

# The Path to Modern Turkish Law

■ By Av. Özgür Metin & Av. Onur Gelbal\*

*In this issue, we will try to concisely convey some information about the Turkish jurisdiction system as well as the overall composition of the Turkish legal system. As an introduction, the history of the Turkish constitutional system will be analyzed briefly. In the following issue the courts, their jurisdiction and the law that the courts practice will be explained in further detail.*

Since the Turkish Republic is the successor to the Ottoman Empire, it would be plausible to begin with an overview of the Ottoman legal system (the last century of the Empire, to be exact) in order to efficiently examine the Turkish legal system.

## A System in Transition

The legal system of the Ottoman Empire was founded solidly on the principles of Islamic law, with absolute power belonging to the Sultan. In classical Islamic theory, “law is a divinely-ordained system preceding and not preceded by the Muslim state, controlling and not controlled by Muslim society.”<sup>1</sup> The Sultan was his instrument and representative on earth. In principle, the Şeriat<sup>2</sup> covered all aspects of Muslim life, public and private. The main function of the state was to maintain and enforce the divine rules. Thus, in theory, there was no legislative power to regulate any aspect of social or political life. However, in reality, the Sultans could not find answers to their complex government and society in revelation. When the Empire grew enormously, it became impossible to govern it by enforcing only Şeriat, which had only a few rules concerning public law. As a result, “in order to rule their wide lands by filling the vacuum in the field of public law, Ottoman Sultans made local and sui generis arrangements.”<sup>3</sup> Accordingly, Muslim jurists tried to find answers to many problems for which revelation provided no explicit answers. If the answers came from society, they were called *gelenek* (custom). If they came from Muslim jurists, they were called *iċtihad*

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\* Attorneys at law, Members of Ankara Bar Association. You may contact them at av.ozgurmetin@gmail.com and gelbal24@gmail.com, respectively.

<sup>1</sup> J. Coulson, A HISTORY OF ISLAMIC LAW 1-2 (Edinburgh University Press, 1964).

<sup>2</sup> Shar’iah in Arabic. Throughout the paper, Arabic derived terms are spelled according to their Turkish transliteration.

<sup>3</sup> Bozkurt, G., *Review of the Ottoman Legal System*, 3 OTAM (Osmanlı Tarihi Araştırma ve Uygulama Merkezi Dergisi – Otoman History Research and Application Journal) 115, 117 (1992).

(interpretation). If the answers came from the Sultan, they were *kanuns* (regulations). Kanuns were imperial directives rather than legislative enactments for the Ottomans. Even though disguised, it was, in fact, the making of new laws (*kanuns*). However, *kanuns* were justified since they covered areas not mentioned in the Şeriat. “In earlier centuries [of the Empire], the Ottomans had developed secular civil law (*kanuns*) in terms of administrative categories and rules to an extent unmatched in other Islamic states.”<sup>4</sup> Thus, early forms of secular administrative law, even commercial law, came from the directives of the Sultan,<sup>5</sup> but for the private or social life, the Şeriat was the answer.

Thus, in classical era, Islamic laws dominated the legal system in the Ottoman Empire. However, it is important to recognize the difference between private and public law during this period. While the Ottomans adopted the Islamic private law in full, Islamic laws were supplemented with local and *sui generis* arrangements in the areas of public law. In conclusion, Islamic legal and social patterns, which the Ottoman Empire itself helped to perfect, functioned very efficiently during the rising years of the empire. As Joseph Schact argued, the Ottoman Empire gave the Şeriat the greatest degree of actual efficiency it had ever possessed.<sup>6</sup> Later, Findley pointed to the paradox in Ottoman legal development that the same Empire “ultimately evolved in such a way as to prepare the legal and judicial foundations for the most secular Islamic state of the twentieth century.”<sup>7</sup>

The gradual decline of Ottoman power started at the end of the seventeenth century with the gradual increase of Ottoman Sultans’ reforms towards Europeanization/modernization. The 1839 Charter of Liberties, in which Ottoman citizens were granted some fundamental rights and freedoms, is considered to be the start of these reforms.<sup>8</sup> The first Turkish Constitution was promulgated in 1876 and re-promulgated in 1908. Furthermore, the cultural influence of the states of continental Europe, especially France, showed itself in a broad movement towards codification.<sup>9</sup> Many laws were adopted from France, including commercial, penal and administrative laws; France became the country to which the Ottomans looked in search of models of change and reform. “Young Turks” were sent to Paris by the Sultans and they came back with their ideals of civilization, modernization, nationalism and secularism. Although some Sultans succeeded for a short-term in these reform efforts, their successes were only temporary. They tried to rehabilitate

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<sup>4</sup> Findley, C., BUREAUCRATIC REFORM IN THE OTTOMAN EMPIRE 5 (Princeton University Press, 1986).

<sup>5</sup> Starr, *supra* note 9 at 27.

<sup>6</sup> J. Schact, AN INTRODUCTION TO ISLAMIC LAW 84 (Clarendon Press, 1964).

<sup>7</sup> Findley, *supra* note 14, at 5-6.

<sup>8</sup> Bernard Lewis, THE EMERGENCE OF MODERN TURKEY 104 (Oxford University Press, 1961).

<sup>9</sup> C. Rumpf, *The Importance of Legislative History Materials in the Interpretation of Statutes in Turkey*, 19 NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION 267, 269 (1994).

the existing system with a patchwork of reforms, instead of having major systematical changes. Furthermore, reforms in this era introduced some European legal concepts – such as ‘rule of law,’ ‘public service,’ ‘equality’ and ‘parliamentary regime’ – into the Ottoman legal system. This was a period in which two entirely different legal and social ideas and institutions (Islamic and Western) coexisted. In spite of the law reforms, which were transplanted from the continental European legal systems, Islamic law remained in force until the end of the Ottoman Empire. This created legal and cultural duality, wherein institutions based on Western models began to emerge side-by-side with the long established Islamic institutions. Even though this legal and cultural dualism caused uncertainty in theory and practice, it paved the way for the total reception of civil law system in the modern era.

The modern era started when the Turkish Republic was established in 1923, after a four-year war of independence against British, French, Italian, and Greek troops. The leader of the independence movement was Mustafa Kemal (one of the ‘Young Turks’). The Republic had a Parliament which had already been established in 1920. Radical changes were introduced into the lives of Muslim Turks. Under the revolution led by Mustafa Kemal (later named Atatürk<sup>10</sup>), every feature of Turkish life began anew. Again, the wave of westernization was rising without the West. Under Atatürk’s leadership, the new regime abolished the Caliphate that belonged to Sultan (the Turks were no longer the leader of the Muslim world), Arab calligraphy, Arabic numerals, the Islamic educational system, Shari’ah (Islamic law according to the Koran), and polygamy (which was allowed under Shari’ah). Instead, the regime introduced a secular democracy with a parliament, Latin characters (alphabet), Western numerals, secular public education, and the civil law tradition of continental Europe (with a penal code modeled on the Italian Penal Code and a Civil Code modeled on the Swiss Code). The new regime’s desire for modernization/Westernization was reflected in these and many other reforms. “Atatürk also began introducing more egalitarian gender relationships. His reforms were so revolutionary that hearth, home, the business firm, and public spaces were virtually reconstructed from the bottom.”<sup>11</sup> Ironically, these reforms were imported from the West and at the same time were the products of the independence war against the West. During the following two decades, Turkey changed more than it had been changed in the previous two centuries.

The legal reforms were an attempt to reconstruct a new culture and society through radical legal reforms. Law was an instrument to lead a complete change and rearrangement of not only legal, but also social, life. In 1925, at the opening ceremony of the first law school of the Republic, University of Ankara – Faculty of Law, Atatürk candidly stated his purpose: “The greatest and at the same time the most insidious enemies of the revolutionaries are

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<sup>10</sup> Because Mustafa Kemal was respected very much for creating the modern Republic, he was given the title “Atatürk” or “father of the Turks.”

<sup>11</sup> See Starr, *supra* note 9.

unjust laws and their decrepit upholders... It is our purpose to create completely new laws and thus to tear up the very foundations of the old legal system."<sup>12</sup>

Like the secular system of education that began under the Ottoman Empire, Atatürk's secular system of government was firmly based on the European tradition. For his minister of justice, Atatürk chose Mahmut Es'ad Bey, who had been trained in law at Lausanne, Switzerland. He became the chair of the committee that would overturn Islamic family law and create a new civil family law.<sup>13</sup>

The new secular civil code was meant to change domestic life of Turkish families, the smallest units in society. Marriage was not a private matter anymore, as under the Şeriat, but it was to be under state control. In order to be legitimate, the marriage ceremony had to be performed by a state official and be registered with the state. For the first time, the Civil Code required a minimum age for marriage, both for men and women, and it allowed a Muslim woman to marry a non-Muslim.

The European model was essential to [Mahmut Es'ad] Bey's thinking... By 1926 an entirely secular legal system was in place... The paradox cannot be ignored that secular law and courts represent a configuration of cultural ideas in opposition to Islamic culture. A secular legal system ... symbolizes a fundamental reorientation of values and a disassociation or disavowal of values inherent in Islam ... Turkey's secular court system asserts universal legal norms of individuality and equality and, like other civil law countries, uses established norms of proof and systemic legal procedures, required by the rule of law.<sup>14</sup>

### **History of the Turkish Constitutional System**

The Turkish Grand National Assembly abolished the Sultanate on 1 November 1922 subsequent to the final victory over the Greek army. The Republic was officially proclaimed on 29 October 1923 by this constituent assembly.

The new Republic clearly needed a new Constitution since it was determined to introduce a new social structure and law reform. The constitution of 1921 was not meant to be a constitution in the sense of the word, but rather a document dealing only with the most urgent constitutional problems at that time.

A new constitution was enacted by the Turkish Grand National Assembly in 1924 in consideration of the particularities of the 1921 Constitution. The provisions of 1924 Constitution set out a representative democracy. This was the underlying characteristic of this Constitution.

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<sup>12</sup> Starr, *supra* note 9 at 27. See also Lewis, *supra* note 18, at 269.

<sup>13</sup> Starr, *supra* note 9 at 17-19.

<sup>14</sup> *Id.*

In 1937, secularism found a place in the legal history of the Republic for the first time through a constitutional amendment. This was also the last of Mustafa Kemal's revolutionary steps.

In 1961, a new constitution was drafted by the Constituent Assembly, which was composed of the House of Representatives and the National Unity Committee (*Milli Birlik Komitesi*). The Constitution of 1961 was prepared and adopted by this assembly and came into force after being ratified by a popular vote of the people.

The general characteristics of 1961 Constitution were as follows:

- Pluralistic Democracy (Representative democracy was superseded by pluralistic democracy)
- Principle of social state (Direct control of the economy by the state)
- Separation of powers (Legislative, executive, judicial)
- Improvement of civil rights and liberties

In 1982, the third Constitution of the Republic was promulgated. Although amended several times, this Constitution is still in force. The general characteristics of 1982 Constitution are as follows:

- Strong state and strong executive
- State authority having priority over social rights and freedoms due to concerns about public security and law and order
- Less participatory democracy
- Although the Turkish Grand National Assembly held the legislative power, the 1982 Constitution conferred on the Executive the power to make decrees.

In summary, currently Constitutional review in Turkey relies on a centralized model. There is a special court with exclusive jurisdiction over constitutional matters. The Constitutional Court consists of eleven regular and four substitute members. It ensures that legislative enactments do not violate the Constitution. It may declare that a law is unconstitutional; if so, the law is annulled. Individuals cannot challenge the constitutionality of laws, however, constitutional challenges can be raised by a public authority, like the executive branch, a political party, a parliamentary majority, or a lower court.<sup>15</sup>

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<sup>15</sup> H. Enver, *Gender Equality from a Constitutional Perspective*, in *THE GENDER OF CONSTITUTIONAL JURISPRUDENCE* (B. Baines and R. Rubio-Marin, eds., Cambridge University Press, 2005).