# THE RECEPTION OF WESTERN LAW IN TURKEY

## WORKING PAPER

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*Receptions of Law — Historical Considerations.*

1. The problem of the reception of foreign law is one of the most fascinating presented by Western legal history where the texts of post-classical Roman law were moulded by the *usus modernus pandectarum* Much light has been thrown upon this development by the recent work of Koschaker. This showed that the character of this fundamental upheaval in Western law was largely accidental : that political considerations played their part and that the rational or logical element exercised a comparatively small influence.

*Modern Reception*

2. The reception of Western law in Turkey in 1926 provides a unique modern example, inasmuch as this reception was wholesale and deliberate. For these reasons a study of this reception is particularly valuable. It will throw light upon the technique of reception, and upon its practical possibilities and limitations and will thus provide new material for the legal historian, the sociologist, quite apart from the comparative lawyer. The latter will be able to assess, on the basis of a living example, to what extent legal institutions are capable of being transplanted without changing either the nature of the institution or the society in which it must operate.

*Sources adoped*

3. It must be remembered that the reception which took place in Turkey was not, in a sense, the first impact of Turkish law with that of the Western world. But the attempts to modify Turkish law during the 19th century were piecemeal and remained strictly within the framework of an indigenous system of law. The reform of 1926 was totally different. The old legal system was abrogated *in toto*. Private law was henceforth governed by a Code closely modelled upon the Swiss Civil Code. Since the part of the Swiss Code of Obligations dealing with commercial law was not yet introduced in Switzerland, a separate Commercial Code which was based upon a mixture of various legal systems, but mainly German and Italian, took its place. Today a new draft Code of Commerce is before parliament. The Code of Civil Procedure of Neuchâtel was adopted and the swiss Law of Bankruptcy and Execution. The Criminal Code relies upon Italian and German law ; the Code of Criminal Procedure is also German in origin.

*General Problems of Reception*

4. When the system of laws of one country is taken over by another, especially if it appears in the form of a Code, three questions arise at once : firstly, how does it fit into an entirely different background ; secondly, how is the linguistic difference overcome by the translator ; and thirdly. how did the local courts succeed in interpreting and applying an alien law ?

*Choice of Legal System*

5. As regards the first question, it may cause surprise, at first sight, why Swiss law was chosen. Admittedly, the Swiss Civil Code represented the most modern European codification in matters of private law. On the other hand it is a Code which is peculiarly adapted to the multitude of cantonal customs and competences : it uses homely rather than technical language which, therefore, lends itself less easily to translation, and it avoids intentionally the system of juridical conceptualism which characterizes the German Civil Code of a slightly earlier date. Yet Turkish lawyers had been orientated to-

wards France and Germany rather than towards Switzerland, and the choice of the Swiss Civil Code must be attributed to the predilection of certain leading personalities, (" les Lausannois ", as Sauser - Hall has called them — especially Mahmut Esat Bozkurt), rather than to the special suitability of the Code. The reason, which is sometimes given, that it favours democratic equality, by allowing freedom of contract, freedom of testation, equal rights on intestacy and equality of sexes seem less convincing in the light of the German Code, in particular.

As regards the other Codes, the choice of the law of Neuchâtel is a little perplexing, but here, as in the case of the Civil Code, the fact that it exists in a French version may have been of importance. In the sphere of Criminal Law, reliance upon Italian scholarship, which was specially advanced during the relevant period, may have been decisive ; the Commercial Code shows the work of many hands and is a work of a different character. It is eclectic.

*Language difficulties*

6. As regards the second question, namely that of language and translation, the present discussion will be confined to the Civil Code. Its model, the Swiss Civil Code, exists in three versions, German, French and Italian. It is well known that, among themselves, these versions do not always agree. Thus the celebrated art 1 of the Swiss Code (henceforth called ZGB) states in subsection (1) that the law applies to all questions for which it contains a provision " 'nach Wortlaut und Auslegung ". The French text says " 'la lettre ou l'esprit " ; the Italian " la lettera od il senso ". The Turkish Code (henceforth called CCT) adopted the French meaning which, may be, itself, an inadequate expression of the correct meaning.

Again in art 1 (3) it is stated that in the absence of an express rule of law, whether statutory or customary, the judge must apply such a rule as he would enact if he were the legislature. In so doing he must follow " bewährte Lehre und Überlieferung ". The French text says : :" des solutions consacrées par la doctrine et la jurisprudence " and gives thereby undue emphasis to case law, to the detriment of customary law.

The latter solution was taken over by the CCT, but not without further modifications. Art 1 CCT provides : " Le juge profite de la doctrine et des décisions judiciaires ". This is understandable since, as will be shown later on, ancient customary law cannot be resorted to.

7. Other deviations between the various Swiss official texts are more technical, but none the less significant. Art 323 (2) ZGB German version excludes *Zusprechung eines Kindes mit Standesfolge* (déclaration de paternité) i.e. a judgment declaring the illegitimate father to be a quasi-legitimate parent against a defendant father provided that he was married to another person at the time when he cohabited with the illegitimate mother. The French version, which was followed by the CCT, omits the proviso, thus extending the rule considerably and possibly unjustifiably.

8. Other articles involving the uncritical transplantation of a defective original version are art. 514 CCT (= art. 534 (ii) ZGB) " transfer of " possession " instead of transfer of ownership ".

*Interpretation*

9. The third problem is that of interpretation. It is well known that common law countries and also — though to a lesser extent — those following the civil law — rely on unwritten law to fill the gaps in statutes. The form in which this process takes place may differ — judicial decisions in the common jurisdictions ; customary law in the civil law jurisdictions, although this latter source tends nowadays to yield second place to " la jurisprudence ".

Art. 1 ZGB (= art. 1 CCT), cited above, follows this practice. See also art. 5 (2) ZGB (cf. art. 7 CCT), which refers to cantonal law as a limited subsidiary source. However, with the total abrogation of the old Turkish law, in so far as it was incompatible with the new Code, much of customary law and of the practice of the courts lost its validity as well (art. 43 of the Introduction Law) and, as a result, the process of filling gaps in the new Code had to be adapted to the situation. While some customs may have lost their legal force with the advent of the new system, others have not, and

the task of bringing order into this chaos lies with the Supreme Court. The Court combines, thus, the functions of a quasi-legislature envisaged in art. 1 with that of establishing what customs have survived as law or have arisen recently.

*Survival of old law*

10. In the sphere of land law, in particular, the Courts have continued to draw on the old law. Reference may be made to *yarıcılık, ortacılık, örf-ü belde, paftos* and includes separate property in trees. See AU 4.6.1947, 41-17.

See also AU 16 May 1941-5 (" simulation " in transactions affecting land) — See Law No 2280 of 1933.

Indeed, old customs and concepts derived therefrom may imperceptibly influence the interpretation of otherwise perfectly straightforward provisions of the Code. Thus arts. 938-940 ZGB (= arts. 906-908 CCT), dealing with the claim by the non-possessing owner against the possessing non-owner for the return of the object and possibly damages were treated until 1950 as contractual, following the institution of " ecrimisil " which is a claim by the landlord against the tenant, which it certainly is not in Swiss law.

11. Such broad concepts as bonnes moeurs, ordre public and abuse or right (art. 2 (2) ZGB, = art. 2(2) CCT which may be more restrictive, reflect, more than any other, the social and moral values of a society and had to be re-appraised by Turkish courts. See eg. art. 52(3) ZGB ; art. 45(2) CCT.

It would be interesting to see to what extent the practice of the Supreme Court has either developed the provisions of the original Swiss law in a direction which differs from that of the Swiss Federal Tribunal and to what extent it has let in previous customs and legislation so as to modify the text of the Code. See the Law of Associations, 1909, s. 7 Registers of Births, Deaths, Marriages : art. 39(2) ZGB = art. 35(11) CCT. — Law of 14 August 1914 (Sicilli Nüfus Kanunu)

*The authority of foreign writers*

12. Both the Swiss and the Turkish Code refer to " la doctrine ". Yet Turkish legal literature had to start afresh, and it would be attractive to examine to what extent foreign influence (and if so what) has made itself felt *after* the reception, through the medium of foreign books and articles.

*Deliberate Modifications*

13. The Turkish Civil Code is, generally speaking, a reproduction of the Swiss Civil Code, but modifications were inevitable.

In the first place the absence of a federal and a cantonal organization required the suppression of all references to the latter and the adaptation of references to the former according to organization of the authorities in Turkey.

In the second place, the absence at the time of the introduction of the Code, of registers of birth, death and marriage, of a land register, of a register of matrimonial property regimes and of special authorities dealing with guardianship, caused serious difficulties. Today these matters have been taken in hand. There is now *one* register for all questions of status, but its administration is divided. The registration of Births and Deaths is directly the responsibility of the Ministry of the Interior while the register of Marriages is kept by the Commune. How far the latter has facilitated the registration of marriages, which is an essential element in the marriage ceremony, and which was only too frequently omitted with results to be discussed below, is a matter for discussion.

The land register is being established, but during the period prior to its completion, the application of the Swiss provisions concerning title to land and encumbrances which rely exclusively on the existence of such a register must have raised problems of considerable magnitude. It explains, *inter alia*, the failure of the cédule hypothécaire (ZGB art. 842ff.), the lettre de rente (ZGB art. 847ff.) and of the titre foncier (ZGB art. 875 ff.) to establish themselves in Turkey. The consequences of this failure must be examined in the course of the discussion. A register of matrimonial regimes is

still lacking. Instead, notarial practice has attempted to fill the gap. However it must be asked whether publicity, which is the purpose of this register as well, has been assured thereby. Probably the absence of the register does not make itself felt seriously, given the fact that in Turkey separation of property is the legal régime and that contractual variations are unpopular. However, the question remains whether they would have gained in popularity if a public register had existed.

The Justice of the Peace takes the place of the guardianship office.

*Famility Law - Equality of Sexes*

14. Probably the greatest changes of social and technical significance took place in Family Law. The equality of the sexes was introduced into the law of marriage, wills, adoption and guardianship, to mention only a few.

*Age of Marriage*

15. The age of marriage, taken over from Swiss law as being 18 for males and 17 for females proved to be unsuitable for Turkish conditions which are based upon different biological and geographical facts and was reduced to 17 and 15 respectively in 1938. But by this time a great many illicit marriages of persons below the required age had taken place who had concealed their age, and many children were born illegitimate. The actionable nature of the engagement to marry is an innovation and it would be interesting to know whether it is of much relevance in practice. See s. II 9.2.1946. 5861-637.

*Formalities*

16. Marriage having been a secular, formless consensual contract, obtained the position of status endowed, if not with religious, then at least with spiritual significance. The series of formalities provided by Swiss law to characterize its permanent character and its social importance proved, however, either excessive, or inconve-

nient[1], or inded repugnant, seeing that according to popular belief, both before and after the enactment of the CCT a religious ceremony was required and sufficient.

The consequences of the introduction of the compulsory civil marriage appear to have been disappointing, to say the least. It is sufficient to point to the need to enact three successive statutes in 1934 (No. 2576) in 1945 (No. 4727) and in 1950 (No. 5524) which validated secret (or formless) and illicit marriages and rendered the children legitimate. This need was urgent, for not only were such children excluded from intestate succession ; the public interest required the subsequent registration of these marriages and births, if any reliable statistical information was to be obtained. The question is only to what extent such emergency measures can remedy a situation where a considerable part of the population has shown its disapproval of a legislative enactment. Geography, religion or even a hankering after the old polygamous marriage may provide the ground for this phenomenon.

*Divorce*

17. Like the Swiss Code, the CCT provides six grounds for divorce, five of which rely upon specific offences or situations. The sixth, however, is general. The marriage may be dissolved if the matrimonial relations have deteriorated to such an extent that the spouses cannot be required to continue to live together (art. 142 ZGB = 134 CCT). This ground, which originated in rationalist thought during the late 18th century and which has retained its objective character in Swiss practice appears to have been modified by the practice of the Turkish Supreme Court. The decisions of this Court disclose a tendency to require a subjective element of guilt before a divorce can be granted.

See AP. 4.1.1933, 933-5 ; 12.1.1944, 4-1 ; S. II, 25.9.1942, 2823-3486 ; 1.9.1944, 4614-4833 ; S. II 26.11.1946, 2374 ; S. II 9.2.1940, 1286-3196.

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1) This is not peculiar to Turkey - see Schwarz, Das Schweizerische Zivilgesetzbuch in der ausländischen Rechtsentwicklung, Zürich, 1950, p. 54

Thus divorce on this ground becomes more restricted and loses its characteristic feature. The merits of this practice from the point of view of policy deserve consideration. Yet statistics seem to show that the number of divorces is still increasing and that the general ground embodied in art. 134 CCT is still the most popular.

*Judicial Separation*

18. Little need be said about judicial separation. This institution is of little importance where divorce is available, and the Turkish experience where it was first introduced by the CCT is no exception. In addition, art. 139 CCT is more restrictive than the corresponding art. 147 ZGB. The latter allows separation either from 1-3 years, or indefinitely. The CCT omits the latter possibility.

*Legitimation*

19. In view of what has been said before about the formalities of marriage and non-age, it is clear that legitimation is of considerable importance, but the means provided by Swiss and Turkish law are ample, given normal circumstances. However, as was stated above, further *ad hoc* legislation was required from time to time.

*Matrimonial Property*

20. Contrary to the solution of the Swiss Code, separation of property is the regime established by law in the absence of any agreement to the contrary. This modification seems to have found popular support ; this is a little surprising since this solution represents an achievement reached only slowly in Western countries.

As shown above, the absence of matrimonial property registers and a general disinclination of the population appear to have reduced to insignificance the other matrimonial property régimes at the disposal of the parties.

*Maintenance*

21. The rules regarding to maintenance are wide and include the duty of the wife to support the husband in certain circumstances

(art. 190 CCT = art. 246 ZGB). It would be interesting to see how these rules operate in practice.

*Adoption*

22. The institution of adoption has only found its place in modern European law during the last century. It is thus not surprising that its inclusion in the CCT was an innovation.

*Protection of the Person*

23. In adopting the solutions of Swiss law, the CCT has given an unusually broad protection to rights of the person (art. 27, 28 ZGB ; art. 23, 24 CCT), which is base upon recent doctrinal and judicial developments. It includes also the protection of the name. To what extent these provisions are of practical importance, must be elucidated by Turkish experts.

See s. II 25.10.1943, 3004-4457
26. 4.1934, 258 - 563
s. IV 5. 3.1933, 443.

*Associations, Foundations*

24. The subject of associations and foundations can only be touched briefly. The concept of associations as separate legal entities seems to have been first introduced into Turkey by the law of 3 August 1909, which followed the French pattern. The extremely liberal regulations in art. 60-79 ZGB = art. 67-86 CCT were modified by a law of 28 June 1938 No. 3512, which in turn, was changed by more lenient legislation 1946 (law of 11 June 1946, No. 4919) which led also to the recognition of trade unions as legal entities (Law of 20 February 1947).

As a matter of curiosity it may be mentioned that a wrong version, in art. 45(1) C T, of art. (52(1) ZGB appears to have led to the belief that the doctrine of inscription was favoured by the Code, contrary to Swiss law.

25. Apart from the modern foundations framed upon that recognized in Swiss law, the ancient institution of Wakf has survived.

But since their purposes are entirely different, no difficulties seem to have arisen.

*Property*

26. After the law of persons (marriage and divorce), the law of property lends itself least readily to transplantation. The property law of the Swiss Civil Code is specifically Swiss, especially as regards land law. Thus the old forms of land holding *(memlüké, miri, mevkufé)* were abolished. Moreover, being a modern Germanic system, it centers around the registration of land,, which is the universal root of title (art. 656 ZGB = art. 633 CCT, art. 971 ZGB, art. 929 CCT and others). The Court of Cassation has helped as best it could to come to reasonable results in cases where the title had not been registered, owing to the absence of a land register. (But see art. 910(1) CCT = art. 942(1) ZGB Ordinances of 8 October 1930, 12 April 1932 ; 10 April 1935 and the law of 26 June 1932 modified on 29 May 1936 and 7September 1939). Thus where such land had been sold and transferred, and the purchaser had erected a building, it applied art. 673 ZGB = 650 CCT, thereby conferring title upon the purchaser.

In so far as the possessor of unregistered land is concerned, his position is less precarious than would appear at first sight, for the possessory actions (art. 927, 928 ZGB = art. 895, 896 CCT) protect him amply. Moreover the remedy is speedy, for the law of 12 June 1933 conferred jurisdiction upon the chief local administrative officer to deal with such cases.

The catalogue of encumbrances follows that established by Swiss law. But while servitudes and usufructs are popular, land charges, with the exception of mortgages, are hardly used. The reasons for this are not immediately evident.

An interesting suggestion, thrown out by writers, sponsors the introduction of horizontal ownership of houses by flats. This is not possible under the Code, but shortage of accommodation appears to make it a proposition worth considering.

*Succession - General Problems*

In the law of succession, three questions deserve special attention. In the first place, it is the question how the new law of intestate succession satisfies local needs. (art. 457-466 ZGB = 439-448 CCT.) More specifically it is whether the division between " souches " has proved acceptable. In the second place, it is the question whether the new provisions which offer a limited right of succession to the wife — which nevertheless exceeds considerably the portion which she would have received under the old law — has been received favourably, as well as the admission of illegitimate children among those entitled to a portion on intestacy. In the third place it must be asked whether the somewhat limited provisions of the Swiss ZGB concerning the réserve (legitime, Pflichtteil) : art. 470-480 ZGB = 452-460 CCT have proved suitable. The absence of rules corresponding to arts 472 and 473 is to be explained, as regards the former, that it refers to cantonal law, but, as regards the latter, that it contains a subsidiary rule in favour of the surviving spouse, additional to that contained in art. 471 (4) ZGB = 453 CCT. Neither omission is significant.

*Other innovations*

28. Among other innovations which must be mentioned are the introduction of personal liability of the successors for the debts of the deceased with the consequential introduction of the right to refuse to accept an inheritance, to limit liability and bankruptcy of the right to refuse to accept an inheritance, to limit liability and bankruptcy of the inheritance. Further, pactes successoraux are new to Turkey, but it would seem that they are not much used.

A technical difference between the old Turkish and the new Swiss law seems to have created some inconvenience. While the former treated the successors on intestacy or under a will as holding in common, the latter regards them as joint owners. If, therefore, any act is necessary, and if the heirs either cannot, or do not wish to act in concert, nothing can be done. Geographical conditions and

costs often exclude the quick dispatch of a power of attorney ; family quarrels prevent agreement.

A more serious question is whether the present system of equality of succession leads to an excessive splitting up of rural properties. Swiss law provides measures against this (art. 702 ZGB, omitted in CCT). On the other hand, art. 620 ZGB = art. 597 CCT provide means for preventing the splitting of agricultural holdings which form an economic unit. Yet, her again, it must be asked whether the converse effect has proved salutary, i.e. to exclude the equality of sucession and to substitute for it a payment in money, the method of assessment of which differs again in Swiss and Turkish law (art. 617(2) ZGB = art. 595 CCT).

*Organization of the Courts*

29. It is impossible for an outsider to write on the Turkish law of procedure, but the following points must be stressed.

In the first place, the two tier system of courts and appeals may have contributed much to the accumulation of work in the Court of Cassation.

In the second place, art. 428 of the Turkish Code of Civil Procedure (but not the model Code of Neuchâtel) may have added to this burden, for it provides : " La Cour de cassation peut casser les jugements des tribunaux de premier ressort pour appreciation des faits matériels ". Thus the Court of Cassation is given a task which, in a three tier appeal is often given to the court of second instance. However, it may well be that this regulation has proved beneficial. Finally it is necessary to mention the institution of *arrêts d'unificction* which in a system which is new and does not know the doctrine of *stare decisis*, must be regarded as of capital importance, tempered only by the fact that neither the lower courts nor the Court of Cassation itself are in theory bound to follow these arrêts. In practice they will undoubtedly do so.

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