

THE INTERPRETATION OF A NATIONAL SYSTEM OF LAWS RECEIVED FROM ABROAD

by

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When it is said that a reception of foreign law has taken place in Turkey, this does not mean that a foreign system of laws has been received *in toto*. What is received is not foreign law or a foreign legal system, but only the Codes of another nation. For foreign legislation and foreign law are not the same. Legislation is intended to create law in a wider sense. Thus civil law is formed on the basis of a Civil Code. But the formation of civil law does not consist in the application pure and simple of the rules of the Code to social relations. The lawyers, judges, advocates and professors must make new law by taking into consideration the social, cultural and economic conditions of their own surroundings if they are called upon to apply the legislation in force. The new legal system, which is thus closely related to these local conditions, cannot be called a legal system of a foreign country which has been adopted by way of reception. The Swiss Civil Code is the expression of established legal traditions which were developed in Switzerland and in its cantons. It has its roots in legislation, decisions of courts and in scientific doctrine. In taking over this Code and in interpreting its text, it is necessary to refer to this legal atmosphere in order to draw inspiration for the application of rules of the Code in Turkey and for the ensuing creation of a new system of Turkish civil law.

The legal system of a nation is closely bound up with the national character. It cannot be adopted by another country without adopting the national character of the former as well. Consequently a

complete reception of foreign law cannot take place, except where it is accompanied by the extinction of the national character of the receiving country.

Turkey adopted the Swiss Civil Code and the Swiss Code of Obligations. As a result of the application of these codes by the Turkish courts there came into being a Turkish civil law and a Turkish law of obligations. But these are not therefore necessarily identical with their Swiss counterparts. Even the same legal provision may be applied in a different sense in different courts of the same country.

This does not mean to say that the new codes must be interpreted and applied on the basis, for example, of the legal methods of Mohammedan law which was in force in Turkey before the present codes were taken over. The new civil code cannot be applied and cannot be taught without a knowledge of the atmosphere of its country of origin. But just as this atmosphere changes in Switzerland itself, so it does not follow the code into Turkey. The fact that it is constantly changing makes it a valuable aid in the process of interpretation. Swiss methods of interpretation are not binding in Turkey, although the text of the Swiss Civil Code is. An independent Turkish judicial practice must be the scientific basis of the new Turkish Civil law. Admittedly it must be inspired by Swiss ideas, provided always that these do not conflict with the moral and social principles which are accepted in Turkey. The difference which exist between the practice of Turkish and of Swiss courts in applying and interpreting the same legal texts illustrates the difference between the reception of foreign legislation and the reception of a foreign legal system as a whole. The latter is only called upon to assist in the development of the growth of a new Turkish law. Those who believe that Turkey has adopted a foreign legal system overlook this qualification.

The distinction remains largely concealed where the adopted legislation concerns what are essentially matters of form. For instance, the replacement of religious marriage by compulsory civil marriage does not bring about a real change in social life. Although the population is reluctant to abandon the traditional formalities, such a change is gradually accepted, since it concerns the form rather than the substance of marriage. The distinction is also of little relevance

where technical rules are involved, such as in the law of obligations, commercial law or mining law which fall outside the sphere of local traditions and concepts.

Real difficulties arise, however, where the adopted legislation concerns substance and alters existing institutions. The introduction of the principle of monogamy, as a corollary of civil marriage, and the concomitant abolition of polygamy, is a case in point. It is well known that this important measure of legal reform in Turkey has caused difficulties and has produced the problem of informal marriages and of illegitimate children. Here the old and the new law react upon, and conflict with, each other for some time.

There is another and perhaps even more important reason why the reception of foreign legislation cannot be said to constitute a reception of a foreign legal system as a whole. Turkey has taken over several foreign codes, both in the field of private and of public law. These codes are of Swiss, German and Italian origin respectively. If their adoption were identical with the introduction of the legal system of their country of origin, the Turkish legal system would not consist of one, but of several legal systems at the same time, and this is inconceivable. The spirit of the adopted codes must be brought into line with the general spirit of the Turkish legal system. Even if foreign codes have been adopted, it is impossible to deny that the Turkish legal system has a spirit of its own, which is neither Swiss, nor German, nor Italian.
