

Turkish Family Law in German Courts

Overview

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I. GERMAN PRACTICE AT THE COURTS

1. Application of Turkish Law

Turkish statute law

International private law (renvoi)

Swiss law?

Margin of appreciation and discretion of the German court!
(Article 1 Turkish Civil Code)

2. Experts in Turkish law in the German Civil Procedure

How an expert should work

II. THE TURKISH LANGUAGE IN THE COURT

Translation of Turkish texts into German (documents for evidence, legal texts etc.)

Translation of German texts into Turkish (e.g. for serving documents under international instruments in Turkey)

The educational level of interpreters and translators

Google translation

German lawyers/judges should be able to understand the issue or system behind the term!

Turkish lawyers/judges should be able to understand the issue or system behind the term!

Who controls the interpreters?

III. INTERNATIONAL INSTRUMENTS

1. Multinational

Turkey is a Party to almost all international instruments relevant for the application of international private law

EU-law makes the situation a little bit confused: when a marriage is divorced, in various respect different legal orders may apply

2. German Turkish

One bilateral instrument of a certain importance is the German-Turkish Agreement on Mutual Legal Assistance in Civil and Commercial Law of 1931

Another bilateral instrument is the German-Turkish Consular Convention, including an Inheritance Agreement of 1929

IV. HISTORY

From Ottoman Empire to the Republic

First Reforms since 1839 - leaving the Islamic tradition behind

Mecelle of 1878 (no family law!)

Law of 1917 (a kind of reform, but no real modernization)

1926: Jumping into modern civil law: reception of the Swiss Civil Code. Why the Swiss Code?

The Patriarchate Swiss Style

Exception: Division of matrimonial property - Turkish practices struggling with the consequences till 2001

The Civil Code reformed: 2001.

V. RECEPTION OF FOREIGN LAWS

Criminal Law

Criminal Procedure

Civil Procedure

Bankruptcy

Commercial Law

Administrative Law

EU Law

VI. CONSTITUTIONAL LAW

1. Outline

1876 - 1921 - 1924 - 1961 - 1971/73 - 1982 - 2017

Rule of Law - Social State - Democracy (Art. 2)

Due Process (Art. 36)

Natural Judge (Art. 37)

Guarantee of Recourse to the Courts (Art. 125)

Protection of Family Life (Art. 20, and others)

Institutional Guarantee of the Family as the Core of Society (Art. 41)

Making of Statute Law

Presidential Orders (no interference in fundamental rights!)

2. The Court System

Constitutional Court

Judge of Peace

Civil Court (Family Court)

Regional Court of Appeals

Court of Cassation

VII. INTERNATIONAL PRIVATE LAW

First statute law in 1982

Today: Law No. 5718 of 2007

Ordre public

Article 5 - If a provision of foreign law applicable in a certain case is evidently contrary to the public order of Turkey, the said provision shall not be applied. Where deemed necessary, Turkish law shall apply.

Family Law

Capacity

Article 9- (1) The legal capacity of a person shall be governed by his/her national law

(2) A person lacking legal capacity pursuant to his/her national law shall be bound by the transaction he/she has concluded if he/she is legally capable under the law of the state where he/she has concluded the transaction. Transactions pertaining to family law and inheritance law as well as "in rem" rights on immovable property located in foreign countries are excluded from the scope of this provision.

(3) Change of citizenship shall not change the adult status a person acquired under his/her national law.

(4) The legal capacities of legal entities or units of persons or assets are governed by the law of the jurisdiction where their administrative head-

offices are located according to their statutes. However, where the de facto central office is located in Turkey, Turkish law may be applied.

(5) The legal capacity of legal entities lacking statute and the group of persons and goods lacking legal entity shall be governed by the law in their "de facto" administrative headquarters.

Engagement

Article 12- (1) The legal capacity to become engaged and the conditions thereof shall be governed by the respective national laws of the parties which are in force at the moment of engagement. (2) The provisions and consequences of the engagement are governed by the common national law or by Turkish law if the parties are of different nationalities.

Marriage

Article 13- (1) The legal capacity to marry and the conditions thereof shall be governed by the respective national laws of the parties at the time of the marriage. (2) The form of marriage shall be governed by the law of the state where the marriage is solemnized. (3) The general provisions of marriage shall be governed by the common national law of the spouses. If the spouses are of different nationalities, the law of their common habitual residence shall govern and in the absence of a common habitual residence, Turkish law shall govern.

Divorce and Separation

Article 14- (1) The grounds and provisions for divorce and separation shall be governed by the common national law of the spouses. If the spouses have different nationalities, the law of the place of their common habitual residence, in case of absence of such residence, Turkish law shall govern.

(2) The provisions of the first clause shall also govern demands for maintenance between divorced spouses. This provision also governs in cases of separation and nullity of marriage.

(3) Custody and problems thereof in accordance to divorce is also governed by the provisions of the first clause.

(4) Turkish law shall govern demands for temporary measures.

Matrimonial Property

Article 15- (1) Spouses may clearly designate either the internal law of their habitual residence or national law at the time of marriage to govern their matrimonial property. Where no such choice has been made, the common national law of the spouses at the time of marriage, or in the absence of common law, the internal law of their habitual residence at the time of marriage shall govern or in the absence thereof, the Turkish law shall govern.

(2) In case of liquidation of property, the immovable are governed by the state law which they are located in.

(3) If the spouses acquire a new common nationality upon marriage, the laws of their new nationality may govern, provided that the rights of third parties are reserved.

Acknowledgment of foreign court decisions (Article 50 etc)

Only court decision, no execution order.

VIII. INTERNATIONAL JURISDICTION OF TURKISH COURTS

Article 40

Citizenship

IX. CITIZENSHIP

Turkish law accepts multicitizenship

Ius sanguinis

Citizenship by birth

No automatic citizenship by marriage

Citizenship on application

Loss of citizenship on application

Loss of citizenship due to criminal activities

Legal status of expatriates (mavi kart)

X. FAMILY LAW (SELECTED ISSUES)

Law of Obligations within the Family Law

Tradition, Islamic Law and Secular Law

Example: Mehir

Equality of Partners since 2001

Real Estate within Matrimonial Property

XI. BIBLIOGRAPHY

Ansay/Wallace, Introduction to Turkish Law, Ankara 2020

Korkusuz/Kayali, Introduction to Turkish Law, Ankara 2016

Rumpf, Einführung in das türkische Recht, 2nd ed. Munich 2016

Rumpf/Odendahl, Türkei, Bergmann Ferid Hausmann (latest ed. 2020)

Rumpf (list of publications - http://www.tuerkei-recht.de/downloads/Publikationen_Rumpf.pdf)

XII. INTERNET

<https://www.lawsturkey.com/laws> (collection of legal texts, English)

<http://www.tuerkei-recht.de> (platform, mostly German texts, some English texts)

<http://www.raodendahl.de> (numerous texts on issues of Turkish law, especially family law)