

Transformation of Turkish Criminal Law from the Ottoman-Islamic Law to the Civil Law Tradition

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I. INTRODUCTION

The Turkish Republic was established in 1923, after which it inaugurated a number of drastic reforms seeking to remake outmoded social and political institutions inherited from the Ottoman Empire. The new regime continued its efforts to modernize Turkish society by passing a series of laws.

In 1926, the government declared that social changes made it necessary to discard religious rules of conduct and began a full scale reform of the legal system. The Criminal Code of Italy was adopted to replace the old Islamic Law. This was one of the major turning points in cutting ties with Islamic rule.¹

The Turkish Penal Code of 1926 was revolutionary. It was intended to abolish prior law and substitute a new legal system. It purported to abolish all prior law in the field. In this paper I will briefly try to clarify the main themes of Turkish Criminal Law and compare it with some important features of Ottoman-Islamic Criminal Law.

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1 See Gabriel Baer, *The Transition From Traditional to Western Criminal Law in Turkey and Egypt*, 45 *STUDIA ISLAMICA* [PARIS], 139-158 (1977).

II. OTTOMAN-ISLAMIC CRIMINAL LAW SYSTEM:

A. The “Millet” System

The Ottoman Empire had Turkish roots and rested on Islamic foundations, but from the start it was a heterogeneous mixture of ethnic groups and religious creeds.² According to centuries-old tradition, the state religion of the Ottoman Empire was Islam. This fact found expression in the first written Constitution of the Empire in 1876. During the Ottoman Empire, the legal system was based on Islamic law.³ In spite of the acceptance of law from the continental European legal systems, Islamic law remained in force until the end of the Ottoman Empire. The Ottoman concept of the ideal law was traditional Islamic law: the *Shari'a*.⁴ However, the “*Sultans*” (kings) were nevertheless able to introduce and enforce their own secular laws.⁵

In the Ottoman Empire, the sultan acted in a number of capacities under a variety of titles, including judicial – ‘Judge’ was one of the sultan’s titles. The Ottoman Empire inherited many Byzantine (East Roman Empire) institutions that came to be overlaid with Islamic ideology and Turkish customs. The “*ulema*” (Islamic scholars and theologians) consisted of judges in the *Shari'a* courts.⁶

Under the influence of Islamic law for centuries, the Ottoman Empire tended to look upon a crime as a willful act and thus to assume that penalties were intended to punish the act and deter the similar acts. There had been a trend in Turkish institutions to see criminal acts as the products of social conditions in order to emphasize rehabilitation and reeducation. Unlike European countries, the Ottomans never used the law as a tool to prevent lower classes from taking the property of the upper class. Instead, Ottoman law was the tool to control the tendency to practice despotic ruling practice against the lower classes.⁷

“*Millet*” (nation) is an Ottoman term for a legally-protected religious minority. The concept was closely linked to Islamic rules regarding the treatment of non-Muslim minorities. The main *millet*s were the Jewish, Greek, Armenian, and Catholic communities. Each *millet* was under the supervision of a leader, most often a religious patriarch, who reported directly to the Ottoman Sultan. The *millet*s had a great deal of power; they set their own laws and collected and distributed their own taxes. All that was insisted upon was loyalty to the Empire. When a member of one *millet* committed a crime against a member of another, the law of the damaged person applied. The Muslim majority was seen as paramount and any dispute involving a

² See Richard F. Nyrop, Turkey, A country Study 23-25 (1980).

³ Niyazi Berkes, The Development of Secularism in Turkey 467 (1977).

⁴ See generally Colin Imber, Ebu's-su'ud and the Islamic Legal Tradition (1997); Haim Gerber, State, Society, and Law in Islam-Ottoman Law in Comparative Perspective (1994).

⁵ Stanford J. Shaw & Ezel K. Shaw, History of the Ottoman Empire and Modern Turkey 273 (1977).

⁶ Nyrop supra note 2, at 23-25.

⁷ *Id.*, at 296.

Muslim fell under Islamic law.⁸

In the Ottoman Empire, law, to a large extent, had also been the responsibility of the various millets. Even in religious law, borrowing law from other places was the primary instrument of the law's development.⁹ The first Ottoman Criminal Code with European reforms was the 1858 Imperial Penal Code, which was the Turkish translation of the French Penal Code of 1810. This code remained in force until 1926 and abolished Islamic punishments. But the Capitulations¹⁰ exempted foreigners and those Ottoman citizens on whom foreign consuls confirmed protection from the application of criminal law. The *millet* system was altered by the increasing influence of European powers in the Middle East.¹¹

B. Criminal Law in Islamic Perspective:

Crime is considered as a serious moral problem in Islam, and is closely linked to peace and harmony of human life. Criminal actions were divided into four categories:

1. Crimes against physical life, such as injuring people or murdering them.
2. Crimes against property, such as robbery, vandalism, etc.
3. Crimes against descendents, such as adultery.
4. Crimes against human virtues and chastity, such as false accusation of unchastity (*gaza*), drinking alcohol or apostasy (*murtad*).¹²

Within the *Shari'a*, the law on crimes is one of the least developed portions, in large part because various caliphs appropriated criminal jurisdiction to the state and relieved the "*qadi*" (judge) of exclusive control. The *Shari'a* categorizes crimes primarily according to a schedule of penalties:

1. *Hadd* crimes for which there is a fixed penalty;
2. *Ta'zir* crimes for which the penalty is variable; and
3. *Jinayat*, corporal interpersonal crimes for which the penalty is retaliation or a fixed compensation.¹³

1. Hadd Crimes

Hadd crimes are called "Qur'anic offenses," although the penalties for some have come to be different from those declared in the Qur'an (the holy book of Islam). Repentance or reparation by the convicted

⁸ See [http://en.wikipedia.org/wiki/millet_\(Ottoman_Empire\)](http://en.wikipedia.org/wiki/millet_(Ottoman_Empire)) (last visited April 15, 2009).

⁹ H. Patrick Glen, *Legal Traditions of the World* 189 (2001).

¹⁰ The Turkish Capitulations were granted by successive sultans to Christian nations, conferring rights and privileges in favor of their subjects who were resident or trading in the Ottoman dominions, following the policy towards European states of the Byzantine Empire. http://en.wikipedia.org/wiki/Capitulations_of_the_Ottoman_Empire (last visited Apr. 28, 2009).

¹¹ Feyyaz Golcuklu, *Criminal Law*, in *Introduction to Turkish Law* (Tugrul Ansay & Don Wallace, Jr. eds.) 165 (1996).

¹² See <http://www.brudirect.com/criminal/part1.htm> (last visited April 10, 2009).

¹³ Sadiq Reza & David F. Forte, *Islamic Criminal Law*, Joint AALS, American Society of Comparative Law and Law and Society Association, Workshop on Islamic Law 1 (2004) at <http://www.aals.org/am2004/islamiclaw/criminal.htm> (last visited Nov. 20, 2008).

person cannot derogate from the severity of the sentence.¹⁴ Among offenses which are categorized as offenses punishable by *hadd* are robbery, fornication, false accusation of unchastity without valid evidence, drinking alcohol or apostasy from the religion of Islam. The offenses and their punishments are as follows:

- a. **Adultery (*zina*):** Death by stoning or a specified number of lashes.¹⁵
- b. **False Accusation (*qadhif*):** Eighty lashes for free people or forty lashes for slaves.
- c. **Drinking intoxicants (*shrub al-Khamr*):** Eighty lashes for free people or forty lashes for slaves.¹⁶
- d. **Theft (*sariqa*):** Amputation of a hand.¹⁷
- e. **Apostasy:** Death.

2. *Ta'zir* Crimes

All non-*hadd* crimes can incur discretionary punishment by *qadi* depending upon the circumstances of the crime, the offender, and his level of remorse or purpose of commission. The punishments cover a range of severity from private admonition to death. Under the *Shari'a ta'zir* crimes are not defined, and hence there is a problem of fair notice and due process.¹⁸

3. *Jinayat* Offenses

Three kinds of punishments can be permitted in cases of proven homicide or bodily harm: retaliation (*qisas*), blood money (*diya*), and penitence (*kaffara*).¹⁹ Where the retaliation is applied, the guilty party is liable for the same degree of harm as he inflicted on his victim. The blood money was sometimes an alternative to retaliation, at the option of the nearest relative of the slain person or of the wounded victim. The penitence is never the sole required punishment. When imposed, it was attached in certain kinds of cases to the payment of blood money. An act of penitence consists of freeing a Muslim slave or, if one has no slaves, in fasting during daylight hours for two consecutive months.²⁰

III. REVOLUTIONARY MOVEMENTS IN TURKISH CRIMINAL LAW

Following the establishment of the modern republic, Turkey westernized and modernized its criminal law in the 1920s, along with other aspects of Turkish law.²¹ After the War of Independence, the Turk-

14 Nevin Ünal Bozkurt, "İslam Ceza Hukukunda Kadın," Ankara Üniversitesi Hukuk Fakültesi Dergisi, Cilt 56, Sayı 2, 2007, p. 89.

15 For conviction, Islamic law requires either the testimony of four eyewitnesses, instead of the normal two, or the confession of the accused. See id. at 2.

16 This punishment is not prescribed in the Qur'an but was established later and analogized from the punishment for the *qadhif*. See id. at 3.

17 To be guilty of theft, one must be a competent adult and have the mental intention to steal. See id. at 2.

18 Id. at 3.

19 Ünal Bozkurt, "İslam Ceza Hukukunda Kadın," p. 85-88.

20 Id. at 1.

21 Adnan Guriz, *Sources of Turkish Law*, in Introduction to Turkish Law (Tugrul Ansay & Don Wallace, Jr. eds.) 10 (1996).

ish Grand National Assembly passed a law abolishing the religious (*Shari'a*) courts in April 1924 because the religious courts were hindrances to the efforts to modernize the legal system. The Italian Penal Code of 1899 was adopted as the Turkish Criminal Code in 1926 and the Turkish Code of Criminal Procedure, adopted in 1929, was a translation of the German Code of Criminal Procedure of 1877. Both of these codes have been amended many times.

It is important to understand that state positivism was much more sharply and consciously emphasized in Turkey during the period of revolutionary change. Turkish codification followed the rationalist and secular natural law thinking. The leaders of the new regime believed that “secularism” should be one of the most important aspects of the new state; Turkey today still has no officially-established religion. The principle of secularism in short requires a neutral position before any religious denomination. On 5 February 1937, the amendment of Article 2 of the Constitution represented a clear and positive step by the Turkish legislature towards the establishment of secularism in Turkey. Today, Turkey is administered by a totally modern civil law and no residue of Islamic law remains. Because a huge majority of Turkey’s population (99 percent) practice the Islamic faith, on one hand it sets Turkey apart from Western countries, and on the other hand the secular and liberal democratic nature of the Turkish state sets it apart from almost all other countries with Muslim majorities.²² The process that Bernard Lewis called the “victory of Turks over Ottomans” entailed a dramatic change in the concepts of the state, the nation, and the individual’s relationship to them.²³ But secularism in Turkey does not mean that the law completely ignores religion because the Turkish revolution did not wage a war against Islam. Its attack was directed against those people who declared incorrect beliefs to be Islamic and considered all those who rejected them as irreligious.

IV. PRESENT-DAY TURKISH CRIMINAL LAW SYSTEM

A. Penal Law

Turkey is a civil law country. Substantive criminal law in Turkey does not differ greatly from that of other civil law countries or even common law countries for that matter. Turkish culture has many similarities with European culture. The reason for this phenomenon may be found in historical and geographical factors. The same kinds of actions are considered criminal, and the same general approaches to punishment are discussed and debated as in Western culture. With some minor changes, the definition of offenses and criminal procedures derived from European models provide the basis for the systems instituted after the Turkish revolution.²⁴

²² See generally Kemal H. Karpat (ed.), *Social Change and Politics in Turkey: A Structural-Historical Analysis* (1973); Andrew Mango, *The State of Turkey*, 13 *Middle Eastern Studies* [London] 261-274 (1977).

²³ Nyrop *supra* note 2, at 69.

²⁴ *Id.*, at 290.

The legislature is the sole lawmaker.²⁵ Discussions by scholars are regarded as a subsidiary source of Turkish law in view of the incompleteness of legislation and insufficiency of case law in the field. During the revolutionary term, customs did not take part in the creation of the new legal regime in Turkey. On the contrary, some of the new statutes have contained rules very much against the established customs of Turkish society.²⁶

Crimes are defined as either felonies or misdemeanors, the latter including minor infractions such as traffic violations.²⁷ Punishments for felonies are strict imprisonment, ordinary imprisonment, and heavy fines. The death penalty was abolished in 2001. Misdemeanors are punished with light imprisonment and lesser fines.²⁸ The Penal Code does not permit indeterminate sentences. A sentence for an offense must fall between the minimum and maximum penalties specified for that offense, but the judge has the discretion to fix the penalty within those limits after considering several factors that are stated in the code.²⁹

B. Criminal Procedure

Criminal procedure has been essentially an independent field of regulation and study since the period of revolution. Like most civil law systems,³⁰ the Turkish penal law includes separate codes of civil procedure and criminal procedure.

The principal actors in the legal process under Turkish penal law are the judge, the prosecutor, and the attorney. Each is a specialist. The typical criminal proceeding in Turkish law can be thought of as being divided into two main parts: the investigative phase and the trial. Turkey abolished the examining phase in the 1970s. The investigative phase comes under the direction of the public prosecutor. The entire pretrial process is in the hands of the prosecutor and the police. The public prosecutor is like a district attorney in a typical American state. The public prosecutor is also a civil servant, and typically, he has two principal functions. The first is to act as prosecutor in criminal actions, preparing and presenting the state's cases against the accused before a court. His second principal function, however, is quite different; he is called on to represent the public interest in judicial proceedings between private individuals. Trial procedures are flexible and relatively informal; they are open to the public except in specified circumstances.³¹

When the police believe that a person has committed a crime, the suspect is usually taken to the nearest police station for registration

25 Nevin Ünal Bozkurt, "Yargı Bağımsızlığı Açısından Osmanlı'da ve Günümüz Türkiye'sinde Yargıya Genel Bir Bakış," Ankara Üniversitesi Hukuk Fakültesi Dergisi, CILT 57, SAYI 1, 2008, s. 236.

26 Tugrul Ansay, American-Turkish Private International Law 13 (1966).

27 Nyrop *supra* note 2, at 3.

28 *Id.* at 291.

29 *Id.* at 292.

30 John Henry Merryman, The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America 111 (1985).

31 Nyrop *supra* note 2, at 293.

and interrogation. If evidence is found, the case is transmitted to the public prosecutor; otherwise the suspect is released. Arrest is not mandatory.³²

Criminal offenses are tried before the courts of first instance, which are established in all districts and municipalities in varying numbers, depending on the size of the population.³³ A trial begins with a reading of the indictment. The judge, as well as the prosecutor and the defense, then questions the defendant and the witnesses, experts, and accomplices. The defendant may retain and consult counsel at all stages of the proceedings. The defendant is entitled to know and challenge the admissibility of all evidence to be used against him at the trial.³⁴

The trial ends with summary statements by the public prosecutor and the defendant and his counsel. The judge then renders a decision, stating the reasons for his judgment. Either the defendant or the public prosecutor may appeal the decision.³⁵

The Turkish Court of Cassation (High Appeals Court – the *Yargıtay* in Turkish) was created to overrule incorrect decisions on a question of law made by the lower courts. Like any other civil law country,³⁶ the Court of Cassation in Turkey is not a source of law since judicial decisions are not a source of law.

The civilian and military criminal systems have two separate sets of courts, each with its own jurisdiction, its own hierarchy of tribunals, its own judiciary, and its own procedures, all existing within the same nation. Offenses and disciplinary actions involving military personnel are handled by military courts. Appeals are referred to the Military Court of Cassation.³⁷

V. CONCLUSION:

Within a period of about twenty years, Turkey was transformed from an empire with Islamic laws and tradition into a republic with new secular laws and a new philosophy of government. Turkish legal development has continued progressively since then.

As a candidate member of the European Union, Turkey is in the process of harmonizing its laws with European Union legislation. Therefore, the legislature is harmonizing the existing Penal Code and Criminal Procedure Code by bringing them to a level acceptable to the European Union. These changes will help Turkish legal system keep up with the requirements of global competition in a free market economy.

32 *Id.*, at 292.

33 *Id.*, at 199.

34 *Id.*, at 293.

35 *Id.*, at 293.

36 MERRYMAN, *supra* note 26, at 46.

37 NVRÖP *supra* note 2, at 198.