INTRODUCTION

THE RECEPTION OF WESTERN LAW IN COUNTRIES OF A DIFFERENT ECONOMIC AND SOCIAL BACKGROUND WITH SPECIAL REGARD TO PROBLEMS ARISING OUT OF INDUSTRIALIZATION

REPORT ON THE COLLOQUIUM HELD BY THE INTERNATIONAL ASSOCIATION OF LEGAL SCIENCE IN LUXEMBOURG, 27 - 30 JULY 1959.

by

K. LIPSTEIN

1 — BACKGROUND :

The motives for the wholesale reception of Swiss law in Turkey and the techniques of introducing it were discussed at a meeting of the Association in Istanbul in 1956 (see Social Sciences Bulletin 1957, Vol. IX No. 1 (1951) ; (Annales de la Faculté de Droit d'Istanbul No. 6 1956, pp. 1-251.)

This reception offers a fascinating study for comparative lawyers from all countries, for it shows that in a country with a small, united and intensely active intelligentsia and a largely rural and not highly educated population, technical innovations of the kind known as layers' law can be introduced efficiently and speedily. Thus changes in the law of contract, commercial law and procedure take place smoothly. Matters are different when the family, succession and even property in general are concerned. Here the movement to change a patriarchal, agricultural and theocratic society into one which his egalitarian, industrial and secular met with many difficulties. It is only necessary to refer to the many

problems which arose from the reluctance of the population to celebrate their marriages in secular form. Thus void first marriages encouraged the conclusion of equally void second unions, thereby reviving the prohibited institution of polygamy, increased dangerously the number of illegitimate children and caused confusion among heirs. The change in the legal order of sucession was frustrated by the unwillingness of the family to distribute the property of the deceased among his descendants, if there are parents. The absence of a reliable cadaster and of a land register made it impossible to apply the Swiss rules on the transfer of immovable property.

Many of these difficulties arose from deep-seated convictions of the population as to the conduct of family relations. However, some — and not only an inconsiderable part — were due to the lack of technical development. Thus secular marriages were rendered difficult by the absence of roads and communications, which would have enabled the parties to reach the administrative centre, especially in order to obtain a medical certificate of health. The absence of a land survey is another. At the same time it appeared that the development of new techniques could directly or indirectly lead ot the acceptance of the new legal order. Thus, for instance, the introduction of health and other State insurance schemes, available only to a lawful wife and to legitimate children, helped to speed up the new form of marriage. In short, technical advance goes hand in hand with legal development. The former stimulates the latter, but their interdependence is such that cause and effect may be reversed, and legal development itself may exercise a creative influence upon the growth of technical advance.

2 — PURPOSE OF THE COLLOQUIUM :

The purpose of the colloquium was twofold. In a broader sense it was to examine the differences which have arisen in the application of the same laws in two countries of a different economic background. This discussion was primarily technical, but it served to expose the reasons which have led to divergencies of interpretation. It also established once more that the absence and

the emergence of new technical devices, both of a physical and of a social character, played their part in this development.

In a narrow sense, the influence of technical progress as such upon the development of the law formed the object of the discussion. As stated before, this problem presented itself less as one of cause and effect, than as one of interdependence. While technical progress or its absence can be found to have been the reason for the success or the failure of certain institutions and rules, it appeared equally that in a *dirigiste* economy, legal innovations may stimulate technical progress.

3 — TECHNICAL PROGRESS AND LEGAL DEVELOPMENT :

The reports of *Fındıkoğlu* and *Balta* concerning the situation in Turkey, supplemented by those by *Yadin*, *Derrett* and *Allott* dealing with Israel, India and Ghana respectively, and the observations of *Serophim*, during the debate, regarding the position in Egypt, disclosed this interaction very clearly. In Turkey, the creation of a road system, the growth of urbanization and the move towards villages from agricultural districts, gave rise to new problems of administration, health, education and social services which could only be handled on the basis of extensive modern legislation. On the other hand, the control of labour relations, including the limitation of hours of work, the protection of periods of leisure, of health, safety, of women and children and of dangerous occupations, and accident insurance, preceded rather than followed the modern trend of industrialization. This legislations, coupled with the Turkish approach to the solution of labour relations and to the settlement of disputes, left little room for the industrial forces themselves to work out the conditions of employment by a process of bargaining and a trial of strength. This solution differs radically from that followed in Israel where the intervention of legislation in this field is restricted, given the existence of strong trade unions, of a predominantly agricultural community and of a reluctance on the part of the Government to interfere in the pace and direction of industrial growth. Again differently, in India, a traditional approach to relations between employers and employees in a predominantly agricultural society has led, so far,

to a minimum of legislative action either in response to or in the direction towards industrialization.

The degree of legislative action in respect of planning of the administrative control of the management of industry and of its finance reveals also the close interrelation between legal development and economic *dirigisme*, whether it be in the form of State-owned or of mixed enterprises. The report by *Balta*, which reviews the legislative techniques employed for these purposes, is sufficiently explicit so as not to require any elaboration here.

4 — TECHNICAL MODIFICATIONS OF THE RECEIVED LEGAL SYSTEM :

It is indicated to consider first the technical modifications introduced by Turkey when she adopted the Swiss Codes. Those affecting the law of obligations, commercial and procedural law were conveniently set out in the report by *Elbir*, which covers such diverse matters as companies and partnerships, commercial registers, bills of exchange, interest for delay, anatocism, the contract of transport, warehouse warrants, unfair competition, limitation of actions and a great number of individual rules dealing mainly with contracts. These are technical innovations which are little affected by the circumstance that the economic situation in Turkey differs greatly from that in Switzerland except perhaps in so far as credit facilities in Turkey require a new approach to the legal limits of rates of interest and that longer periods of limitation are necessary in a country where the means of transport are often lacking.

Turning to family law in general, the report by *Arik* on adoption showed clearly the special problems of reception, if the background in the receiving country differs from that of the country where the legislation was originally planned. In Turkey, the prevalence of illiteracy requires clearly the admission of representatives to carry out, or to assist in, the act of adoption. It appears also that in a society which is only slowly acquiring the common conviction that the sexes are equal, the need may be urgent to allow the adoption of male children, even if female children of the marriage are in being. The question arises, further, whether the elborate safeguards developed in Swiss law as regards the form

of the adoption, the age of the adopter, etc. are perhaps excessive in a society where the protection of children has not yet reached the same degree of perfection as in Switzerland. The existence of *de facto* adoptions, brought about by registering the child at birth as the adopter's own issue, invites the question whether adoption in the modern form has become acclimatised in Turkey as a living institution.

In the sphere of divorce, the reports by *Ataay* and *Grossen* disclosed that, at least in so far as divorces by and against lunatics are concerned, Swis law has reached a greater degree of refinement. The Turkish attitude to allow the representative of the lunatic to bring a petition for a divorce may well be influenced by the different approach to divorce in Turkey, where formerly Islamic law looked less to the grounds for a divorce (which form the basis of an interesting Swiss distinction) and treated the divorce as the exercise of an undoubted right, existing in all circumstances. In short, the distinction between the permissible exercice by the curator of the right to petition for a divorce if the ground is absolute and the prohibition to exercise this right on behalf of the lunatic if the ground is relative only, may be an innovation, the repercussions of which have not yet been sufficiently appreciated in Turkey.

The report by *Grossen*, treating the question of the property regime between spouses from the Swiss point of view, raised a number of fundamental questions. Has the Turkish solution, which in the absence of a marriage contract established separation of goods as the statutory regime, proved to be successful? Has the Turkish wife assumed the administration of her property, and if so, what is the relationship between husband and wife in this respect? What is the wife's contribution to the expenses of the household? Is there a tendency to demand a pooling of the income saved during the marriage ? Although it emerged from the debates that the law and reality are widely divergent, that the husband administers the wife's property, but that he is not, in practice, called upon to account for it, and that the wife's labour for the common household is not treated as an activity to be assessed in economic terms — a consideration which is applied equally to the husband's contribution, — the Turkish experts expressed themsel-

ves satisfied with the present regulation. The reason appears to be that it expresses formally in terms of Western law a material relationship of a somewhat different character which had been observed by Islamic society.

The observations by *Ataay* and the report by *Lalive* showed that the protection of the right of personality is as yet less developed in Turkey than in Switzerland. This is not surprising, since the existence and the extent of this right remain a much debated question in many legal systems.

Reports by *Çağa* and *Yung* dealt on fairly similar lines, but with somewhat different results, with what appears at first sight to be merely a technical problem ; *réserve* and *quotité disponible* in the law of succession. The report by *Yung* established, as a result of comparative survey, that the *réserve* in Swiss law is a stable factor, while the *quotité disponible* varies. It emerged that, in face of the clear provisions of the Code, Turkish lawyers are making a strong effort, which is not supported by the provisions of the Code, to reverse this order. As the report of *Çağa* and the subsequent discussion disclosed, the present regulation of intestate succession as well of the *réserve* and the *quotité disponible* is contrary to Turkish family traditions, which still cherish the notion of the patriarchal family and aim at safeguarding the parents and sisters, even when descendants exist. The debates showed, however, that by means of donations and wills, both Turkish and Swiss practice has been able to introduce a certain flexibility of disposition, which appears to be reinforced in Turkey by the reluctance to resort to the courts in order to challenge the validity of a testamentary disposition.

The question discussed by the extensive reports of *Gursöy* and *Beck*, whether the action en *pétition d'hérédité* should be retained, seeing that it has been put to little use in Turkey, brought out once more the restraining effect of national customs and traditions. While the action provides a valuable protection in Switzerland, traditional notions have so restricted its ambit in Turkey as to pervert its original nature.

One of the most delicate problems which faced Turkish courts as a result of the reception of the Swiss Civil Code is that of title to immovable property and its transfer. Since the Swiss Code as-

sumes the existence of a cadaster and of a land register where the title to land and its encumbrances are inscribed, and since such registers have not yet been established in Turkey on any important scale, Turkish courts in the last thirty-five years have been confronted regualarly with seemingly insoluble problems where contracts relating to land and the acquisition of title to land were involved. These delicate problems were handled by the Turkish Court of Cassation on a footing which does not derive its validity directly from the provisions of the Code on the transfer of immovables, but from those concerning the possession of movables. The report by *Tekinay*, *Sungurbey* and *Birsen*, supplemented by those of *Gilliard* and *Liver*, dealt respectively with the transfer of unregistered land, title by prescription and the restitution of possession resulting from the failure of purchasers to acquire a valid title according to the provisions of the Code.

Since there can be no registration, the transferor has not, and cannot transfer valid title. In addition the agreement to transfer would be invalid in the absence of competent authorities who, by Swiss law, are called upon to draw up the requisite documents of transfer. In fact, under the pressure of practical reality, Turkish practice was forced to find means of countering the danger that all purported transfers of land were to be subject to a claim for restitution of possession. As *Tekinay* indicates, the acquirer can avail himself of the plea of prescription, when called upon to restore possession, even if the contract is void for lack of form.

Thus, in Turkey, the institution of possession has assumed unexpected importance which has caused much doctrinal discussion. This is set out by *Sungurbey* and is approved by *Liver*. The latter's exposition indicates that the institution of prescription is of much greater importance in Switzerland than was thought. The debates brought this impression into clear relief. They showed that the problem of the transfer of unregistered land is by no means unknown in Switzerland, but that the practical solution differs radically from that developed in Turkey. The basic difference is a technical one. In Switzerland, the absence of a land register (which is still not extant in certain regions) does not preclude the acquisition of title to land by prescription. Since the new title cannot be registered, an order of the court provides a convenient

substitute for the registration. Once this possibility is conceded, the transferor, who will normally have completed the period of prescription before he disposes of the land, can regularize his title. A prospective purchaser is likely to insist on the execution of this regularizing procedure before he enters into a contract for the acquisition of the land, and even if he should have failed to demand it, he can avail himself of the same procedure in order to obtain an order in his own favour, since he is entitled to join the transferor's period of prescription to his own. The use of this device assures the existence of a title vested in the transferor before the conclusion of the contract to transfer, or the creation of a title vested in the transferee, after the conclusion of the contract. to transfer, or the creation of a title vested in the transferee, after the conclusion of the contract.

It would seem that the use of this technique will not eliminate all the difficulties which have arisen in similar circumstances in Turkey, since in addition, the contract to transfer is automatically void as a contract to transfer land, having regard to the present absence of means in Turkey to conclude such a contract in valid form. However, if the transferor has not obtained a previous order of a court declaring him to be the owner of the land in virtue of prescription, the transferee can do so in his own favour as soon as he has obtained possession, provided that the period of prescription has been completed in his own person and in that of the transferor. Thus he is protected against all attempts by the transferor to recover the land. The next transfer, on the other hand, cannot be treated similarly, since at this stage a legal owner exists with the result that the second transferee must complete a new period of perscription in his own person, without being able to add the period of possession by his transferor. It follows that the adoption of the Swiss procedure whereby the acquisition of title by prescription is pronounced by a court in the absence of means for registering it in the land register would only provide temporary relief in Turkey and that a technique must be devised whereby contracts for the transfer of land can be validly concluded in some form, even if the form prescribed by the Swiss Civil Code as adopted in Turkey cannot be employed as yet.

The conclusion drawn from a prolonged and constructive

discussion was, therefore, in a broad sense that Turkish lawyers must reconsider the entire complex of problems arising from the transfer of land by reference to the experience gained in Switzerland when dealing with a comparable situation.

The frequency with which claims are brought in Turkey for the restitution of possession of land which was transferred in virtue of an invalid contract and could not be acquired by way of registration may account for a stricter approach in Turkey to the liabilty of a *bona fide* and a *mala fide* possessor than in Swiss law.

Turning to a problem of legal policy which is closely linked with the scarcity of housing arising from the Second World War and the economic problem of how to encourage the erection of blocks of flats by small investors acting together, the reports of *Oğuzman* and *Deschenaux* illustrate that in different economic and social conditions the same needs engender the same legal questions. The legal difficulty is not in superable of having to accommodate the concept of property in a horizontal part of a house within the closed system of recognized and registrable rights in immovable property, of safeguarding the rights of secured creditors and of establishing a common administration of the premises. The experience in Turkey, following the legislative recognition of such property rights in virtue of Law 6217 of 6 January 1954 and that gained in France, Belgium, Italy, Germany and Austria, provides a valuable basis for the present movement to introduce a similar system of property in flats into Swiss law.

5 — DIVERGENCIES OF DECISIONS BASED ON IDENTICAL TEXTS :

Apart from studying the deliberate divergencies between the Swiss and Turkish legislations and from examining the obstacles and failures which the introduction of the Swiss codes had experienced in Turkey, the conference considered the seemingly accidental divergency of decisions based upon the same texts. The question to be examined was whether this diversity of conclusions was merely accidental, because two equally acceptable alternatives were available or whether important social and economic differences and aims supplied the true motive. The reports by *Bilge*,

Atsay, Yung and *Grossen* treated a number of decisions of the Turkish Court of Cassation, from which three typical examples were chosen for a detailed discussion.

In the first place, it appeared that Turkish courts are more vigilant than courts in Switzerland in controlling the exclusion of members of an association and that they have relied on specific remedies which Swiss courts are unwilling to grant in the absence of formal defects or of abuse of rights. It appeared that, particularly in Turkey, the form of an association is employed for many different purposes ranging from social activities to combinations of workers and of employers. The liberal attitude of the Turkish Supreme Court appeared to be influenced by the consideration that a small directing caucus, rather than the members as a whole, may be able to deal with, or to determine, current business, including expulsions. It therefore seemed imperative that a member, since he is unable to appeal to his fellow members in these circumstances, should be in a position to invoke the protection of the courts. There was general agreement, both on the part of the Swiss and of other experts, that the Turkish solution is much in advance of developments elsewhere and that it is to be welcomed, even if it is not borne out by the text of the law on which it is based.

In the second place, Turkish courts appear to be more generous than Swiss courts in allowing grandparents a right of access to their grandchildren. The meeting considered whether this was due, in the particular circumstances, to the absence of an efficient sytem of authorities to supervise guardians and wards, or whether a different conception of the family was instrumental in guiding the practice of the Turkish courts. A close examination showed that both possibilities must be excluded and that the different result in Turkey was the consequence of a special factual situation.

In the third place, Turkish courts allow the legal representative of a person who is incapable of acting himself to institute a petition for a divorce. Here the cleavage between the Swiss and the Turkish view remained complete for the reason, explained above, that according to Turkish opinion, marriage has remained a contract, as it was in Islamic law, and has not assumed the

function of an institution conferring a new status, as it does in Swiss law, and in European law in general.

6 — CONCLUSIONS :

As stated at the beginning, the purpose of the colloquium held in 1959 was to supplement in the technical field of law the investigations carried out in 1955 in regard to the general social and economic consequences of the Swiss codes in Turkey. It emerged clearly that even when the text of the law leaves gaps to be filled by the practice of the courts, the latter are reluctant to assume the function of legislators, although the text of Article 1 of the Swiss and Turkish Civil Codes enables them to do so. Instead, Turkish courts are still influenced, albeit unconsciously, by the notions and traditions of the old Islamic law, although its application as such is expressly excluded. Thus, at least in the sphere where the new law has not assumed express control, the old law has succeeded in giving the received law a direction towards national traditionalism.

Further, it appeared that the doctrine and practice of the country from which the received system was taken, may assume a much greater rigidity in the receiving country than in its natural birthplace, since the subtle shifts of the constant development in the country of origin do not make themselves felt in the country of reception until they have crystallized sufficiently. Thus the received law assumes greater rigidity than it possesses in the country of origin.

On the other hand, the need to deal quickly with situations which do not or cannot arise in the country where the codes originated, owing to different social and economic conditions, may give a powerful impulse to develop techniques which, by their originality, deserve the attention and admiration of lawyers in the country from which the Codes were taken.

(*) V. le compte-rendu du Colloque par **K. Lipstein** dans la Revue Internationale de droit comparé, 1959, p. 758. [N.D.R.]