

THE RECEPTION OF FOREIGN CODES OF CRIMINAL LAW AND CRIMINAL PROCEDURE IN TURKEY

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I. CRIMINAL CODES.

It must be stated at the outset that no reception proper of foreign Penal Codes has taken place in Turkey. Beginning with the foundation of the Ottoman Empire, criminal law was Mohammedan law which applied to this sphere as it did to any other branch of Turkish law, and it remained applicable for centuries. However, criminal codes were prepared and promulgated during the reign of Mehmet II, the Conqueror, in the 15th century, under Soliman the Magnificent and under Mehmet IV, in the 16th and 17th centuries respectively. These Codes contain a limited number of provisions creating offences and sanctions, but the first detailed and more or less comprehensive code was only published in 1840. This was followed by the "New Code" (Kanun-u cedit) of 1851 which had for its purpose the establishment of a better system of criminal justice and the inclusion, among the catalogue of offences, of an additional number of acts, the punishment for which was apparently required. It must be emphasized, however, that the last two codes, as well as their predecessors, were neither received from abroad nor inspired by foreign law. They were original in character and may be regarded as products of national legislation throughout.

On the other hand, the Royal Criminal Code (Ceza Kanunname-i Hümayunu) promulgated in 1858, which superseded the Code of 1851, was influenced by the French Criminal Code of 1810, of

which it is a translation. However, it was not identical with the French Code, since those sections of the Turkish Code were inspired by Mohammedan law. Moreover, this Code was modified on several occasions, until it was abrogated in 1926. These modifications were sometimes influenced by the French Code and sometimes by the Italian and German Codes which were in effect at the relevant moment. Nevertheless, the real motives for these reforms were the proper needs of Turkey, which determined the introduction of many new provisions. As a result of the great number of such modifications, the Criminal Code of 1858 acquired a new character. The Turkish Criminal Code of 1 July 1926 was modeled upon the Italian Criminal Code of 1889. As the previous legislative history shows, Turkey had by that time, assimilated in matters of criminal law the technique and the spirit of European Law. Yet the Turkish Criminal Code of 1926, which has now been applied for nearly thirty years, underwent several modifications. In particular, a revision carried out in 1933 changed 84 articles and another, in 1936, modified 143 articles. As a result of these and subsequent modifications altogether nearly 300 articles have been altered fundamentally. The principal aim of all these various modifications, which followed the practice of the Court of Cassation, was to adjust the Code to the changing conditions in the country. This aim was achieved, and an almost completely national Criminal Code was created.

To conclude : in so far as criminal law is concerned no reception, in the true sense of this term, of foreign law has taken place in Turkey for nearly a century, but European legal principles continued to be absorbed. When the Italian Penal Code was introduced in Turkey in 1926, no radical change took place. Instead it may be said that a new Turkish Code succeeded an earlier national codification.

II. CRIMINAL PROCEDURE.

In the field of criminal procedure, too, Mohammedan law applied in Turkey from the foundation of the Ottoman Empire onwards. Leaving aside some old regulations, which are only of historical interest, it may be said that the first Code of Criminal

Procedure in Turkey was the Code of 1879, which was based on the French *Code d'Instruction Criminelle* of 1808. However, this Code was not adopted as a whole. It was modified considerably both during the process of translation and subsequently in the course of its application until 1929.

The present Code of Criminal Procedure, which came into effect on 20 August 1929, is fashioned upon the German Code of Criminal Procedure of 1877. A preliminary draft was prepared by a committee which is known as the "Istanbul Committee". This draft was revised by a second committee known as the "Ankara Committee" and received its final form after further revision by the competent committees of the Legislative Assembly. During the 25 years in which it has been in force, the Code was amended several times and has thus almost acquired a national character. In this connection it must be pointed out that it is far more difficult to adjust a foreign Code of Criminal Procedure to national conditions than a foreign Penal Code. The satisfactory operation of a Code of Criminal Procedure depends largely upon the existence of other institutions within a country, such as the organisation of the administration of justice, of the police and of the sanitary authorities. It is, therefore, impossible to adopt the criminal procedure of another country as a whole. A perfect operation of an adopted code depends upon the existence of those institutions and organisations, the presence of which is assumed by the code. In fact, when the German Code of Criminal Procedure was adopted, it was necessary to omit the provisions concerning courts of appeal, the jury in proceedings for serious crimes, and lay assessors. The situation that owing to the difficulty of finding the necessary individuals these institutions are not incorporated in the Turkish Code, does not make it easy to apply certain parts of the Code, which presuppose the existence of such institutions.

Other provisions which must be mentioned here are those concerning the preliminary examination. The jurisdiction to collect the evidence is given to the examining magistrate, while the jurisdiction to determine whether there is to be a Committal for trial is conferred upon the trial judge himself. In adopting these provisions,

the Turkish legislature attempted to follow the system of the German Code of Criminal Procedure which gives the power of decision to a committee of three judges, that is to say to a court. However, as the appointment of examining magistrates, apart from the trial judge himself, involves the question of staffing, Article A of the Transitory Provisions of the Turkish Code conferred upon the examining magistrate jurisdiction to try the case until such time as a separate trial judge was appointed. Subsequently, by an amendment of 1936, the institution of trial judge was abolished and the examining magistrate was given the power, not only of collecting the evidence in the course of the preliminary examination, but also of deciding whether the accused is to be committed for trial or not.

Similar observations apply in respect of other provisions of the Code. For instance, a number of articles were added in order to ensure the speedy and efficient application of the Code ; but such changes give rise to difficulties at times. The rules governing arrest lend themselves to an application which may endanger personal safety and the guarantee of the liberty of the individual. Occasionally situations arise in which it is impossible to apply the provisions of the Code because they are incompatible with the realities of life in Turkey. In these circumstances, the courts disregard the Code and substitute their own rules in its stead.
