

# SPECIAL ASPECTS OF THE TURKISH RECEPTION OF LAW

by

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## CONCERNING ISLAMIC JURISDICTION

In reply to the remarks of certain Turkish delegates e.g., Prof. Hıfzı Timur and Prof. Hıfzı Timur and Prof. Saymen, our friend Mr. Afşar who is a representative of faith defended the Islamic law and noted that this law is not worn out and useless and that it kept its value and its livelihood, for instance, in Iran. I do not know whether my Turkish friends reached a definite judgement on this matter. They can take that up themselves. However, we must agree that doubtlessly after a certain date — which is around the beginning of the XIX<sup>th</sup> century — Islamic law had frozen or it was made to freeze and that in terms of a Turkish saying, 'The door of jurisprudence was closed'. The reasons for this situation should not be searched for in the Islamic law itself, but in the sluggishness of juridical thought and jurisprudence among the Islamic nations. This opinion has been elaborated on systematically by Mr. Ziya Gökalp — whose ideas are well known in the orientalist circles. As you may well know, in the western codes today there are canonical elements gradually getting more secular. Juridical thought in Moslem nations could not follow a direction of this kind. As a matter of fact, a notion like all western nations stamping their own characteristics to canonical law has not been observed among the nations possessing Islamic law. This is another sociological problem. The real danger is in the possibility of sluggishness in thought and in jurisprudence which has curbed the progress of Islamic law in the Moslem nations overtaking the western code as is, or by means of an adaption, to also freeze the

western juridical system in the East. Therefore, the duty of Moslem nations is to constantly try and nationalize the elements observed and taken over from western codes and from Islamic law, by means of dynamic juridical reasoning. From that point of view, elements reaching us both from the east, e.g., the principles of Islamic law, principles set forth in the publications of Prof. Mustafa Reşit, and in one recent publication by our juridical scholar Mr. Ali Himmət ; and western influences e.g., the adaptation and acceptance of foreign codes in total, (like it has occurred in Turkey) or partially (like it has occurred in Egypt) have to be melted in the melting pot of juridical reasoning, and then the codification process has to get started.

#### THE INSTITUTION OF ILLEGITIMACY

Our friends rightfully spent some time discussing the illegitimate marriage and child problem in Turkey. This problem is a fact in our actual juridical milieu. It is known that in our Parliament there is third law project proposal concerning these matters. I will only point to a conceptual issue on this matter. That is, in the juridical history of Turkey, men and women who got married illegitimately, did not themselves consider it as such. Because these marriages, regardless of their nature, be it monogamous or polygamous, were a result of religious wedding, they were therefore considered illegitimate. We may even add as a matter of psychological curiosity, that civil weddings which took place in terms of the 1926 Civil Code are considered illegitimate among certain public circles in Turkey and their modification by a religious wedding is deemed necessary. We must note here that such circles are constantly diminishing. In short, I wish to direct the attention of the worthy local and foreign specialists in law who discuss illegitimate marriage in Turkey, to a *sui generis* illegitimacy. This illegitimacy is not the one generally observed in the other parts of the world, and not even in some cities in Turkey.

#### THE PROBLEM OF RELIGIOUS WEDDING

The worthy delegates are asking questions on wedding in general and specifically on civil marriage cases in Turkey. This is really an interesting problem. Especially after our foreign friends relating us the civil and religious weddings in their own countries,

the problem gets to be more important for us. Particularly what the Swedish delegate Mr. Sandström has said opened new horizons for us. Our friend Prof. Velidedeoğlu has concerned himself with this matter 12 years ago. We have made a classification on this problem some time ago, in relation to the sociology courses at our Faculty of Law. The result is the following : Codes granting priority to religious weddings ; codes granting to religious weddings the right and the possibility to follow civil weddings ; and codes which do not recognize civil weddings at all. The situation in Turkey prior to 1926 constituted a fourth type to be considered apart from these three types. After 1926, Turkey, following the reception, almost became a laboratory for this kind of reception. Now it is desired that the wedding affair in Turkey be manipulated in such a way that it gets to be consistent, and that this consistency is in line with the Turkish Civil Code. But our social reality is not responding to this desire. What should be done ? In my point of view, the Swedish type of wedding will substantiate the applicational possibilities of our Civil Code. We must think of our future men of religion to be functioning as a means to civil wedding. Prof. Velidedeoğlu tells us that he is not of the opinion he was twelve years ago. However, the opinion he held twelve years ago is justified and worthy by all means. In my point of view, the value of his opinion has increased especially after listening to the legal facts about certain northern countries. The institution of religion is a source of indoctrination and the representative of religion is the most effective educational element. If those desiring a progressive reception to establish its roots in Turkey proceed in that direction, we must then benefit from that source, as well as the means to attain that goal. I am thinking of the process of benefiting only in terms of utilizing the social function of the 'imam' (e.g., moslem priest) who happens to be the leader in religious affairs in a country 85 % of its population of whom are farmers located in about 40.000 villages, rather than conceptualizing the problem in terms of superiority of religious wedding and religious authority interfering in worldly affairs. The morphology of our society, that is, considering it from the angle of transportation policies, village- City - and - town relations not being in line with what is desired, can be a causal factor in this. On the

other hand, I am of the opinion that the dichotomy which the public calls "state wedding" and "our wedding, can be unified in that manner.

The problem is significant for sociology of law as well as for Turkish sociology of culture. Our intellectuals and specialists in law who indicate an antipathy towards religious wedding may possibly be complaining about the mentality and background of representatives of religion. They think that their interference in the wedding problem may render valueless the Renaissance mentality and culture Turkey is getting into as a consequence of destiny. Today's remainders of yesterday's generation of 'ulema' (e.g., religious scholars) hold a 'şariat' (e.g., religious law) point of view in terms of their concepts and beliefs. According to them, the law, by its nature, is altogether theological. The 'Faculty of Divinity' established ten years ago in Ankara and the 'imam' schools established following it have started training new and reform minded men of religion needed not only in Turkey but also in all other Moslem countries. Under these conditions it is expected that Turkish specialists in law and sociologists will get together and will assign a status to civil marriage which should be influenced by the religious frame of mind, and which could be conducted by men of religion as it occurs in northern countries, or in other western countries applying it in a very good way.

#### POLYGAMY OR BIGAMY

Our worthy specialists in law spoke quite a lot concerning the Institution of polygamy in Turkey, and they have touched on important points. A clarification of concepts is necessary on this matter as it is on the 'problem of illegitimacy'. This is needed, because the constantly talked about polygamy, creates as a word and concept, the effect that 'harems' are prevalent in Turkey, the way they are figured in the imagination of certain western authors. Our social reality is totally foreign to a matter like this. The above mentioned clarification is also needed because when the terms 'polygamy' and 'harem' are taken together, one can easily reach a decision to the effect that polygamy is non-existent in Turkey today. The Institute of Sociology which has now been abolished by the Faculty of Eco-

nomics which substituted another Institute in its place, sometime ago conducted a sociological attitude and opinion survey with the help of the students at the Faculty of law of Istanbul University. The results obtained from this survey show that almost all polygamous families established by religious wedding, in reality, are merely bigamous. Psychological conditions and social causes necessitating a second wife, very rarely place a third wife in the same house with the other two. This means that we have to substitute the word and concept bigamy in place of polygamy in order to clarify our thinking.

However, the scientific term polygamy or the phrase 'having many wives' the way they are worded different in old and new turkish, are rather widespread. One may not be accustomed to using 'bigamy' or "having marry wives" signifying reality. Due to this fact, it is not disadvantageous to use the word and concept polygamy instead of bigamy, providing it will be used in place of bigamy and will carry that meaning.

So, we the provision that we mean bigamy, what is the nature of polygamy, and what are the causes leading to polygamy as a fact in Turkey ? We will take that up seperately.

#### NATURE AND CAUSES OF POLYGAMY

Some of the worthy delegates, e.g., the British delegate Mr. Hanson, discussed the causes of polygamy in Turkey. We must confess that we are confronting a very complex problem of social causation. Conducting the Institute of Sociology attitude and opinion survey, we already mentioned on some occasion during yesterdays meeting, provided us with certain facts which may solve the problem to some extent. I will briefly mention them with your permission. As a matter of fact my friends are irresistibly requesting this from me.

First, you may consider the polygamous family a small 'harem'. One of the prohibitions set in this harem, are the men tabooed in the famous verse of the Koran. On the other hand, another event is observed next to this religious prohibition. Excluding certain big cities, and the Black Sea Coast among them, the family structure in

Turkey offers the picture of a shattered semi-patriarchal system. Turkish polygamy should be viewed in that context. Certain human helpers get into the family of that nature. Some foreign friends and Turkish colleagues mentioned the need for 'hand-labor' as a cause of Turkish polygamy, which is true, providing the following interpretation is made : If the woman's labor in the family were the cause of polygamy, this ought to lead to the same result where similar hand labor is called for, e.g., in Italy and France. However, there is no sign of this. The female helper associating herself with the farmer's family in Turkey today, marries the patriarch with a few words uttered by the imam at the house, and in that way the prohibition I have mentioned above is abolished, illicit behavior is avoided.

Sterility is a second causal factor effecting polygamy in Turkey. The notion of 'continuity' is quite strong in the Turkish family. For this reason, in many instances the first wife will recommend, seek for, and find a second wife for her husband. In certain provinces in Turkey, this second wife is called 'kuma'. This behavior which conflicts with the frame of mind of the Turkish woman today, living in the city, is considered natural among the circles where polygamy occurs. In that way, even the first wife who seeks for another, generally satisfies her need to keep her rule and superiority over the house. The husband is almost grateful to the first wife who has been anxious to have a child in the family, and the second wife appears to be or is attached to her so-called 'kuma' who intervened. This situation may only be understood if we think in terms of a 'psychology of comprehension'. It can not be comprehended by thinking about monogamy as an element of 'Homojuridicus'.

Then a third causal factor deduced from the opinion survey is concerned with morals. As you know, the Moslem religion does possess a solidarity organization, outside of the state, like Christianity does. As a matter of fact, in accordance with the Prophets advise monkhood has not been established. Factually speaking, there are no monasteries and the like to serve as refuges for lonely women. Remember here also, the first cause I have previously mentioned. As a result of all, the woman who is left lonely, wedds as a matter of formality, in order to be able to wander freely in the house, and to help with the agricultural affairs of the family, if possible. In a

situation like this, the sexual factor which our imagination would fancy and accept as natural, is in reality not at all there. The 'harem' institution which is a topic of concern for Moslem and generally eastern society officials who possess first or second degree political authority, is a different event and is not related to our topic. Now that 'harem' is no longer talked about, 'polygamy' is still a fact in our country- and we do not feel the necessity to say, unfortunately.

We are confronting a complex of causalities composed of several causes. The sociology of law concerning itself with examples will comprehend the event commensurate with the length it will consider these causes. The policy of law or other policy areas supporting it e.g., economic, social, and even educational policies, will benefit from the results of such an undertaking. As a matter of fact, prior to planning a functional, social policy, the natural flow of events have to be observed. The cultural progress of women, changes in the attitudes concerning sin or wearing a veil, the evolution of the family from patriarchal to the conjugal type as a consequence of many social causes, the family no longer being a center of production, gradually weakened the polygamy institution, and this process is still going on at a high pace. If one looks at the results labored by these events, from the angle of applied and functional sociology, the inclinations of the Swiss Code will prove to be even more realistic for Turkey. Especially as the dignity of the woman continues to effect herself as well as men, the psychological factors feeding the mechanism of polygamy will extinguish. We should admit that the 1926 reception was effective in reinforcing this consideration. I wish to elaborate on that point later on. In sum, the Turkish woman's taking part in the economic division of labor, resulted in the emergence of her personality and individuality. And to such an extent that even sterility does no longer necessitate a new person to enter the family institution. Then again, the social and social security organizations are spreading all over, starting from big cities, thus lessening for polygamous families' refuge function.

Even if we take into account these optimistic considerations, it is impossible to say that polygamy in Turkey will be abolished soon. Only when and if the causes which abolish it, spread all over Turkey and effect people's subconsciouses, will the 1926 reception's

principle concerning monogamy be saved from being a dead phrase. If not, rebellious attitudes to be experienced against the reality of polygamy will be of no functional use. But then, the realization of social inclinations has already started. On this date of our meeting and discussion, these inclinations exist probably in only 25 % of Turkey's area. However, observations indicate that the remaining area is getting progressively narrower e.g., even in the form of bigamy, polygamy will eventually fade away into history.

#### THE RELATIONS BETWEEN LAW AND MORALS

Permit me to mention that there is a problem hidden behind all the questions asked by our foreign friends. The problem is this: To what extent has the 1926 reception created a moral of the law in our country, and has it been settled and/or deeply rooted? I think that this question is the most important one on the problem of reception which is the topic of discussion at this meeting. The Institute I have mentioned above, has constructed an attitude and opinion scale ten years ago which included that question. I wish to present to you with an explanation formulated according to the results of that questionnaire and my personal observations.

The 1926 reception which is partly the topic of concern here, is subjecting the polygamous family psychology, the growth of which in the past has been in part considered natural, to a necessary evolution. For instance, a Turk with two wives today is hesitant to mention this fact in official and private circles, he is even ashamed of it. A feeling of social shame has emerged which was not there half a century ago. Families of that type were seen walking comfortably on the streets with men walking ahead of their wives. They don't appear that way now in public. Polygamies established prior to 1926 and which are supposed to be in effect today, from a legal point of view, are fading away into history, because they basically lack new additions to them. Polygamies established after 1926 exist under the following two types: 1) The first one with civil wedding and the second one with religious wedding due to the impossibility of civil wedding. 2) Both with traditional and religious wedding. Both of these types are doomed to vanish, at least not appear in pub-

lic circles when they come to town or to the city from their villages. And even the man's frame of mind is changing. Doubtlessly, the fact that the first wife no longer looks for a second one, is included in this conglomeration of events. Therefore, the woman's dignity, her honor and her ability which characterize western culture, are influencing Turkish society also. Thus, we are confronting an interesting social psychological change.

This point I have briefly mentioned, probably reminds you of the relationship between morals and law in legal theory. The generally accepted point of view is that laws will never create morals and customs, but they will always follow morals and customs and habits, and that the role of laws will be that of setting principles. However, we can say that the Turkish reception occurring in 1926 supports the formation of social and familial customs in Turkey not only in the field of civil code, but also in other branches of law. A sociologist confessing this may possibly seem a little strange, because sociologists usually think that laws will never create morals, but 'the juridical' will create 'the social', more so than specialists in law. But there is not much we can do, since in this country you happen to be visiting at present, events have occurred which indicate the opposite, e.g., that laws will create morals. Establishment of monogamy is a case in point. An attitude and opinion survey including all fields of law will show influences of that sort in other matters also.

However, are the socio-moral principles created by the 1926 reception solely a product of legislation? Doubtlessly not. This point constitutes an important legal and sociological problem, therefore I am leaving it aside for the moment. I shall only indicate in passing that in our country, reception which is the topic at this meeting, has demonstrated that the opposite of the hypothesis e.g., (laws will never create morals, but they will only sanction them and the customs which are established) can be valid. Probably the theoreticians in law will learn a great deal by investigating legal events between 1926-1955.

#### THE HISTORY OF RECEPTION IN TURKEY

I wish to terminate my explanations on certain points after discussing one other matter. Reception in our country began in 1926

in the field of civil code, and prohibition concerning polygamy was put into effect at this date, and civil wedding was enforced. However, generally speaking, the reception event reaches further in the history of Turkish law. Prohibition concerning polygamy was already established and it was in effect as a customary principle and tradition long ago. Following is a typical example : About eight years prior to 1926, a short familial code codified in terms of 'invention' rather than 'reception', also prohibited polygamy. However, this prohibition was put into effect in altogether a different manner. To that extent, the prohibition put into effect in 1917 by way of the above mentioned familial code made peace between norm and reality due to its nature. Polygamy was allowed only if the first wife approved of it. On the other hand, neither when the 1917 code was passed, nor twenty five years prior to it, were the people living in Turkish cities ready to accept a situation whereby the existence of the first wife approving of a second marriage would be allowed for. This means that the reception of the Swiss Civil Code occurred during a period of gradual development. Those working on the Turkish codification system may relate not only the 1926 reception of the Civil Code, but all receptions prior and after 1926, to a principle of historical continuity within a sociological frame of explanation of this kind.

The matters I found necessary to mention at this Colloquium consist of these. In case my friends wish to inquire about other problems, I am at their disposal. By arranging this meeting, the International Legal Sciences Council has brought together Turkish and foreign specialists in law and consequently has offered a new possibility for progress to Turkish juridical matters. It is desired that contacts of this kind become more frequent, that attitude and opinion surveys as well as research on sociology of law in Turkey be conducted with the financial support of the Council, and that material for more objective and factual reasoning is thereby provided for the following meetings. Apart from the above, it may be worthwhile for the Council to consider preparing materials for those scholars in law who study comparative law, by translating the important Turkish publications on problems which were discussed at this meeting. I wish to emphasize in that context that myself and my assistants are at the disposal of the Council both for examining juridical facts in

the various regions of Turkey where they occur, and for translating some of the relevant Turkish publications into western languages. As a matter of fact, as a friend of yours' who directs the sociology instruction at the Faculty of Law, I also consider that my duty<sup>1</sup>.

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- 1) In relation to these problems we suggest the following books;  
Ziya Gökalp, sa vie et sa sociologie. Essai sur l'influence de la sociologie française en Turquie  
Essai sur la transformation du code familial en Turquie; étude de sociologie juridique appliquée.  
Les sociologues turcs. I: Ziya Gökalp. Etude biographique publiée à l'occasion de l'anniversaire de la mort de Ziya Gökalp, which we have published in France in 1935. We also suggest the chapters on codification in (Türkçe içtimaiyat) -e.g., Turkish sociology- book consisting sociology lectures delivered at the Faculty of Law; and the attitude and opinion survey on (polygamy and the illegitimate child) sponsored by the Ministry of Justice in 1942. The translation and publication of this survey is especially desirable.