

September 2005

## The Role of Comparative Law in the Development of Turkish Civil Law

Arzu Oguz

Follow this and additional works at: <https://digitalcommons.pace.edu/pilr>

---

### Recommended Citation

Arzu Oguz, *The Role of Comparative Law in the Development of Turkish Civil Law*, 17 Pace Int'l L. Rev. 373 (2005)

DOI: <https://doi.org/10.58948/2331-3536.1152>

Available at: <https://digitalcommons.pace.edu/pilr/vol17/iss2/9>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace International Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact [dheller2@law.pace.edu](mailto:dheller2@law.pace.edu).

# ESSAY

## THE ROLE OF COMPARATIVE LAW IN THE DEVELOPMENT OF TURKISH CIVIL LAW

Dr. Arzu Oguz†

I. Introduction .....	373
II. From Islamic Law to Modern Law.....	375
A. Modernization Efforts of the Law During the Ottoman Era .....	375
B. Adoption of the Swiss Law .....	380
1. Causes and Stages of Receiving the Swiss Law.....	380
2. Developments After the Adoption .....	382
III. The New Civil Code Dated January 1, 2002 .....	385
IV. Conclusion.....	386

### I. INTRODUCTION

The radical transition from the religious Islamic law to the secular western justice system that has taken place in the Turkish civil law has a unique character and deserves the attention of international researchers. That transition becomes more intriguing as the integration of private law is widely on the agenda in Europe. Although the transition from Islamic law to secular law put the Turkish Civil Code (“Turkish Code” or “1926 Code”) on a westernized route, it also made a fine example of the phenomenal difficulties that occur when adopting aspects from a foreign justice system.<sup>1</sup>

---

† Professor of Comparative Law. Head of the Department of Comparative Law at the Faculty of Law of Ankara University. I would like to thank Mr. Aril Cansel for translating this study into English.

<sup>1</sup> See J.G. Jonas, *Ein zeitgenössischer Rezeptionsprozess am Beispiel des türkischen Zivilrechts* [A Contemporary Reception Procedure — the Example of the Turkish Civil Code], 4 *Jus*, 266, 266 (1987).

Many civil codes in Europe came into effect only within the last few decades. (Italy, Spain, Greece, Portugal) Turkey, on the other hand, had a westernized civil law in place since the 1920's. Such a change is considered the only example of its kind in the recent history of Europe. With the purpose of radically modernizing the civic relations of the Turks, the legislature ignored all Islamic traditions and rules, and brought into effect a civil law that had been prepared and developed for a society with different social, religious and economic traditions. The radical transformation of Turkish civil law sets a fine example of how to replace a religious justice system with a man-made one.

In the classic Islamic tradition, the earthly religious representative of God can only serve heavenly justice and God's rules. The representative can only interpret such rules and can never generate new ones.<sup>2</sup> However, after becoming a republic, the new politicians of Turkey voted for the man-made law and justice system. The religious sector of society has not always viewed the transformation positively. For example, family law alone contains remarkable differences between the Islamic system and the Western system.

The speed of change in which the transformation took place is considered another important factor in Turkey's success. Eliminating a justice system and replacing it with a new one is usually a lengthy process. Only a foreign influence or a colonial relationship can make a fast change and adaptation possible. For example, the influence of the French Civil Code (*code civil*) on North African countries resulted from the French colonial movement.<sup>3</sup> However, there was no such colonial movement in Turkey. Although the country was put under the obligation by the Lausanne Peace Treaty<sup>4</sup> to enact a new civic law, the modernization of Turkish law began with a conscious decision by

---

<sup>2</sup> See RENE DAVID & G. GRASMAN, *EINFÜHRUNG IN DIE GROSSEN RECHTSSYSTEME DER GEGENWART* [INTRODUCTION TO TODAY'S MAJOR SYSTEMS OF LAWS] 471 (1966).

<sup>3</sup> See E. Pritsch, *Das Schweizerische Zivilgesetzbuch in der Türkei, Seine Rezeption und die Frage seiner Bewährung* [*The Swiss Civil Code in Turkey, Its Reception and Prosperity*], 59 *ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT* 123, 127 (1957).

<sup>4</sup> Signed on July 24, 1923 in Lausanne, Switzerland.

the Turkish law-makers themselves, and the act quickly and seamlessly resulted in success.

## II. FROM ISLAMIC LAW TO MODERN LAW

### A. *Modernization Efforts of the Law During the Ottoman Era*

Islamic rule remained in effect in the Ottoman land until World War I. According to some authors, the era of Islamic rule actually began in the twelfth century during the Turkish Seljuk Empire's reign when Hanifian Islamic Law dominated the land for eight centuries.<sup>5</sup> Besides Hanifian Islamic Law, some aspects of the private law and public law were regulated by custom, tradition, and the Sultan's set of written orders, called *Kanunname*.<sup>6</sup> *Kanunname* were usually written in connection with the constitution, administration, military organization, land ownership policies and some fiscal and criminal issues.<sup>7</sup> Those rules sometimes conflicted with the canonical law. In order to harmonize the two, a new interpretation method was developed by jurists to prevent the conflict between two laws. On the other hand, the unique justice system that was based on the Ottomans' tolerant approach to ethnic and religious minorities remained. Accordingly, the law in the Ottoman era seemed like a two-legged system; canonical law on one hand, and tradition on the other.<sup>8</sup> Within that framework, Christian and Jewish

---

<sup>5</sup> The Turkish Seljuk Empire was the empire which had been established by Oguz Turks before the establishment of the Ottoman Empire. COŞKUN ÜÇOK ET AL., TÜRK HUKUK TARİHİ [Turkish Legal History] 148 (1999).

<sup>6</sup> In Ottoman Empire usage, the term *Kanunname* generally referred to a decree of the sultan containing legal clauses on a particular topic. In the ninth and fifteenth centuries, the term *yasakname* had the same meaning, and, during the Arab caliphate, *kawanin*, it had the sense of "code of laws." In the Ottoman Empire, *Kanunname* was occasionally extended to refer to regulations which viziers and pashas had enacted. However, a *kanunname* was like any normal *kanun* in that only a Sultan's decree (*ferman* or *berat*) or a defined and limited topic could form a *kanunname*. There were others that were applicable to the whole empire or to a particular region or social group. See THE ENCYCLOPEDIA OF ISLAM, NEW EDITION, 562 (E. van Donzel et al. eds., 1978).

<sup>7</sup> *Kanunnames* were related to constitutional, administrative, military organization, land policy, and certain penal and fiscal issues. These rules were sometimes conflicting with the *shariat* (rules in the Koran). In this respect, in order to align these rules with the *shariat*, it was necessary to develop a new method of scientific construction by taking into account the former cases

<sup>8</sup> See H.N. Kubali, XIX. *Yüzyılın Sonlarından İtibaren Türkiye'de Mukayeseli Hukukun Gelişmesi ve Mukayeseli Araştırmaların Bugünkü Durumu* [The Devel-

minorities were given the right to resolve conflicts among themselves autonomously. Specialty courts operated in the consulates and handled conflicts among foreigners.<sup>9</sup> In fact, before the engagement of Turkish civil law, there were three types of religious laws in effect in Turkey: Islamic, Christian and Jewish. Canonical law courts and *Nizamiye* (order keeper) courts took care of Islamic conflicts, the church took care of Christian issues, and the synagogues handled the Jewish law. *Nizamiye* courts, equally and with no exception, practiced only the *Mecelle*,<sup>10</sup> a Code on Obligations, to entire subjects. This last era was referred to as the "Pure Islamic Law" period, which continued until October 3, 1839.

Few comparative law studies took place during the Pure Islamic Law period. Islamic law claimed worldwide prevalence due to its divinity, and denied the existence of a national law in principle. Since there have to be similar or dissimilar national laws to compare, and the Islamic law theoreticians totally denied the existence of such laws, they never showed any interest in conducting comparative research. The only comparative work conducted in that era was limited to the following:

- a) While interpreting the Koran, some comparative work was conducted among the four religious sects;
- b) The secular rules originating from usage and customs and the rules from the emperor's decrees which were supposed to comply with the shariat (rules in the Koran) but which in fact did not usually comply;

---

*opment of Comparative Law in Turkey Since Late 19th Century and the Comparative Research of the Day*] 10 MUKAYESELI HUKUK ARAŞTIRMALARI DERGİSİ [COMPARATIVE LAW RESEARCH JOURNAL] 4, 4 (1973) (Turk.); ARZU OGUZ, KARSILASTIRMALI HUKUK [COMPARATIVE LAW] 100 (2004).

<sup>9</sup> See Ernst Hirsch, *Vom schweizerischen Gesetz zum türkischen Recht, Fünfzig Jahre türkisches Zivilgesetzbuch* [From Swiss Code to Turkish Law], in ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT [SWISS LAW REVIEW] 223, 227 (1976).

<sup>10</sup> When the necessity of an Ottoman Law reform arose in the nineteenth century, some European-type laws were passed only to fill the gaps where the canonical law was insufficient. However, only a part of the Canonical Law had been codified and that codification was called *Mecelle*. *Mecelle* was issued in sections between 1869 and 1876 and was contained in sixteen books and had 1,851 articles. After an introduction to the general principles of law, *Mecelle* non-systematically covered the following issues: sales, renting, donations, bail, money transfers, pledges, possession, unlawful acquisition, psychological constraint, pre-purchase, corporation, power of attorney, settlement and acceptance of execution, confession, suing, and acceptance of evidence.

- c) Comparison of Islamic law with the law of custom and tradition that demonstrated semi-secular character.<sup>11</sup>

In a last ditch effort, shortly before the collapse of the Ottoman Empire, Sultan Abdulmecid began a widespread reformist action on October 3, 1839 with a historical written announcement called *Gülhane Hatt-ı Humayunu* that included legal reforms.<sup>12</sup> In fact, the Ottoman Empire widely opened up to western influence in the late eighteenth century in an effort to reorganize and survive. The period of reforms, called *Tanzimat* (reorganization) lasted until Turkey became a republic in 1923.<sup>13</sup> In terms of law, the transition period is called the "Westernized Islamic Law Era."<sup>14</sup> The main characteristics of the era included implementing massive westernization efforts to create a state of law in order to save the empire from collapsing, to secularize the justice system, and to boost development and progress.<sup>15</sup>

The reformist action, *Tanzimat*, was affected by two strong influences. The first was a more conservative influence, supported by the Minister of Justice, Cevdet Pasha, who defended the continuation of Islamic law, while making changes to its details in order to adapt it to the new requirements of modern times.<sup>16</sup> The supporters of that view believed in synchronizing tradition with modernity. They passed two laws: The Land Code (*Arazi Kanunnamesi*) in 1858, and the Book of Court Order (*Mecelle-i Ahkâm-ı Adliyye*) in 1869.<sup>17</sup>

<sup>11</sup> See Kubali, *supra* note 8, at 16.

<sup>12</sup> *Gülhane Hatt-ı Hümayunu* was a reformist action that had started the *Tanzimat* period and the reforms. See GÜLNIHAL BOZKURT, *BATI HUKUKUNUN TÜRKİYE'DE BENİMSENMESİ*, [Adoption of Western Law In Turkey] 48 (1996).

<sup>13</sup> *Tanzimat* reforms were enacted with the purpose of protecting the collapse of the Ottoman empire. The reforms had covered the protection of life, property and honor. It had great importance in development of Turkish Law because it also contained the important legal developments.

<sup>14</sup> Or "İslam-Batı Hukuku Dönemi" as it is called in Turkish. See Kubali, *supra* note 8, at 6.

<sup>15</sup> See *id.* at 6.

<sup>16</sup> M. ŞAKIR ÜLKÜTAŞIR, *CEVDET PAŞA [CEVDET PASHA] 13 (1945)(Turk.)*; H. BOWEN, *THE ENCYCLOPEDIA OF ISLAM*, 284-286 (1960).

<sup>17</sup> See ERGUN OZSUNAY, *KARSILASTIRMALI HUKUKA GIRIS [INTRODUCTION TO COMPARATIVE LAW ] 93 (1976) (Turk.)*; Kubali, *supra* note 8, at 6. See also A. SCHNITZER, *VERGLEICHENDE RECHTSLEHRE I [Theory of Comparative Law] 350 (1961)*.

Another influence, one especially supported by Grand Vizier Ali Pasha, focused on completely adopting western law, by concentrating primarily on adopting the French Civil Code.<sup>18</sup> However, Ali Pasha also believed in keeping the Islamic Law alive in certain areas, such as family law.<sup>19</sup> That radical approach gained momentum among Ottoman subjects, and found itself a firm ground within general law applications when the principle of equality was announced with the Tanzimat (reorganization) movement of 1839 and was confirmed with the *Islahat* (reform) movement of 1859.<sup>20</sup> The movements lifted the religious and ethnic differences within the practice of law among minorities. However, Ali Pasha's influence and success was not limited to the minority law. He also managed to ensure passage of portions of western law, directly translated into Turkish, such as the criminal law (1858), the commercial law (1859), the maritime commerce law (1864), the criminal procedural law (1880), and the civil procedural law (1881).<sup>21</sup> However it was not sufficient to change the whole law system. The impetus behind the above-mentioned adoptions was different than for the western law-making process. The Ottoman public administration was pressured by the public's changing needs, such as order, equality, protection of a legal system and the desire for a modern society that generated a major economic, political and social power.<sup>22</sup>

Studying foreign legal systems became a necessity in the Tanzimat era due to the duality of law, the adoption of western law, and the imposition of reforms to facilitate practice of the adopted law. It became a priority to train a new generation of lawyers. When the "legislation courses," given by the Ministry of Justice proved insufficient to achieve this goal, it became necessary to revise the education system in order to westernize and secularize the imperial administrative, legal, and political structure. The first efforts to establish a western-type university occurred in 1844.<sup>23</sup> In 1870, those efforts resulted in a regulation that founded a university with a school of literature,

---

<sup>18</sup> See ÜÇÖK, *supra* note 5, at 290.

<sup>19</sup> See Kubali, *supra* note 8, at 7.

<sup>20</sup> See BOZKURT, *supra* note 12, at 48-49.

<sup>21</sup> *Id.* at 151-58.

<sup>22</sup> See *id.*

<sup>23</sup> See Kubali, *supra* note 8, at 15.

philosophy, natural sciences, mathematics and law.<sup>24</sup> In addition to Islamic law, the law school offered courses in land and maritime commerce law, civil procedure, criminal law, criminal procedure, international public law, administrative law and European-originated law. In 1874, with the intention of fostering a liberal and higher level of education, three new classes opened at the prestigious imperial Galatasaray educational institute.<sup>25</sup> These included economics, introduction to law, Roman law, commercial law and constitutional law. Some undergraduate and doctorate courses, such as philosophy, economics, introduction to law, Roman law, commercial law and constitutional law were lectured in French by foreign academics. In 1881, the Ministry of Justice opened a law school and undertook the responsibility of the legal education.<sup>26</sup> The school opened four classes within five years and added new courses to its curriculum including a course on the summary of Roman law and a course on the comparison of commercial codes with French codes.<sup>27</sup> The law school administration transferred to *Darülfunun* (the school of the elite) on August 1, 1899 through a regulation, and enriched its program with “comparative legislation courses.”<sup>28</sup> It is conceivable that the only comparative law institution in the world, *Société de législation comparée* (The Society of Comparative Legislation), was an inspiration for that course.<sup>29</sup>

After the reforms in 1910, the legal education adopted a more scientific perspective on comparisons, and doctorate classes opened in politics, economics and legal studies. The legal program included courses in comparative commercial law, comparative criminal law, comparative civil law, and Roman law. Political and economic programs included comparative constitutional law.<sup>30</sup> In 1913, the philosophy of law and the comparative law courses were integrated. Professor Mison Ventura,

---

<sup>24</sup> See *id.*; See OZSUNAY, *supra* note 17, at 95.

<sup>25</sup> Founded in 1481, the institute exists today as Galatasaray high school and university in Istanbul, <http://www.gsu.edu.tr/en/university/history>.

<sup>26</sup> See Kubali, *supra* note 8, at 15.

<sup>27</sup> See OZSUNAY, *supra* note 17, at 95.

<sup>28</sup> See *id.* at 95; see also Kubali, *supra* note 8, at 17.

<sup>29</sup> See Kubali, *supra* note 8, at 17; OGUZ, *supra* note 8, at 102.

<sup>30</sup> See BULENT DAVRAN, MUKAYESLİ MEDENİ HUKUK DERSLERİ [COMPARATIVE CIVIL LAW LECTURES] 37 (1963) (Turk.).

who lectured on comparative civil law, published the first comparative law book in 1924, called *The Comparison of Civil Laws* (Dersaadet, 1330).<sup>31</sup> Ventura compared the thought of Mecelle with French and German civil codes from the perspectives of positive law and practice. However, he considered comparative law not an independent branch of law, but simply as a research method that could be useful in developing Turkish law due to its functions in legislation and justice.<sup>32</sup>

Immediately after the law reform in 1917, courses in European civil law and comparative civil law were added to the legal curriculum and the German professor Erich Nord started lecturing the courses.<sup>33</sup> In 1924, a Turkish professor, Samim Gonensay (1884-1963), took responsibility, for the very first time, to integrate and teach comparative civil laws and European civil law.<sup>34</sup>

## B. *Adoption of the Swiss Law*

### 1. *Causes and Stages of Receiving the Swiss Law*

Divisions in the Ottoman law and justice system were emphasized topics during the Lausanne peace talks. The new Turkish Republic was committed to reorganizing its legal and court system in harmony with the League of Nations by signing the Lausanne Peace Treaty, which also confirmed the end of the Ottoman Empire on July 24, 1923.<sup>35</sup> The politicians, under Mustafa Kemal Atatürk's leadership, quickly established the commitment to the reorganization effort in the early 1920's.<sup>36</sup> A new civil code was written and submitted to Parliament on February 17, 1926.<sup>37</sup> In fact, this was a direct translation of the French version of the Swiss Civil Code (ZGB, hereinafter Swiss Code). After reviewing and making minor changes, the appointed committee passed the code to Parliament where it was

---

<sup>31</sup> See *id.*; see also Kubali, *supra* note 8, at 17; OZSUNAY, *supra* note 17, at 96.

<sup>32</sup> See Kubali, *supra* note 8, at 17; DAVRAN, *supra* note 30, at 39.

<sup>33</sup> See *id.* at 19; see also OZSUNAY, *supra* note 17, at 96.

<sup>34</sup> See DAVRAN, *supra* note 30, at 37; See Kubali, *supra* note 8, at 17; See OZSUNAY, *supra* note 17, at 96.

<sup>35</sup> M. Cemil Lozan, *Bariş Konferansı, Tutanaklar, Belgeler* (Lausanne Peace Treaty, Documents, Receipts) (Trans: Seha Meray) Istanbul (1933).

<sup>36</sup> BERND RILL, *KEMAL ATATURK*, 77 (1991).

<sup>37</sup> See BOZKURT, *supra* note 12, at 196.

accepted by a unanimous vote.<sup>38</sup> The law was in effect six months later, on October 4, 1926.<sup>39</sup> Similarly, the French version of the Swiss Code came into effect almost simultaneously as the new Turkish Code.<sup>40</sup> With those adoptions, Turkey became a member of the European family of law.

There were many reasons for Turkey to choose Swiss law over other civil law:

- (a) The obligations resulting from the League of Nations were mandatory. Even though a committee was formed by the Ottomans to modernize the private law during World War I, it was only able to realize a fraction of the new civil code and other codes after eight years of work. As a result, adoption was unavoidable.<sup>41</sup>
- (b) In those days, the politicians in power strongly believed that only a secular and westernized Turkey could be successful both economically and politically. Therefore, religion and state would have to be separated and God's rules of Islamic Law discarded.<sup>42</sup>
- (c) What became a problem was to choose between the three major civil law jurisdictions of those days: Swiss Code, German Civil Code (Bürgerliches Gesetzbuch - BGB), and the French Civil Code. The Swiss Code was chosen because it was believed to be novel and more democratic and, therefore, better than the others.<sup>43</sup> In other words, the Turkish legislature

<sup>38</sup> See Hirsch, *supra* note 9, at 226.

<sup>39</sup> See Bozkurt, *supra* note 12, at 196.

<sup>40</sup> See Hirsch, *supra* note 9, at 226.

<sup>41</sup> See *id.*, at 229.

<sup>42</sup> See Jonas, *supra* note 1, at 226. See also E. Pritsch, *Die Rezeption des Schweizerischen Zivilrechts in der Türkei* [The Reception of Swiss Civil Code in Turkey], 23 SCHWEIZERISCHE JURISTEN-ZEITUNG [JOURNAL OF SWISS JURISTS] 273, 273 (1927).

<sup>43</sup> The justification of the Turkish Parliament's Justice Committee for its stand is as follows: "As we adopted the Swiss Civil Code, the best among the existing ones, with its new principles and conclusions, it will fill many gaps and connect many missing links in our civil, social and economic environment in harmony with the requirements of the new century." Ernst Hirsch, *Vier Phasen im Ablauf eines zeitgenössischen Rezeptionsprozesses. Ein Beitrag zur Rechtsvergleichung zwischen Mutter- und Tochterrecht* [The Four Steps of a Contemporary Reception Procedure. An Essay on Comparison of the Parent and the Young Systems of Law], 69 ZVGLRWISS, 182, 186 (1968). See *id.*, for the committee report. Besides that official view, some authors offered unofficial ones as well: The Prime Minister of that era, Mr. Mehmet Esad Bozkurt, who had his higher education in Switzerland, strongly influenced the decision of adoption towards the Swiss Code, the one that he knew in great detail. See H. KÖTZ, EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG

thought that the Swiss Code was more modern than the Code civil and more adaptable than the German Code. The formal and concise nature of the Swiss Code played a major role in its acceptance by the Turkish legislature. The decision can be justified, for example, by looking at Article 1, Section II of the Swiss Code, which gives the judge flexibility and the authorization to fill the gaps.<sup>44</sup>

- (d) Finally, the election of the French version of the Swiss Code was largely affected by members of the Turkish legal system, who had a better command of French than German because they were educated in Turkey and/or in France.<sup>45</sup>

## 2. *Developments After the Adoption*

Turkey is the sole example of success in Europe where one nation received and adopted a foreign country's law within a totally different social structure. The real success was to transform and create a new character for the adopted system that would harmonize the interpreted code with custom, tradition, and social reality. Consequentially, the Swiss Code was no longer considered an adoption, but was rather recognized as the Turkish Code. The Turkish Code is based on the legal thoughts, ideals, and perspectives of Switzerland, rather than just its legal code.<sup>46</sup> In that case, this particular adoption should be con-

---

AUF DEM GEBIETE DES PRIVATRECHTS [COMPARATIVE LAW IN THE FIELD OF PRIVATE LAW] 176 (3d ed. Paul Siebeck 1996); Pritsch, *supra* note 3, at 143. See also Ernst Hirsch, *Die Einflüsse und Wirkungen ausländischen Rechts auf das heutige türkische Recht* [Effect of Foreign Law on Today's Turkish Law], 116 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND KONKURSRECHT [JOURNAL OF COMMERCIAL LAW AND ENFORCEMENT LAW] 201, 206 (1954) [hereinafter Hirsch, Effect of Foreign Law].

<sup>44</sup> See SCHNITZER, *supra* note 17, at 352-53. See also Pritsch, *supra* note 3, at 144-45; F. AYITER, *Das Rezeptionsproblem im Zeichen der Kulturhistorischen Perspektive "Europa und das Römische Recht" und unter besonderer Berücksichtigung der Rezeption Westeuropäischer Gesetzbücher in der modernen Türkei* [The Problem of Reception with a View to Historical Culture, "European and Roman Law" and Considering the Reception of Western Law in Modern Turkey], in L'EUROPA E IL DRITTO ROMANO STUDI IN MEMORIA DI PAOLO KOSCHAKER II 133, 155-56 (1954).

<sup>45</sup> See Jonas, *supra* note 1, at 266. See also Ernst Hirsch, *Das Schweizerische Zivilgesetzbuch in der Türkei*, [Swiss Civil Code in Turkey] 50 SCHWEIZERISCHE JURISTEN-ZEITUNG [JOURNAL OF SWISS JURISTS] 231, 231 (1954) [hereinafter Hirsch - Swiss Civil Code].

<sup>46</sup> See Hirsch, Swiss Civil Code, *supra* note 45, at 337. See also Hirsch, Effect of Foreign Law, *supra* note 43, at 202.

sidered a continuing, living social process from the adoption point forward.<sup>47</sup>

Immediately after the passage of the Swiss Code, the law of obligations, commercial law, regulations, and laws of judgment and execution were passed and Turkey became a member of the western legal family. However, time was needed for the law, written by the legislature, to be accepted as the law of the country.<sup>48</sup> The new code needed to be practiced, adapted and accepted by the Turkish society. The legislature expected the judges to use their theoretical background and the flexibility of the Swiss Code, and to turn the adopted codes into a national legal system. However, they were faced with some major difficulties in practice.<sup>49</sup>

The first problems arose with interpretation of the Turkish Code's language. Since the language contained in the Swiss Code was not completely consistent with the Islamic Code, it was problematic to formulate technical terms. Due to time constraints, the translations had been made by a number of translators, and each translated a specific section of the Swiss Code. However, there was not enough time to put together all sections and homogenize all of the technical terms throughout the Turkish Code. The legislature tried to overcome the problem by generating new terms for the non-existent ones in the Turkish Code, and generating new content for the existing ones. The language problems, which strained the translations, had been resolved in practice by interpreting the codifications conceptually rather than literally.<sup>50</sup>

The major responsibility of adapting the new legal system was given to students of theory and legal education, and the mission was fulfilled in a step-by-step manner.<sup>51</sup> In the begin-

---

<sup>47</sup> See ERNST HIRSCH, *DAS RECHT IM SOZIALEN ORDNUNGSGEFÜGE, BEITRÄGE ZUR RECHTSSOZIOLOGIE [LAW IN THE STRUCTURE OF SOCIAL ORDER, A CONTRIBUTION FOR SOCIOLOGY OF LAW]* 360 (1st ed. 1966).

<sup>48</sup> See Hirsch, *Effect of Foreign Law*, *supra* note 45, at 232.

<sup>49</sup> See HIRSCH, *supra* note 47, at 337-46. See also Hirsch, *Effect of Foreign Law*, *supra* note 43, at 182-222; Z. Goren-Ataysoy, *Die Fortbildung rezipierten Rechts, Ein amtlicher Vorentwurf zu einem türkischen Rechts, Fünfzig Jahre türkisches Zivilgesetzbuch [The Continuous Development of the Recepted Law, The Official Draft for Turkish Law, the Fiftieth Year of Turkish Civil Code]*, in *ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT* 265, 266 (1976).

<sup>50</sup> See HIRSCH, *supra* note 47, at 338.

<sup>51</sup> See Hirsch, *supra* note 9, at 234.

ning of parliamentary discussions and during the translations, the law minister prepared to establish a law school in Ankara. All of the graduates of the law school in Istanbul received an Islamic legal education, which worried the new Turkish administration. Therefore, it was important to have a law school that reflected the new spirit of the country. M.K. Atatürk delivered a speech that is now carved in marble in the entrance of the Ankara Law School on November 5, 1925.

Simultaneously, an intensive exchange program began between the Ankara Law School and law schools in European countries.<sup>52</sup> Swiss legal practice was carefully observed and important decisions were translated. Many Turkish students graduated from Swiss law schools.<sup>53</sup> Important Swiss civil law practices were translated into Turkish and distributed to attorneys, judges, and academics free of charge. Today the Turkish Supreme Court of Appeals, which had difficulty finding its place in the beginning, consciously generates law in accordance with Article 1 of the Turkish Code, as opposed to before, when it struggled between generating free law and/or interpreting the law literally.<sup>54</sup>

There were many aspects of the Turkish Code, including its provisions on personal law, inheritance law, property law, and family law, which conflicted with Islamic law.<sup>55</sup> However, aside from some specific cases of fraud, such as fake foreclosures, the Turkish Code was practiced rather smoothly. The law of obligations, in particular, was a problem-free practice. The land records system, on the other hand, was a problematic area since there had never been a land survey process in the country before.<sup>56</sup>

---

<sup>52</sup> Three professors who contributed to education in Istanbul and Ankara law schools for many years include B. Schwarz, who was invited to lecture in Roman law and Civil Law, Ernst Hirsch, who was invited to lecture in Commercial Law, and Paul Koschaker, who was invited to lecture in Roman Law.

<sup>53</sup> See A.B. SCHWARZ, *DAS SCHWEIZERISCHE ZIVILGESETZBUCH IN DER AUSLÄNDISCHEN RECHTSENTWICKLUNG* [THE SWISS CIVIL CODE IN THE DEVELOPMENT OF FOREIGN LAW] 51 (1950).

<sup>54</sup> See SCHNITZER, *supra* note 17, at 353.

<sup>55</sup> See Goren-Ataysoy, *supra* note 49, at 267.

<sup>56</sup> See SCHNITZER, *supra* note 17, at 352.

Family law was the most problematic in more than one way.<sup>57</sup> First, under traditional Islamic law, if a willing couple or the couple's families expressed their will verbally before witnesses, a valid marriage existed.<sup>58</sup> Traditionally, an imam (priest) or Hodja (Islamic guru) attended the ceremony, however attendance was not obligatory. Even when the new 1926 code introduced civil marriage,<sup>59</sup> the Turkish people living in the villages or the poor areas of the country continued to keep their traditions and in particular continued to conclude religious marriages in lieu of civil marriages.<sup>60</sup> One of the main reasons underlying this choice was that the Turkish Code did not provide the legal opportunity to end a civil marriage through *talak* (meaning "divorce by husband").<sup>61</sup> The status of children born into religious marriages became an issue, and the number of these children who were legitimate in the public sense but considered illegitimate by the 1926 Turkish Code increased. In response, the legislators chose to resolve the issue by enacting particular statutes to legitimize the status of children from religious marriages.<sup>62</sup>

### III. THE NEW CIVIL CODE DATED JANUARY 1, 2002

The new civil code was adapted to the requirements of the twenty-first century. It was also adapted to overcome the bottlenecks that had been experienced during the seventy-five years of practicing the original civil code.

After the adoption of the Swiss Code, both the Turkish theoreticians and practitioners established strong ties with Switzerland, which served as a bridge between the Turkish and European law systems. As is well known, many civil codes in continental Europe, such as the French, German, Italian and

---

<sup>57</sup> See Tugrul Ansay, *Zur Eheschliessung nach türkischem Recht*, 27 DAS STANDESAMT 78, 79 (1974).

<sup>58</sup> See ÜÇÖK, *supra* note 5, at 92-97.

<sup>59</sup> B. ÖZTAN, B. AILE HUKUKU [FAMILY LAW] 152 (1979).

<sup>60</sup> Ansay, *supra* note 57, at 27.

<sup>61</sup> See Pritsch, *supra* note 3, at 171.

<sup>62</sup> See Ramazan Arslan, *Die türkischen sog. "Amnestiegesetze" und das Verbot einer Anerkennung von Ehebruchskindern in Artikel 292 Türkisches Zivil Gesetzbuch* [The Law on Legitimation of the "Illegitimate Children" and the Prohibition of Recognition of the Children that are Products of Adultery Pursuant to Article 292 of the Turkish Civil Code], 29 DAS STANDESAMT 99-100 (1976).

Swiss codes, are founded upon the concept of *jus commune*. The new Turkish Code follows the tracks of the developments in the Swiss Code, in that it reflects all of the new developments in the continental European legal systems. Turkey carries on the organic ties with the Swiss legal system. For instance, the new Turkish Code emulates the Swiss model of a joint approach for inter-marital property gains, which is a very similar approach to the German earnings partnership (*Zugewinnngemeinschaft*).<sup>63</sup>

The new Turkish Code brought a series of reforms in addition to the inter-marital property gains, in areas such as gender equality, marital age, rights and responsibilities in marriage, residence selection decisions in marriages, parental rights, management of marriage and joint expenditures, representation of marriage, and preserving the woman's last name after marriage.

#### IV. CONCLUSION

This abbreviated description of the historical development of Turkish civil law displays how Turkish private law has strived to harmonize with European private law. This endeavor began in the beginning of the nineteenth century. With the incorporation of the Swiss Code, Turkey was able to enter into the European law family, particularly the Germanic one. Specifically, many laws have been enacted within the last several decades to align the Turkish Code with European directives and regulations. A harmonization of Turkish civil law with European civil law is the motive behind such enactments. These assimilation efforts must be taken into account when assessing the new Turkish Code. Due to the huge change in social life that is expected as a result, those amendments to the Turkish Code that relate to inter-marital property have been the most popular. The Turkish civil law is therefore ready to accept the European Civil Code.

---

<sup>63</sup> See AHMET KILIÇOĞLU, EDİNİLMİŞ MALLARA KATILMA REJİMİ [INTERMARITAL PROPERTY RIGHTS] (2002); A.İ. ÖZÜĞÜR, A.İ., MAL REJİMLERİ [MATRIMONIAL PROPERTY REGIMES] 152 (2003).