THE FAMILY LAW OF TURKISH CYPRIOTS

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Introduction

As is well known, the law of Turkey underwent a revolution in the year 1926 with the adoption of codes of European origin—virtually lock, stock and barrel—in place of the laws of very heterogeneous background which had previously obtained. This momentous decision involved the most decisive break with the past in the law of personal status and family relations, where the Islamic law of the Hanafi school was replaced, almost overnight, by the Swiss Civil Code. It is true that the Hanafi law had been temporarily modified, in 1917, by the Ottoman Law of Family Rights: but this codification had been firmly based on the Shari'a, although it did substitute either a variant Hanafi opinion or the doctrine of some other Sunni school, in a number of particulars, for the dominant Hanafi doctrine which had previously prevailed; and this Law was, in any case, repealed in Turkey in 1919—although it survived in some of those States which were carved out of the Ottoman Empire at the end of the First World War.

It was not without considerable hesitation that even Mustafa Kemal Pasha and his colleagues turned their backs in this uncompromising fashion on the principles and precepts of Islamic law in a sphere so intimately bound up in the warp and woof of the religion of Islam as family relations; for it has always been the law of marriage, divorce and succession which, after matters of ritual and worship, has represented to Muslims the very heart of the Shari'a. On the contrary, the new regime in Turkey set up a special committee, following the Lausanne Peace Conference in 1923, to draft suitable legislation based on the principles of the Shari'a, because the Government still regarded “the extraction and derivation of the needed codes from the ready source of Islamic law as the most propitious and efficient means for the overall codification.” 1 But the committee soon ran into difficulties regarding the heterogeneous opinions and interpretations advocated by the different schools and jurists, past and present, and the principles on which these should be selected and integrated in the new legislation. A year’s work ended in a complete deadlock: and it was only at this juncture that the Government stepped in, dissolved the committee, and decided to abandon the attempt to base a codification even of family law on the Shari'a but to adopt a European code instead. This was regarded by the reformers as the “inevitable solution to centuries of paradoxes and conflicts”, for the previous attempts to draft “laws and rules in accordance with the provisions of Moslem canonical law”, to conform with the convictions of a “deeply religious population”, had all proved abortive or inadequate. 2

Even so, it was not to be expected that this deeply religious population would abandon both its religious principles and its age-old traditions, almost overnight, in favour of a code of entirely alien origin and inspiration. On the contrary, marriages and divorces on Islamic

2 Annales, 1956, p. 76; cf. WI XXII, 1940, p. 21.
principles 1 have continued to exist, side by side with civil marriages and divorces, particularly in the villages of Anatolia; and it has been impossible for the Government and the courts wholly to ignore them. It was comparatively easy for the courts to extend the rule that the children of parents who were betrothed, but prevented from concluding their marriages by the death or loss of capacity of one of them, could be declared legitimate upon the application of the other party or of the child himself 2, and regard it as applicable to the children of "informal" marriages contracted under Islamic principles 3. It was also considered necessary to reduce the minimum age of marriage, in 1938, from eighteen for a boy and seventeen for a girl to seventeen and fifteen respectively or even, in exceptional circumstances, to fifteen and fourteen. 4 But these expedients were not enough, and laws had to be passed in 1933, 1945, 1950 and 1956 5 providing that the children of all such "informal" unions 6 (that is, marriages under the traditional law) might be registered as legitimate, and that where there was issue these marriages themselves should be considered valid, and should be registered as such, provided only that they were in fact monogamous. 7

In the circumstances the dichotomy which still persists, it is clear, between the statute law and the practice of the people, particularly in rural areas, is small matter for surprise. It can partially be explained on grounds of mere convenience, for the conclusion of a marriage under the Civil Code must involve considerable exertion and expense in the more remote districts. It can be attributed in part to economic and social reasons, such as the circumstances which still induce a farmer, on occasions, to marry a second wife, or the sentiment which prompts many to desire a union which can be repudiated more easily than a civil marriage. But there can be no manner of doubt that a further explanation is provided by religious sentiment and conviction; for to many Turkish Muslims it is the civil marriage which appears irregular, and a union concluded in the traditional way valid and respectable. It may well be that the number of such persons is steadily decreasing, although statistics are not, of course, readily available; but it seems indubitable that those who still take this view represent a not inconsiderable proportion of the rural population. 10

Nor is this, in its turn, at all surprising. It is true that many different communities of Muslims in the history of Islam have continued, throughout long periods, to follow customary practices—even in regard to marriage, divorce and inheritance—which are at sharp variance with the doctrines of the school of law to which they profess to belong. Even so, the pressure of the Sharī'ah is apt to become more insistent with the years, so that sooner or later the more educated among them find it increasingly difficult to reconcile their principles with their practice—for it is in the sphere of family law that the precepts of Islam are most unequivocal and imperative. But while it may take centuries before the pressure of the Sharī'ah succeeds in

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1 The "Imām marriage" as distinct from the "Civil marriage". Cf. G. Jäschke, "Die 'Imam-Ehe' in der Türkei", in WI, N.S. IV, No. 2-3, 1955, pp. 182 ff.
2 Turkish Civil Code, s. 249; Swiss Civil Code, s. 260.
5 Laws Nos. 2330, 4727, 5524 and 6652 respectively; cf. WI, N.S. IV, p. 184 ff.; V, 1957, p. 115.
6 Or "persons living together as married people" but without having registered with a Marriage Officer.
7 Cf. Velidedeoglu, art. cit., p. 112.
9 It seems that some ten per cent of the rural population are still practising polygamy, for the Turkish newspaper Dünüya, of 24th January 1957, published statistics showing that nearly 3 per cent of all Turkish women were married to husbands who had more than one wife; and this must represent some 10 per cent in rural areas. Cf. Central Statistical Office, Ankara, Publication Nr. 372, 1957, p. 25.
10 Cf. WI, N.S. IV, p. 184.