

Revolution of Islamic Law. Eighty years of the Swiss Civil Code in Turkey

Veranstalter: Hans-Lukas Kieser (Research Foundation Switzerland–Turkey); Walter Stoffel (Univ. Fribourg)

Datum, Ort: 20.10.2006-21.10.2006, Fribourg

Bericht von: Kerem Öktem, European Studies Centre, St. Antony's College, University of Oxford

Recent years have witnessed a proliferation of literature on the legal aspects of Turkey's Kemalist modernisation. Most accounts, however, dwell rather uncritically on the 'revolutionary' nature of the reception of European law texts, depicting the legal reforms as indispensable elements of the Kemalist teleology of 'contemporary civilisation' (*muasir medeniyet*). Some have dismissed the adoption of European law texts as a mere transplantation of codices rooted in distinct traditions and therefore unsuitable for the Islamic context of Turkey. Hence, they have depicted what most legal scholars in Turkey name the 'legal revolution'¹ as a superficial emulation of modern legal conventions. In the meanwhile, a body of scholarship in comparative legal studies, particularly on the Swiss and Turkish Civil Codes, remained largely inaccessible to the larger debates on modern Turkey. The Symposium *Revolution of Islamic Law – Eighty years of the Swiss Civil Code in Turkey* at the University of Fribourg provided a welcome opportunity to reconnect these debates and to revisit such opposing narratives.

The following summary of the debate roughly follows the sequence of the panels. For the sake of concision, overlapping and complementary papers will be discussed together, even if they were not presented on the same panel.

The Symposium, initiated by Dr Hans-Lukas Kieser, President of the newly established Research Foundation Switzerland–Turkey and co-organised with Walter Stoffel, Professor of Law at the University of Fribourg, brought together seventeen experts –legal scholars and practitioners, historians and anthropologists of the Middle East–who revisited the eightieth anniversary of the adoption of the Swiss Civil Code (SCC) in Turkey

through the angles of their respective disciplines. This interdisciplinary approach facilitated a rich and differentiated discussion beyond established narratives of success and failure or technical legal analysis, while it contextualised the Turkish legal reform both comparatively regarding other majority Muslim societies and historically with a view on more recent legal changes in Turkey. It also raised broader questions pertaining to the resilience of legal culture as opposed to the relative ephemerality of administrative acts, and regarding the feasibility of adaptation of legal norms in a different societal and cultural setting.

Historical and anthropological approaches to the Turkish case of legal reception

The papers of the first panel entitled 'Islam versus Laicism' dealt with the historical context of the adoption of the SCC in 1926.² Osman Gürzumar (Bilkent University Ankara) suggested conceptualising the Turkish Republic as the inheritor of the Ottoman Empire, in legal, institutional and political terms. Pointing to the treaties between the Ottoman and British empires in 1838, he gave an overview of codification efforts in the aftermath of the reform edicts of 1839 (*Tanzimat*) and 1856 (*Islahat*), thereby alerting the audience to the pre-republican precedence of legal adoption and reform. In the second half of the nineteenth century, French secular laws were translated in close succession to meet the legal needs of an Empire that became increasingly integrated –if unequally and asymmetrically– into the global market.³ This process of legal innovation culminated in the Ottoman Civil Code of 1876, the *Mecelle*. Compiled by Ahmet Cevdet Paşa and based on Islamic sources, the *Mecelle* was the first ever attempt to codify and standardise Islamic Law. It did, however, not touch on the most contested matters of family and inheritance law. While the *Mecelle* also served as a foundation for the short-lived Ottoman Family Law of 1917, the nascent Republic inherited a fragmented

²The terms secularism/secularisation and laicism (from the French *laïcité* and the Turkish *laiklik*) are often used interchangeably. It should be noted, however, that despite the conceptual proximity, secularisation mostly refers to the process and secularism to the state of separation between religious and political power in western European societies. The Turkish form of laicism has been defined by critical scholars such as Baskin Oran as a policy to subordinate and control of religion.

³Some of the most important laws that were passed in the 1850s and 60s are: Adoption of the Napoleonic Trade Laws in 1850, the French Penal Code in 1858, the Property Law also in 1858 and the Maritime Trade Law in 1864.

¹The terms 'legal reform', 'legal revolution', 'adoption' etc. are used interchangeably in this report. While these terms might differ in nuances reflecting the political or scholarly preference of the user, they all refer to the same process of the translation and adoption of French, Swiss and Italian law texts in the first decade of the Turkish Republic.

legal structure of competing law schools, regulations and law texts, especially in the spheres of family and inheritance law, and different provisions and courts for the different religious communities. Başak Baysal Erman (University of Istanbul) asserted that it was precisely this fragmented structure that led the political elites to opt for a complete break with the Islamic tradition. She alluded to the standardising impact of the SCC adoption that ended the fragmentation of competing secular and religious legal frameworks and court systems.

Gottfried Plagemann (Kultur University Istanbul) examined the adoption of the SCC in 1926 as a prime example for the republican elite's deep-seated belief in the educational power of law. Another central factor was the understanding of secularisation not as a long-term by-product, but as precondition for modernisation. He inquired why the efforts of the many commissions attempting to develop the *Mecelle* through a comparative review of the four Islamic schools of law into a comprehensive civil code came to an abrupt halt. When the first Minister of Justice of the Republican government, Seyid Bey, was deposed, the *Mecelle* was abrogated and the Islamic *Sharia* Courts were dissolved in close succession. Plagemann suggested that the Justice Minister Mahmut Esat Bozkurt's decision to adopt the SCC was largely shaped by the political and international environment during the first years of the Republic, and especially the Lausanne Treaty. In order to minimise deviations from a standard civil code and circumvent special regulations for non-Muslim minority communities Bozkurt opted for the SCC, hence pre-empting criticism from European countries, as well as from within Turkey's non-Muslim minorities, who hoped for a continuation of their religious status laws. Bülent Uçar, University of Bochum, in a later panel, drew attention to two factors that ultimately thwarted the *Mecelle*-based codification. While the theologians of the reform commission were unable to reach a common understanding on how to proceed, the political atmosphere among leading Kemalist elites turned increasingly hostile toward the idea of a continued engagement with *Sharia* courts, Islamic norms and theologians. Islamic law was increasingly seen as an alien remnant, and a 'law for bedouins' (Yunus Nadi).

Heinz Kaeufeler (University of Zurich) introduced an anthropological perspective by distinguishing between two different concepts: The adoption of a normative framework on the one side, and

the *longue-duree* phenomena of legal culture and *esprit de loi* on the other. The latter might well outlive administrative initiatives. He proposed that the principle dictum of Islamic law "*al-'amr bil marouf wan-nahi 'anil-munkar*" (the obligation for every Muslim „to protect virtue and prevent vice“) was subordinated, but not replaced by the Turkish reforms, and hence co-existed with the adopted legal norms. The result was a mismatch between legal text and innate legal culture, or at least a field of constant tension and contestation. As an authoritarian principle, the dictum was irreconcilable with a liberal political mindset and might therefore account for the authoritarian nature of the republic. This thread was received with criticism by some participants, who accepted his claim of the authoritarian nature of Kemalism up to a point, yet insisted that Kemalist authoritarianism was historically rather than legally contingent.

The second panel in general, and Hans-Lukas Kieser in particular examined Mahmut Esat Bozkurt's life in Switzerland. Bozkurt was the Minister of Justice who initiated and implemented the adoption of the SCC in 1926. Mahmut Esat Bey, born into a landholding family of Kusadasi in the Aegean province of Aydin, had been influenced by his family's experience of displacement and flight and witnessed tensions with members of local Greek-speaking Orthodox communities. This experience might have shaped his ruthless stance towards communities not considered as Turkish. Kieser highlighted the significance of Switzerland and Swiss universities in the beginning of the twentieth century as receptacle for dissident and nationalist movements, and particularly for Balkan secessionists, Russian revolutionaries, Zionists and Young Turks. It was in this politically agitated and tantalising atmosphere that Mahmut Esat Bey began his studies of law at the University of Fribourg in 1912, which he completed with his doctorate in 1919. Although he studied in Fribourg, Mahmut Esat Bey lived in Lausanne, where he joined the *Foyer Turc (Turk Yurdu)*, an organization closely related to the Committee of Union and Progress and sympathetic to its radical social and political agenda. Members of the Foyer, many of them students of Law in Fribourg, Lausanne and Geneva, campaigned for the secularization of family laws and were opposed to polygamy and religious parochialism. During his time in Switzerland, Mahmut Esat Bey came into contact with some of the leaders-to-be of the Kema-

list movement and the Turkish Republic, among them Sukru Saracoglu, Cemal Hüsnü Taray and Reşit Safvet Atabinen. Some members of the *Foyer*, and most probably Reşit Safvet Atabinen came into contact with the racial history theories of Geneva-based anthropologist Eugene Pittard, who in the 1930s would also teach the Atatürk protégé and influential historian Afet Inan. Pittard's influence might explain in part the decidedly secular, yet racialist conception of Turkish identity that became influential throughout the 1930s.

The following panel on the women's right dimension of the 'law revolution' exposed two diverging analytical trends regarding the nature and depth of improvements in the field. Şükran Şıpka (Istanbul Ticaret University) emphasised the new civil code's revolutionary character and examined it as a building block of the larger project of Kemalist reforms. Based on her criticism of the *Mecelle*, which was far from providing gender equality, she argued that the secular civil code facilitated legal equality between the sexes and established (Turkish) women as legal persons, ending their subordinate status to men. In this, the abrogation of the *Mecelle* and the adoption of the SCC amounts to a clear break with Islamic law. In addition, she claimed, the Kemalist reforms also allowed for the introduction of general suffrage in 1930 (local elections) and 1934 (general elections). Two questions were raised by this presentation: Firstly, were the Kemalist reforms motivated by a Feminist or an authoritarian understanding of women's rights? And secondly, have these reforms penetrated society sufficiently to actually change the predominance of male authority and female subordination?

Osman Can, Rapporteur to the Turkish Constitutional Court, in his evaluation of the SCC adoption, responded to the first question by clarifying that while the republican regime indeed granted general suffrage, this amounted to little more than a symbolical act, as the conditions of the day did not allow for democratic elections in the first place. Some discussants took his point further and reminded the audience of the body of feminist studies on the late Ottoman Empire and the early Turkish Republic that calls into question the emancipatory agenda of republican state. In his *excursus* into the transformation of legitimating discourses –from dynastic (i.e. Ottoman) to secular (i.e. Republican)– Can argued that secularism (*laiklik*) was not so much an essential value of the republican project but an instrument of state-building

that was embedded in –and ultimately subordinated– the overwhelmingly ethno-nationalist outlook of its authors.

Tentative answers to the second question regarding the depth of reforms were provided by Mahide Aslan (University of Luzern) in the following panel. Her PhD research aims at reconstructing the implementation of the new civil code in the first twelve years after its promulgation. She was discerning towards a glorification of the civil code's emancipatory agenda. Its application began rather tentatively and cautiously, especially in the remote eastern provinces, while it hardly ever penetrated the society of Turkey as a whole. Günter Seufert (University of Cyprus) also contested the claim that the civil code had revolutionised the role of women in Turkish society. He suggested that normative systems of religious/traditional, tribal and secular extraction coexisted ever since the adoption of the SCC, often complementing each other, but sometimes also conflicting. He elaborated this argument with reference to a number of recent surveys, which suggest the continued discursive and material subordination of women in Turkey. This argumentation is noteworthy as it triggers the question whether large-scale surveys especially regarding intimate personal choices satisfy the requirements of validity. Most of the recent Turkish surveys give an idea about overarching, socially sanctioned discourses, but they do not deepen our insight into actual individual choices.

The final panel on Friday extended the scope of the debate in that it included family law experiences in countries with majority Muslim populations other than Turkey. In her paper on Muslim reactions to the Turkish SCC adoption, Astrid Meier (University of Zurich) pointed to its relatively limited significance in Arab and Indian debates on Turkey. Muslim reaction focussed on the abolition of the *Sharia* and the secularising reforms, and more specifically on the termination of the Caliphate. In large parts of the Muslim world, the latter was widely seen as a momentous betrayal of the very tenets of Islam. Meier also referred to the historical context of colonialism in Arab countries, which allowed for the *Sharia* to be championed as part of a moral-political and anti-Imperialist discourse. The contrary was true in Turkey, where the 'old order' of the Caliphate came to be associated with the subservience and failure of the Sultan-Caliph to stand up against European encroachment. Her paper established the different meanings ostensibly

ly solid terminologies such as *Shariah* or Islamic Law can take on under different historical conditions and in different constellations of power. Edouard Conte's (University of Bern) presentation on Islamic Family Law in Palestine and Israel responded to the earlier discussions on the Turkish example of legal standardisation in drawing attention to the state of extreme legal pluralism and fragmentation prevailing in Palestine. Exacerbated by the debilitating effects of occupation and isolation, the Palestinian territories (and Palestinian citizens of Israel proper) are characterised by a legacy of fragmentation: While the Preliminary Ottoman Family Law of 1917 is still in use today, the contested coexistence of competing law texts and courts continues. Different legal traditions are upheld by segregated court systems for Muslim and Christian communities.

Juridical aspects of legal reform and general appraisal

The Symposium's second day was dedicated to the appraisal of the social incentives for the reform of family law in Switzerland, Egypt and Turkey and to a comparative evaluation of the Turkish case. The first panel brought to the fore the constraints of comparative legal studies in the absence of common socio-legal trends such as secularisation, codification and continued reform. Hermann Schmid (Swiss Federal Office of Justice) and the Turco-Swiss lawyer Anne Banu Brand (Baden) compared the recent reform processes of the civil codes in Turkey and Switzerland. They agreed that in both countries a general trend towards strengthening of women's rights, especially regarding divorce and inheritance has prevailed. In comparison to the Swiss case, however, the Turkish reform process appears to have been somewhat more piecemeal and volatile at times. The latest codification of the Turkish Civil Code, if discussed widely in Turkey, closely followed the earlier Swiss reforms.

In contrast, Sami Aldeeb (Swiss Institute for Comparative Law, Lausanne) delivered a rather sombre presentation on the increasing fragmentation of family legislation in Egypt, predicated upon the ossified application of the Ottoman Hatt-i Humayoun of 1856. He contended that Egypt needed an intellectual debate to begin a legal reform based on indigenous and hence Islamic sources. He also underlined the necessity for an independent power broker such as the military that would balance the demands of the religious establishment for a re-introduction of the *Sharia*. This statement,

however, was seen critically by the other participants.

The following panel revisited the Kemalist republic's legal reforms, raising questions on the possibilities and constraints of comparative legal studies and on the success and failure of adoption of legal texts in societies with different cultural and socio-economic structures. Ali Çivi, lawyer in Izmir and Basel, drew the balance of eighty years since the inception of the SCC in Turkey, and touched on the repeated reform efforts that came to full fruition only with the revised Turkish Civil Code (TCC) of 2001. The implementation of the SCC in 1926 met with multiple obstacles in the first decades. In the long run, however, the TCC created a climate that facilitated societal emancipation processes, even if asymmetrically in regional, social and ethno-religious terms. Therefore, Çivi argued, a retrospective view on the adoption process suggests a relative success in that it introduced a trajectory of increasing secularisation and equality in the realms of family laws and individual status. Urs Fasel (University of Fribourg) agreed with this general evaluation, and argued for a dynamic understanding of legal reception and adoption, underlining that the process of adoption is continuous, and needs to be supplemented by an exchange between Turkish and Swiss scholars and practitioners. His criticism of the largely uni-directional nature of the adoption process and his call for the compilation of a commentary on the SCC/TCC drawing on both Swiss and Turkish cases in both languages was received very warmly.

The closing session allowed for a wider reflection on the issues at stake. Hans-Lukas Kieser suggested thinking about the legal reform process as the bright side of the Kemalist project, while the re-writing of history and language appears rather as one of its dark sides. As both reforms were concerned with the identity of its citizens, however, one might also want to explore to what extent the secular aspect of the civil code can be separated from the ethno-racial undertones of the Turkish history thesis. Walter Stoffel signified Turkey's legal 'revolution' as a case of societal change through codification. He detected some meta-structures emerging from comparative legal studies, with legal fragmentation reigning in Islamic and to a lesser extent Common law and standardisation in continental European countries, and for that matter Turkey.

Astrid Meier, Günter Seufert and Edouard Con-

te proposed to explore further some of the questions raised in the preceding debates through targeted, cutting-edge research in the fields of anthropology, history and critical legal studies. Meier stated the need to examine more closely the processes of legal implementation, and suggested to consult the available literature in the anthropology of law, which so far is scant regarding Turkish case studies. The coexistence of secular legal norms and religious social and cultural norms in Turkey –alluded to, yet largely under-discussed during the Symposium– further underscores the need for a deeper engagement with the micro-levels of everyday life. Conte drew attention to the significance of Islamic Law in Europe grace to immigration from Muslim countries without secular family legislation, and the negative impact it has particularly on Muslim women. In this regard then, the Turkish engagement with a secular civil code indeed appears as a considerable step forward. More importantly, he recommended a comparative debate on secular family laws in Muslim societies with a particular view on Turkey and Tunisia, which adopted the French *Code Civile* in 1957, while maintaining Islamic regulations based in the *maliki* and *hanafi* schools of jurisprudence, albeit with a modernist interpretation.

The wealth of debates at this Symposium demonstrated impressively the importance of comparative and interdisciplinary approaches to the study of global modernisation processes and the role of the transfer and adoption of cultural norms and legal systems in this context. This is even more significant for the analysis of Turkey's complex, contested, fragmented yet momentous process of modernisation. Furthermore, it reaffirmed the importance of historical contextualisation for such comparative approaches, and the need for solid, in-depth engagement with micro-histories and everyday levels of analysis to widen the sample for further generalisation on the limitations and possibilities for cultural change, exchange and interaction through law.

Footnotes:

Tagungsbericht *Revolution of Islamic Law. Eighty years of the Swiss Civil Code in Turkey*. 20.10.2006-21.10.2006, Fribourg. In: H-Soz-u-Kult 10.11.2006.