's rights and were supported by the West, the increase in women's participation in social and economic activities, and the admission of women to all levels of educational institutions from primary school to university, and some family and economic problems caused by wars necessitated family law legislation. In addition to granting women more rights in marriage and other fields, the legal order has always remained under the influence of Islam.

¹Official Gazette: Nr : 24607, date 8th of Dec. 2001

²Turgut Akıntürk/Derya Ateş Karaman, Family Law, 16th Edition, İstanbul 2014, p.3.

With the change in the world order, the development of European states, wars and the slow collapse of the Ottoman Empire, the Republic of Turkey was proclaimed on October 29, 1923, and the caliphate was abolished on March 3, 1924.

Thus, the foundations of modern-day Turkey were laid. The fact that this republic is based on the Ottoman Empire and that some of it is in Asia causes the existing legal order to be under the influence of cultural habits and religious teachings. However, the fact that some of Turkey is in Europe ensures that it has a more modern legal order and a more egalitarian structure than other Islamic states.

For example, the habits that continue in most Muslim countries have lost their importance in Turkey and have become modernised. Egypt can be given as an example. In Egypt and many other Muslim countries, the bride is often neglected, even when deciding on her future spouse. Ninety percent of Egyptians are Muslims, who believe that religion is descended from the father; therefore, men can marry non-Muslims without significant problems. Problems can arise if a woman wants to spend the rest of her life with a man who is not a Muslim.

However, this is a rule that has lost its importance in Turkey. Nevertheless, because of past impulses, families in Turkey interfere with and restrict their daughters' marriages more than their sons'. They still adhere to their pre-marriage customs and do not support intercourse before marriage. Of course, it is not right to generalise on such matters, but most of them think it is not right to have a sexual relationship before marriage and act accordingly.

These modernised cultural habits entered our lives with the Westernization process during the Atatürk period. Because, shortly after the establishment of the Republic of Turkey, a significant change began to take place in the political, economic, and social fields. In the Ottoman state, Western societies had a closed society structure, although the developments and relations were closely followed. I want to talk about a family-state structure that is not interested in what other societies are doing regarding their culture and religion.

However, with the collapse of the Ottoman Empire and the roots of today's republic, starting under the leadership of Atatürk, Turkey underwent radical changes; both politically and socio-economically, it began to become more Westernised and assimilated. The customs coming from the Ottomans are the customs that have been assimilated and continued in the society for centuries, because we can still see the traces of these deep-rooted customs in our society. However, the openness to these changes/Westernization in the republican period greatly impacted Turkey being where it is now.

However, it should be known that the family is the part of society that is least affected by the change. Change has not been included in daily life with a system of sanctions. There is no coercion or exchange programme. This openness provided a free environment for those who desired change, so the family transformed what they learned with their efforts in the name of modern life as they wanted to use them in their lives. Although this situation sometimes has positive results, at other times, it has exaggerated and negative results. Nevertheless, the common thing in the change of many families is that no matter how modern or Western the family seems in the public sphere, it is seen as very simple, modest, and even loyal to its traditions in its inner space, because it should be known that Turkey's family law is not a branch open to changes.³

If we compare the family structure and law of Turkey, which is the bridge between Asia and Europe and adopts the cultural habits of both sides, with the family law of a highly modernised state in the middle of Europe like Slovenia, we observe that there are many differences as well as similarities.

For example, in Turkish family law, the stage of engagement before marriage also has a place in law.

2. Engagement

Engagement in law means that the parties declare that they want to marry each other. However, a ceremony is not required for the engagement. The presence of the will to be engaged is sufficient. Engagement takes place with the promise of marriage. For the engagement to be valid, there should be no general reasons that hinder the will of the parties, the promise of marriage should not be against morality, there should not be a definite obstacle to marriage, and marriage should not be impossible.

As a result of the betrothal, the betrothed obtain the following rights.

³Gamze Akbas&ArzuErÅşetin&VehbiTosun&ZuhalErdemir, 2020. "Westernization in Ottoman Culture and Built Environment," International Journal of Humanities, Arts and Social Sciences, Dr. Mohammad Hamad Al-khresheh, vol. 6(3), pages 113.

1. The right to claim compensation for loss of support and non-pecuniary damage,
2. The right to conclude a goods regime contract,
3. The right to abstain from hearing the case as a judge or arbitrator,
4. The right to abstain from testifying.

The parties can terminate the engagement relationship by mutual agreement, but if one of the engaged does not want to marry, he or she can terminate the engagement with a unilateral declaration of will without giving any reason. This is called 'disengagement' or 'breaking the engagement'.

Disengagement. There are two ways to break the engagement with a just cause and break the engagement without a just cause. If the breaking of the engagement is based on a just cause, the party breaking the engagement does not have to pay material and moral compensation to the other party. However, if the breaking of the engagement is not based on a just cause, material and moral compensation can be demanded from the party that broke the engagement. The ability to demand gifts back does not depend on the breaking of the engagement for a just or unjust cause. Gifts given can be demanded from the other party even if the engagement is broken for just or unjust reasons.

According to Article 120 of the Turkish Civil Code, 'If one of the engaged ones breaks the engagement without a justified reason or the engagement is broken for a reason that can be attributed to one of the parties; the faulty party is obliged to give the other an appropriate compensation in accordance with the rules of honesty and in return for the expenditures made for the purpose of marriage and the material sacrifices he has endured. The same rule applies to engagement expenses. Parents of the party entitled to indemnification, or persons pretending to be like them, may also seek appropriate compensation for their expenses under the same conditions.'

According to Article 122 of the Turkish Civil Code, 'If the engagement is terminated for a reason other than marriage, the unusual gifts given by the betrothed to each other or by the parents or those who act like them to the other fiancée may be demanded back by the givers.'

Engagement is a defined type of relationship in Turkish law; in Slovenian family law, this issue is not given much importance. Engagement is recognised in Slovenian family law, but it is mainly performed by the public as a tradition and a means of entertainment.

Another example is that a marriage in Turkey takes place in two stages. Islamic marriage is done, but as the civil law states, 'The validity of the marriage is not dependent on the religious ceremony.' In other words, religious ceremonies or imam marriages do not have any validity in law.

As I mentioned above, this is mostly a product of the fact that the Turkish state has been legally modernised and is still a state that adheres to Islamic customs, so this is continued in society as a cultural habit and a religious requirement. However, it should be noted that to be considered married before the law, a civil marriage other than a religious one must be performed.

There is no such custom in Slovenian family law or in Europe. However, the civil marriage ceremony of religious adherents in the church can be counted as an example. In fact, these changes are all about the habits of the countries from their own cultures and history. Most of the traditions in Turkey have continued since the religion of Islam was adopted by the Turks. When Islam was established in Turkish society, it created some of the customs and traditions that were well known among the people and became a tradition as they were, and thus the custom and tradition constituted one of the important sources of Islamic law.⁴

In the Western literature, tradition is referred to as 'the social heritage that creates a bond between the most heavily changing values and institutions in society and the old societies and living societies'. The share of the future and the power of society to connect old forms to new ones vary from society to society. Some sociologists say that revolutions destroy tradition, but that even after the most drastic revolutions, some traditions remain.⁵

Assuming that Turkey is also a state that lives together with its deep-rooted history, we can see that today's modernised family law and some issues of many different legal fields remain under the influence of religion.

One of the best examples of this is the laws regarding homosexual marriage and cohabitation.

⁴Osman Öztürk, *Mecelle in the History of Ottoman Law*, Istanbul 1973, p. 7.

⁵Hilmi Ziya Ülken, *Sociology Dictionary*, Istanbul 1969, p. 115.

3. Cohabitation

The number of new laws regulating extramarital affairs in the world has been increasing continuously in the last thirty years. This increase can be attributed to the fact that it has become extremely difficult and, at the same time, objectionable to keep couples from cohabiting outside the law.

In Europe, this movement started in the former Yugoslavia, where Kosovo (1984), Slovenia (1976), Croatia (1978), Bosnia and Herzegovina (1979), and Serbia (1980) (long before the Scandinavian countries) were the first to pass laws on cohabiting. For example, the law adopted in Slovenia on 26 May 1976 recognised that two persons of the opposite sex have the same rights as married spouses if they live together for a long time out of wedlock.

At the same time, this law includes the provision that ‘a continuous union between an unmarried woman and a man results in the parties having the same rights as in the case of marriage, provided that there is no legal barrier to marriage between the parties’ (art. 12).

If we compare this with Turkey, we see that civil partnership and same-sex marriage are not allowed or recognised in Turkey.

As mentioned above, a registered partnership is a new institution that has been accepted in a few countries, mainly in European countries.

The Slovenian 81 Laws of 1999 include a special binding rule for the model of cohabitation outside of marriage, different from the binding rule for marriage. In these foreign laws, the special binding rule determined for the model of cohabitation out of wedlock is only applied in the togetherness of people of different sexes.

In Turkey, cohabitation is still not recognised by law.

‘Why is cohabitation not legally recognised in Turkey?’ To answer the question, I think it is necessary to make small comparisons between Turkey and the countries where cohabitation is legally recognised, in terms of lifestyles, customs, economic conditions and social structure.

Conservatism, bigotry, and even simple religiousness are less common in Western countries. In their social structure, having illegitimate children or having sexual intercourse outside of marriage does not receive many negative reactions from society.

The general worldview and lifestyle of the Turkish people are quite conservative, unlike in Australia and Canada, where the culture of northern European and northern European immigrants is dominant. Having a common sexual life and a child between two individuals who are not married can cause reactions in society and even anger in some regions of Turkey.

In other words, we cannot say that there are no common-law cohabitants in Turkey, but this lifestyle is reserved for such a small group that it is far from reflecting the realities of Turkish society. This is my opinion, although it is somewhat apart from the legal framework.

Turkey’s population growth rate is already well above the European average. Far from encouraging people to have children, the Turkish government is teaching population planning to its citizens.

4. Same-Sex Partnership-Marriage

In Turkey, the social visibility of LGBTI (Lesbian, Gay, Bisexual, Transgender, Intersex) individuals and having a relationship with one of their own sex has increased in the last ten years. Despite this, neither Turkish society nor the Turkish legislature is ready to embrace LGBTI individuals and provide Family Law protection to couples with such relationships. *De facto* partnerships of people of the same sex outside of marriage cannot benefit from legal protection in Turkey. As a matter of fact, only heterosexual engagement and marriage are the types of relationships protected in Turkish Family Law. Family law protection is not provided for life partnerships other than this.

In Turkish law, marriage can only be established between a woman and a man. Therefore, the relations of two persons of the same sex are null and void in Turkish law.

For example, to talk about engagement in Turkish law, it is sufficient for the parties to promise to marry each other. In this context, it can be considered to apply the provisions of engagement to such unions that have the will and right to marry each other. However, according to the law, as we have mentioned, it can be a promise of marriage and to establish a valid marriage, so it can only give judgment between a woman and a man.

Accordingly, couples who have an LGBTI relationship will not be able to benefit from engagement protection. As a result, such couples will not be able to benefit from the protections of Family Law, such as property regimes, alimony, compensation, or inheritance rights.

Adoption by single people is possible in Turkish law. Accordingly, individuals with LGBTI relationships can adopt children alone and raise them together. However, an LGBTI individual who wants to adopt a child alone may face various difficulties. As a matter of fact, in an old decision of the Supreme Court, a mother divorced on the grounds of being a lesbian did not obtain custody of her child just because of her sexual preferences. As long as this approach prevails in Turkish law, it is legally possible for LGBTI individuals to adopt a child alone, but it is actually very difficult. However, in accordance with the United Nations Convention on the Rights of the Child, to which Turkey is a party, the sexual preferences of the adopter should not be considered as a criterion in the adoption process unless it is against the child's best interests.⁶

It is not expected that such a law will be approved in Turkey any time soon. I think it will take many more centuries for Turkey to be open to such thoughts.

The Constitutional Court of Slovenia legalised same-sex marriage and adoptions with immediate effect after finding a law under which only heterosexual partners can marry and same-sex couples cannot adopt children to be in contravention of the constitutional ban on discrimination. The court deliberated on the matter based on a constitutional complaint by two same-sex couples who failed in front of regular courts to marry or make the list of candidates for adoption.⁷

Referring to marriage, it said discrimination against same-sex couples 'cannot be justified with the traditional meaning of marriage as a union between a man and a woman, nor with special protection of family.'

The decision 'does not diminish the importance of traditional marriage as a union of a man and a woman, nor does it change conditions under which persons of the opposite sex marry. All it means is that same-sex partners can now marry just like heterosexual partners can.'

On April 21, 2016, the Parliament approved the bill that gives same-sex partnerships all marriage rights except joint adoption and in vitro fertilisation.

However, Estonia, Italy, Slovenia, San Marino, and Switzerland allow stepchildren where the registered spouse can adopt the biological child and, in some cases, the spouse's adopted child.

In addition to all these differences, the two laws have similar rules. One of them is the age restriction on marriage.

According to the regulation of the Turkish Civil Code, the legal age of marriage is 17. Since marriage is an official contract, the age at which people can marry without permission is the age of majority (i.e., 18 years old). In accordance with the regulation of the law, men and women over the age of 17 can also marry with the permission of their representative (parent or guardian).

Persons who have completed the age of 16 can only marry in the presence of extraordinary and significant reasons and with the permission of the judge. In this case, the consent of the legal representative is not sufficient for marriage. Whenever possible, the parents or guardians are heard before the decision. It is against the procedure and the law to allow marriage with incomplete examination and research without taking any action for the plaintiff's parents to be heard.

Extraordinary and significant reasons sought for permission to marry are not listed in the law. According to the decisions of the Supreme Court, it has been accepted as an important reason that 'the person who asks for permission to marry is being cared for by his relatives, does not have a regular life and will stop being dependent on others by getting married'.

Regarding cases of permission to marry, it is also a legal obligation that the person who is asked for marriage permission has completed the age of 16. A marriage permit case filed before the age of 16 is rejected without an extraordinary reason examination.

(Court of Appeals 2nd Civil Chamber 2007/19532 E, 2009/2335 F, 16.2.2009 T)

⁶On the principle of the best interests of the child, see Serozan, R.: Children's Law, Istanbul 2005, p.65 et al.

⁷Constitutional decision Republic of Slovenia, numb.U-I-486/20 from 16 June 2022 and numb. U-I-91/21 from 16 June 2022.

It is understood that the person who is asked to be allowed to marry did not reach the age of sixteen on the date of the lawsuit and the verdict. While the court should decide to reject the case due to the absence of the legal requirement, it is against the procedure and the law to allow marriage.

(Court of Appeals 2nd Civil Chamber 2007/16487 E, 2009/1771K, 09.2.2009 T)

One of the leading legal requirements for being able to be married in Slovenia is to be at least 18 years old (applicable for both partners). When a person is below 18 years old, parental consent will be required; couples getting married in this country cannot be related by blood or adoption.

The other similarity is that two witnesses must be present to witness the ceremony, and they must be present to show their passports to the registry office the day before the ceremony.

As we can see from these comparisons, Turkey, as well as Slovenia, is a country that is moving in this direction and is changing in every respect, although it has moved away from its cultural identity and religion enough to keep up with the modern society that is open to changes in family law. However, such changes were important to the public. I think that the influence of the people who run the state and the people who run the state has made Turkey move away from the Westernization policy more instead of pursuing modernisation. These, in turn, have led to the development of the country's family law and to many different issues.

For example, women and family issues did not fall off the agenda in 2019-2020; in connection with this, reports of violence, sexual assault, and murder were associated with supposed malfunctions in the legal system.

Inevitably, the changing structure, women's participation in the workforce, redefinition of social life, and expectations from marriage affect the whole family. The family life of individuals who get married within the traditional structure does not continue within the framework of the same traditional rituals. The fact that one of the parties does not accept the changing family structure may trigger problems. This situation affects not only the parties but also the social order and state policies. The issue of violence against women and domestic violence, which was discussed in the context of the Istanbul Convention, also brought about changes in state policies and the legal system. This agreement, signed by Slovenia on 08 September 2011 and entered into force on 01 June 2015, was abolished by a presidential decree with an application; although it had to be abolished in the same way, it came into force with a parliamentary decision in Turkey.

The fact that change and modernisation affected every field without exception and changed many of them to their foundations caused the family to be defended as the 'last stronghold'. Of course, the convictions that the nuclear family structure is a family model that is more open to the intervention of the states and that the capital has been carrying out activities for the preference of this family type for a long time are too dominant to ignore. However, the conservatism showed that the changing position of the family and especially the position of women caused the problems not to be seen. Most importantly, the existing family structure could not be criticised from a reasonable point of view.

The belief that men and women complement each other fed the belief that the family could only be disrupted from the outside. When we look at the criticisms of the Istanbul Convention today, the belief that the family is being tried to be corrupted by outside intervention, that is, by the hand of the West, is evident. This old way of thinking of the conservative side generally does not exist in the new generation, but it manifests itself in the older ones.

This situation causes the problems arising from structure and change in the Civil Code and family law to be ignored.

Another criticism of this convention, which Slovenia and many European countries also recognise, is that it tries to legitimise unions other than heterosexual marriage.

In the context of our subject, the issue of violence, which the Convention draws attention to today, deals with the violence of all individuals living in the same house against each other. In this context, the approach recognises unions other than men and women and thus affects domestic law.

Conclusion

Even though family law is the branch of law most open to change, it is understood that it is also one of the least likely branches of law to change in Turkey.

If the existing problems continue to be ignored in Turkey and society is not modernised, my biggest concern is that Turkey will return to the Arab countries, which are much more closed and have very Islamic legal rules, unlike Slovenia and other European countries.

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