Cinsiyetlendirilmiş Öznelik ve Meşruiyetin "Çevirisi": 1926 Tarihli Eski Türk Medeni Kanunu Örneği

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Öz

Bu makalenin amacı, 1907 tarihli İsviçre Medeni Kanunu'nun çevrilmesi yoluyla yapılan ve 76 yıl yürürlükte kalmış olan 1926 tarihli Eski Türk Medeni Kanunu'nun "nesebi sahih çocuklar" ile ilgili maddelerinin çevirisini incelemek suretiyle hukuki bağlamda cinsiyetlendirilmiş özneliğin ve meşruiyetin tarihsel inşasını araştırmaktır. Eski Türk Medeni Kanunu, 20. yüzyılda yeni kurulmuş bir ulus-devlet olan Türkiye Cumhuriyeti'nin modernleşme/batılılaşma hedefi bağlamında, özellikle de kadının statüsünü iyileştirdiği gerekçesi ile "bir "devrim" olarak nitelenmiş, övgüyle karşılanmıştır. Ancak, "nesebi sahih çocuklar" konusundaki kanun maddelerinin çevirisinin karşılaştırmalı incelemesi, ne İsviçre Medeni Kanunu'nun ne de Eski Türk Medeni Kanunu'nun toplumsal cinsiyet eşitsizliğinden azade olduğunu, Eski Türk Medeni Kanunu'nun çeviri yoluyla hazırlanması sürecinde kaynak kanun olan İsviçre Medeni Kanunu'ndaki toplumsal cinsiyet eşitsizliğini ihlal eden maddelerin "aynen" çevrildiğini, böylece Türk Medeni Kanunu'nda, İsviçre Medeni Kanunu'nda olduğu gibi, annenin/kadının dışlanarak çocuğun meşruiyetinin tek kaynağı olarak babanın/erkeğin esas alındığı/imtiyazlı kılındığı bir hukuk dilinin benimsendiğini göstermiştir. Bu makale, gerek Türkiye'deki cinsiyetlendirilmiş öznelik ve meşruiyetin tarihsel inşasının izini sürmek ve bu inşayı sorunsallaştımak gerekse batı hukuku ile toplumsal cinsiyet eşitliği arasında olduğu varsayılan "yakın ilişki"yi sorgulamak açısından çevirinin kilit önemini ortaya koymaktadır.

Anahtar kelimeler: Çeviri yoluyla kanun yapmak, çeviri tarihi, toplumsal cinsiyet, öznelik, medeni kanun.

Gender(ed) Subjectivity and Legitimacy in "Translation": The Case of the Old Turkish Civil Code of 1926

Abstract

This paper aims to investigate the historical construction of gendered subjectivity and legitimacy in the context of law through the analysis of the translation of the articles on "children with true descent" in the old Turkish Civil Code of 1926 which was made through the translation of the Swiss Civil Code of 1907 and remained in force for 76 years in Turkey. The old Turkish Civil Code was praised as a "revolution" with respect to the new Turkish nation-state's aim of modernization/westernization in the early 20th century and especially on the grounds that it improved the status of woman. However, a comparative analysis of the translation of the articles on "children with true descent" demonstrates that neither the Swiss nor the old Turkish Code was free of gender inequality, that in the old Turkish Civil Code those articles of the Swiss Civil Code which violated gender equality were translated rather "literally", adopting a legal language which privileged husband/man over wife/woman as the only source of legitimacy for a child, as was also the case in the Swiss Code. The present article shows the critical importance of translation in tracing and problematizing the historical construction of the

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relationship between gender subjectivity and legitimacy in Turkey, as much as in questioning the presumed "close" link between western law and gender equality.

Key words: Lawmaking through translation, translation history, gender, subjectivity, civil code.

1. Introduction

Translation has always been one of the major shaping forces in Turkish history, society and culture. An outstanding evidence of this force is the practice of lawmaking through translation (Öner, 2013; Öner & Karadağ, 2016), beginning from the very first years of the Turkish nation-state and dating back even to the second half of the 19th century Ottoman Empire. The Turkish Civil Code of 1926, referred to as the old Turkish Civil Code was also a translation, a law made through the translation of the Swiss Civil Code of 1907.

The old Turkish Civil Code was accepted at the Grand National Assembly of Turkey on 17 February 1926 and was enacted on 4 October 1926. In the preamble of the Turkish Civil Code, Turkish Minister of Justice Mahmut Esat Bozkurt stated that The Swiss Civil Code was chosen on the grounds that it was "the newest, most complete and populist code" (Bozkurt, 1926) adding that "Turkish nation who is determined to adopt modern civilization must keep up with the requirements of the modern civilization at all costs" and that "this is compulsory for a nation-state to survive." (Bozkurt, 1926). The translation of the Turkish Civil Code from the Swiss Civil Code was marked with the new Turkish nation-state's aim at modernization and westernization and was regarded as a revolutionary step with regard to this aim. The old Turkish Civil Code was especially appraised on the grounds that it secured the equality between woman and man. The Code remained in force until 2002 when it was replaced by the new Turkish Civil Code.

As explicit in the preamble of the Code, this translational act was regarded compulsory for the Turkish nation-state to become one of the nations of modern civilization. The old Turkish Civil Code replaced *Mecelle*, the religious legal text remaining from the Ottoman Empire. The fact that a western legal code was selected as the source code is meaningful in the Turkish historical context in which a newly established, secular nation-state was trying to distance itself as fast and as fundamentally as possible from the religion based empire and its institutions, especially its law. In "Türk Medenî Kanunu Nasıl Hazırlandı" (How Was the Turkish Civil Code Drafted) Mahmut Esat Bozkurt states that "Turkish nation is a member of the civilized word….With this respect, the law system it would adopt is the law system of the civilized world" (Bozkurt, 1944: 10). According to Hıfzı Veldet Velidedeoğlu, the reasons for the adoption of a European civil code are that the old law system was too backward to meet the requirements of the day, that it was necessary to have a unity in the laws to be applied to all citizens about issues such as marriage, divorce, guardianship, inheritance, no matter to what religion and sect the citizens belonged to and that there was a political necessity to establish a new law system in Turkey after the abolition of the capitulations in Lausanne (Velidedeoğlu, 1944: 404). These remarks illustrate the historical and socio-political conditions in which a European civil code was decided to be translated.

The Turkish Civil Code of 1926 remained in force for 76 years. In the course of time it had been the subject of much debate and certain amendments were undertaken by the legal authorities. The old Turkish Civil Code had been criticized especially on the grounds that it did not provide full equality between women and men. Accordingly, most of the amendments undertaken since 1926 concerned the articles about gender. In "Türk Kadınının Eski ve Yeni Hukuktaki ve Gerçek Hayattaki Durumu" (The

Situation of the Turkish Women in the Old and New Law and in Real Life), Velidedeoğlu mentions that in the old Turkish Civil Code the number of the articles which create "legal inequality between husband and wife are considerably high" (Velidedeoğlu, 1968: 21). Especially in 1990s the public pressure concerning these articles increased and women's organizations criticized state authorities for not abolishing the articles that harmed women. As a result, the articles regulating the wife's profession and craft and the one regulating the surname of a wife were abolished in 1990 and 1997, respectively. In 2002 the old Turkish Civil Code was completely abolished and a new Code was adopted.

What does the analysis of the translation of the old Turkish Civil Code indicate with respect to the question of gender? This is the question pursued in the present paper which argues that the way the gender-related articles were translated in 1926 is explanatory about the historical construction of gender subjectivities by/in the law in Turkey. Each word, sentence (not) omitted, retained or changed in the translation tells "something" concerning the relationship between gender and law, especially law made through translation. To observe this relationship, the present paper focuses on the articles concerning "legitimacy of children" which strikingly shed light to the construction of motherhood and fatherhood and the concept of legitimacy in the context of law and gender.

2. Language/Translation as a Reflector/Oppressor and the Question of Gender in Law

The idea that "language defines our possibilities and limitations, constitutes our subjectivities" (Black and Coward in Cameron 1992: 162) is crucial for investigating the relationship between law, legal language and gender. Sexist language is not only "an offensive reminder of the way the culture sees women" but also is "positively harmful in and of itself" (Petersson, 1999). Thus, language is both a reflector of the oppression of women in a society and also a cause of oppression. Therefore, the language produced through translating a legal code matters to a great extent in terms of the gender subjectivities a code constructs. It is precisely this interrelation scrutinized in the present paper: What kind of a legal language was used in the translation of the old Turkish Civil Code on the articles about the legitimacy of children, as the most striking example through which it is possible to trace the historical construction of gendered subjectivity and legitimacy in Turkey?

It cannot be said that the decision of the Turkish authorities to make the Civil Code through translating the code of a "foreign" country had never been criticized. On the contrary, it gave rise to a strong discomfort on the part of the ones who argued that a foreign code would not meet the needs of, would not suit the Turkish nation. Of the three objections Bozkurt recounts, the third objection concerns polygamy, which in Bozkurt's view was regarded as indecency by the contemporary, civilized nations (Bozkurt, 1944: 12-14). Bozkurt also tells two anecdotes from his visit in the women prisons to underline the revolutionary nature of the translated Turkish Civil Code for women as opposed to the existing, religion-based law system. Telling the story of a woman who killed the child of his husband's second wife out of jealousy, Bozkurt asserts that "both the one who was killed and the one who killed were the victims of our old institutions of law" (Bozkurt, 1944: 15).

This is a very striking statement which demonstrates the impact of law on the lives of people who are subject to it. Bozkurt was right. That woman was the victim of the old law system which permitted polygamy. However, was the then new Turkish law system, established through the translation of the "modern" Swiss Civil Code in Bozkurt's words really free of oppression in terms of gender? Moreover, was the Swiss Code itself free of that oppression? A closer look at the textual make-up of the Code(s) displays the reverse, as I shall demonstrate in what follows.

3. Constructing Gendered Legitimacy: "Legitimacy of Children" in Translation:

"Nesebi Sahih Çocuklar" (Children with True Descent) is a substantial part of the old Turkish Civil Code (OTCC) regulated under the subtitle of "Relatives" (Tepeci, 1946: 212-277). I believe this part, the translation of "Des Enfants Légitimes" (Legitimate Children) of the Swiss Civil Code (SCC) (Rossel, 1967), is a crucial part to observe and trace the construction of gender subjectivities, of fatherhood, motherhood and the concept of (il)legitimacy in the context of law.

A "legitimate child" is defined in the source code, i.e. the Swiss Civil Code of 1907 (SCC), as follows:

> L'enfant légitime porte le nom et acquiert le droit de cité de son père. (SCC, art. 270 in Rossel 1967: 134)
>
> [Legitimate child bears the name of his father and acquires the citizenship rights of his father.]

The translation of Article 270 of the Swiss Code is Article 259 of the Turkish Code:

> Nesebi sahih olan çocuk babasının ismini taşır ve onun vatandaşlık haklarına malik olur. (OTCC, art. 259 in Tepeci, 1946: 235)
>
> [The child with a true descent bears the name of his father and acquires the citizenship rights of his father.]

In the Turkish translation, the word "légitime" (legitimate) is replaced with the phrase "nesebi sahih", literally meaning "with true descent". Here it should be pointed out that although the terminology seems to differ in the two codes, "nesebi sahih çocuk" (child with a true descent) continued to be used interchangeably with "meşru çocuk" (legitimate child) in Turkish until the law reform in 2002 through which these terms were abandoned. Despite the difference in terminology, the translation of above articles shows that both the Turkish Code and the Swiss Code construct the father as the only source of legitimacy.

The discrimination between a "legitimate child" and an "illegitimate" one is made in Article 252 of the Swiss Civil Code:

> L'enfant né pendant le mariage ou dans les trois cents jours après la dissolution du mariage a pour père le mari. l'enfant né après les trois cents jours n'est pas présumé légitime. (SCC, art. 252 in Rossel 1967: 127)
>
> [The child which was born during the marriage or within the three hundred days after divorce has the husband as the father. The child who was born after three hundred days is not presumed legitimate.]

In the Turkish Code, the above article was "literally" translated as follows:

> Evlilik mevcut iken veya zevalinden itibaren üçyüz gün içinde doğan çocuğun babası, kocadır. Bu müddet geçtikten sonra, asıl olan, doğan çocuğun nesebi sahih addolunmamaktadır. (OTCC, art. 241 in Tepeci, 1946: 213)
>
> [The child which was born during the marriage or within the three hundred days after divorce has the husband as the father. The descent of the child who was born after three hundred days is not presumed to be true.]

Similar to the first pair of articles presented above, Article 252 of the Swiss Code and Article 241 of the Turkish Code take the father as the sole subject who legitimizes an offspring, excluding the mother from playing a determinative role in the recognition of the child by the state.

The third example to be given as a highly explanatory one with respect to the patriarchal nature of both Codes under scrutiny is Article 302 of the Turkish Code which "literally" corresponds to Article 315 of the Swiss Code:

> L'action en paternité est rejetée lorsque la mére vivait dans l'inconduite à l'époque de la conception. (SCC, art. 315 in Rossel 1967: 151)
>
> [If a woman had been living in misconduct at the time of conception, paternity suit is rejected.]
>
> Ananın, gebe kaldığı zaman iffetsizlikle meluf olduğu sabit olursa; babalık davası, reddolunur. (OTCC, art. 302 in Tepeci 1946: 264)
>
> [On the face of the evidence that a woman had been living an indecent life at the time of conception, paternity suit is rejected.]

The one-to-one correspondence between the Swiss Code and the Turkish Code is obvious once again: Both Codes reject a paternity suit if the woman/mother "lives in misconduct"/"lives an indecent life" at the time of conception, showing no interest in the life of the father in anyway.

As above examples illustrate, what marks the strategy of Turkish lawmakers in 1926 for translating the articles that regulated legitimacy/descent of children is a "literal" translation of the articles of the Swiss Code, with shifts of minimal significance. Thus the Turkish Code transferred the strictly patriarchal gender constructions of the Swiss Code as literally as possible.

The interesting point with regard to the translation of the articles on the descent of child in 1926 is the striking commonality -even sameness- between the source code and the target one. Precisely for this reason, in the context of gender, it is difficult to make sense of the objections to the Turkish authorities' decision to translate a foreign civil code, in other words, the decision to make a civil code through translation of a foreign code, on the grounds that a foreign code would not fit local culture and society. For, as the very "literal" translation of the articles in question demonstrates, there is a surprising harmony between the source and target codes, between the foreign code and the local one, when it came to the construction of the legitimacy of a child. Both codes constructed the father as the mere source of legitimacy of a child. Similarly, both codes established the institution of marriage as the only legitimate form of relationship between women and men, which, in turn, became the only legitimate form in which a child can be recognized by the state, recognized as the legitimate citizen, subject (of the state).

One wonders the reason of the objections, for the construction of motherhood and legitimacy/decency in this way does not seem to be inharmonious neither in terms of the previous, religion based law which remained from the Ottoman Empire, nor that of the gender roles the then new nation-state, seemingly, wished to create. Moreover, it is critical to observe also that the Swiss Civil Code of 1907, praised as the most "civilized", most "modern" civil code by the Turkish lawmakers was far from reflecting/constructing equality between woman/wife and man/husband, from being free of gender inequality.

The pair of articles discussed above attest to the harmony between the source code and the target one in regulating the legitimate gender relations within the tension between decency-indecency and this necessitates questioning the correlation between gender equality and modern/western law - best representative of which was presumed to be the Swiss Civil Code in view of the Turkish lawmakers in 1926.

The intricate relations between western law, gender and patriarchal power is discussed by Ursula Vogel in "Whose property? The Double Standard of Law in Nineteenth Century Law" where she argues that what was at stake in the construction of the law, which freed man of adultery while imposing a rigid regulation upon women, was men's proprietary demands on women's sexuality (Vogel 1992: 154). Vogel maintains that the law "defined the status of a husband by a right of exclusive access to the wife's body while conceding to her lesser, conditional claims" (Vogel 1992: 163). Similar to this, as obvious in the Article 315 of the Swiss Civil Code and its "literal" translation, i.e. Article 302 of the old Turkish Civil Code, female sexuality becomes a domain to be watched over by the state, to the extent that an "indecency" in that domain would result in the exclusion of the child of such woman from the "legitimate" limits of the state. So, the child whose mother was "indecent" at the time of conception, or the child of an unmarried mother is called, as Martine Spensky underlines "filius nullius" ("nobody's child") (Spensky, 1992: 102).

Accordingly, the "harmony" between the target and source codes in terms of the legitimacy of the child urges one to suspect the claim that the Swiss Civil Code brought a ground-breaking transformation with respect to gender. In "The Ottoman and Islamic Substratum of Turkey's Civil Code", Ruth A. Miller argues that "one possible reason for the relative success of the adoption of the Swiss Civil Code into Turkish Society … as well as for the disappearance of the early dissent is precisely that the Turkish Code was not a mere translation of the Swiss, but a somewhat flexible adaptation" (Miller, 2000: 336, emphasis mine). At the end of the article in which she analyses the shifts or alterations in translation of the articles concerning registration/declaration of birth/death, marriage and divorce, Miller argues that the drafters of the Turkish Civil Code "wanted to preserve, more than the original Swiss Code would have allowed, an Ottoman inspired relationship between the state and its citizens, while at the same time introducing all sorts of new definitions and ideas about what personality meant and what, conceptually, the relationship between a citizen and the state should be" (Miller, 2000: 356). According to Miller, what the Turkish lawmakers did was to change the "abstract, definitional concepts" of Turkish civil life but interfere as little as possible in the daily, practical domain (Miller, 2000: 356), thus creating, in marriage for instance, "a hybrid Ottoman-Swiss version of Turkish Republican Marriage" (Miller, 2000: 345). So, what Miller's analysis implies is that the Turkish drafters desired to change the society, but as strong as this was their desire to preserve the status quo in the everyday, practical domain. What makes Miller to come to this conclusion is the deliberate changes in translation, which were, in her view, "made with previous Islamic ideas as their sources" (Miller, 2000: 361).

The analysis of Miller seems convincing. However, when we re-consider it in the face of the textual comparison undertook above, i.e. in that of the translation of the articles on descent of child, it comes out that Miller assumes a complete, essential contradiction or difference between the Swiss Civil Code and the Turkish society of that time with respect to gender. However, as the unique harmony between the articles that regulate the legitimacy of child demonstrates, the Swiss Civil Code and the then existing socio-cultural values of the Turkish society need not be contradicting in every domain. Moreover, as the very "literal" translation of the articles on legitimacy/decency – which does not involve any deliberate change on the part of the Turkish law makers - demonstrates, the two cultures, the two law systems and legal languages were in no contradiction with respect to the construction of gendered legitimacy in Turkey.

Not unrelatedly, Miller bases her analysis on the idea that the Turkish Civil Code was not a "mere translation" but a "flexible adaptation". It is interesting to observe that Miller assumes a clear-cut boundary between "mere translation" and "flexible adaptation". With regard to Article 99 of the Turkish

Civil Code about marriage process, for instance, Miller states that "the organization of the concepts and the way in which they interact with one another is to a large extent Swiss. The authorities which impose the concepts… and their specific foundation are borrowed straight from Ottoman" (Miller, 2000: 350). This is not a "mere translation" according to Miller. In my view, however, this is what translation, especially lawmaking through translation, is all about.

Moreover, the making of the old Turkish Civil Code through translating the civil code of a foreign country was not an immediate decision taken in a vacuum. The historical and socio-political account of the circumstances surrounding such a decision was given by Mehmet Tevfik Özcan who mentions that before the decision to make the Turkish Civil Code through translating the Swiss Civil Code, two commissions had been founded in 1923 for the codification of civil law but due to the fact that the drafts prepared by these commissions had been dominated by the elements of Islamic law, they were abolished in 1925 (Özcan, 2004: 462-463). After this attempt was the decision to translate the Swiss Code made. In his article, Özcan also states that besides the Swiss Civil Code, the French and German Civil Codes were among the alternatives considered by the Turkish drafters but it was the Swiss Civil Code which was both an explicit product of national unification as compared to the French one and whose pragmatic nature would lend itself to be adapted to new conditions as compared to the German one (Özcan, 2004: 464-471).

Interestingly, after depicting the political and historical aspect of the translation of the Turkish Civil Code in a diligent way, at the end of his article Özcan also mentions that this translation was not "a mere translation" (basit bir çeviri değildir) and explains what he means by not being a mere translation: "it was a legal text produced by adapting the Swiss code as much as possible to the social life of Turkey by finding a way of conciliation between the systemic needs and the requirements of reform" (Özcan, 2004: 473). So, although Özcan also excludes this kind of adaptation from the limits of translation, he, does not seem to be surprised, like Miller, in the face of the fact that the Turkish Civil Code was not a mere translation and points to the existence of reconciliation, whose nonexistence, rather than existence, would be surprising in any case of legal code made through translation. However, no reconciliation seems to have been necessary for the translation of the articles on "legitimate children"/"children with true descent" examined above and abolished only in 2002 with the new Turkish Civil Code.

Article 259 of the old Turkish Civil Code which defined a "child with true descent" was transformed into Article 321 in the new Turkish Civil Code of 2002 that radically dropped its discriminating tone, adopting an equal attitude both to the mother and the father:

> Çocuk, ana ve baba evli ise ailenin; evli değilse ananın soyadını taşır. Ancak, ana önceki evliliğinden dolayı çifte soyadı taşıyorsa çocuk onun bekârlık soyadını taşır. (NTCC, art. 321 in Türk Medeni Kanunu: 88)
>
> [If the mother and the father are not married, the child acquires the surname of the mother. However, if the mother has two surnames due to her previous marriage, the child acquires the maiden name of the mother.]

In the new Turkish Code the article that refused to recognize a child born from a woman and man who are not permitted to get married by law or from the adultery of a married woman and man, i.e. Article 292 of the old code was totally omitted. A very similar example is the omission of Article 302 of the old Civil Code, which rejected the paternity suit in case of "indecency" of the mother at the time of conception, and of Article 241, which proclaimed the descent of a child who was born after the three hundred days of a divorce as "not true".

Conclusion

Focusing on the analysis of the translation of the articles on "legitimate children"/"children with true descent", the aim of the present paper has been to trace the historical construction of gendered subjectivity and legitimacy in Turkey in the early 20th century. Made through the translation of the Swiss Civil Code of 1907, the Turkish Civil Code of 1926 was then praised as a "revolution" in the context of Turkish westernization and modernization and on the grounds that the translated law improved woman's status. However, the analysis of the articles concerning legitimacy has attested to an obvious violation of gender equality in the Turkish Civil Code. It has also demonstrated that the related articles of the Turkish Code were the "literal" translations of the corresponding articles of the Swiss Civil Code as the source of violation of gender equality in the present case.

According to the old Turkish Civil Code and to the Swiss Civil Code, the father was the only source of legitimacy. Both Codes recognized the father as the sole subject that legitimized a child and excluded the mother from playing a determinative role in the recognition of the child as a "legitimate subject" by the state. In similar vein, both the Turkish and Swiss Codes rejected a paternity suit if a woman "lived in misconduct"/"lived an indecent life" at the time of conception without paying attention to the way the father lived his life. Thus, the strictly patriarchal constructions of gender in the so-called modern Swiss Code were "literally" translated/transferred into the Turkish Code. The obvious result was the gendering of legitimacy through law privileging men over women, father over mother, male subject(ivity) over female subject(ivity) in the Turkish legal system.

I believe the present case shows not only the critical importance of translation in tracing the historical construction of gendered subjectivity and legitimacy in Turkey but also the necessity of questioning the allegedly "close" link between gender equality and western law, as was manifest in the discourse of the Turkish lawmakers in 1926.

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