

LEGAL CULTURE AND LEGAL TRANSPLANTS
TURKISH NATIONAL REPORT*

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I. Legal Models as a Whole. Historical perspective. II. Specific Institutions or Legal Mechanisms.

QUESTIONNAIRE

I. LEGAL MODELS AS A WHOLE

Historical perspective

1. The reception of foreign law in Turkey can be distinguished into three periods¹ in the light of the classification made by the Rapporteur General.

a) The first wave of reception of foreign law occurred in the 19th Century.²

* *Nota Bene*: The Turkish national reporter would like to express that he has encountered serious difficulties in replying to the questions in their original order as put in the Questionnaire on the reception of foreign laws. Therefore the information on receptions of foreign laws in Turkey below has been given, unfortunately, not within the framework of the Questionnaire and without following the order of the questions determined by the Rapporteur General.

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¹ For details on the history of adoption of foreign laws during the Ottoman Empire and after the foundation of the Republic of Turkey see *Özsunay, Ergun*, "Legal Science During the Last Century in Turkey, Inchieste di diritto comparato", *La Science du droit au cours du dernier siècle*, Padova, 1976, pp. 695 et seq.; *From the same author*: "The Total Adoption of Foreign Codes in Turkey and Its Effect", *Le Nuove Frontiere del Diritto e Il Problema Dell'Unificazione*, Milano, Università degli Studi di Bari, 1979, Vol. II, pp. 803 et seq.; "Some Remarks on the Amendments Proposed by the Preliminary Draft of the Turkish Civil Code", *Erauw, J. et al.* (eds.), *Liber Memorialis François Laurent 1810-1887*, Bruxelles, Story-Scientia, 1989, pp. 605 et seq.; "Religious Fundamentalism: Turkish Experience", *Universidade da Coruna, Nacionalismo en Europa-Nacionalismo en Galicia, La religion como elemento impulsor de la ideología nacionalista, Simposio internacional celebrado en: Pazo de Marinan A Coruna, 4-6 Septiembre 1997, NINO Centro de Impresion Digital, 1997*, pp. 116 et seq. For several types of "reception of foreign law" and particularly "total reception of foreign codes", *Özsunay, Ergun*, *Karşılaştırmalı Hukuka Giriş (Introduction to Comparative Law)*, Istanbul, 1978, pp. 269 et seq.; *Özsunay, Ergun*, *Türkiye'de Yabancı Hukukun Benimsenmesi Hareketi İçinde Türk Medeni Kanunu'nun Anlamı ve Önemi (The Meaning and Importance of the Turkish Civil Code within the Movement of Adoption of Foreign Law in Turkey)*, Istanbul Üniversitesi, Mukayeseli Hukuk Enstitüsü, TMK'nun 50. Yıl Sempozyumu (Symposium for the 50th Anniversary of the TCC), Istanbul, 1976, pp. 399 et seq".

² In the Rapporteur General's classification: second period, 1789-1918.

b) The second wave of reception was carried out after the foundation of the Republic of Turkey in 1923 (voluntary adoption of foreign Codes) (1918-1989). (According to the Rapporteur General's classification: "third period: 1918-1989").

c) The New Turkish Civil Code, num. 4721 of 22 November 2001 and enactment of several laws modeled on international treaties and EU legislation belong to the Post-Modernism period (after 1989) according to the Rapporteur General's classification.

2. a) Ottoman legal system.

During the Ottoman Empire (1299-1918) the Ottoman legal system was based on Islamic law.

b) First wave of reception of foreign law.

The first westernization movement occurred upon the Promulgation of the Decree for New Regulation (Tanzimat Fermanı) in 1839. During the "Reform Period" (Tanzimat) western codes or laws were adopted in several fields of law. Within the framework of "New Regulation", the Commercial Code 1858 (Kanunname-i Ticaret), the Criminal Law Decree 1858 (Ceza Kararnamesi), the Commercial Maritime Law 1864 (Ticaret-i Bahriye Kanunnamesi), the Code of Criminal Procedure 1880 (Usul-i Muhakemet-i Cezaiye Kanunu), and the Code of Civil Procedure 1880 (Usul-i Muhakematı Hukukiye Kanunu) were enacted. They were modeled upon the French codes and laws in force in those years.

At the same time, some codifications were made in this period mostly based on islamic legal sources: These were the Criminal Code (1840 and 1851) (Ceza Kanunnamesi); the Law on Land 1858 (Kanunname-i Arazi); the Compilation for Judicial Provisions (Medjelle) 1876 (Mecelle-i Ahkamı Adliyye) and the Decree on Family Law 1917 (Hukuku Aile Kararnamesi).

c) Second wave of foreign law in Turkey.

When the Republic of Turkey was founded on 29 October 1923 after the War of Independence, *Mustafa Kemal Atatürk*, leader of modern Turkey and the founders of the Republic decided to secularize and modernize Turkish law. For this purpose, some special Commissions were set up by the Ministry of Justice to draft modern codes which would be based on the new developments in the contemporary legal systems and satisfy the social needs of the nation. The Law Reform Commissions could not achieve

these goals. Upon failure of the Commissions, it was decided to adopt foreign codes. To secularize and modernize the current law of the country, the *Swiss Civil Code* (SCC, *Zivilgesetzbuch*) of 10 December 1907 (entry into force on 1 January 1912) and *Code of Obligations* (CO, *Obligationenrecht*) of 30 March 1911 (entry into force on 1 January 1912) were translated into Turkish from their French versions with some alterations and modifications.

3. a) The reasons for the adoption of foreign law.

The driving forces for reception in the 19th century were, on the one hand, the *determination of modernization of the Ottoman law* for “*economic purposes*” to harmonize the national law with the Western legal system emerging after the Industrial Revolution in Europe; on the other hand, the “*political pressures of the Super Powers*” of those years for the purpose of protecting their nationals (e.g. Orthodox minority) living in the territories of, or trading with, the Ottoman Empire. Thus the reception of foreign law in the 19th century was partly “*conscious reception*” for economic/commercial purposes; partly as the *result of political pressures of Super Powers* in the 19th century for their own political and economic interests.

b) Reception of major Swiss Codes.

As regards the reception of Swiss Codes (Swiss Civil Code, Code of Obligations, Swiss Federal Code on Enforcement and Bankruptcy [Bundesgesetz betr. Schuldbetreibung-und Konkurs] etc.), this is a typical “*voluntary total reception of foreign law*” carried out for purposes of secularization and westernization of national law. This reception has nothing to do with “*imposition of foreign law*” upon a country.

In spite of the influence of French *Code civil* on the lawyers in those days, the Swiss Codes were preferred as these Codes were the newest codification in the first decade of the 20th century.

The voluntary global reception of *Swiss Civil Code* and *Code of Obligations* together with some other *Swiss Codes* in 1926 (i.e. Federal Code on Enforcement and Bankruptcy) was a “*legal revolution*” in Turkey.

The most important consequences of “*global reception of Swiss law*” on Turkish law, legal practice and legal science can be summarized as follows:

— First of law, as the result of global reception of foreign law, Turkey left the *religious legal system of Islam* that had dominated in the Ottoman Empire for centuries. The ties with Islam as a legal system were cut off

voluntarily by reception of foreign law. Thus the law of modern Turkey became a part of the *continental legal sphere*.

In spite of the continuation of some traditions based on religion (e.g. imam- marriages), Islamic law today in Turkey constitutes only a part of the “*history of national law*”.

— The second impact of global reception of foreign law was the termination of “*legal plurality*” that had dominated during the last century of the Ottoman Empire, particularly after the “Tanzimat” (Reform, New Regulation) movement (1839).

— Thirdly, *prohibition of polygamy, introduction of compulsory civil marriage and divorce subject to certain grounds* brought a *radical change* in Turkish family life and the status of married woman.

— Fourthly, the voluntary global reception of foreign law has introduced *new legal forms and concepts* to Turkish law. The global reception of foreign law introduced “*a new approach*” to legal problems and a “*new way of legal thinking*”.³

4. *Influence of Swiss law regarding the application of TCC*

The adaptation of foreign law to a “*new legal climate*” is not an easy task. In several cases, the application of the provisions of TCC has taken a different direction from the application of SCC despite the norms and solutions being similar in both Codes. In order to cope with such contradictions, Turkish lawyers tried to follow carefully the Swiss Civil Law doctrine and decisions of the Federal Court in several fields of civil law.

With regard to interpretation of several provisions and filling the legal gaps, Turkish doctrine and jurisprudence usually enjoyed the Swiss doctrine and practice.⁴

³ For details see Özsunay, Ergun, Some Remarks on the Amendments Proposed by the Preliminary Draft of the Turkish Civil Code, pp. 638 et seq. Further see Davran, B., “Bericht über die Aenderung im türkischen ZGB gegenüber dem schweizerischen, verbunden mit einigen Bemerkungen über den Sinn der Rezeption”, *Annales de la Faculté de Droit d'Istanbul*, 1956, num. 6, pp. 131-143.

⁴ In the *Unification of Decisions* of 28 November 1945, num. 13/15 of the all chambers of the Court of Cassation, the highest court makes the following statement: “Regarding interpretation of our laws, whereas we take into account our own texts in principle, we cannot give up to examine *their origins* as the doctrine (scientific opinions) is enjoyed in respect of interpretation”. See Özsunay, Ergun, *Medeni Hukuka Giriş (Introduction to Civil Law)*, 5th Edition, Istanbul, 1986, p. 218.

All generations at the law schools in Turkey since 1926 (particularly the teaching staffs at Istanbul and Ankara Universities Law Faculties) have closely studied Swiss law and some neighboring laws (e.g. German and French laws), through the legal problems that they examined in their researches and works (i.e. dissertations, “Habilitationsschrift”, text books in several fields of law etc.).⁵

Translations of important Swiss “commentaries” (i.e. Bern and Zurich Commentaries) into Turkish played an important role in respect of the development of Turkish law.

Furthermore, “*Journées juridique turco-suisse*”, organized every four years, in which Swiss and Turkish lawyers come together, contributed much to observing similarities and differences of the applications of Swiss and Turkish Civil Codes, to analyzing the grounds of different applications. Thus, the papers submitted to these “law days” and discussions among Swiss and Turkish lawyers on the application of “adopted law” (Mutterrecht) in the “receiving country” (Tochterrecht) have also contributed to the improvement of Turkish law.

5. Alterations and amendments

When Swiss Civil Code and Code of Obligations were adopted by Turkey, several alterations and amendments were made. They can be distinguished into two different periods: (i) amendments and alterations in the Turkish Civil Code at the time of adoption; and (ii) after the adoption until the revision of the Turkish Civil Code in 2001.

a) Amendments and alterations in the Turkish Civil Code at the time of reception

Several changes were made for “*political, social, moral, geographical and economic grounds*” when Turkey adopted the Swiss Civil Code by “*voluntary reception*”.

— Some changes were due to the different “*forms of the State*” in Turkey (i.e. centralized State) and Switzerland (CH). Such provisions were not adopted.

— As the Turkish “judicial system” was different from Switzerland, some provisions of former SCC were adapted to the Turkish “*judicial*

⁵ *Comparative law* meant for a while in Turkey the “*comparison of Turkish and Swiss laws*” regarding examination of legal problems before the “comparative law” was developed as an autonomous branch of law. For details see Özsunay, Ergun, *Karşılaştırmalı Hukuka Giriş (Introduction to Comparative Law)*, pp. 4 et seq.; Ergun Özsunay, *Legal Science During the Last Century in Turkey*, pp. 803 et seq.; Özsunay, Ergun, *Some Remarks on the Amendments Proposed by the Preliminary Draft of the Turkish Civil Code*, pp. 638 et seq.

structure". In general the provisions relating to the cantonal law were not received.

— Some provisions of SCC were altered on the ground of the "*revolutionary character of the adoption*" in Turkey. For instance, as Turkey secularized its law leaving the Islamic legal system, marriage could be solemnized only by a marriage officer (i.e. mayors or their representatives). Under TCC, only "civil marriage" was valid. The so-called "imam marriage" was regarded as "non-existent". Only after obtaining a civil marriage certificate, could a religious ceremony be done (TCC Article 110; former SCC Article 118).

— In the *fields of family and inheritance laws*, some provisions of former SCC were altered on the grounds of "*social and moral structure*" of the Turkish nation. A typical example deals with the *age of legal majority*: 18 years (TCC Article 11; SCC Article 14). The *age of majority by the decision of court* (i.e. emancipation) was lowered: 15 years (TCC 12; former SCC 15). Likewise, the *marriage age* was also lowered: 17 years for males; 15 years for females; and in exceptional cases; 15 years for males and 14 years for females (TCC Article 88; former SCC Article 96).

— For "*social grounds*", the "*matrimonial regime*" in Switzerland was not adopted. The traditional Swiss "*marital system*" (Güterverbindung) as an "*ordinary matrimonial regime*" was not adopted. It was found to be not suitable for matrimonial property in Turkish family life. Instead, a "*system of separate estates*" (Gütertrennung) was adopted as an "ordinary matrimonial regime" (TCC Article 170 et seq.; former SCC Article 178 et seq.) as it was observed that it was more suitable to the family relations of the Turkish people.

— Moreover, the provision of al. 3 of Article 137 of the former SCC on the "consent to adultery" (loss of the right of action) was not adopted as it was not compatible with the conservative Turkish family life in the 1920's. In the case of "desertion" as a divorce ground, the "period of absence" was reduced to three months (TCC Article 132) by taking into account economic and social structure of the Turkish family whereas this period was 2 years in former SCC Article 140.

— Likewise, the provision of SCC on *judicial separation for an indefinite period* (former SCC Article 147 al. 1) was not adopted in Turkey (TCC Article 139). A "*period of one to three years*" was found sufficient for "judicial separation" on the reason of Turkish family relations.

— Several provisions of former SCC were not adopted for they were not compatible to Turkish family life relations. Therefore, "*several periods*" in the family law or law of inheritance was reduced by TCC: E.g. "one month"

for *disavowal of a child born in wedlock* (TCC Article 242; in former SCC Article 253 “three months”).

— For “*moral grounds*”, “the proportions of property and usufruct of the surviving spouse” were reduced in order to protect the father and mother and grand parents of the deceased, (TCC Article 444; former SCC Article 462).⁶

b) Amendments in SCC and TCC between the date of Adoption of the Swiss Civil Code (4 April 1926).

aa- Amendments in the Swiss Civil Code

The SCC has been amended several times after its entry into force on 1 January 1912. In family law, the rearrangement of divorce and matrimonial regimes in the light of new developments, the need for a better protection of married women and children born out of wedlock, the reform of adoption and parental responsibility (parental authority) under the new concepts and understandings were the main reasons for these amendments.

Moreover, the new issues related to co-ownership, arrangement of flat ownership and right of building (Baurecht, droit de superficie) needed new regulations.

The amendments and rearrangements in SCC have been carried out by federal laws enacted on various dates. Following the system of SCC, the important reforms and rearrangements can be cited as follows:

* *Law of persons*

— Federal Law of 16 December 1983 on Amendment of SCC amended Article 28 on “*protection of personality right*” (Article 28) and added new Articles 28a-28l relating to lawsuit in case of infringement of personality right, interim measures, types of compensation etc.

— Some provisions relating to “*foundations*” (Article 89bis) were added by Federal Law of 21 March 1958. This Law provided the application of provisions on foundations when a “*fund for assistance to the personnel*” (Personalfürsorgeeinrichtungen) was established in the form of a “*foundation*”.

⁶ For details on other modifications and alterations see Özsunay, Ergun, Some Remarks on the Amendments Proposed by the Preliminary Draft of the Turkish Civil Code, p. 611.

* *Family law*

— Federal Law of 5 October 1984 on the Amendments of Swiss Civil Code made amendments on *the effects of marriage, matrimonial property and law of inheritance*.

— Federal Law of 5 June 1974 amended the provisions of SCC on “*recognition*” and “*action for paternity*”. (See SCC Article 260 et seq.).

— Federal Law of 30 June 1972 has reformed the “*adoption*” in the light of the new developments after the Second World War in this field. (This Law added new Articles 264-269 to SCC on adoption.)

— Federal Law of 1976 on *Child’s Law* revised the legal situation of children in SCC.

— Federal Law of 26 June 1998 has rearranged the *parental authority* (die elterliche Gewalt) in the light of the new “*Child’s Law*” in the neighboring countries for better child protection. (See SCC Article 296 et seq.).

— Federal Law of 5 June 1974 has amended *duties of parents relating to education and training of children* and the *child’s property*. (See SCC Article 276 et seq. and 318 et seq.)

* *Law of inheritance*

— Federal Law of 5 October 1984 rearranged the “*freedom of disposition*” (Verfügungsfreiheit). (See SCC Articles 470 et seq.)

* *Property Law (Law of Things)*

— Federal Law of 19 December 1963 on the Amendments of SCC rearranged *co-ownership* (Miteigentum) and provided provisions for *flat ownership*. It amended several Articles relating to *property* (Eigentum) and added new Articles to the Code on *ordinary and important management transactions on property under co-ownership* (647a-647e).

The legal regime for “*flat ownership*” was established by this Law. (See Articles 712a-712t.).

— Federal Law of 19 March 1965 rearranged the provisions of SCC on “*right of building*” (Baurecht, droit de superficie) in the light of new developments in this field for a better use of land and premises. (See SCC Articles 779, 779a-779 l).

bb- Amendments in the TCC during the period 1926-2001

(i) “Revision” of TCC in general

TCC has experienced several amendments after its coming into force on 4 October 1926 until the enactment of the New Turkish Civil Code of 2001.

Regarding the amendments of TCC of 1926, it should be noted that not only the problems encountered in the practice of the Code, but also the developments and amendments in the “adopted (mother) law” have been taken into account.

The need for revision of TCC was felt in the early 1950’s. For the revision of the Code, the Ministry of Justice established several “*Revision Commissions*”. The first one was set up in 1951. After the work of 20 years, the Commission’s “*Preliminary Draft and Its Explanatory Memorandum*” was published in 1971.⁷

Upon receiving serious criticism of the Revision Draft, the Ministry of Justice set up a *second Revision Commission*” to specifically reform the “*divorce law*” that was interesting to everyone in those years. However, the members of this Commission objected to such a limited assignment. Thereupon the Ministry of Justice never convened the Commission again.

The *third Revision Commission*” was established by the Ministry of Justice in 1976.

Despite the endeavors of this Commission for reforming the Code, its drafting activity was halted by the Ministry in 1978, probably for political reasons.⁸

The *fourth Revision Commission* was established by the *Act on Establishment of a Commission for Revision of the Turkish Civil Code*, num. 2647 on 1 June 1981. This Commission started to revise the Code on 3 July 1981 and finished its revision work on 7 October 1984. The Commission revised the

⁷ On the criticism of the Revised Draft see Tandoğan, Haluk, *Türk Medeni Kanunu Ön Tasarısının Tüzel Kişilere İlişkin Hükümleri Üzerine Görüşler* (Remarks on the Provisions of the Preliminary Draft of the TCC on Legal Entities), Ankara Üniversitesi Hukuk Fakültesi Dergisi, Vol. XXX, 1973, num. 1-4, pp. 121 et seq.; Sungurbey, İsmet, *MK Öntasarısının Nesnel Hukukunun Eleştirisi* (Criticism of the Law of Things of the Preliminary Draft of TCC), İstanbul, 1972.

⁸ See Özsunay, Ergun, *Some Remarks on the Amendments Proposed by the Preliminary Draft of the Turkish Civil Code*, p. 615.

whole Turkish Civil Code except the Vth Book on Code of Obligations. The Commission's "*Preliminary Draft and Its Explanatory Memorandum*" was published by the Ministry of Justice in the same year.⁹

Nevertheless, the coalition governments in 1980's and 1990's could unfortunately not present this Revised Code to the parliament. Thereupon, another Revision Commission was set up by the Minister of Justice in the mid 1990's. The revision work of the Code was completed in four years. The *Revised Turkish Civil Code* was presented on 30 December 1999 to the Grand National Assembly. The new Turkish Civil Code, num. 4721 was enacted on 22 November 2001 and published in the Official Gazette, num. 24607 on 8 December 2001. It entered into force on 1 January 2002.¹⁰

(ii) Amendments in the TCC during the period 1926-2001: Impact of amendments in the SCC

After the entry into force of TCC on 4 October 1926, several amendments and additions were made to the Code in order to satisfy the requests of the practice and to arrange new social and economic needs until the New Turkish Civil Code of 22 November 2001 was passed by the Grand National Assembly.¹¹

⁹ See *Ministry of Justice, Türk Medeni Kanunu Öntasarısı ve Gerekçesi* (Preliminary Draft of Turkish Civil Code and Its Explanatory Memorandum), Ankara, 1984. For a detailed assesment of this Revised Code see *Ergun Özsunay, Some Remarks on the Amendments Proposed by the Preliminary Draft of the Turkish Civil Code*, p. 616 et seq.

¹⁰ See Ministry of Justice, *Türk Medeni Kanunu Tasarısı (Preliminary Draft of the Turkish Civil Code)*, Ankara, 1998

¹¹ On this occasion it should be noted that several statutes have been enacted in order to arrange the field of civil law beside TCC. The following statutes are of importance regarding the application of TCC: Act on Associations, num. 2908 of 4 October 1983 repealed by Act on Associations, num. 5253 of 4 November 2004; Act on Flat Ownership, num. 634 of 23 June 1965 (amended); Act on Land Register, num. 2644 of 22 December 1934 (amended); Act on Rents of Real Estate, num. 6570 of 18 May 1955 (amended); Act on Family Name, num. 2525 of 21 June 1934; Act on Registration of Livings Together without a Formal Marriage as Valid Marriage and Correction of Legal Status of Children Born out of Wedlock as Children Born in Wedlock, num. 3716 of 8 May 1991; Act on Prevention of Infringements upon Possession of Real Estate, 3091 of 4 December 1984; Act on Foundations (established before the enactment of TCC), num. 2762 of 5 June 1935 (repealed by the Law, num. 5555 of 9 November 2006); Act on Construction, num. 3194 of 3 May 1985; Act on Mortgage of Commercial Undertaking, num. 1447 of 21 July 1971; Act on Environment, num. 2872 of 9 August 1983; Act on Protection of Cultural and Natural Heritage, num. 2863 of 27 January 1983; Act on Land Surveying and Land Register, num. 2613 of 11 December 1934 repealed by the Act, num. 3402 of 21 June 1987; Regulation on Land Register, num. 94/5623 of 7 June 1994; Regulation on Application of the Provisions of TCC on Parental Authority, Guardianship and Inheritance, num. 6/5100 of 24 July 1965; Regulation on Foundations Established under TCC, num. 7/1066 of 25 July 1970.

The important amendments have been indicated below following the system of TCC of 1926.

* *Law of persons*

— Law, num. 3444 of 4 May 1988 added Article 24/a relating to several kinds of lawsuits in case of infringement of personality rights. Later, Article 23 of TCC on “protection of personality” was amended by the Law, num. 3678 of 11 November 1990.

— Law, num. 3612 of 7 February 1990 added a new provision to Article 36 on Records for Personal Status Registry by granting recording power to diplomatic representatives of Turkey abroad.

— The provisions of TCC on “foundations” were amended essentially by the Law, num. 903 of 13 July 1960. This Law added also several Articles to the Code. (See Articles 73-77, 77/A, 78, 79, 80, 80/A, 81, 81/A, 81/B).

* *Family law*

— Law, num. 3080 of 15 November 1984 amended Articles 97, 105 and 110 relating to the persons authorized to solemnization of marriage and religious solemnization after solemnization of civil marriage.

— Law, num. 3444 of 4 May 1988 reformed the ground of “incompatibility” for divorce (Article 134). An essential reform was realized with regard to “divorce” by this Law in Turkey. This solution was adopted by the new TCC (Article 166). (Cf SCC Article 142).

— Law, num. 3678 of 14 November 1990 rearranged the legal status of divorced women. The right to use the husband’s family name was granted to divorced women under some circumstances (Article 141). This solution was adopted by the new TCC (Article 173). (Cf SCC Article 149).

— Article 144 related to “alimony for poverty” was rearranged and “request for alimony without time limit” was granted to a divorced spouse under certain circumstances by Law, num. 3444 of 4 May 1988. This rule was emphasized by the new TCC (Article 175). (Cf SCC Article 152).

— Law, num. 4248 of 14 May 1997 granted to married women the right to use her family name together with the husband’s family name. This solution was adopted by the new TCC (Article 187).

— Article 159 TCC that required the husband's approval for a married woman's professional or trading activity was abolished by the decision, num. 30/31 of the Constitutional Court of 29 November 1990. This solution was adopted by the new TCC.

— Law, num. 2846 of 16 June 1983 changed the age for "adoption". It was reduced from 40 to 35 (Article 253). It also rearranged the effects of adoption (Article 257).

— Law, num. 3678 of 14 November 1990 added a provision to the Code concerning "non-request of parents' consent for adoption of a child" (Article 254/a). This Law also amended the "form requirement" for adoption (Article 256).

The decision, num. 67/23 of the Constitutional Court of 21 May 1981 found to be unconstitutional and cancelled the provision of Article 310 Al. 2 of TCC that prevented the court from rendering judgment on paternity if the defendant father was married at the time of sexual intercourse. This solution was adopted by the new TCC.

** Inheritance law*

— In the field of law of inheritance, the Law, num. 3678 of 14 November 1990 amended Article 441 Al. 2 with regard the "rights of inheritance of grand parents as heir" and abolished Article 442 related to the rights of inheritance of "parents of grand parents".

These solutions were adopted by the new TCC.

— Under TCC, if a child born out of wedlock was recognized by the father or bound to the father as a result of a paternity action, he or she could be heir of the father. Nevertheless, if children born in wedlock and out of wedlock were heirs of their father, children born out of wedlock were entitled to inherit half of the inheritance shares of children born in wedlock (Article 443). This rule was found unconstitutional by the decision, num. 1/18 of the Constitutional Court of 11 September 1987 and cancelled. Later Law, num. 3678 of 14 November 1990 emphasized the "principle of equality" with regard to inheritance between children born in wedlock and out of wedlock by amending Article 443. This solution was adopted by the new TCC.

— Law, num. 3678 of 14 November 1990 rearranged the inheritance right of a surviving spouse. It abolished the "right of usufruct" on the part of surviving spouses (Article 444). This solution was adopted by the new TCC.

— Law, num. 3678 also amended Article 448 related to the inheritance of Treasury (State) as the last statutory heir. When the Treasury was the last heir, “the rights of usufruct of parents of grand fathers and grand mothers” were abolished.

— Article 453 TCC on “compulsory portion” was amended by Law, num. 3678 with regard to “foundations devoted for public benefit”. The compulsory portions of heirs were reduced when the deceased established a foundation and if half of its income was devoted to “public services”. This solution was adopted by the new TCC.

* *Property law (Law of Things)*

— In the field of property law, Law, num. 3678 of 14 November 1990 provided the possibility for “*exclusion of co-owner from the co-ownership status*” by a court decision under certain circumstances (TCC Article 626/a). Likewise, *other right holders* (such as holder of usufruct right or holder of the right of tenancy that is entered as an immovable in the Land Register a permanent and independent right) could also be excluded as co-owner (Art. 626/b).

— Article 632 TCC deals with the *subject-matter of land ownership*. Ownership of land means ownership of all immovable property which includes (i) land; (ii) independent and permanent rights entered in the land register, and (iii) mines.¹²

— Another important amendment realized in TCC dealt with “*right of building*” (Baurecht, droit de superficies). According to Article 751, under the “right of building” the owner of a piece of land can create a servitude in favor of another by giving him the right to construct or retain a building or other construction on or under the land. In the absence of a contrary agreement this right is alienable and transmissible to the heirs. If this purports to be a permanent and independent right it can be entered as an immovable in the Land Register. Law, num. 3678 of 14 November 1990 amended Article 751 TCC and added Articles 751a-751j to the Code that were modeled upon the amendments realized by the Federal Law of 19 March 1965 in SCC (Articles 779a-779 l).

¹² Regarding mines, a special Act on Mines, num. 3213 of 4 June 1985 was enacted. Under the new TCC mines are no longer the subject-matter of ownership on immovables (Article 704). Instead mines, “*independent parts entered in the Register for Flat Ownership*” has been cited as the subject-matter of immovable property.

— Law, num. 3678 of 14 November 1990 provided the possibility of establishing *mortgage* to be based on *foreign currency* by adding Article 766/a to the Code.

6. New Turkish Civil Code, num. 4721 of 22 November 2001

The new Turkish Civil Code is a work of a Revision Commission composed of law professors, judges, attorneys and bureaucrats of the Ministry of Justice.

During the work of revision, the Revision Commission has taken into account particularly the legal problems encountered in practice, the needs of the people, the recent understanding of Turkish family relations, the latest developments for the protection of personality right and personality values, and amendments realized in the SCC for during last decades of the 20th century.

The Revision Commission maintained, on the one hand, the amendments in TCC realized by several Laws during the last half of the 20th century; and imported, on the other hand, the latest amendments in SCC. Further, the developments in some neighboring jurisdictions (e.g. German amendments in BGB, French revisions in Code civil etc.) have also been taken into consideration.

Therefore, the amendments in TCC by several Laws, particularly by Law, num. 444 of 4 May 1988; Law, num. 3678 of 11 November 1990; Law, num. 4248 of 14 May 1997 that we have explained above III 2 b have been included in the new TCC.

On this occasion, it should be noted that one of the most important developments in the new TCC can be seen in relation to “*matrimonial regime*”. Regarding the reform of matrimonial regime, the new TCC adopted the new solution of SCC (i.e. joint ownership of acquired property, regime of community of income and profits acquired during the marriage, Errungenschaftsbeteiligung). Therefore, if spouses do not make a “marriage contract” at a notary public for “separation of property” or “community of property” (Gütergemeinschaft) or “separate of estates to be shared” (paylaşmalı malm ayrılığı), the “legal matrimonial regime” would be the “*regime of community of income and profits acquired during the marriage*” (Errungenschaftsbeteiligung) (Article 205).

II. SPECIFIC INSTITUTIONS OR LEGAL MECHANISMS

After the second wave of reception of foreign law in Turkey in 1926 for the purpose of westernization and secularization of Turkish law and during the decades following the total foreign law receptions, the new legislation was usually modeled upon the international treaties, UNCITRAL model laws or EU legislation (i.e. directives). These enactments took place in the Post-Modernism period (after 1989) according to the Rapporteur General's classification.

The national reporter would like to give the following information on such legislation:

1. The following Turkish legislation on intellectual property is mostly based on mostly international treaties or EU legislation: See Law on Intellectual and Artistic Works (Fikir ve Sanat Eserleri Kanunu), num. 5846 (as amended) of 5 December 1951 (as amended by Law, num. 2936 of 1983; Law, num. 4110 of 1995; Law, num. 4630 of 2001); Act Having Power of Law for Protection of Patent Rights (Patent Haklarının Korunması Hakkında Kanun Hükmünde Kararname), KHK/551 of 24 June 1995 (as amended); Act Having Power of Law for Protection of Trade Marks (Markaların Korunması Hakkında Kanun Hükmünde Kararname), KHK/556 of 24 June 1995 (as amended), Act Having Power of Law for Protection of Industrial Designs (Endüstriyel Tasarımların Korunması Hakkında Kanun Hükmünde Kararname), KHK/554 of 24 June 1995; Act Having Power of Law for Protection of Geographical Indications (Coğrafi İşaretlerin Korunması Hakkında Kanun Hükmünde Kararname), KHK/555 of 24 June 1995 (as amended).

(Turkey is a party to Paris Convention for the Protection of Industrial Property (as revised at Stockholm on 14 July 1967 (Sınai Mülkiyetin Himayesine Mahsus 1883 Paris Birlik Sözleşmesi ve Stockholm Değişikliği, Official Gazette, num. 9520 of 7 February 1957 and Official Gazette, num. 15418 of 20 November 1975 (Stockholm text) and to the Berne Convention for the Protection of Literary and Artistic Works (Edebi ve Artistik Eserler Üzerindeki Hakların Korunmasına Dair Bern Birliği Sözleşmesi, Official Gazette, num. 7825 of 2 June 1951).

2. The Law on International Arbitration of 21 June 2001 (Milletlerarası Tahkim Kanunu) is modeled upon the UNCITRAL Model Law on Commercial Arbitration 1985.

3. The Law on Protection of Competition, num. 4054 of 7 December 1994 (as amended) (Rekabetin Korunması Hakkında Kanun) is

based on provisions of Articles 85 and 86 of the Rome Treaty (Articles 81 and 82 of Amsterdam Treaty) and the former Regulation, num. 17 (replaced by the Regulation, num. 1/2003). The Law on Protection of Consumer, num. 4077 of 23 February 1995 (as amended) (Tüketicinin Korunması Hakkında Kanun) is also modeled upon the EU legislation. Likewise, the Law on Access to Information, num. 4982 of 9 October 2003 (Bilgi Edinme Kanunu) and Law on Electronic Communications, num. 5809 of 5 November 2008 (Elektronik Haberleşme Kanunu) have been modeled on the new laws in EU Member States.

4. New Turkish Penal Code, num. 5237 of 26 September 2004 (Türk Ceza Kanunu) and Code of Criminal Procedure, num. 5271 of 4 December 2004 (Ceza Muhakemesi Kanunu) have been enacted by taking into account recent developments in these fields on the Continent and solutions by the international treaties.