

2014 International Conference, HUFS Law Research Institute,
SEOUL KOREA

The Development of Law in a Connected World

- Date : May 12, 2014 14:00-18:00
- Venue : Rm No. 101 (Law School Bldg.)
- Organized by HUFS Law Research Institute



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The Development of Law in a Connected World

▣ Program ▣

13:30-13:50 Welcome Remark : Jaewan Moon (Dean, HUFS Law Research Institute)
Congratulatory Remark : Hoon Dong Lee (Dean, HUFS Law)

14:00-15:00 Session 1. Chair: Jang Hie Lee (professor, HUFS Law)

Title : The Development of Turkish Law in Historical Process

Speaker: Murat SEN (Dean, Law Faculty, Meliksah Unvi., Turkey)

Discussants: Jong Il KIM (Professor, Middle East Institute Ashin Unvi., KOREA)

15:00-15:20 Coffee Break

15:20-17:30 Session 2. Chair: Chul Choi (professor, HUFS Law)

(1) Title: The Crisis of EU Economic and Monetary Union and its Solution

Speaker: Michael Tomasek

(Vice-Dean, Faculty of Law, Charles Universty, Czech Republic)

Discussants: Yo Sop Choi

(Professor, Division of Language & Diplomacy, HUFS, KOREA)

(2) Title: New Changes of Foreign Investment Law

Speaker: Doljin S (Professor, School of Law, National University, Mongolia)

Discussants: Joung W Hwang (Professor, HUFS Law, US)

(3) Title: Historical and Current Constitutional Developments in Arab Countries

Speaker: Sherif Heikal (Professor, HUFS Law, KOREA)

Discussants: David Linton (US Attorney, CJ E&M, Korea)

17:30-18:00 Comprehensive Discussion

18:00-20:00 Banquet

Session 1

Title :

The Development of Turkish Law in Historical Process

Prof. Dr. Murat ŒEN

Dean of Law Faculty at MelikŒah University

THE DEVELOPMENT OF TURKISH LAW IN HICTORICAL PROCESS

Prof. Dr. Murat ŞEN

Dean of Law Faculty at Melikşah University

INTRODUCTION

Throughout history there have been different legal systems, states and nations had their own separate legal structures. Once the states demolished from the stage of history the states' legal heritage is often eliminated or modified. In a globalizing world the existing legal systems and their implementations are affected by each other. Both due to demolish and globalization, the legal systems are greatly modified, and hence, to be able to understand the true nature of a legal system it is very important to understand the stages the system went through and how it was modified.

Turks founded a state in 220 BC, and structured an independent unique legal system. As time progressed, legal practices have developed in line while new states founded, but the real turning point in Turkish legal system lies in the acceptance of Islam which created a whole new legal system. On the one hand the Turks until then, they have developed a strong state organization, on the other hand to accept the Islamic legal system, revealed, will continue until the establishment of the republic, a Turkish-Islamic legal system has revealed the structure. The Ottoman state also established until then from a legal point of Turkish-Islamic state has created the most beautiful example. Reflects the structure of the Turkish law in the State of customary law rules, as well as revealing the character of Islamic law, Islamic law has found the application of the rules. Customary and Islamic law rules in a split legal system is not integrated with each other and create a legal system that has life conflict.

When Ottoman Empire approached the stages of slowdown and collapse, European legal system started to be adopted and by the establishment of the Turkish Republican regime the Turkish-Islamic law structure was replaced by continental European Law. However, some of these adopted laws evolved and amended by various legal reforms over time to create a legal system that is more competent with the Turkish national and cultural structure.

In this study, the first time the Turks appeared on the scene in time to the present day legal structures, together with the Republic of radical changes that occurred before and after taking into consideration the Republic shall be dealt with in the form of a separation.

I. THE PERIOD BEFORE THE DECLARATION OF THE TURKISH REPUBLIC

A. TURKISH LAW BEFORE ISLAM (220 BC-940 AD)

Pre-Islamic Turkish law that was founded by Turks in Central Asia contains legal systems of, first and foremost, the Huns (220 BC - 552 AD), Gokturks (552 - 745 AD) and Uighur (745-940 AD) states¹. During that time, it is known that Turks have been under the influence of various religious belief systems including Turkish Shamanism, Buddhism, Mandeizm (Zarathustra), Manichaeism, Nestorianism.

This period is limited to the legal sources of the period, our knowledge of the law is not too much. Source of law in this period, inscriptions, documents, and are the gravestones. Former providing valuable information about the structure of the Turkish state Orkhon inscriptions (Ash-Thompson, Bilge-Kagan, Tonyukuk inscriptions) and the Yenisei inscriptions of Ergenekon Epic has a different significance².

Former Turkish state to the whole of the social and legal rules of "honor" is called. An important place in ceremony of former Turkish state and this state is understood that the continuation of a longer. "Provincial expenditures remain ceremony" proverb describes it.

Customs,

- People between the time of customs and traditions that exist within a particular character in the process of winning a legal and social sanctions as well as also with the introduction of legal sanctions,
- President with the will of the rights,
- The decisions taken by the General Assembly called advisory council is composed³.

B. TURKISH LAW AFTER ISLAM (940-1923 AD)

Turks' introduction to Islam goes back to where Turks was encountered by Islamic armies under caliph Omar. Later in the famous battle of Talas (751) Chinese army with the collective efforts of the Arab and Turkish forces stopped the establishment of friendly relations between the Arabs and the Turks began. In subsequent periods on the one hand Muslim traffickers in Asia among the Turkish tribes to Islam introductions from the other side of the Turks of Abbasids military and administrative staff to take part in the start of Islam among the Turks quickly paved the way. Thus, AD 868, Tolunoğulları on the first Muslim Turkish state (868-905) was established. Then, they IHS is (935-969), Karahans (940-1040) en masse this new religion and, finally, Khan is the head of state, at the beginning of the tenth century Islam as the official religion of the state has Adopted. The Ghaznavids (963-1087), the Ayyubids (1171-1462), Mamluks (1250-1517), the Great Seljuk (1040-1157), the Anatolian Seljuk (1074-1277) and the Ottoman Empire (1299-1923) states ensued⁴.

Thus, as the Muslim Turkish state; Tolunoğulları in the Middle East and İhşid the Ghaznavids and the Delhi Sultanate in India, we are still living on the land of the Great Seljuk, Anatolian Seljuk and Ottoman Empire was established.

Established religion in this state with the provisions of Islamic law applied in parallel, at the same time having the structure of an advanced state of Turkey, especially on issues related to state government, which is implementing the law has been applicable.

¹ Ahmet Akgündüz / Halil Cin, Türk Hukuk Tarihi, Osmanlı Araştırmaları Vakfı, İstanbul 2011, s.68.

² Halil Cin / Gül Akylmaz, Türk Hukuk Tarihi, Sayram, Konya 2011, s. 16.

³ Mehmet Akif Aydın, Türk Hukuk Tarihi, Beta, İstanbul 2012.

⁴ Aydın, s.26.

Accordingly, the first of these states have implemented it is necessary to briefly refer to Islamic law.

1. THE ISLAMIC LAW: AN OVERVIEW

In the world today, and has been applied to various systems of law are being implemented. Of these, some divine commandments and prohibitions (eg. Islamic Law), some customs and practices (eg. common law-Anglo-Saxon), some with the heads of state or their legislatures interests of the laws that (continental Europe) is formed. Islamic law, the source of the divine law systems come between. Islam, Allah's prophet by an angel named Gabriel. Muhammad is reported to consist of provisions. Islamic law, the Prophet of God through the people's happiness to preach the rules that are on the one hand faith provisions (theological provisions), on the other hand people with other people and with God provisions relationships (deeds provisions), and finally the moral interests (moral provisions) is composed of the provisions⁵.

2. IMPLEMENTATION OF THE ISLAMIC LAW

Qur'an, Sunnah, ijma, and as compared with the four primary sources of Islamic law, by individual legal matters, and that it provides the solutions are developed with the legal review. Jurist, against certain resources in order to solve the conflicts were used. The first of these sources the Qur'an is the book of Allah sent Prophet. Next source, according to the Koran has shaped the life of the Prophet; solutions are brought about by the conflict. Lawyers in resolving conflicts in these two sources, the first solution is to see whether, if there is an existing provision applies. Or a lawyer himself, within the limits had drawn by these sources and including them in parallel, making comparison between similar provisions and public interest, so as to develop a solution itself.

Variety of legal disputes with the development of Islamic law, gained differences of opinion among jurists began to emerge. Some legal systems emerged from divine sources, like Islamic law, some emerged from traditions and implementations (Anglo Saxon Common law), and some emerged from legislations made by a president or legislative parliament as in the case of continental European legal system⁶.

Islamic law falls into those legal systems where source is a divine power. Religion of Islam is collection of rulings that was sent by Allah to his prophet Mohammed (peace be upon him aka pbuh). Islamic law, on the other hand, is a collection of rulings that was adopted by Allah for the sake of happiness of all creatures. Ruling in Islamic law consists of belief "itikadi" rulings, rulings which govern the relationships between people and Allah which are called "ameli" rulings, and finally moral "ahlaki" rulings which collects moral values.

3. IMPLEMENTATION OF THE ISLAMIC LAW DURING THE OTTOMAN EMPIRE

The Ottoman state was affected as in Islam and the Turkish state, have accepted Islam as a religion, as a natural consequence of this legal structure, as has been based on Islamic law. With the establishment of the Ottoman Empire began a new and original legal system is not. It was established previously established the state of Turkish and Islamic states as well as many other things, it takes time until you have the legal framework in force. However, the Ottomans, they have taken to this legal heritage is impossible to think that they were practicing without having

⁵ Ekrem Buğra **Ekinci**, *İslam Hukuku Umumi Esaslar*, Arı Sanat, İstanbul 2006, s. 12.

⁶ Mustafa **Avcı**, *Türk Hukuk Tarihi Dersleri*, Mimoza, Konya 2012, s. 62.

to change. Over a period of six centuries, inherited this legal structure necessary arrangements have been made in accordance with Islamic law⁷.

In fact, one state's legal system, legal structure in order to reveal the first, it forms the basis of the legal system and legal regulations, court decisions that they need to examine practices.

Accordingly, the Ottoman legal framework consists of two parts. One directly Quran, Sunnah, ijma, and analogy-based and fiqh books codified been the norm up a new era is that these "canonical provisions" or "Islamic law" is called. Classical Ottoman Islamic law legislation, the courts apply the resources which consists of books of fiqh and fatwa⁸.

The other part of the Ottoman legal framework legislation constitutes customary law. Sharia law to touch him, are not contrary legislative powers are limited by the Ottoman sultans. The Sultan's, which puts it on the basis of the authority of law "customary law" is named. When called customary law, a mere traditions and customs law should not be understood. Though norms of customary law imposing certain areas of the law, at least in terms of the traditions and customs of the settled, legal precedent has been taken into account. However, the Ottoman law customary law mentioned, only common law, not the canonical provisions of the laws of the style codified as well, including the sultan recognized the limited legislative powers within the framework of legal experts of the ijihad and fatwa to the reference set forth the legal provisions come to mind. Customary law, the Shari'a does not violate the provisions, unless the contrary is not valid⁹.

Located in the classical fiqh books and occurs independently of the intervention of the state in the past Sharia law to the law; sultan orders and edicts of the law occurred with the customary law is named.

4. SECULARIZATION PROCESS OF THE LAW DURING THE OTTOMAN EMPIRE

Salt period called Islamic law continued until 3 October 1839. Abdulmecid, 3 October 1839 (Gülhane Code, Tanzimat Edict) with the reforms initiated in the field of law reform efforts began. Continued until the proclamation of the Republic of the reform era is called the era of Islamic-Western law. In fact, 18 century in the last period of the Ottoman Empire opened to Western influence in all areas, with the Tanzimat led to the start of a new era. Characteristic of this period, to recover from the collapse of the Empire, in the modern sense to establish a state of law, promote and legal institutions of the country and hence secularized form westernise their efforts. Reform process in this period is observed that under the influence of the two currents. One, represented by Justice Minister Ahmet Cevdet Pasha, to uphold Islamic law, to issue the applicable law and jurisprudence to choose one of the requirements of modern times by revealing the thoughts of the requirements is current. Members of this opinion, a combination of modernization with tradition suggests that you need to walk. Under the influence of this current was enacted two laws: the Ottoman Land Code of 1858 and 1869 in Mecelle-i Ahkam-ı Adliyye¹⁰.

The other, advocated by the vizier Ali Pasha and west, which is the current law favors the fully quoted. This stream defend the French Civil Code, although not fully quoted, Islamic law, particularly in areas such as family law should continue to be valid it is said that. Ali Pasha, under the influence of western law is a translation of the many laws have been introduced: 1850 dated Trade Code, the 1858 Criminal Code, 1863 Trade Naval Decree, dated 1879 Procedure

⁷ Aydın, s. 65.

⁸ Murat Şen, "Osmanlı Hukukunun Yapısı", Yeni Türkiye Yayınları Osmanlı Sayısı, C. 6, Ankara 1999, s. 328.

⁹ Şen, s. 329.

¹⁰ Coşkun Üçok / Ahmet Mumcu / Gülnihal Bozkurt, Türk Hukuk Tarihi, Turhan, Ankara 2011, s. 321.

criminal Law Proceedings, dated 1879 Procedure Legal Proceedings Law. This current law has not fully quoted or replacement. This ordinance usually under the influence of the doctrine of natural law that, unlike Europe, equality before the law, legal security and social, economic and political conditions in need of modernization under the pressure heard relied on¹¹.

As a result, the Ottoman Tanzimat domestic law on the one hand, on the one hand taking the west incompatible with each other has been subject to many regulations and legalization. This new arrangement functioning in an orderly manner in the form of Ottoman law did not provide a structure. Considering the constitutionally late Ottoman law, the rule with the 1921 Constitution, the nation has been taken from the sultan. At the same time the legislative and executive forces, were collected in the Grand National Assembly of Turkey¹². These developments will change in the legal structure reveals a serious way.

II. POST PERIOD OF THE TURKISH REPUBLIC (1923 - present)

A. PROCESS OF RESTRUCTURING THE LAW DURING THE TURKISH REPUBLIC

Place on 29 October 1923 in the Ottoman Empire was replaced by the Republic of Turkey. The 1921 Constitution (Fundamental Law Organization) According to Article 1, "Sovereignty unconditionally belongs to the nation"¹³. Proclamation of the Republic shortly after the prepared 1924 of Fundamental Organization Law Article 1, according to "The State of Turkey is a Republic." And sovereignty in the use of a single competent authority elected as the view that the Article 3 and the "Sovereignty unconditionally belongs to Nation." it says. However, the first form of the Constitution, "The State of Turkey's religion is Islam." As the expression takes place (m.2), the Assembly's powers include "Sharia implementation of the provisions" were counted in points (m.26). This provision was removed by constitutional amendment in 1928, with changes in 1937 and has been formally adopted the principle of secularism¹⁴.

The Law of Fundamental Organization in 1924, unlike the 1921 Constitution, included the concepts of natural rights recognizing classical rights and freedoms as adopted in Europe since the French Revolution¹⁵.

Constitutional guarantees of fundamental rights and freedoms, taking into consideration the limits regulated by these laws were drawn. For the first time the social state principle has been adopted. Thus the religious character of the Republic of Turkey in the field of law has been abandoned, according to the needs of the era and a new constitution in parallel with reconstruction work has started all laws.

a. Administrative Law: In Turkey, administrative law, within the Ottoman Tanzimat period of westernization efforts, modeled after France, has taken place in the legal system. Management at initial recognition today as it was in our law, although to a large extent be influenced by French law, a development of the original shows. The Turkish Constitution of 1982 is the main source of administrative law. Administrative law system is based on the principle of the rule of written

¹¹ Aydın, s.432.

¹² Düstur, 3. Tertip, C. 1, s. 196.

¹³ Düstur, 3. Tertip, C. 1, s. 196.

¹⁴ R.G., 15.01.1945, S. 5905

¹⁵ R.G. 15.01.1945, S. 5905

law. Besides, the decisions of the judiciary to the formation of the law is effective. In which case the development of administrative law, judicial decisions are a lot of impact¹⁶.

In Turkey, an independent judicial formed separately from the administrative justice system is valid; disputes in the courts of expertise separate from the judicial courts (administrative courts) and with different methods and rules of private law disputes are resolved. The highest court in the administrative jurisdiction of the Council of State in position for the first time established during the Tanzimat, thus an addition to the administrative jurisdiction of the courts of justice have been adopted.

b. Criminal law: In the area of criminal law in 1926, a new Turkish Penal Code was enacted. This is the source of the Penal Code, 1889 is the Italian Penal Code. Then, on the basis of the Italian Criminal Code in 1930 some changes were made. Our current Penal Code which came into force from time to time until the old TPC significant changes have been made to adapt to the modern and democratic life. For this reason, the different laws that have been removed, for example, the Establishment, Duties and Trial Procedures of Juvenile Courts Law (1982) and the Law on the Execution of Sentences (1965). When it comes to 2004 instead of the Criminal Code is now inadequate, new and more current crime types found in a 5237 Turkish Penal Code was enacted. We are currently in force this rule, mostly under the influence of the German Penal Code has been prepared¹⁷.

c. Civil Law: Republic of Turkey, by making some small changes in the Swiss Civil Code, the Turkish Civil Code was enacted in 1926. This law 75 years after the application, in 2002, German, French, and even to a certain extent the Italian Civil Code, from further Against Women Discrimination Convention on the Elimination of the Child Rights Convention as international agreements benefiting from 4721 the new Turkish Civil Code was enacted¹⁸.

d. Law of Obligations: The Civil Law, Law of Obligations entered into force in 1926. 1911 of the Swiss Code of Obligations and departments, excluding some items, was translated from the French text. Turkish Code of Obligations from time to time changes are made in the. Law of Obligations in the system is not the most important changes in the law, new laws enacted are made. For example, the Road Traffic Law, the Law on Real Estate Lease, Business Law, Financial Leasing Law, as the Law on Consumer Protection. For this law because the Civil Code in 2012 made similar criticisms, ie the Turkish Code of Obligations No. 6098 was enacted¹⁹.

e. Tax Law: In Turkey, the tax law system in the true sense of the republic was formed. After the establishment of the Republic of Turkey Ottoman tax system was completely eliminated the tax laws of the countries of Western Europe is modeled. For this reason, the fact that the origin of the Turkish tax law is not a national. A major portion of the tax laws in Western Europe, in particular the Federal German law has been prepared as an example. However, these laws, when changes made in substantial compliance with the social and economic structure is provided. The most important tax reform in the history of the Republic of Turkey in 1949 were carried out. On these dates the laws of the Federal Republic of Germany on the basis of Income Tax, Corporate

¹⁶ Şeref Gözübüyük, *Yönetmelik Yargı*, Turhan, Ankara 2009, s. 17.

¹⁷ Mehmet Emin Artuk / Ahmet Gökçen / Caner Yenidünya, *Ceza Hukuku Genel Hükümler*, Turhan, Ankara 2007, s. 90.

¹⁸ Jale Akipek / Turgut Akıntürk, *Türk Medeni Hukuku Başlangıç Hükümleri*, Beta, İstanbul 2007, s. 49.

¹⁹ Fikret Eren, *Borçlar Hukuku Genel Hükümler*, Beta, İstanbul 2008, s. 9.

Income Tax and Tax Law was adopted. In 1953, the Law on the Procedure of Collection of Public Receivables were removed. Later, motor vehicle tax, business tax as well as taxes were also introduced. Finally, Turkey's efforts to join the European Union as a result of loss of funds in 2002 to meet the Special Consumption Tax was enacted²⁰.

f. Commercial Law: Turkey's first Trade Act of 1926, which TK, based on different principles taken from various foreign legislation, a compilation consisting of the provisions of the Law and these qualities were lacking as of the particular system. General provisions dated 1882 from the Italian Trade Commission Act (Cidimar by commerciale), partnerships related provisions are taken from the German and French law. TK received from the Swiss Code of Obligations of the Civil Code and had not established compliance. A number of issues regulated in the Law of Obligations, in a different way in the TA was also adjudged (eg sale, attorney and commission contracts). This basic law in order to resolve the conflict in a new Commercial Code was introduced to remove the preparation and drafting of the German jurist Prof. task. Dr.. Ernst Hirsch was given. Prof. Dr.. Hirsch draft prepared by the National Assembly after changes are made scrutinized by various commissions to be adopted and entered into force in 1957. In fact, TK has started to work in order to amend the breeding and although ultimately, the new law is made can be counted. For many years, remaining in force, the law changed again in 2011 by the Law No. 6102, entered into force in 2012²¹.

g. Business Law: The most important regulations governing business in the Ottoman period, from Mecelle-i Ahkam-ı Adliyye law has taken place. Mecelle, business relationships of workers and employers had agreed they would organize in full freedom. In the early years of the Republic, the most important law regulating the business of life is the Law of Obligations. BK 313-354. service contracts between agents, has been prepared with a view to individualistic and liberal. Later, a separate Labor Law was enacted in 1936. This Business Law, Turkish Business Law is a law in the field of protection of workers' rights. Because of this law, preparing contracts of the International Labour Organisation have been used to a large extent. Thus, workers in foreign countries who have adopted the same or similar rights is provided, it can be said. In the actual development work legislation after the 1961 Constitution was. Along with this constitution, constitutional rights such as the right to strike and lockout when guaranteeing collective labor law, issued after the entry into force of the 1982 Constitution and the laws established permanent changes could be made²².

h. Law of Civil Procedure: The source of this, is the Code of Civil Procedure of 1927. Enter into force from the date amended many times, some agents abolished, some new items are added. The source of the Law, Civil Procedure Law of 1925 in the canton of Neuchâtel, Switzerland, is generated. Some departments have benefited from the German and French Procedure Code. For many years, the CCP implemented with changes made in 2011 in order to respond to new needs rearranging No. 6100 was enacted by HMK²³.

²⁰ Mualla Öncel / Ahmet Kumrulu / Nami Çağan, Vergi Hukuku, Turhan, Ankara 2003, s.11

²¹ Sabih Arkan, Ticari İşletme Hukuku, T. İş Bankası A.Ş. Vakfı, Ankara 2009, s. 6.

²² Nuri Çelik, İş Hukuku Dersleri, Beta, İstanbul 2008, s. 8.

²³ R.G., 12.01.2011, S. 6100.

B. THE TURKISH LAW: AN OVERVIEW

Turkish law, the legal system is considered to be the four major Anglo-Saxon Law, Continental (Black) European Law, Islamic Law and Legal System in Communist includes continental legal system is located.

Continental legal system, a law has been codified system. This legal system, rules compiled code (codification) was collected in. Therefore, it is considered a written legal system. Formal sources of law, essentially the constitution, laws, rules and regulations consist of rules as written. Customary is the case in this system, but complementary sources, even if the validity of the constitution and the law takes. On the other hand, case law, is the primary source of law, but is a source of help. At a particular event, a particular court which decides on a similar incident may decide completely different. In addition, this legal system is based on Roman Law in the supply of private law and public law is the distinction. As a consequence, there is a distinction between judicial and administrative. There are two groups in the upper court²⁴.

CONCLUSION

There have been different legal systems on the lands of Turks. Legal systems and implementations have been different before Islam and after Islam with the introduction of Islamic law, and finally with the declaration of the Republic of Turkey. In Ottoman Empire, the ancestor of Turkish Republic, though, the dominant legal system was based on Islamic law.

The legal system of the Republic of Turkey, on the other hand, is not Islamic law; instead it is based on the Continental European law. Due to very small number of lawyers competent with the European law at the beginning times of the Turkish Republic though, some traditional legal conducts and rulings which were oriented to Islamic law or implementations under Ottomans were used. However, over time such traditional and Islamic law rulings were abandoned.

After the establishment of the Turkish Republic many laws that were received from the West were amended in accordance with the needs of the people. When such amendments were not seen enough to particular cases, new legislations have been put in place or new practices were adopted. Of course, such changes and amendments in legal systems will continue since societies develop and change and these developments and changes make it a must for appropriate amendments and new adoptions.

²⁴ Muhammet Özekes, Temel Hukuk Bilgisi, Yetkin, Ankara 2010, s. 63.