REVIEW OF THE OTTOMAN LEGAL SYSTEM

*Dr. Gülnihal BOZKURT**

As is well known, Islamic Law was enforced in the Ottoman Empire which had a theocratic structure. The Islamic Law and new Laws adopted from the West gained validity simultaneously after the proclamation of the Reform Edict. (Tanzimat Fermanı). Consequently, the proclamation of the Reform or Tanzimat is a very important event in the Turkish history of law. New concepts and norms were introduced to the legal system which was valid during the classical era.

I. Ottoman Law in the Classical Era

In the Classical Era, i.e., per-Reform Era, the Islamic Law dominated the legal system in the Ottoman Empire. While a generalization does apply, it is important to consider a distinction between the private law and the public law. In fact, the Ottomans have adopted the Islamic private law in full and have not insisted on new rules. Provisions related to the private law have been studied in detail in the four basic sources, the Koran, Sunna (precepts of Mohammed) icma (teachings of Muslim scholars) and kıyas (analogy). The fact that Sunni sects arrived at different conclusions from these sources and because one interpretation has not resulted in the renunciation of a previous interpretation has led to the simultaneous validity of various diverse interpretations. These rules were compiled in various pieces of literature. During the Third Century of Hegira the door of interpretation was closed. The elaboration of the private law with the existing rules continued. Ottoman Sultans never interferred with the judgements passed by the Kadis (Judges) in the field of private law, unless these judgements were unjust and considered themselves the protectors of Shariat. For this reason, the

*Assoc. Prof. of Law, Chairman, Department of History of Law, School of Law, Ankara University.

enforcement of Islamic private law continued in the Ottoman Empire without any change[1]. In other words the rules of the Islamic law prevailed in Ottoman social practies in the fields of Law of Persons, Real Rights, Family, Inheritance, Obligations and Commercial Law[2]. Needless to say, these rules were valid only for the Muslim citizens of the Empire. Non-Muslim Ottoman citizens were subject in the field of private law to the rules of their own religions[3].

In the field of public law, however, a completely different development is observed. The Islamic Law is a law of individualistic nature. There are only a few rules on public law in the Koran, i.e. administration of or internal structure of State. The institution of the Khalifate was adopted after the death of Mohammed the Prophet by, was Icma (the teachings of the Scholars). It became impossible to govern an Islamic State, the borders of which were increasingly expanding, by enforcing only a few rules pertaining to public law. As a result various administrative systems in countries that were conquered, were adopted beginning with the eras of the first four Khalifs. The Islamic States that were founded subsequently have also complied with these principles and adopted various systems of administrations compatible with the conditions of their respective countries. The administrators of these counutries were relegated administrative powers by the Khalif and governed their countries based on the sovereign powers.

For these reasons, the rules of the Islamic Law were enforced differently in each country in response to economic and social requisites during various periods. Muslim monarchs, governing their subjects from various religions and origins together with the Muslims, adopted changes related to the field of public law because of political reasons, such as "the interest of the State" and developed

1. In practice, some exceptions were observed. A new system of transfer of ownership and inheritance was established through descendency foundations and rental revenue foundations were established.

2. For detailed information on Islam Private Law, see Halil Cin-Ahmet Akgündüz, Türk Hukuk Tarihi (Turkish History of Law). I, Konya, 1990 and Coşkun Üçok-Ahmet Mumcu, Türk Hukuk Tarihi (Turkish History of Law),. Ankara 1976, p. 77.

3. For detailed information on this subject, see: Gülnihal Bozkurt, İngiliz-Alman Belgelerinin ve Siyasal Olayların Işığı Altında Gayrimüslim Osmanlı Vatandaşlarının Hukuki Durumu (Legal Status of Non-Muslim Ottoman Subjects under the light of British-German Documents and Political Events) Ankara, 1989, TTK Basımevi.

new institutions. They enforced this new law at their discretion and judgement as empowered by the theocratic law of Shariat. They promulgated laws based on customs and traditions of the lands they conquered for the public interest, provided these laws were not in violation of the Shariat. Consequently, rules of public law, particularly in the fields of tax collection and the management of land, were asserted particular to each Islam State.

In order to rule their wide lands by filling the vacuum in the field of Public law, Ottoman Sultans made local and fully sui generis arrangements. In this State, which had a strong central administration since the days of Fatih The Conqueror, the expressions of the will of the Sultan who ruled the country and the official to whom the Sultan delegated authority manifest as rules of Public Law (decrees, edicts, etc.). Ottoman Sultans had legislative power as long as they did not break or violate the rules of the religion (Shariat). The Law imposed by the Sultans based on their authority was called common law (Örfi hukuk). Many regulations pertaining to the Ottoman State structure appeared as a consequence of the power of the Sultan to formulate common law. While imposing new rules solely based on their absolute power, the Sultans were exercising their administrations in provinces with completely different structures by imposing various decrees that met the local requirements by preserving loval traditions and legal principles. Thus the Ottoman public law encompassed rules deriving from local traditions and cultures as well as principles elaborated by the legislative power of the Sultan. Furthermore, in the Ottoman State structure it is possible to see the footprints of Byzance, Balkans and Mongols as well as Turkish and Islamic institutions. In other words, the Ottoman public law encompasses a sui generis arrangement. For this reason the study of the Ottoman public law requires the study of the Islamic Law as well as decrees issued by the Sultans. Under an Islamic umbrella the Ottomans have combined some principles of their old system of law, merged many traditions, created new institutions and set up principles in order to govern their vast lands. Under this organization that was set up in appearance and format[4] in confor-

4. "Fermans" (edicts).. Before "Fermans-Edicts" were submitted for the approval of the Sultan, a clearance of the Şeyhülislam would be secured pronouncing they were in compliance with the Shariat or if they were outside of the Shariat, they could be arranged as the Sultan saw fit. The final draft submitted to the Sultan would be the final text and became a principle of the law. For detailed explanation on this subject, see Coşkun Üçok-Ahmet Mumcu, Türk Hukuk Tarihi, Ankara 1976.

During the Tanzimat Era, preparations to draft laws one after the other to regulate the field of activities, spelled out in the Edict, were launched. While laws were being adopted from the West, important arrangements were made in the Islamic Law. Laws enacted during this era may be enumerated according to their subjects as follows:

A. Constitutional Law

A Constitution in a basic document of law, regulating the fundamental structure of this State and the relations of the institutions of the State with each other Reform and improvement edicts, do not incorporate these characteristics. As they include basic principles of the Constitutions such as guarantees for lives and property; they are considered as constitutions and constituted the first steps in Ottoman Law in the transition to the Constitutional system.

The first Constitution of the Ottoman State (Kanun-u Esasi) was proclaimed by Abdulhamit II in 1876. This Constitution was drafted by a board under the chairmanship of Mithat Pasha by using Belgian and Prussian Constitutions as sources. In this Constitution, which took effect on December 23, 1876, the Sultan held all the powers. According to the Constitution, sovereignty was held by the Ottoman dynasty. The oldest male member of the dynasty was to become Sultan (seniorat system). The Sultan was holy and infallible. Article 113 of the Constitution did not include any guarantees for individual rights and freedoms. The Sultan was head of the legislative and the executive.

Legislative power was extended to the Ottoman Parliament consisting of Meclis-i Mebusan (Assembly of Deputies) Meclis-i Ayan (Assembly of Notables) and executive power was extended to the Sultan and the Council of Ministers. The Sultan had the power to supervise over the legislative and executive.

Judicial power was extended to the religious courts and regular courts founded in accordance with the new laws. In order to hold the trials of high level officials, a High Court consisting of thirty members was established.

When the structure of the state was arranged in the Constitution consisting of 119 articles and 19 sections, rights and obligations of the Ottoman citizens were indicated. All freedoms were recogni-

zed for the Ottoman citizens with the exception of freedom of assembly and the freedom to form associations. Taxes were to be collected consistent with the capacity of the individuals. All schools were to be under state supervision and protection.

This Constitution remained in effect only for a short period and on February 14, 1877, Abdulhamit II dissolved the Assemblies and the era of Meşrutiyet (Legitimacy) was suspended until 1908.

Following the proclamation of the Second Parliamentary Constitutional system in 1908, the 1876 Constitution was reintroduced. With amendments made in 1909, the powers of the Sultan were restricted and the powers of the Parliament were widely expanded. Article 113 was revoked and Ottoman citizens were given the freedoms of assembly and of association.

This system, however, also was not long lived. As a consequence of the activities of the Union and Progress Party (Ittıhat ve Terakki Partisi), the Sultan was accorded the powers to open, to disband and to close the Parliament before the end proclamation of the Republic in 1923.

B. Penal Law

During the pre-Reform era, the Sultans had made some arrangements based on their powers to impose common law rules not included in the Islamic Law. The first Penal Law dated May 3, 1840; enacted after the proclamation of Reform incorporated many novelties not included in the Islamic Law. This type of enforcement which constituted a deficiency in the enforcement of the Penal code enacted during Sultan Mahmud II for the scholars (Muslim clergy-Ulema) and civil servants, was eliminated with a penal law encompassing all citizens.

The principle of "punishment of all persons who commit crimes, regardless of their connections, considerations, friendships or rank" stipulated in the Reform Edict has been established in the Penal Law with the pronouncement that "all are equal beginning with the Vizier on down to the shepherd on the mountain". Crimes and canonic and common law punishments were enumerated and stipulated one by one in this law. All crimes, however, requiring enforcement of punishment were not included in the law. Enforcement of a single type of punishment for every crime caused diffi-

culty in judging concrete events and phenomena according to their contents.

Crimes which required death sentences have also been enumerated, but the enforcement of the sentence was left to the approval of the Sultan.

In 1851, a new penal law entitled "Kanun-u Cedid" was enacted. The most important change introduced by this law into the Penal law of 1840, was the introduction of the concept of public prosecution in the Turkish legal system. According to this principle, the pardon to be extended to the criminal by the inheritors in cases requiring the enforcement of "law of talion" would not preclude the State from imposing punishment. In this law crimes were divided in three categories as crimes committed against the security of lives and persons of citizens, crimes against the honor and dignity of citizens and against properties of citizens.

In 1855 a law was enacted to combat against bribery. The Reform Edict indicated that a law was to have been enacted against bribery.

In 1858 a new penal law, based on the 1810 French Penal law and with the addition of some canonic rules in sections where needed[11], remained in effect until 1926.

C. Trial Procedure Laws and Judical Organization

French Criminal Trial Procedure Law dated 1808 was translated in 1879 and put into effect. This law introduced the contemporary institutions of penal courts and public prosecutors in to the Ottoman judicial organization. The same year, Courts of Justice Trial Procedure Law prepared based on 1807 French Courts of Justice Trial Procedure Law was adopted.

In the meantime Shariat courts were reorganized. A Seminary for "Kadi-Clerical Judges" was opened.

With the enactment of the Law on Organization of Courts in 1879, judicial organization, public prosecutors, the status of judges, enforcement officers (bailiffs) and court fees were arranged. Legal

11. Full text of the law is in "Düstur" Series I, V. I, p. 537.

practice (lawyers) began taking root as an institution in the country during this period.

Various arrangements had been made in the judicial organization since the proclamation of Reform. A penal court (Meclis-i Tahkikat-Assembly of Investigation) was established at Istanbul in order to enforce the 1840 Penal Law. These courts were opened in a short time to conduct activities in all provinces. The President of the Court, working in the capacity of a board, was the Province Governor. Members of the Court were selected by the Governoor. This Court was to enforce punishments immediately and death sentences were to be referred to the Court of Appeals, but in practice these sentences were referred to the Tribunal of Judicial Cases (Divan-ı Ahkam-ı Adliye) which in reality was an administrative institution. These sentences could be enforced only after the approval of the Sultan.

In addition to Penal Courts, commercial courts were established to oversee commercial disputes. These Courts also operated in the form of boards and initially they were established under the Jurisdiction of the Ministry of Commerce under the Chairmanship of the Minister of Commerce. Members of the Court were elected by the Guild and merchant representatives. In 1848 again, a mixed commercial court with 14 members was established to oparete under the Chairmanship of the Minister of Commerce. Half of the members of this court were Ottoman citizens and the other half consisted of foreign businessmen engaged in business in the Ottoman territory. Extension of judicial rights of the State to the foreigners, as in the case of Consulate Courts operating in accordance with capitulations, constituted a restriction on the judicial power of the State. As indicated above, there were also community courts overseeing certain private law matters such as family law and inheritance law of non-Muslim Ottoman citizens.

The Commercial Law enacted in 1870 based on the traslation of French Commercial Law, introduced completely new concepts such as interest and partnership in the Ottoman law. In 1861, Commercial Trial Procedure Law was enacted. This law included provisions for the formation of land and sea commercial courts with wide powers and consisting of one Chairman, two permanent and four provisional members. In Istanbul a commercial appeal court was established to oversee the judgements of these courts. These courts,

which were under the jurisdiction of the Ministry of Commerce, were brought under the jurisdiction of the Ministry of Justice in 1876.

In 1863 the Maritime Trade Law was adopted.

With the 1864 Provincial Statues a Trial Board in every county, an appeal board in every provincial subdivision and a superior appeal board in every provincial subdivision and a superior appeal board in every provincial capital, were established in addition to commercial courts. These courts were to review cases not covered by Shariat, community, consular and commercial courts. These courts which would review the cases of all Muslim and non-Muslim Ottoman citizens, were called Regular (Nizamiye) Courts. The Religious Judge (Kadi) chaired these courts.

When the administrative courts were separated with the formation of the Council of State in 1868, the Tribunal of Judicial Cases (Divan-ı Ahkam-ı Adliye) began to serve as the superior court for Regular Courts. This Court included as members Muslims and non-Muslims. The Court was divided in two parts, as Appeals and Cassation[12].

In 1868, Regular Courts were restructured in subdistricts, counties and sub-divisions. Sub-division courts were given appeal power for lower courts. Aggravated Criminal Courts called"Criminal Courts" were established to review important criminal cases consisting of members from Criminal and Justice Court members in the Provinces.

A Law School was established in Istanbul in 1869 for the first time to give schooling to the judges who would be serving in these courts to enforce the new laws. Lawyers trained in this school were gradually appointed to the Presidencies of the Regular Courts, Law School was included in the School of Sciences (Dar ül Fünun) established in 1890[13].

While transition to the contemporary law was completed in the Ottoman State with all these new courts, Shariat, community and consular courts continued to exist and operate.

12. Cassation section was abolished in 1870. Consequently, a court similar to the present Court of Appeal was established.

13. This was the forerunner of Istanbul Law Faculty.

Failure to establish uniformity in the judicial structure led to important power and jurisdiction trans-gressions between the courts. This situation prevailed until the collapse of the State.

D. Administrative Law

While changes were made in the judicial structure during the Reform era in the outlying provinces and new courts were opened, the Administrative Law was also formulated and regulated.

The High Tribunal of Judicial Cases (Meclis-i Valay-i Ahkâmı Adliyye) established during Sultan Mahmut II, continued its task to draft administrative justice and law. In 1854 the authority to draft laws, regulations and statutes was transferred to the High Tribunal of Reform. The High Tribunal of Justice was accorded only the authority to conduct administrative justice. In 1861, these two courts were combined and took the name of Tribunal of Judicial Cases (Meclis-i Ahkâm-ı Adliyye).

The new Tribunal was divided into three departments; one in charge of administrative affairs, one having the responsibility of preparing laws and regulations and the third in charge of administrative law. In 1868 this institution was reorganized into the High Tribunal of Justice (the highest court of justice), Court of Appeals and Council of State (an institution incorporating a department which prepared laws and regulations and at the same time reviewed administrative cases and held the trials of civil servants).

The 1876 Constitution authorized courts of administrative justice reviewing conflicts between the administration and private persons.

E. Land Law

The Ottoman land practice "Timar" (fiefdom) has been for many centuries the foundation of the administrative, military and economic structure of the State. The lands which did not come under private ownership (proprietorship) and endowments (foundations) were subject to public property (mirî) and disposed of as "Timar" (fiefdoms).

The "Timar" system began deteriorating toward the end of the 16th century and was shaken from its foundation with the transition

to the "assignment by public auction system". When the central administration considerably weakened during the mid-18th century, persons granted "Timar" began exploiting the land as if they were primary owners. During the Mahmut II era, the "Timar" system was abolished. In 1858 the Land Decree[14] was issued in order to legalize the de facto situation and to fill the vacum in the land law.

This law decree was one of the laws drafted during "The Reform Era" based on the Islamic Law and common law[15]. This law decree was systematized in conformity with the Western legislative technique.

This law, consisting of 132 articles, divided the lands of the country into five categories: private property, State land (public land), endowment land (endowed pious or other types of foundations and trusts), land left under the jurisdiction of laws (abondoned laws) and lands not under the ownership of any person or not assigned for any specific purpose (waste land).

This law brought some clarity to the confusion in the law enforcement, but also caused some fundamental inconveniences, such as including forest areas among areas which could be used by all[16].

Although amendments were frequently made in this law it remained in effect until 1926.

F. Mecelle (Islamic Code)

While adjustments were being made in all branches of law during the Reform era, the views on drafting a civil law also surfaced. On this subject, two views emerged. While Ali Pasha wanted to have French Civil Law translated and enforced in the country, Ahmet Cevdet Pasha asserted that the Muslim population could not comply with such a law and proposed a systemized compilation of Islamic rules of law. After prolonged deliberations, Ahmet Cevdet Pasha's view prevailed. A committe working under his chairmanship prepared a law combining Civil law and law of Obligations en-

14. For detailed information on this subject, see: Halil Cin, Mirî Arazi ve Bu Arazinin Mülk Haline Dönüşümü (Public Land and Transformation of This Type of Land into Private Property), Ankara, 1969.

15. The other is "Mecelle" (Islamic Code).

16. For detailed information, see, Üçok-Mumcu, op. cit. p. 325.

titled "Mecelle" (islamic Code). "Mecelle" consisted of one introductory article, 99 articles incorporating general provisions and 16 books, a total of 1851 articles.

Mecelle is a compilation consisting primarily of provisions on Law of Obligations. This compilation does not incorporate law on persons, foundations and family and inheritance and therefore is not a compilation of civil law in the true sense. Mecelle also includes some provisions on real rights and trial procedure laws.

The law was prepared based exclusively on "Hanefi Sect" Islamic Law and is very important from the point of view of History of Law because it is the first systematic compilation incorporating in part Islamic Law of Obligations and Civil Law.

In order to correct the discrepancies in this law, studies were launched in 1914. In 1917 the Family Law Decree was issued[17]. This was an unprecedented decree combining family laws of Muslim, Christian and Jewish citizens. Family laws of Ottoman citizens of different religions were being compiled under a single title for the first time. This law decree was a detailed arrangement incorporating provisions on marriage and divorce. The Committee, working on the draft on lineage and subsistence (maintenance allowance) could not complete its work because of World War I.

In this law decree, religious rules pertaining to marriage and divorce of Muslims, Chirstians and Jews were compiled under three main titles. The law decree had restrictions on powers of non-Muslim clergy in the field of family law while the powers of "Shariat" courts were expanded. A regulation on the enforcement of the law decree was also issued[18].

The Family Law Decree took effect on January 1, 1918 and it was revoked by the Occupation Forces in Istanbul on June 19, 1919.

Varios legislative and legal arrangements were made during the Reform Era in addition to those explained above. Included among arrangements, were regulation in the field of taxation, 1864 Provincial Regulations abolishing the Principality (Provincial)

17. Düstur (Code), Second Series V. 9, p. 762.

18. Düstur (Code), V. 10, p. 52.

System and the 1869 Citizenship Law. Citizenship Law adopted the concept of "citizenship" for the first time based on contemporary principles, instead of "religious" criteria stipulated for citizenship in the Islamic Law.

The new modifications materialized in the field of law during the Reform Era led to the entrenchment of concepts such as "State of Law", "public service", "equality" and "parliamentary regime" (administration). The perpetuation of the activities of religious, justice, consular and community courts and the simultaneous validity of religious law and Western law led to important problems in the practice. The failure in establishing legal uniformity in the country, conflicts in the field of authority and responsibility between the courts caused difficulties in the proper dispensing of justice. This confusion in the field of law, remained until the end of the Ottoman State.