

The Voyage of Civil Code of Turkey from Majalla to the Present Day

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Abstract:

In this paper, I introduce briefly the process of codification of civil law of Turkey. In XIX.th century, Ottoman administrators started some codifications which went to two different ways. One is national codes and the other was translation of some French codes. Ottoman codes of land law, civil law, and family law depend on the *fiqh* and Ottoman sultan's will. Actually, making a western type statue was a turning point in Islamic tradition and this was revolutionary character in *fiqh* in that century. The architect of this achievement was famous Ottoman statesman, legalist, historian Ahmed Cevdet Pasha (1822-1895) and his friends. The title of Ottoman civil of law that based on Islamic law is Majalla-i Ahkām-ı Adliye, literally codes of judicial rules, famous in briefly Majalla. The preparation of Majalla took 8 years between 1868 and 1876. After the establishment of the republic of Turkey, the parliament was removed it and in 1926 the Swiss civil code and the obligations code were received with little change by Turkey. In 2001, the Civil Code of 1926 was abolished and a new Civil Code and in 2011, Obligations Code were enacted.

Key words: Ottoman Civil Code, Majalla-i Ahkām-i Adliye, Islamic law, Turkish law, Ahmed Cevdet Pasha, Swiss Civil Code, Swiss Obligations Code, reception.

Abstrait:

L'Aventure du Droit Civil de la Turquie du Medjelle à nos Jours

Dans cette communication, je présenterai le voyage de la codification du Civil Code de la Turquie. Dans XIXe siècle l'Empire Ottoman a commencé la codification avec deux méthodes différentes. L'un de ces méthodes était composé les codes nationaux, l'autre était composé la traduction des codes français. Le Code Civil Ottoman dépendait droit Islamique et la volonté du sultan. D'après la tradition Islamique de ce siècle, faire des lois occidentales était un révolution. Les artisans de ce succès étaient principalement le juriste et l'historien Ahmet Cevdet Pacha (1822-1895) et ses amis. Le titre du Code Civil Ottoman qui dépendait droit Islamique était Mejjelle-i Ahkām-ı Adliye. Mejjelle-i Ahkām-ı Adliye veut dire littéralement la somme des règles judiciaires et était connu brièvement comme Mejjelle. Mejjelle été préparé en 8 ans, entre 1868-1876. Après la fondation de la République de la Turquie, Mejjelle est abrogé et au lieu de Mejjelle, le Code Civil Turc et le Code des Obligations Turc, qui sont préparés en faisant quelques modifications dans le Code Civil et Code des Obligations Suisse, sont acceptés en 1926. En 2001, en protégeant mêmes principes, un nouveau Code Civil Turc est accepté avec quelques modifications selon les besoins actuels. En 2011, la même chose est faite pour le Code des Obligations et un nouveau Code des Obligations Turc est accepté avec quelques modifications.

Mots-clés: Code Civil Ottoman, Mejjelle-i Ahkām-ı Adliye, Mejjelle, Droit Islamique, Droit Turc, Code Civil Suisse, Code des Obligations Suisse, réception, Ahmet Cevdet Pacha.

1. The new codification era in the Ottoman Empire and Majalla

Codification in Ottoman Empire began in the first half of 19th Century, actually after a turning point called Tanzimat Era dated 1839 and completed after the foundation of Turkish Republic in Ankara in 1923. This era has two dimensions of codification. One dimension is to translate and adapted some French statues into Turkish and gave them the power of statue. These statues are both relating to justice organization and rules of law. The second dimension of this era was the make native codes depend on sharia law and emirnāmes of Ottoman sultan. The second dimension produced three important codes: The first is *Kanūnāme-i Arāzi* means Ottoman Land Law. The second is shortly Majalla, in a full name is *Majalla-i Ahkām-ı Adliye* means literally Code of Rules of Justice. And the third is *Hukūk-ı Aile Karār-nāmesi* means Code of Family Law. These three were really original and well-prepared codes of Ottomans. And they had good effects inside Turkey and abroad, especially in the Muslim countries of Middle East, indeed in the Muslim countries all over the world.

In the first quarter of 20th Century, when Ottoman Empire was collapsing, as a new Turkish state, present day Turkish Republic born in Ankara. In 1926, founders of new Turkish state choose a radical path to make Turkey part of Europe.

Discussions of those days say that Turkey should change its civilization from Islamic to western. I don't know this possible or not, but Turkey along the other things changed also its legal system completely. Turkey took a very brave decision to install civil code of Switzerland. The politicians of young Turkish Republic abolished the Ottoman civil code called shortly Majalla, and took a very European code. The ongoing battle between liberal and conservative politicians since Tanzimat Era, now ended with a big triumph on behalf of the liberal politicians, when the

1st World War had finished and Ottoman Empire was the side of looser. This context also helps to understand how Turkish politicians and intellectuals rejected the legal system that the nation applied approximately one thousand years. I think, it was a syndrome of fatigue on the one hand and it was eagerness being a part of European nations on the other which I told very briefly above.

Before preparing Majalla, there was a big pressure on Ottoman government especially by France in order to receive the Code Napoleon. But Ahmed Cevdet Pasha (1822-1895) and his friends not accepted this suggestion.

Majalla has attracted some critics after gaining power and the Justice Minister of Ottoman administration constituted a commission to modify it. This commission opened first session on 9 May of 1916. I may remind you that this date was completely a century ago! This commission took a decision that it would choose relevant rules from other Islamic law schools, *mezāhib*, besides Hanefi law school. You know that Majalla depends on merely Hanefi law. This commission also accepted that it might to choose some rules from the modern codes as long as they wouldn't to contradict to sharia law. It founded a sub-commission called *ukūd ve vacibāt komisyonu*, a commission of contracts and obligations, and this secondary commission suggested that 20 articles of first book of Majalla which is the book of sales should be amended, 33 new articles should be added to this book, and finally 13 articles of book of sales should be abolished. Again amongst these suggestions were amendments of 10 articles of Book of *Īcāre* (rental book) and add 3 new articles to it. But, the time was the 1st World War and these suggestions couldn't gain power. After foundation of Turkish Republic in turn newly two different commissions were constituted in 1923 and 1924. But these commissions have no comprehensive harmony the contents

of new code and the legal system that this new code was depending on. Meanwhile, the second one prepared a draft code consisted 251 articles. But this time, the Turkish government changed its mind and took the decision of abolish its old legal system totally and accept European or modern legal systems. When this decision occurred, then the Minister of Justice of Turkish Republic, Mahmud Esad Bey (Bozkurt), dissolved the two commissions. And he ordered to translate the Swiss Civil Code and the Swiss Obligations Code.

The Turkish parliament accepted firstly the Swiss Civil Code on 17 February 1926 and the Swiss Obligations Code on 22 April of that year. Both two codes gained power on 4 October of 1926. And so, the Ottoman Majalla, being 58 years in power abolished by the Turkish parliament.

Majalla consist of 16 section, literally "kitāb"s or books, and was 1851 articles. First 100 articles were principles of law generally, not actually for Islamic but for secular law systems also. It becomes famous been an Islamic civil code but actually it is not a typical civil code. Because it has law of persons, law of property, and civil procedural rules. There are no general principles of civil law, no family law, no inheritance law. Today we know that a civil code should rule these legal spheres. But it should not rule the civil procedural law. It was essentially work of Ahmed Cevdet Pasha.

The structure of the Majalla was a product of the social and historical context of Ottoman Empire. In those days, Ottoman administrators brought new courts to their own system. These courts were multi-membered and the judges rule these courts were tradesmen and notables of both Muslims and non-Muslims communities. They didn't get the diploma from law schools; they didn't know the Arabic which essential *fiqh* books written down. So, they need simple codes' texts in Turkish

language. Majalla and the other codes prepared for this purpose. There were no Islamic procedural codes in that time and that was a compulsory need. That why Majalla commission added some sections or books relating to the procedural to the corpus of Majalla. And these were procedural rules.

Ottomans applied Majalla rules quiet long period and there was no big or important criticism to the code of Majalla. But Ottoman Empire and its allies lost the 1st World War. And losing the war, Ottoman administration found itself a turning point and decided to accept a European code. In the end of the war Turkey, signed an armistice called Mudros on 30 October 1918; according to this armistice Ottoman administration dissolved its own army. Soon after this armistice Britain, France, and Italy invaded some part of Ottoman territory in Anatolia even they invaded the capital city of Turkey, Istanbul. It was also capital of caliphate. Then national uprising occurred all over the Turkey. The leader of uprising was Mustafa Kemal. After gaining independence, Turkey abolished the sultanate on 1 November of 1922, then caliphate on 3 March 1924. On 23 July 1923, Turkey and great powers signed a treaty in Lausanne in Switzerland. Under articles of this treaty Turkey abolished the long-lasting capitulations on behalf of the Europeans states. The Republic also abolished the legal and judicial autonomies of religious communities, namely Jewish, Orthodox Rums and Gregorian Armenians. Turkey correspondingly accepted to employ Europeans legal advisors for five years and to make acquaintance legal autonomy of religious communities. But this situation didn't satisfy the Turkish statesmen and sometime later, they changed their minds and decided to receipt a European code. The Minister of Justice Mahmud Esad Bey (Bozkurt) was a Swiss educated lawyer. Addition with this point, he assures Mustafa Kemal and other statesmen to accept civil code of Switzerland.

Maybe Turkey can or should choose one of the three: French, German and Swiss. It choose Swiss code because of it was the most new one of Europe, second it was very understandable, simple code, bringing rational and practical solutions to the problems, whereas French code was older and the German was very complex. These Swiss codes were also in a democratic spirit, depending on men and women equalization and being characterized secular mode.

The Swiss civil and obligations codes relatively in a very short time were translated to the Turkish language by a group of legalists.

Admission of these new codes means that radical changes occurred in family and inheritance law. Because of these two radical amendments, Turkish people resist to apply new family and inheritance law, especially alongside places where people has strong religious feelings. But for the time being, after 90 years later, I can say that the transition period ended and modern civil law accepted broadly in Turkey.

Turkish legislator and professors argue that new civil code was secular character and brought equal regulations for women. Amongst the new rules relating to the women was the making difficult to divorce, gaining equal assets from inheritance share.

Adoption of the Swiss Civil Code following points can be noted:

- * It was compulsory to make marriage registered officially. Thus, marriage has been under state control.
- * With only one wife, Turkish family has been given a modern structure.
- * It is provided that boys and girls receive an equal share of the inheritance.

- * The right to divorce regulated and is recognized women's rights in this regard.
- * Women were granted the right to work at what they want. Thus it is ensured equality between women and men in economic and social fields.
- * Ensuring organized social life according to modern rules. This also affected the non-Muslim peoples living in Turkey. The non-Muslim peoples had given the rights of the Lausanne Treaty granting them some privileges; they want to follow the Turkish civil law. This request has been accepted.
- * The Patriarchate and consular jurisdiction has ended.
- * Unity of law in Turkey is provided.
- * Secular conception of law has become applicable in all sections of society.

Other regulations in the legal field after foundation of the Turkish Republic are follows: To gain the secular legal system in all areas, the Turkish Republic examined the system of law that is being implemented in Europe in determining to bring the appropriate regulation to Turkey in the Turkish legal system. So, the Obligations Code was received from Switzerland on 8 May 1928. The commercial Code was received from Germany on 10 May 1928. And the Penal Code was received from Italy on 1 July 1928.

2. *The new codifications of millennium*

On 3 December 2001 the Turkish parliament accepted new Turkish Civil Code and it was published in the Official Gazette on 8 December 2001. New Turkish Civil Code prepared again according to the Swiss code and amendments made on it. Meanwhile, many corrections had been made due to translation errors which occurred in the old version of 1926. In the same time, some various problems that Turkish judicial system experienced since then also included in the new code.

In 1920s, Turkish parliament accepted civil code, obligations code and commercial codes respectively. Again in 2000s, these codes also respectively legislated but they considered as a whole code. New civil code has 1030 articles.

New Turkish Civil Code has 1030 articles. Many professors, judges and lawyers criticized the new codes due to not following old code articles' number. I think this criticism is serious, right and important. So many members of the legal profession have lost their legal information. New one also changed the many terms and words of old version, mostly these changes acceptable but few of them also criticized.

The new code consists of General Principles of civil law, books of persons, family, property and inheritance. Changes made in substance as follows:

In old civil code, husband's domicile was also wife's domicile. New code changed this. Mostly changes went on family law. Men or women can marry on 17, in extra-ordinary situations completion of 16. If medically there is any dangerous mentally deranged person can be marry. Degraded treatment considered one of the reasons of divorce amongst others. This term is now integrated to the reason "attempted murder and several bad behavior of divorce. Divorce due to leave spouse 3 months now amounted to 6 months. For wanting husband poverty alimony from his wife was depended to being his wife wealth, the new code abolished this condition. If a divorce case is going on trial and in this process one of spouses died, inheritors may go to follow the case and at the end the judge find that surviving spouse is defective he/she is not allowed to be an inheritor to deceased one.

As a whole new Turkish civil code granted women generally, and female spouse especially better conditions than before.

3. The acceptance of the new Turkish civil law in 2001

The new Turkish civil law is prepared on principle of Swiss Civil Law and considering its last version with amendments. Also, many translation mistakes in the previous law are corrected. Additionally, some kinds of problems occur in the Turkish judicial process are arranged. Besides, in the part of the general provisions of the marriage made important innovations related to the spouses' authority to represent the conjugal community, legal actions and the protection of the community by bringing the principle of equality for men and women in the foreground. Leadings of these, the abdication of the principle that the husband is the head of the conjugal community; the authority to select the shared place is belongs to the both of the spouses not only to the husband; the authority to represent the conjugal community belongs to the both of the spouses and because of the debts occur in this relation both of the spouses are severally responsible; giving some kind of utterly strong rights and authorities to the spouse who is not the possessor of the shared place; the protection of the economic entity of the family or if required for the performance of the financial obligations caused from conjugal community; the restriction of the spouse's authority to dispose on some specific values of assets; giving the legal option to purchase to spouse under the various conditions in the frame of a law of property between wife and husband; not seeking the judge's permission for the actions wife taking behalf of her husband; abolishing of a compulsory performance ban between the spouses and finally, acceptance the regime of participation in acquired property as a legal law of property between husband and wife, providing for the conventional regimes not only separate property and community property also a new model under the name of

separate property regime with sharing (in Turkish *paylaşmalı mal ayrılığı*).

Primal innovation upon descent is removing the separation between legitimate and illegitimate genealogical line and regulation of adoption to a new and radical reform.

Furthermore, the principle which puts the father's vote before mother's in case of conflict related to using of guardianship, is abandoned. Also, in case of one of the parents' taking a legal action for the child in front of third party, been accepted the presence of permission of the another spouse behalf of third party as a presumptive evidence (*qarīne*).

In inheritance law part, if another spouse is alive and testator's grandmother and grandfather died before testator, letting their interests pass to their children (the testator's aunt, uncle); if all of the nearest legal heirs refuse the inheritance, the resolution of deceased's estate according to the process of bankruptcy; allocation of the shared place and household goods to the alive spouse; the principle of equality in the allocation of the agricultural business and putting objective criteria and generally making discount on the reserved share rates (in Turkish *saklı pay: mahfūz hisse*) are the leading reforms.

The amendments in the law of property part are not serious as the ones in family law. In this part the chief reforms are regulation of the joint ownership detail by detail; acceptance of acquisition of property is taking place when all conditions are occurred during the extraordinary prescription of real property and the decision of the court of registration is retrospective; letting to pawn chattel mortgage only by enregistering to register not also by transferring the possession for the chattel needed to record to the register (for example, motor vehicle)*; enlargement of extent of pledging upon real property on foreign currency; was given permission to credit institutions at home in

order to pledge on foreign currency; was brought some reforms related to right of construction and organizing various problems related to use of right of pre-emption.

The new Turkish civil law went into operation on January 1st, 2002. Which situations are related to this new law or how to apply this, is shown in the law dated December 3, 2001 and no. 4722. The most controversial article of this law contained 25 articles is the article 10 titled as property regimes at conjugal community. In this article said that all marriages got before this law's effective date - January 1st, 2002- have whatever property regime that is the valid one, but if spouses don't select any other property regime until the December 31st, 2002, then for all of the properties that spouses will have after the date January 1st, 2002 the valid property regime will be the legal regime, regime of participation of acquired property. But spouses do the others.

As final judgment, I can say that some laws are like the big stones in the country's law system. Abrogation of a law something like that and putting the new one instead of it requires an extensive study and long process and needs thinking about every single point detail by detail. And after the creating that kind of law, unless the new social needs occur, there won't be any other amendments for long terms. The leading one of these kinds of law is Civil Law. However, in our country the legislative system does not work like this. There were already new amendments only one year after the abrogation of the previous one and going into operation the new law.

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