

THE RECEPTION OF WESTERN LAW IN TURKEY

The purpose and the results of the meeting of the International Association of Legal Science held in Istanbul in September 1955

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1. When the International Association of Legal Science resolved to give the study of the reception of Western Law in Turkey first place in its broader programme of studying the influence of receptions of foreign law upon countries with a different cultural and social background, it was moved by the following reasons. The process of reception, in the circumstances attracting the attention of the Association, is commonly practised in modern times in the Near East, and the Far East, not to mention the territories administered by Western Powers. But the process which is normally employed is slow and piecemeal and does not affect those branches of law in which the national character expresses itself most forcibly, such as the law of marriage and divorce, succession and land law. The reception of foreign law in Turkey, on the other hand, was sudden and wholesale, and affected all branches of the law and all aspects of life. It seemed indicated, therefore, to concentrate first of all on this unique phenomenon, the more so since the highly developed state of Turkish legal science made it possible to rely on the experience and advice of local Turkish experts, and did not require the initiation of new studies in the field.

2. To most students of legal history, reception of foreign law is primarily identical with the reception of Roman law in Western

Europe. This movement differs from all other subsequent receptions in various respects. It originated in the Universities and was thus academic. Its claim to obedience was universal, and not territorial or personal, limited only by the physical boundaries of the Holy Roman Empire and the Christian world. It relied on the mystique of a continuous Rome and served, incidentally, to overcome the feudal diversity of law and administration. But the Roman law which conquered Western and Central Europe was not the law of Rome. It was a scientific system of concepts and institutions which had been adapted to the needs of medieval society by discarding all obsolete rules. The classical and post classical law of persons, of the family, including marriage and divorce, land law and the rules of succession, could not be introduced into a Christian society whose economic situation and cultural background were totally different from that of the pagan society whose economic situation and cultural background were totally different from that of the pagan society of slave owning landowners and town dwelling occupiers of flats. Local customs retained their validity in these fields, and what is commonly known as the reception of Roman law was only a partial process. Family law, the law of marriage and divorce, remained Christian, land law, including the law of succession, land, retained its Germanic characteristics, and the law of matrimonial property preserved that variety of local customs which determines its peculiarly diversified features even today. The new system, which was superimposed upon, but did not displace the old, brought with it a technical, not a social revolution. It happened to facilitate the centralisation of the administration and the creation of small land holdings. But owing to its technical character, which is most conspicuous and most effective in the law of contract, delict and property, it did not become identified with popular thought and convictions. This gulf between law and the society which it ruled and served, was not bridged at any time up to the period of modern codifications.

3. Modern receptions were determined by these codifications and by colonization. The series of codifications which, in a limited field, began in France in the 17th century culminated in the Civil codes of Prussia (1794), France (1804), Austria (1811), German (1900) and Switzerland (1911) as its most outstanding and influ-

ential exponents, together with the less original Codes of Italy (1865) and Spain (1889). They served, at first, as patterns for the unification of the laws of smaller, but socially similar countries in Europe and in South and Central America, which were then consolidating their independence. During the 19th century the influence of the French codification remains outstanding. Leaving aside the intrinsic merits of the French Codes, their success was assured by the circumstance that they were received by countries whose society and culture did not differ in any marked degree from that for which they had been originally enacted.

4. During the same period the common law of England expanded by different means and with more limited effects. From the 17th century onwards, British settlers had brought the common law of England to those parts of the world where they established colonies by way of peaceful settlement in accordance with the principle of English Constitutional Law; that colonization is accompanied by the law of the home country, which acquisition by conquest is not. Thus English law penetrated North America and the West Indies. But where an established régime was overcome by conquest and treaty, the local system of laws was preserved. This happened notably in India. In the course of time, English law supplemented and even superseded these local systems (mainly Hindu and Mohammedan law) in the field of commercial law, criminal law and procedure, but it never attempted to displace those branches of law which are most deeply rooted in the popular conscience, namely family law and the law of succession. In short, to a great extent the common law of England was received during the 18th and 19th centuries by people whose cultural and economic background differed greatly from that of the parent state, and it was only received during the 18th and 19th centuries by people whose cultural and economic background differed greatly from that of the parent state, and it was only received in part. Of course, other colonizing powers, such as France followed a similar course in its more developed colonial territories. On the whole, it may be stated that outside the sphere of colonial settlement of under populated and unorganized regions, the common law was received only in so far as it offered immediate technical advantages. Certainly no wholesale adoption of

the common law was ever attempted either by force or by a voluntary process of reception.

5. The 20th century witnessed a movement of a different kind. In the Far East, the desire to modernize the administration of justice and to introduce Western standards of life, led to a search for suitable Western codifications which could be taken over with the express purpose of changing the existing mode of life. At this moment the systematic perfection of the new German Civil Code, based upon the high reputation of German scholarship at the turn of the century appeared very attractive.

As a result, Japan and to a lesser extent Siam and China, took over considerable portions of German law. These movements for reform differed from similar receptions of previous periods inasmuch as the driving force was neither the academic profession and the court, nor a movement for the systematic consolidation of national law or an external colonising power. Moreover, the purpose was not to supersede the existing system by a similar one, which was more perfected technically. Instead, the reform was sponsored by the government of the day with the purpose of bringing about a far-reaching social reform. The country concerned was to be transformed from an Eastern into a Western type, and the law was to be one of the means for achieving this change.

6. The Istanbul Conference considered in some detail the historical background of the legal and social reforms in Turkey from the middle of the 19th century onwards and found that up to the time of the Kemalist revolution the reception of Western law remained limited to technical subjects and to those where foreign contacts made themselves felt most strongly. The Criminal Code alone forms an exception, but common experience shows that Mohammedan criminal law had long proved unworkable throughout the Islamic world. On the other hand, family law, including marriage and divorce, and the law of succession were unaffected by the introduction of Western law. This is a common phenomenon in countries which are exposed to Western influence, for marriage, divorce, land law and succession are those branches of a legal system in which the national character of a people expresses itself more strongly than in

the field of commercial law and of procedure. Thus the Turkish legal reforms prior to the Kemalist revolution were intended to increase administrative and commercial efficiency. Their aim was not to change the cultural and social habits of the population.

7. The Conference went on to examine the reasons for the sweeping reforms under Kemal Atatürk and the motives which led to the eclectic introduction of foreign codes drawn from different countries, and more specifically from Switzerland. As regards the reception of Swiss Codes, two different reasons one objective, the other subjective, were given by the Turkish experts. The objective reason was that the system to be adopted must be clear, easy to apply, practical and in accord with the ideals of justice accepted in the country of reception. The Swiss Civil Code was believed to fulfil these requirements, and within limits this belief was probably justified. The last and most recent in the line of codifications, it served a composite population of German, French and Italian origin and combines the characteristics of the great modern systems. Its homely, untechnical language is attractive and avoids conceptualism ; its insistence on flexible rules gives it great potentialities for adoption and development. Yet its adoption also has certain disadvantages. It is a Code adapted to a multitude of cantonal customs and competences. It is intended for a highly developed society of mixed agricultural and industrial character, living within a confined and intensively utilized space. Its language, for the very reason that it is homely and untechnical, creates problems of translation.

Another view presented to the Conference was that the preference for Swiss legislation in 1926 must be attributed to the predilection of certain leading personalities who had received their legal education in Switzerland. It is difficult to assess the merits of these two conflicting views, but on balance it would seem that personal and political reasons were the preponderant factors.

8. The Conference devoted particular attention to two principal questions :

In the first place, the new Turkish legal system, although uniformly European, was not homogeneous. The selective reception of divers foreign Codes results in inconsistencies, overlaps and gaps. The

methods by which the courts and the legal profession have applied the codes so as to avoid or overcome these difficulties were discussed in some detail. In general terms, this involved an examination of the methods of interpretation, which must fulfil in Turkey a function which differs from that which interpretation has in other Western countries. There a legal system is treated as complete, *ex hypothesi*, and interpretation serves to fill gaps where the express wording of the legislation fails to make provision for the individual problem before the court. In Turkey, after the reception of Swiss and other foreign law, the task of interpretation was different. The law introduced in Turkey was sometimes found to be incomplete, not because it failed to contain express provisions, but because some express provision was technically unworkable in Turkish conditions.

The methods of interpretation must vary according to the problem to be solved. Where the problem is one of filling gaps in the received system, it is possible to rely on the parallel experience and practice of Swiss or other foreign countries, from which the Code is derived. But where a provision of foreign law is unworkable, in Turkey, Turkish courts and lawyers assume a policy making function of first importance while nominally carrying out the task of interpreting existing rules. In these circumstances, interpretation must be of an indigenous nature, and foreign practice can provide little assistance. Here interpretation must follow national lines. Naturally, the decision indicated here does not often present itself in its purest form, for it is well known that even in Western countries where little cleavage exists between legislation and existing social institutions, extraneous considerations of policy must impinge upon the strictly technical work of interpretation. Nevertheless the distinction set out here explains the conflicting views put before the Conference by the Turkish experts, some of whom stressed the strictly Turkish character of the work of interpretation, while others were inclined to attach considerable importance to the work of Swiss and other foreign commentators, while admitting that even in the narrower field of interpretation, Turkish practice does at times deviate from the Swiss.

The Conference noted a number of instances in Turkish practice, some of which illustrate the first method of interpretation, while others clearly fall within the second category.

9. Among the instances of strictly statutory interpretation where Turkish courts have not followed Swiss precedents, the following appeared outstanding :

(i) The principle that the right of preemption of another co-owner's share accorded to owners in common is to be exercised by several owners on a basis of equality and not in proportion to their share in the common property (Cass. United Sections 11 June 1947).

(ii) The practice that a guardian may bring a petition for divorce on behalf of the ward on the ground of adultery or cruelty.

(iii) The rule that transactions entered into by persons who lack capacity are only void in so far as they themselves are concerned, but that the other contracting party is bound (Cass. United Sections, 9 March 1955 art. 15 of the Turkish Civil Code ; art. 18 of the Swiss Civil Code).

(iv) The rule that a married woman requires the consent of a justice of the peace not only if she wishes into an obligation towards a third party for the benefit of her husband, but also if she wishes intends to grant a mortgage or pledge (Cass. United Section, 5 November 1952 - art 169 (3) of the Turkish Civil Code ; art. 177(3) of the Swiss Civil Code).

10. On the other hand, the creative and strictly Turkish approach to the interpretation and application of the new legislation is brought out by the following cases :

(i) The practice that, notwithstanding the provisions of the Civil Code, agreements creating a life rent may be validly concluded in the presence of the Keeper of land register (arts. 512, 492, 479 of the Turkish Civil Code ; arts. 522, 512, 499 of the Swiss Civil Code).

(ii) The practice that a decree of divorce, on the ground of wilful desertion, following an order for restitution of conjugal life, made by the justice of the peace, may be granted in ancillary proceedings before the court of first instance, contrary to the wording of the Code and of Swiss practice, which concentrate the entire procee-

dings in the same court (art. 132 of the Turkish Civil Code ; art. 140 of the Swiss Civil Code).

(iii) The judgment of the Court of Cassation recognizing as valid the transfer of the possession of non-registered land on the ground that such land was to be treated as movable property, a valid title to which can be created by a simple transfer of possession (Cass. United Sections, 9 October 1946).

(iv) The practice whereby the children of an informal marriage are treated as legitimate by analogous application of the rule that the children of parents who were engaged to be married and who were unable to marry owing to the death or loss of capacity to marry of one of them may be declared legitimate by the court upon the application of the other party or of the child himself. (art. 249 of the Turkish Civil Code ; art. 260 of the Swiss Civil Code).

(v) The practice that oral evidence suffices to prove the conclusion of a marriage if no extract from the marriage register or any other document is available.

11. In the second place, certain aspects of the new system conflicted markedly with the former order of things ; this was so particularly where established institutions and practices touching family relations, landholding and the law of succession were concerned.

The problem upon which the discussion concentrated was how a legal system which was created for a Western European community operates in a society having a different social, cultural and economic background ? Has the new system succeeded in imposing new standards of behaviour upon a community for which it was not designed in the first instance and has it thus become naturalized in its new surroundings, or has popular indifference and opposition transformed the adopted alien legal system into a new legal order of an entirely independent character, in accordance with national ideals and customs ?

The Conference of the International Association of Legal Science examined these questions with special reference to the Turkish Civil Code ; partly on the ground that family law and the law of

succession affects most closely the structure of Turkish society, and partly because reasons of time excluded a broader investigation.

12. In the sphere of family law, the problem was how the introduction of a monogamous civil marriage based upon the equality of sexes and of a restricted right of divorce, controlled by the courts have affected a patriarchal society which had known polygamy and which had not regarded divorce as a far reaching change of status affecting the community as a whole.

The Conference considered the notion of marriage in Islamic law. It noted the difficulties experienced as the result of the introduction of a higher age of marriage, which did not suit a population of a different physiological character, living under different geographical and climatic conditions, the frequent impossibility of providing the correct age and the legislative reform of 1938. This led to a discussion of illicit unions and of illegitimate children and of the various reasons which have made them one of the foremost problems in present day Turkey. The Conference studied the grounds which have so far impeded the universal acceptance of the civil marriage ceremony. It appeared that the obstacles are partly of a technical character, arising from the personnel of marriage officers, the accompanying formalities, and the lack of good communications. But it became equally clear on the evidence of the sociological experts that the failure the new marriage ceremony to obtain popular approval is due to deepseated convictions rooted in Islamic traditions ; a formal civil marriage in accordance with the present law is regarded as an illicit union ; an informal consensual marriage contrary to the law is regarded as a valid marriage. It appeared, in addition, that the reluctance of the population to use the civil marriage ceremony as a condition for a valid marriage may be due to the desire to retain the liberty of determining a marriage equally informally according to ancient custom. Another possibility suggested itself, namely that the informal marriage ceremony may perhaps be used where a previous civil marriage had broken down but had not been dissolved by a judicial decree, due either to the inertia of the parties or to the absence of legal grounds for obtaining a formal divorce. Finally the conference considered whether the survival of informal marria-

ges conceals the survival of polygamy. However, no conclusive evidence was produced in general support of any one of these hypotheses.

13. Thus it appeared that law and social practice conflict. Such conflicts appear in all legal systems. However there is a difference between the common experience and the Turkish example. Usually, the legislation commands initially approval and respect of the community, but as a result of subsequent developments it becomes abnoxious and inoperative. In Turkey, on the other hand, the law, as initially introduced by the government in 1926, was a deliberate measure of policy with the purpose of changing existing customs. The conference examined, in particular, how this cleavage between governmental policy and popular custom is being resolved in Turkey.

Various lines of development were indicated which are complementary to each other. In the first place it would appear that administrative practice has resulted in the official registration by the authorities of unofficial marriages. In the second place, successive legislation has attempted to remedy this situation, but *ad hoc* laws made *ex post* are no more than temporary measures. In the third place, the creation of social services, workmen's compensation, retirement pensions and allowances to the families of soldiers on active service, which presuppose the fact of marriage and evidence thereof, have hastened the tendency to comply with the formalities of civil marriage. In the fourth place, it was contended by way of generalization that proper education and organization are the key to the resolution of the conflict which is thus characterized both as a technical and a spiritual and social problem. In the fifth place, some Turkish experts stressed the spiritual conflict and regarded the need for organisational improvements as of minor importance.

Non-Turkish experts, drawing upon the experience of other countries, suggested several remedies. It was pointed out that in practically identical circumstances it was found necessary in Japan in the 20th century to recognize and to give effect to informal marriages, concluded in accordance with the old religious law, side by side with the new civil marriage. Similar experiences were made in France during the late 19th century.

Some non-Turkish experts, going beyond the proposal that informal unions should be recognized, suggested that the time may have come to acknowledge the force of popular conviction, and to introduce, as an alternative to, or cumulatively with, the civil marriage, a marriage of the kind at present practised in rural communities in the presence of an Imam. It was even suggested that the Imam should be invested by the State with the functions of a marriage officer. These proposals were supported by the experience in Europe and in French Northern Africa, but the Turkish members rejected them unanimously on a number of grounds. They pointed to the fact that Turkey is a lay State, and that the present type of Imam is not suited for the post of a civil marriage officer, but the possibility was mentioned that the proposed measures of the Government to provide a special course of education for a new type of religious minister, may lead to a change of attitude in this matter.

14. The Conference examined, further, whether the popular predilection in rural areas for informal marriage remains in some measure connected with a survival of polygamy. Little evidence of the existence and extent of polygamy was available. Estimates varied from 2 % to 10 % of existing marriages, but it appeared from the experiences of a trained social anthropologist with a good knowledge of a limited rural districts that the lowest figure of 2 % is probably nearest to the truth. In any event, present day polygamy appears only in the form of bigamy, and even then it cannot be regarded a a serious threat to the modern institution of monogamy. The conference learnt that the determining factors are social and eugenic. Sterility, the need for help in the house and the obligation to provide for poor female relatives are the factors which produce bigamous marriages which, in the case of marriages to servants or relatives, are only marriages in name. Thus the second marriage conceals a contracts of employment or a measure of social assistance. As the social status of women improves, as wages and pensions will be accorded to them, the old form of maintenance by way of an informal second marriage will vanish.

15. The Conference had little time to consider the effect of the modern Turkish law of divorce. Statistics do not appear to provide a very reliable guide, but it appeared that the universal trend to-

wards an increased number of divorces has also made itself felt in Turkey. It was noted that the majority of divorces is based on the ground that matrimonial relations have broken down and that the parties can no longer be required to live together. This is not surprising since the proof that the marriage has broken down is less offensive to the spouses and to the community than evidence of concrete matrimonial offences. It seemed, however, that the Court of Cassation, in requiring evidence of the respondent's guilt in causing the breakdown of the marriage has discarded the purely objective approach of Swiss law. This practice seems to disclose a tendency to restrict the number of divorces, contrary to the wording of the Code.

16. Although the Conference did not study Turkish land law as such, reference was made constantly to the practice of the courts administering the relevant provisions of the Civil Code. Naturally the question how the provisions of the Code, which presuppose the registration of all titles and the existence of a cadastre, can and have been applied to the transfer of land in country where land registration is still in its infancy, attracted much attention. However, these questions were discussed within the wider framework of the problem how Turkish courts interpret the adopted legislation where local conditions are so different from those in Switzerland as to make its direct application difficult or impossible.

17. The Conference did not consider in detail the question whether the new law of succession has proved difficult to apply or whether it satisfies popular feeling. In this connection it would be interesting to know whether the new rules of intestate succession are largely excluded by wills ; on the other hand such evidence, even if it were forthcoming, would not necessarily be significant in a rural society. The fact is more important that the successors often remain together in possession of the estate for a considerable time without dividing it up. Thus any real dissatisfaction with the rules of intestacy, especially with those favouring an excessive splitting up of the estate remains largely concealed. It appeared, however, that the new system, which gives females equal shares with males has been generally accepted, while the exclusion of ascendants where descendants or collaterals are living has not proved popular.

18. One principal conclusion emerged clearly from the discussion. While the foreign lawyers had assumed that a considerable cleavage must exist in Turkey between the legal system introduced from abroad and its practical application, this assumption was not confirmed by the facts. Legal theory has always taken the view that laws must be based on local customs and moral standards and that they cannot operate unless they are initially supported by popular conviction. Turkish experience seems to prove the contrary. It appears that if a small but highly trained intelligentsia, consisting of administrators and legal experts who are united in their purpose is called upon to operate a new legal system based upon new values and standards of behaviour, among a population which participates little in government and administration, the cleavage between law on the one side and customs, traditions and morality on the other side can be overcome and the new legal system can be made effective.

On the other hand, in the rarified sphere of constitutional and administrative law which involves primarily a small circle of administrators and legal experts, divergencies and frictions on lines well known in Western countries are likely to arise more frequently.

This thesis formed the express or implied basis of most of the speeches and papers prepared by the Turkish experts, and it impressed itself with considerable force upon the minds of those taking part in the conference. It led naturally to an investigation of the devices, such as legislation, administrative acts and judicial practice, through which the process of changing the existing social structure is carried out. It seems that a highly flexible system of administration and judicial practice must be developed. This may conflict with the usual conception that stability and certainty must be the first aim of the law and its administration. The insistence of the Turkish experts upon the fact that the revolution in Turkey is still a living force assumes thus a special significance.

The foreign legal system which was originally introduced haphazardly and almost accidentally as an offspring of the movement for national revival and modernization has, so it would seem, become itself a symbol of the nationalist movement and of its policies. It may

not, as yet, become operative in all its aspects at every moment and in every place, in the country, but these failures have produced only few express or tacit modifications of the legal system itself and no desuetude.
