THE RECEPTION OF THE SWISS CIVIL CODE IN TURKEY

and the fundamental problems arising in the practice of turkish courts out of this reception of a foreign civil law

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The Swiss Civil Code was adopted by the Turkish Parliament *in toto*, with but slight alterations, on April 4, 1926. and the Swiss Code of Obligations on May 8, 1926; both codes went into effect on October 4 of the same year. We propose to deal here, in their main features, with the problems we have to solve then in connection with this adoption and still have to solve, with due regard to the practice of Turkish Courts, an experiment that has been going on for 29 years.

— I —

The attempts at the innovation of the Turkish law go back to the time of the Ottoman Empire, to the middle of the 19th century. The legal system of the old Turkish State (of the Ottomans) was based on religious (Islamic) principles, that is, throughout centuries the rules of religion were regarded as legal rules as well, in the Ottoman Empire. The political development in the 19th century brought about a closer contact between Turkey and the Western world and soon afterward the necessity for a reform of the law made itself felt. For this reason, in the decree of 1856, the so called "Tanzimat Fermanı" the government emphasized the necessity for a reform of the law, especially for new codes. Shortly thereafter, a number of French laws (such as the Commercial code, the criminal code

and criminal procedure code) were adopted. Even then a certain tendency toward the reception of the French Civil Code was existent, but a radical reception of a foreign civil code did not take place and the preliminary studies for a new civil code continued.

When the new Turkish Republic (1923) was founded, the Islamic legal system of the Ottoman Empire was discarded (1924) and was substituted by a secular law. Thus the innovation of the private law on this basis became inevitable. As the time required for the preparation of a new national civil code was limited, there remained for the Turkish jurists, desirous of receiving one of the great codes of the century, only one possibility: the Swiss Civil Code, which, with its popularity, clarity and especially with its simple style was suitable for the purpose.

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The Turkish Civil Code together with the Code of Obligations are the codes and the real products of the Turkish Revolution in the sense of an innovation. After being applied for twenty five years by the Turkish courts, these laws have on the whole proved their value, however, it has been found out that certain gaps pertaining especially to the language and to the provisions concerning their application give rise to difficulty which must be eliminated. In 1951, the Turkish Ministry of Justice set up a committee consisting of University professors, judges and members of parliement which was to propose a revision of the two codes on the basis of the experience of the past decades. The investigations of the committee have been continuing, and not ended yet. According to decision of the Committee the results of these studies will be submitted to the bar associations, universities and other interested circles of the country. After considering the opinions of these bodies the Commitee wil present its final proposals to the ministry of justice which will submit it for enactment to the parliament.

It is noteworthy and quite important for us to point out that the Committee first laid down the following principles concerning its studies :

1. In the process of revising the codes, the fundamental prin-

ciples introduced by the Turkish Revolution are not to be tampered with.

2. On the whole, some of the inconsistencies revealed by the judicial practice of the past decades will be discarded and the committee will make additions that are necessitated by the special conditions of the country.

3. In the process of revision, the structure of the codes and the numbers of the articles and their sequence are not to be altered. Where articles are abrogated, their numbers will be retained and new dispositions will be incorporated with the articles or added to the text of the code with double numbers.

These observations of the committee show that an essential change in the structure and the fundamental principles of our Civil Code and Code of Obligations is out of question. Recently, during the budget debates in the parliament (on February 22, 1955) this was energetically emphasized by the government in a speech delivered by the ministre of justice.

— III —

In our opinion, the difficulties encountered in the application of the Swiss Civil Code by the courts arise from the following causes:

As Professor Dr. E. E. Hirsch recently pointed out in detail in *Schweizerischer Juristenzeitung* (Heft 22, 15. November 1954) the greater part of the inconsistencies revealed in practice stem from the texts of the codes. We now hope that the aforesaid studies of the committee will satisfactorily solve the problem of the texts from the standpoint of language as well as terminology. The inadequacy of the provisions concerning the actual application of and a number of gaps, in the codes, are the real causes of the difficulties observed in the case law of the Turkish tribunals.

This is especially true of the application of the provisions envisaging the disputes that arise over the meadows, pastures and springs. In Switzerland such disputes are settled according to the laws of the cantons. For this reason there are in the Swiss Civil Code a good deal of references to the cantonal laws. In the Turkish text

of the Swiss Code these references were omitted, but the gaps thereby produced were not filled with other laws. Gradually some laws are being prepared by the ministry of justice. There are, however, still a number of problems that need to be legislated upon.

The causes of some of the difficulties in the application of the Swiss Civil Code and the Code of Obligations are of an organisational nature ; for example, there are in Turkey no courts of second instance, Consequently, the Turkish Court of Cassation (Suprenc Court) has to cope with a large number of cases. This, of course, prevents the court from producing a consistent law of precedents. At the moment, the Ministry of Justice is making efforts to take measures relating to the organisation of the courts.