

A GENERAL REVIEW OF THE NEW TURKISH CIVIL CODE PROJECT

Dr. Selim KANETI
Professor of Civil Law
Istanbul University Law Faculty.

I. INTRODUCTION.

The new project of the Turkish Civil Code has been drafted by a commission composed of professors from the law faculties of the Istanbul and Ankara Universities, judges of the Court of Cassation, officers of the Ministry of Justice and representatives of the Bar Association of Turkey. This commission has been appointed by the Ministry of Justice pursuant to the law no. 2467 dated June 11, 1981 relating to the setting up of a commission entrusted with the elaboration of a Civil Code Project.

The commission held its first meeting on July 3, 1981. It concluded its task on June 17, 1984. A last meeting has been held on October 7, 1984 in order to rediscuss one article.

The project of the Turkish Civil Code has been published by the Ministry of Justice on December 1984. This publication comprises the text of the Project, a general preamble and a statement of the purposes of each article¹.

1) Türk Medenî Kanunu Ön tasarısı ve Gerekçesi (Project of the Turkish Civil Code and its Explanatory Statement), Istanbul 1984. (hereinafter referred to as «The Project of the Turkish Civil Code.»)

In our paper we shall try to summarize the main amendments provided by the Project in the existing Civil Code in force since 1926 and to propose some criticism.

II. The general characteristics of the project.

The general characteristics of the Project can be summarized as follows²:

1. The Turkish Civil Code presently in force has been reviewed in its totality. The numbers of the existing articles have been changed. We are in the opinion that it would be preferable to preserve the numbers of the articles of the present Code, taking in view that the general framework of the law remains and that only amendments are proposed. In fact, such a method has been used in the revisions of the Swiss Civil Code and the French Civil Code.

2. The previous works relating to the revision of the Turkish Civil Code have been taken in view. In particular, attention has been paid to the Project published in 1971 and the conclusion of the commission of 1976.

3. The legislative developments occurred in West Europe countries, specially those of Switzerland from which the Turkish Civil Code has been adopted in 1926, the social changes of the country have been considered in framing the new Project. The Commission has aimed to meet the most recent progresses of the Turkish social order.

4. The Turkish and Swiss jurisprudence and the doctrine relating to controversial points are reflected in the solutions proposed by new Project.

5. As the Turkish language in general and the legal terminology in particular have evolved since 1926, the language

2) Project of the Turkish Civil Code, p. V.

of the Code has been adjusted in order to suit these evolutions.

III. Innovations of the project

The general system and the divisions of the present Civil Code have been preserved. The new proposed Code is divided in an introductory party of seven articles followed by four books which are, The Law of Persons, The Family Law, the Law of Inheritance, the Real Law. This system is identical with that of the present code. The principal changes provided by the Project can be summarized as follows:

1. Law of Persons.

a) Article 23, III states that the transplantation of human biological material is admitted with the written consent of the donor; however the obligation of giving human biological material cannot be enforced against the donor through an action of fulfilment or an action relating to material and/or immaterial damages.

The transplantation of organs and/or tissues has already been regulated by the law no. 2238 dated 20.5.1979. The conditions of the transplantation from living or dead persons are fixed by this law in a quite detailed form. The sole innovation of the Project in regard of this special Law is the statement of the unenforceability of the undertaking of a donor in connection with his organs and/or tissues. However, this point has been already stressed in the doctrine.

b) Article 24 protects the personality against illicit attacks, as the present Code. The article defines also the illicitness, stating that the attack against the personality which has not the consent of the attacked person or is not legitimated by a preponderant public or private interest or by the law, is illicit.

As the concept of illicitness is defined by the jurisprudence and the doctrine in a very comprehensive way, we think that a legal definition of this concept in regard of the protection of the personality, involves the danger to restrict the appraisal by the judge of the conflicting interests. The determination of the illicitness of an attack to the personality must be entrusted to the judge which shall establish if the attack is conflicting with the rules of written and/or unwritten law.

c) Article 25, III has regulated the assignment and the transmissibility of the claims of immaterial damages to the heirs. Pursuant to this article, the claims of immaterial damages can be assigned and are transmitted to the heirs, if they are accepted by the other party. They are transmitted also to the heirs, if the claim has been initiated through a lawsuit by the deceased during its life time.

d) One of the main changes relating to corporate bodies, i.e. the associations and the foundations is stated in article 52. Pursuant to this article the liquidation of the corporate bodies is effected according to the rules of the official liquidation of the inheritance. This is an important change in regard of article 51 of the present Code which provides the liquidation of the corporate bodies in accordance with the rules relating to cooperative societies.

2. Family Law.

The most important changes are proposed in the field of the law of family.

a) The formalities relating to the marriage have been almost totally simplified. The formality of the publication of the request of marriage, provided by the present Code has been abolished by the Project. Under article 108 of the Civil Code, the marriage must be in principle celebrated in the official premises of the municipality or in the alderman's

office. Article 104, II of the Project provides that the marriage can be celebrated in any other place with the decision of the officer of marriage.

However, it must be pointed out that the law no. 3080 dated 15.11.1984 has already changed the formalities of the marriage in the way contemplated by the Project.

b) The most important amendment effected in the field of divorce is related to the divorce due to the incompatibility of temperament. Pursuant to article 134, II of the present Code, the divorce action is rejected if the incompatibility is due to the preponderating fault of the plaintiff. This rule is presently applied by the courts very sensitively; it is impossible for a plaintiff who have caused the incompatibility by his preponderating fault, to obtain a divorce. According to the article 130 of the Project, the divorce is granted if it is established that the marriage has collapsed. However the other party can object that there is a preponderating fault of the plaintiff. But, even in this case the divorce is granted if such objection constitutes an abuse of right and the defendant has no legitimate interest in the maintaining of the marriage.

The divorce by mutual consent is not accepted by the present code. Pursuant to article 130, III of the Project, the judge can grant the divorce under the mutual consent of the parties, if the marriage is existing at least since one year and the judge establishes at the hearing of the parties that such a consent has been freely given and finds adequate the agreement of the parties in regard of the financial conditions of the divorce and in regard of the situation of the children after the divorce.

c) The rules relating to the effects of the divorce have been also revised. One of the most important changes concerns the alimonies to be granted to the spouse in financial difficulty due to the divorce. Article 144 of the present code

restricts these alimonies to one year starting from the date of the divorce. Such restriction has been lifted by article 139 of the Project.

d) In regard of the effects of the marriage, a complete equality of the spouses has been accepted by the Project.

— The husband is no more the chief of the family.

— The spouses select their home conjointly.

— The wife can use the name of her husband conjointly with her own family name.

— The matrimonial union can be represented equally by each of the spouses.

— Each spouse can be active in a profession without the consent of the other party. However each spouse shall take into consideration the position of the other party when choosing a professional activity.

— The conflicts related to the matrimonial union shall be solved by the judge, as the spouses have equal rights.

e) In concurrence with the present code, the separation of the properties of the spouses has been accepted in the Project as legal system, if there is no other agreement between them. Under the present law, the parties can choose by agreement the system of the unity of the properties or the system of partnership in properties. The Project has preserved the system of partnership in properties. It has abolished the unity of the properties system, replacing it by the system of the participation to the acquired properties. In this last system, each spouse has the right to participate to the properties acquired by the other spouse during the marriage.

f) Radical changes have been made by the Project in the field of filiation. The difference between the filiation within the wedlock and filiation out of the wedlock has been abo-

lished by the Project. In case the paternity of a child born out of the wedlock is established through the recognition of the father or the paternity suit, the child has the same rights against his father as a child born in lawful wedlock or legitimated through the marriage of the parents.

The rules related to the adoption have been amended by the Project, in line with the changes effected in the Swiss Civil Code in 1972 and 1976.

There is also a fundamental change in the use of the parental power. Pursuant to article 263 of the present code, the vote of the father prevails the vote of the mother, in case of conflict, except the cases provided by the law in which the vote of both parents is necessary. The draft provides equal rights and powers to the mother and the father without any predominance granted to the father. It is why the Project regulates the intervention of the judge, in case of conflict between the mother and the father in regard of the use of the parental power.

3. Law of Inheritance.

There are only slight amendments in the Law of Inheritance. The most significant ones are as follows:

a) The right of usufruct conferred to the surviving spouse by the present code, has been abolished by the Project and replaced by full property.

b) As an exception to the parental system adopted by the present code, the Project has accepted that the mother and father of the deceased can have each $1/16$ of the inheritance if they inherit with the descendants of the deceased.

c) The legal compulsory portions of the forced heirs, which are the surviving spouse, the descendants, the father and mother and the brothers and sisters of the deceased have been decreased, with the exception of the spouse.

d) Changes have been made in the system of the collective property recognized to the heirs in the estate of the deceased. These changes aim to respond to the criticism made to this type of property. An important improvement in this field is the right granted to the heirs to request the conversion of the collective property to co-ownership.

e) In the field of the partition of agricultural lands, the amendments effected in the Swiss Civil Code have been adopted by the new Project.

4. Real Law.

The amendments effected by the Project in the field of real rights cannot be also considered as fundamental.

a) The rules related to co-ownership have been changed in line with the Swiss Civil Code. These amendments aim to provide more elasticity to the co-ownership system. The Project regulates the intervention of the judge, in case of conflict, on the request of one of the co-owners.

b) In the field of collective property, it is controversial if one of the owners can use the legal means related to the protection of the object of the property against unlawful interventions. The Project have ended this controversy by granting to each owner, the right to apply to legal means in order to protect the object of the property. All owners shall benefit from the positive results of the lawsuit; however the negative results shall not harm the other owners which are not a party to the lawsuit.

c) A change has been effected by the Project in the object of the real estate property. Pursuant to the present law, the mines are also considered as an object of the real estate property. The inclusion of the mines to the real estate property is not compatible with the system of the mining rights of the Turkish Mining Law. It is why the Project has abolis-

hed the disposal related to the mines as the object of the real estate property. On the other hand, the flat property (condominium) has been added to the objects of the real estate property.

d) The real estates not registered in the real estate register are not regulated in the Swiss Civil Code and in the present Turkish Civil Code. However the real estates not registered in the real estate register need special regulation, as in Turkey an important part of the real estates are not yet registered in the real estate register. The problems relating to the unregistered real estates have been solved by the jurisprudence of the Court of Cassation. The Project has regulated the legal statute of the unregistered real estates in line with the jurisprudence.

e) The right of preemption and principally the right of preemption of the coowner, has been the object of a very rich and various jurisprudence. The Project has regulated in detail the right of preemption mostly in line with the jurisprudence.

One of the most drastic change effected by the Project concerns the use of the preemption right. According to the present jurisprudence, the right of preemption can be used by a mere declaration to be notified to the concerned party. The Project provides that the right of preemption shall be used only through a lawsuit.

f) The most important amendment in the field of the limited real rights is the adoption by the Project of the amendments and the detailed regulation of the Swiss Civil Code relating to the right of construction. The aim of the Project is to provide more flexibility and practicability to the right of construction.

g) Concerning the possession, the amendment to which it is necessary to point out, is the one concerning the introduction by the Project of the distinction between the immediate possession and mediate possession, as accepted by the

Germar Civil Code (BGB). This distinction has its importance in connection with the protection of the possession.

IV. Conclusion.

The new project of the Turkish Civil Code does not represent a radical and fundamental change of the existing Turkish Civil Code adopted from the Swiss Civil Code in 1926. With the exception of the Family Law, the contemplated changes are connected to the adoption of some of the amendments made to the Swiss Civil Code and the introduction of solutions to some controversial problems, in line with the jurisprudence. The introduction of the right of inheritance of the father and mother as an exception to the parental system, can be considered as a response to certain social requests.

On the other hand, the changes contemplated by the Project in the field of the Family Law are drastic and fundamental. In fact, the complete equality of wife and husband within the marriage, the abolishing of the predominance of the husband as chief of the family, the intervention of the judge in order to solve the conflicts between husband and wife, the equality of the votes of the spouses in regard to the use of the parental rights represent a radical change of system. Radical change is also the abolishing of the difference between the children born within the wedlock and those born out of the wedlock and whose father has been established through the recognition or the paternity suit.

The amendments related to the statute of the children born out of the wedlock are in line with the humanistic approach and with the Constitutional Law of the Republic of Turkey which provides legal equality and the protection of the children.

However, it is difficult to predict how the judge shall solve the conflicts between husband and wife, mother and father, in case the complete equality shall be accepted by the law, as contemplated by the Project.