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## 1 A Historical Perspective

For the Turkish people, the possibility of ending a marital relationship is historically imbedded in Islamic Law and tradition. Yet little need be said about the Islamic framework as, since the 1926 Turkish Civil Code and the proclamation of secularism, Islamic Law has no bearing on the Turkish legal system. A historical perspective is important however, in underlining the radical changes towards modernisation brought about with the Republic and by the Civil Code. A historical perspective<sup>1</sup> is also important in that Islamic divorce (talak) does still play a part in the lives of sections of the rural population of Turkey. It is easy, has no official formalities attached and having its source in the Qur'an, is felt to be rooted in moral and religious consciousness.

In the Islamic world, family relationships are closely associated with religion and hence are governed by Islamic Law. The Ottoman Empire (1299-1923) was an Islamic State and accordingly, up until 1917, did not intervene into marriage and divorce, as under Islamic Law, these are regarded as private matters. The Ottoman Family Law of 1917, in the form of a decree, the first family law codification in the Islamic world, expanded the possibilities open to families by allowing spouses to use of their preferred School of Islamic Law. One of these, the Hanafi School, did permit a woman to have written into the marriage contract the right to annulment should her husband take a second wife and to divorce on grounds of impotence, insanity or abandonment, as well as extreme cruelty and incompatibility. In these two latter cases, a woman could get a divorce, only after an attempt at reconciliation by three male family members. This decree is of great importance when it is remembered that until 1917 divorce was a male prerogative, a privilege realised simply by the utterance of certain words accepted by Islamic tradition. The possibility of a woman getting a divorce was restricted to

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<sup>1</sup> See generally Cin, H., *Eski Hukukumuzda Boşanma*, Ankara Üniversitesi Hukuk Fakültesi Yayınları no: 398, Ankara 1976, especially 122-135 and Şener, E., *Changes in the Family as Reflected in the Jurisprudence of the Republican Era*, in: T. Erder (ed.), *Family in Turkish Society* (Ankara: Turkish Social Science Association, 1985), pp. 401-416.

cases where it was foreseen at the time of the marriage ceremony (nikah) or where the husband's right was transferred to her by proxy (tefviz-i talak).

The position was that before the Republic, family relationships were covered by religious rules: the rules of the Sheriat (Şeriat) for the Moslems and, for the non-Moslems, the rules of their own religions. Changes introduced in 1917 did not affect the exclusive jurisdiction of the separate Sheriat Courts or the competence of Sheriat lawyers in matters of family and personal status. Neither did these changes effect the inequality in divorce and the superior legal status and privileges granted to the husband.

## 2 Divorce in the Civil Code of 1926

In the realm of family relationships and specifically divorce, the Civil Code of 1926 aimed to liberate women and put an end to an unsatisfactory situation. In the Turkish Republic, law was used as an instrument of policy and this Code is a very important component of that policy. The product of the reception of the Swiss Civil Code, it was part of the reorganisation of the entire Turkish legal system achieved between 1926 and 1929. Its impact on family life was fundamental, necessitating far-reaching social reforms<sup>2</sup>. Among the most significant were the introduction of the principle of the equality of the sexes, civil marriage and its formalities, grounds for divorce, wills, adoption and guardianship and also the abolition of polygamy, unilateral repudiation and the absolute authority of the husband.

The Code secularised marriage so that today civil marriage alone, which is a legal contract, produces legal effects and is the only possible foundation for a legally recognised family. Religious marriage is legally irrelevant<sup>3</sup>.

In the Civil Code, marriage comes to an end upon the death of one of the spouses, the annulment of the marriage or the divorce decree of a court.

The Civil Code provides several grounds for divorce (Arts. 129-134), one of them a general ground (Art. 134) and the others specific (Arts. 129-

<sup>2</sup> See generally, Örüçü, E., *Turkey: Reconciling Traditional Society and Secular Demands*, in: Freeman, M.D.A. (ed.), *Annual Survey of Family Law: 1986 Journal of Family Law 26* (1987-88), pp. 221-236. See Starr, J., *The Role of Turkish Secular Law in Changing the Lives of Rural Moslem Women, 1950-1970*, 23 *Law and Society Review* (1989), pp. 497-523, for an ethnographic study analysing divorce cases initiated by women in rural courts, showing the success of the reforms.

<sup>3</sup> Marriages performed before 1926 are regarded as valid and proof can be by any means (2 HD. 10/1/1974, 1973/15)

133). The general ground and the one most commonly used is severe incompatibility<sup>4</sup>. Specific grounds are adultery, attempts on the life of one spouse by the other, physical violence, cruelty and insults, commission of a humiliating crime, leading a dishonourable life, desertion and incurable insanity. As can be seen, the doctrine of irretrievable breakdown and the matrimonial offence doctrine have been compromised.

Severe incompatibility (Art. 134), as it stood until 1988, had to make life in common intolerable. As this was for the judge alone to determine, it was he who had the chance here to lead social and legal change. For example, among the various circumstances which have been regarded by judges as making life in common intolerable, such as extra-marital relationships, bad habits, refraining from sexual intercourse, impotence, loss of trust and continual disagreement and arguments<sup>5</sup>, one sees the husband's inability to provide an independent home. In regarding this last circumstance both as a reason for incompatibility and an unacceptable reason on which to base desertion (Y.HGK 21/4/1971, 2/1969-744/266), the courts have taken a decisive step away from the tradition of sons bringing their wives into the extended household.

Although either spouse could petition for divorce, the spouse chiefly to blame for the incompatibility could not bring the divorce suit. This can be seen as a reiteration of a general principle of Turkish law that no one can benefit from his or her fault<sup>6</sup>. The onus of proving incompatibility

<sup>4</sup> This ground was amended on 12/5/1988, and will be discussed later in part. 4. For divorce generally see, Tekinay, S.S., *Türk Aile Hukuku*, 6th ed. Beta, 1986.

<sup>5</sup> Examples of accepted instances: a married woman going out with bachelors to cafes and beaches (2 HD. 22/3/1956, 1626/1748); a wife riding with a male relative on his bicycle when her husband was away (HDK. 26/3/1976, 1957/1178); a wife inviting male colleagues to her home without her husband's explicit or implicit consent (2 HD. 12/2/1972, 6841/7050); a husband, continually unemployed, drinking and battering his wife (2 HD. 18/9/1978, 5845/6155); a husband not having intercourse with his wife for seven months (HGK. 7/5/1979, 2441/3748); a wife avoiding lovemaking with her husband (2 HD. 10/4/1980, 550/72 and 2 HD. 16/4/1981, 2862/2898); a wife removing money from her husband's pockets (2 HD. 12/4/1976, 3033/3197); a wife having a venereal disease or a husband passing on a venereal disease to his wife (HGK. 9/1/1963, 2/74-3, HGK. 21/11/1979, 1978/2-735/1385); a husband not looking after the material needs of the family (HGK. 19/4/1950, 5/57); one of the spouses refusing to wash without a reasonable cause (HGK. 11/3/1964, 2/604-195); bad breath if it cannot be combated (HGK. 7/7/1976, 2-1075/560-2494).

<sup>6</sup> The Second Civil Division of the High Court in one case (26/4/1962, 2371/2508) held that "the petitioner, the husband, has complained of adultery and the wife was imprisoned. When she came out, not only did he not petition for divorce, but contested her petition. This is an abuse of rights and cannot be protected by law." Whereupon the Civil General Assembly (HGK) annulled this decision (11/9/1963, 2/30-68) by holding that "in such situations, by claiming abuse of rights, the court

and intolerability was on the petitioner, whereas the burden of proof that the plaintiff was more at fault fell on the respondent. The judge had to determine the more blameworthy party by balancing guilt<sup>7</sup>. Hence, the general ground was a discretionary one.

As to adultery (Art. 129), a specific ground and a criminal offence, this is regarded by the Civil Code, though not the Criminal Code, within the principle of equality of the spouses, though a conviction in the criminal court binds the civil court as to the proof of this ground. Neither the adulterous party nor the spouse who forgives the other's adultery (condonation) can petition for divorce. This is an absolute ground and is to be used within five years of the adulterous act; the proof of adultery alone is sufficient, there being no need to prove that it has rendered intolerable life in common. Homosexual acts are not covered by this ground, being regarded either as leading a dishonourable life (Art. 131) or a circumstance leading to incompatibility (Art. 134).

Another absolute ground is the attempt on the life of one spouse by the other (Art. 130). Neither physical violence and cruelty nor insults are absolute grounds and insult must also be proved to have rendered life in common intolerable.

The moral basis of marriage is regarded as being eroded by humiliating crime or leading a dishonourable life (Art. 131). Although the conviction of a spouse for a humiliating crime is an absolute ground, leading a dishonourable life is not, there being a need to prove that this also renders intolerable the maintenance of life in common.

Desertion, which is an absolute ground (Art. 132), must be either with the intention of not performing marital duties or must be without good cause. It must last three months and be continuing. The most frequent occurrence of desertion is when one of the spouses leaves the matrimonial home. It also occurs when the wife does not join the husband in the home he chooses, which is his prerogative according to the Code (Art. 152/11). However, if he cannot find a home, he is considered to be the deserting spouse (2 HD. 31/5/1979, 4112/4519)<sup>8</sup>.

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cannot give a right to sue to the faulty party which that party never had." This is not an established line however. For a different decision see HGK. 11/6/1980, 1979/2-61/2055.

<sup>7</sup> 2 HD. 25/5/1965, 606/1179. There are many cases where the judges weigh the infidelity of the husband against the open and severe insults of the wife in establishing fault. It is interesting to find that by evaluating the specific circumstances of each case in very similar fact situations the courts have found sometimes for the husband (eg. 2 HD. 2/6/1981, 2829/1143) and sometimes for the wife (HGK. 15/9/1976, 2-4/2516, 2 HD. 7/7/1978, 973-4713/5515, HGK. 8/7/1981, 2-200/568).

<sup>8</sup> "For example, if the husband leaves home and does not return for two months, the wife can demand that he return within a month; if the husband moves his wife from the

When requested, the judge is under an obligation to ask the deserting spouse to return to the matrimonial home within a month. At the end of that period, if he or she does not return, a divorce case ensues<sup>9</sup>.

If insanity, not present at the time of the marriage contract, is acquired later, it becomes a relative ground for divorce (Art. 133). It must have lasted for three years, render life in common intolerable for the other party and be incurable. This is the only illness accepted as a ground for divorce by the Code<sup>10</sup>.

The spouse who has the right to bring a divorce suit can instead request judicial separation. Though the judge cannot opt for divorce when the request is for separation, he can decide for separation when divorce is asked for if he is of the opinion that there is a possibility of reconciliation<sup>11</sup>. Judicial separation is for at least one year and at most three years (Art. 139/11). At the end of the period imposed by the judge, if the parties have not become reconciled, a divorce is granted upon the request of either of them (Art. 139/111) (See 2 HD. 25/11/1974, 7482/7251 and 2 HD. 25/2/1984, 2206/2507).

At all times, the judge has complete discretion in evaluating the evidence (Art. 150). When a petition for divorce or judicial separation is instituted, the judge decides on his own initiative on the temporary measures necessary during the course of the divorce case, especially those related to housing, maintenance, management of matrimonial property and the welfare of the children (Art. 137).

It must here be pointed out that more than one ground can be used in a divorce case. It is also possible for the judge to base his decision on a ground not specifically mentioned by the petitioner, if he thinks fit. This possibility flows from articles 76 and 185 of the Code of Civil

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home and subsequently he too leaves with the furniture, she, after having waited for two months, can demand that he find and prepare a new home and invite her. Another possibility is if the wife leaves home and two months elapse. She can demand that the husband accept her into the home and take all measures to allow her to enter it. In such cases, if the husband does not heed the warning or demand, that is, does not prepare an independent home or does not return home, or hinders the wife's entrance into the home, the wife can go to court and has the right to petition for a divorce on the ground of desertion." (2 HD. 31/5/1979, 4112/4519, 2 HD. 13/2/1978, 867/1070).

<sup>9</sup> Obviously, here, the element of good cause is important. For example, if the wife leaves and does not return because the husband has another relationship, then she is considered as not returning for good cause (2 HD. 19/2/1961, 6241/2938). Also the one who invites must make sure that the other can enter upon returning, otherwise he or she cannot claim good faith (HGK. 2/7/1975, 2-626/900).

<sup>10</sup> Illness on the whole cannot be used as a ground for divorce, since this attitude negates the duty of mutual support, love and tender care (2 HD. 26/11/1946, 2374/4906).

<sup>11</sup> This institution has religious overtones in Switzerland but not in Turkey.

Procedure. Yet, this is not always accepted by the High Court (Yargıtay) which, for example, held in 1981 that "since the petition rests on the ground of desertion, its conditions should be looked into and thus decided; the decision cannot be based on incompatibility" (2 HD. 12/11/1981, 6724/6986).

Until the reforms of 1988, there was a ban of at least one, at most two years within which period the blameworthy divorced spouse could not remarry as a matter of public policy and sanction. This provision (Arts. 96 and 142) has now been repealed. A woman however cannot remarry within 300 days of the divorce by operation of the law to resolve filiation problems, unless it is not possible that she be pregnant (Art. 95).

There are certain consequences of divorce. Legal consequences, personal in nature, are related to the wife's resuming her maiden name and her independent domicile. Financial consequences are compensation for material and moral damage extending even to lost expectations, to be demanded from the one who causes the breakdown of marriage. Although divorce puts an end to demands for support, Art. 144 (since 1988 entitled "hardship (destitution) alimony") enables the spouse who would face destitution as a consequence, to demand from the other, in accordance with his or her means to pay, an allowance for an unlimited period of time, as long as he or she is not chiefly to blame<sup>12</sup>. In order for a man to demand this allowance, the woman must be comfortable off. The fault of the spouse paying the alimony is not taken into consideration<sup>13</sup>. The consequence of divorce for the children is that a decision has to be made on custody and guardianship. Since there is no guidance in the Civil Code on this matter, the judge uses his discretion taking the interests of the children into consideration. One parent is given custody, usually the mother in the case of rather young children, and the other granted access. The one who does not have custody must contribute to the expenses (Art. 148/11) until the children are of age or if they are still at a place of education (e.g. Y.GK.13/3/1963, 2/99-21, 2 HD. 23/6/1986, 6110/6293, 2 HD. 24/12/1985, 10787/11100). According to a unification decision of the High Court, access is also granted to the grand-parents (18/11/1959, 12/29, 2 HD. 5/6/1986,

5908/5888). The Civil Code is silent on this point. The Court held that it is the duty of the parents to facilitate such access, not providing access being seen as the abuse of the right of custody. Here the Court was taking the traditions of the extended family into consideration<sup>14</sup>.

### 3 Later Developments

Regarding law in action, the voiced needs of Turkish society and contemporary world developments, various criticisms of the Code have been made and changes suggested. Some of these indicate that the traditional sentiments of the people should be considered in future amendments of the Code. Such suggestions might be seen as retrogressive given the fact that the Code is reformist and secular. Other suggestions aim to bring family law in line with current Western practices. These can be said to reflect the sentiments of only a minority in Turkey and may not be very welcome to most families. Some other suggestions however, which are progressive in nature, might have undesirable implications for Turkey<sup>15</sup>. Thus there is no easy path towards reform in Turkey.

Two official attempts at acceptable compromises were made. The first was the 1971 Draft Bill which did not really tackle the problems but revised language and terminology. The second was the Draft Bill of 1984 which was presented as a brand new Code, though most of its articles were in fact repetitions of the existing Code and of the Swiss reforms. In this Bill there were important provisions to facilitate divorce by introducing mutual consent as a ground, to protect illegitimate children and to correct most of the exceptions to the principle of equality still present in the Code; all in line with contemporary practices elsewhere.

This Draft Bill did not become the new Turkish Civil Code. However, some important changes did occur in relation to divorce through Law No:3444 in 1988 which we will now consider.

### 4 The Reforms of 1988

The long awaited changes to divorce law were introduced by Law No:3444 on 12/5/1988, amending certain articles of the Civil Code no:743 (Arts. 24, 29, 94, 134, 137, 144, 145) and article 49 of the Code of Obligations No:818, repealing Arts. 96 and 142 of the Civil Code, as well as introducing two transitional provisions, one of which is related to divorce.

<sup>14</sup> For a criticism of this view see Tekinay, op. cit., pp. 523-525.

<sup>15</sup> For a summary of and references for these suggestions see *Örücü*, op. cit., pp. 233-235.

<sup>12</sup> Prior to 1988, article 144 titled "alimony" enabled a blameless spouse who could prove to be facing destitution as a result of the divorce, to demand "maintenance" for a period of one year.

<sup>13</sup> According to the amended article 145, if the spouse who has been granted compensation or alimony by contract or court decision is not in need any more or is leading a dishonourable life or is living de facto with another or is remarried or upon the death of one of the spouses, the allowance will be revoked, unless otherwise provided by the parties. There could also be a reduction or an increase in this allowance depending on various conditions, including the financial means of the provider. Thus both the duration and the amount of the allowance can be changed.

Until 1988, Turkish Law did not accept divorce by mutual consent. The general ground of severe incompatibility was always used in conjunction with fault, as we have seen, with the judge using his discretion both in balancing respective faults and evaluating the conditions of intolerableness. Article 4 of Law No:3444 amended Art. 134<sup>16</sup>. The new article 134 is titled "The shaking<sup>17</sup> of the marriage union or the impossibility of resuming life in common" and reads,

"If the marriage union is shaken from its foundations to such a degree that the spouses cannot be expected to continue life in common, either spouse can petition for divorce.

In the above circumstances, if the fault of the petitioner is the more serious, then the respondent can contest the petition. If this objection is regarded as an abuse of rights and there is no benefit worthy of protection in the continuation of the marriage union for the respondent and the children, then a divorce may be granted.

If the marriage has lasted at least one year, the marriage union is considered to be shaken from its foundations either on the joint application of the two spouses or the acceptance by one spouse of the divorce suit of the other. In this case, in order to grant a divorce, the judge hearing both sides, must be convinced that they freely express their wills and must accept as proper the arrangements made by the parties for the financial consequences of the divorce and the position of the children. The judge can make any necessary alterations in this agreement, taking into consideration the interests of the parties and the children. When these amendments are accepted by the parties, divorce is granted. In this case Art. 150/3 is not applicable.

Upon the rejection of a divorce case based on any one of the divorce grounds and the lapse of three years from the finalisation of this decision, if life in common could not be resumed for whatever reason, divorce is to be granted upon the request of either spouse."

The policy behind the amendment is one of easing divorce and reducing the importance of fault, since the requirement that only the blameless party could petition for divorce is no more. The fault principle is still important in that the blameless respondent can contest the petition brought by the party at fault and prove the fault of the plaintiff. This

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<sup>16</sup> Before the amendment article 134 read, "incompatibility". When severe incompatibility arises rendering life in common intolerable, either of the spouses can petition for divorce (134/1). If the cause of the incompatibility is more attributable to one party than the other, the right to petition for divorce belongs to the other spouse (134/2).

<sup>17</sup> "marriage is shaken" and later "marriage is shaken from its foundations" are literal translations from Turkish. These words have a similar meaning to "irretrievable breakdown" or "irremediable breakdown".

right cannot be exercised if it is regarded as an abuse of rights, though the law maker does not define this concept. The judge has discretion in its determination. It is again the judge who is to decide whether there is any benefit in maintaining the marriage. If he is convinced that there is none and that the respondent's objection is not an abuse of his or her rights, then he must grant divorce. Through this Article, divorce by mutual consent has been introduced, not as a sole ground but additional to the catalogue of marital offences, and an attempt has been made to remove the discretion of the judge, in that he no more has to weigh the circumstances and decide that life in common has become intolerable.

Divorce by mutual consent is also possible when one of the spouses petitions for divorce basing the request on any of the grounds. The respondent must accept the suit in court, which acceptance brings an absolute result and the court grants a divorce. There are certain conditions however: the marriage must have lasted at least for one year, the parties must have given their consent freely, they should both be present in the court-room and express their consent and the judge must agree with the financial arrangements and the arrangements for the children. The judge's role seems to have been changed in the context of divorce by mutual consent. Although he must be satisfied of certain conditions, he cannot use his discretion in evaluating the evidence or refuse divorce because he is not convinced that the marriage has broken down.

The other innovation brought by the Law is related to couples whose earlier attempts at divorce based on any one of the grounds have failed. After a period of three years, if life in common has not been resumed, either one of the spouses can successfully petition for a divorce. Fault has no relevance here. All the judge has to do in these cases is to determine the actualisation of certain factual points such as that three years have in fact elapsed and that the spouses have not resumed life in common.

The High Court seems to take a rather narrow view of the possibilities introduced by these changes and attaches the utmost importance to the obligation of the spouses to come to an understanding with each other about the main consequences of the divorce, finance, access and custody, and to make known to the court what they have agreed.

In a recent decision (2/11/1989, 6979/8890) the Second Civil Section of the High Court regarded the approval by the judge of the arrangements as to the financial consequences and related to children as crucial. The Court stated that "divorce by mutual consent is a new possibility, not part of established tradition and therefore great care must be taken to see that justice is done. To this end, the parties should submit to the

court a contract as to the arrangement of financial matters and children's welfare prior to any other process. The judge must take an active part in this settlement since the parties in their haste to end their relationship may be rash. For example, 'one may give up everything' or 'be under pressure or deceived'. The judge must intervene and ensure reasonableness and justice. He is not bound by the facts as presented by the parties. He must directly investigate and determine the truth." In the instant case the Court decided that since such a contract, which it saw as a condition of a divorce decree, had not been submitted to the court of first instance, its decision to grant divorce was contrary to law and to procedure and therefore should be overturned.

If this does become the general trend of interpretation, it will subtract from the value of this kind of divorce and also act against the policy behind the introduction of divorce by mutual consent.

As mentioned above in section two, Law 3444 also introduced amendments to Article 137 so making the granting of temporary measures, such as precautionary alimony and the regulation of the relationship of the children with the spouses, compulsory. The judge must now grant such measures rather than assess the situation upon the request of the parties, as was the case prior to 1988. This is a positive step. The purpose obviously is to protect the parties and the children, stressing the importance attached to the family as an institution closely related to public policy.

Again as pointed out above in section two, hardship (destitution) alimony has been re-shaped in Article 144. One innovation is the possibility of receiving alimony for an unspecified period of time. This is an improvement on the previous position of restricting the period to one year. It takes into consideration the financial dependence of women in Turkey. This Article also introduces the possibility for the husband to ask for alimony from the wife. Here fault does play a role, though the one who is less blameworthy can ask for alimony from the one more blameworthy; thus 'clean hands' is not an absolute prerequisite.

The following article (145) tries to ensure that justice is done while alimony is paid whether in the form of a lump sum or monthly income. This seems to be fair. The conditions to be taken into account in deciding to end such payments however, introduce further value laden policy considerations compared to the previous content of this Article. These additional circumstances are leading a dishonourable life (that is, a style contrary to general traditional and moral standards) and living with someone illegally outside marriage.

Both Article 96 and 142, which allowed the judge to prohibit the party at fault from remarrying for a specific period, have been repealed. This punitive measure was rarely effective and only led to extra-marital relationships. Their removal is an improvement and upholds the fundamental freedom to remarry.

As the last point in this section, I would like to mention the transitional Article 1 of Law 3444. This Article can be considered as an amnesty clause, since according to it, if a petition was brought to court within six months of this Law taking effect, divorce was to be granted. The spouses who could take advantage of this Article were those whose divorce cases had been before the courts prior to 12/5/1988 and who had been living separately for three years; those whose divorce cases had been decided but not finalised before 12/5/1988 and who had been living separately for five years; those whose divorce suits had been rejected, but as of 12/5/1988 a three year period had not yet elapsed from that decision and who had been living separately for three years, and finally those who had not yet petitioned for divorce but had lived separately for five years. If the above conditions were satisfied and life in common could not be resumed, then within six months of Law 3444 coming into effect, they were able to file a petition to the courts which would grant divorce. The period ran out on 12/9/1988. A large number of spouses took advantage of this 'one off' amnesty clause and obtained automatic divorce, as no divorce ground had to be proven and the judge had no discretion. This amounted to divorce "on application".

## **5 The Recognition and Enforcement of Foreign Divorces**

Prior to 1982, cases pertaining to the personal status of Turks had to be brought in Turkish courts, Turkish courts having exclusive jurisdiction. A decree given by a foreign court was not recognised or enforced in Turkey. With the increasing number of Turks living abroad since the 1960's, this principle caused serious problems and inconvenience. Overseas divorces are now perfectly feasible, but the respondent can contest the foreign judgment in Turkish courts claiming that the competent law has not been applied.

According to Turkish International Private Law, the general principle is still that family law and personal status are governed by national law, that is, the main connecting factor is nationality (*lex patriae*), as appears in Law no:2675 on International Private Law and Procedural Law of 20/5/1982 which came into effect on 22/11/1982, regarding the law to be applied to matters and relationships arising out of private law with a foreign element, the international jurisdiction of Turkish courts and the recognition and enforcement of foreign judgments (Art. 1). According to this Law, The Turkish judge applies the provisions of

foreign law on his own initiative, but in the absence of such law, applies Turkish Law (*lex fori*) (Art. 2). However, when a provision of a foreign law applicable to a case is manifestly contrary to Turkish public policy (*ordre public*) it is not applied and if regarded appropriate, Turkish Law becomes applicable (Art. 5). For a Turkish national or a Turk with dual nationality, Turkish Law is applicable and the natural forum is the Turkish courts (Art. 4).

Article 13 is relevant specifically to overseas divorces and judicial separation. It states that the grounds for divorce and separation are governed by the shared national law of the spouses. However, if the spouses are of different nationalities, the law of the shared domicile (*lex domicilii*) applies. In the absence of this, the law of the place of habitual residence applies. If this is not to be found then Turkish law applies. Turkish law is the last connecting factor in this chain<sup>18</sup>.

The judge at all times looks at the law of the country with which the legal relationship has the most real and substantial connection. This is the case also regarding measures of custody and alimony unless they are of a temporary nature (Art. 20). Support is determined in connection with the national law of the respondent.

Article 28 titled "suits related to the personal status of Turks" deals with the position of Turks not domiciled in Turkey. If they do not or cannot bring their cases to the courts of the country domicile, then they can use the courts of residence or last residence in Turkey or the courts of Ankara, Istanbul or Izmir, Turkish courts having inherent jurisdiction.

The enforcement of a decision of a foreign court given and finalised according to the laws of that country, is dependent upon the decision of the Turkish courts as to its enforcement (*exequatur* decision), that is, it is not self-executing (Art. 34). If the person against whom the decision is to be enforced is not domiciled or resident in Turkey, then the Ankara, Istanbul or Izmir courts have jurisdiction (Art. 35). Enforcement must be requested by a petition (Art. 36) and certain documents, including a certified copy and a certified translation of the judgment, must be attached (Art. 37)<sup>19</sup>. Since when foreign law is applicable this is not an absolute rule, an integrated set of enforcement rules has been formulated by Art. 38, which states that for Turkish courts to grant an

*exequatur* decision: a) a reciprocity agreement between the foreign State and Turkey or a provision of law or actual precedent enabling judgments given by Turkish courts to be enforced in that country must be present, b) the decision should not be one within the exclusive jurisdiction of the Turkish courts, c) the judgment should not be manifestly contrary to public policy, d) the respondent must be properly intimated of the case and heard or represented according to the laws of the country concerned and must not have contested enforcement in Turkish courts for one of the above reasons, and e) the foreign decision related to the personal status of a Turk, must have applied the law shown as competent by the rules of the Turkish conflict of laws (*lex fori*) and the Turkish national who is the respondent must not have contested the enforcement of the judgment for this reason. Moreover, the recognition of a foreign judgment as evidence or as a final decision is dependent upon the confirmation by the Turkish courts that the conditions for enforcement are present (Art. 42).

In the context of the recognition and enforcement of foreign divorces, the most important challenge appears to be public policy. Public policy can be defined as rules protecting the fundamental structure and interests of a society related to its political, social, economic and legal life. Such considerations as the foreign law being contrary to fundamental values of Turkish law, being contrary to Turkish mores, customs and moral outlook, or being contrary to fundamental rights and freedoms as expressed by the Turkish Constitution, will lead the Turkish courts to invoke public policy<sup>20</sup>. It is generally accepted however, that public policy is an exception. This is the case in Art. 5 of Law no: 2675. Nevertheless the Turkish High Court sometimes regards public policy rules as directly applicable as if a connecting factor and only sometimes as an exception, the application of foreign law being the general principle.

Public policy is a changing concept, both through time and from society to society and therefore the judge has wide discretion in invoking this rule. His decision however, is not arbitrary but is tied to certain principles. He must, for example, show that foreign law is "manifestly contrary" to public policy in order to waive it.

Public policy considerations can be two: the consequences of applying foreign law to the case can be contrary to Turkish public policy (Art. 5), or the consequences of the recognition and enforcement can be contrary to Turkish public policy. What is important in this instance is not the law applied in arriving at the judgment, which cannot be scrutinised by Turkish courts anyway, but the legal consequences in Turkey. The

<sup>20</sup> Çelikel, op. cit., pp. 144-158.

<sup>18</sup> See Çelikel, A, *Milletlerarası Özel Hukuk*, Beta: Istanbul, 1987, 2nd ed. pp. 65, 72.

<sup>19</sup> 2 HD. 17/6/1986, 5862/6076, whereby the High Court annulled the first instance decision on enforcement, given on the sole evidence that there was a final foreign judgment, with no certified translations and without investigating the realisation of all the other conditions in Art. 38. Even photocopies are not enough (2 HD. 22/6/1987, 4260/5431).

determination of whether a foreign decree fulfils the conditions of an exequatur decision is a general principle in all legal systems. This however does not amount to a "revision" of the foreign decision. Thus the judge has no discretion when the conditions for recognition and enforcement are fulfilled.

The fact that foreign law is different to national law can not in itself be regarded automatically as being a violation of public policy rules. For example, the use of different divorce grounds does not necessarily indicate that a foreign judgment manifestly contravenes public policy. The Turkish High Court however, rejects petitions for enforcement of overseas divorces when no grounds are specified but a decree is granted on mutual consent. This was a very frequent practice prior to the introduction of divorce by mutual consent in 1988 (eg. 2 HD. 15/5/1985, 2674/4577). As late as 22/9/1988, the Second Civil Division (2 HD), after repeating the wording of Art. 38 of Law 2675, held that, "The Turkish Civil Code did not accept de facto separation as a ground for divorce at that time. In the foreign judgment, the enforcement of which is sought however, this is the basis of the divorce decree and no other reasons are stated. This judgment is contrary to public policy and the request for enforcement should have been rejected. The fact that it was not, is the basis for the annulment of the decision of 29/3/1986." (6467/8311).

However, there are also cases indicating that the Court is not always of the above opinion, especially when one of the spouses is not a Turkish national. For example, the same Division granted an exequatur decision in a divorce case where the husband was a Turkish national and the wife was not and the Austrian decree was based on the ground of mutual consent (2 HD. 26/5/1986, 3520/5471)<sup>21</sup>. The dissenting opinion in this case however, supports the established trend. With the amendment of Article 134 of the Civil Code, this practice of the High Court should die out.

The practice can lead to limping marriages and has been criticised by the doctrine<sup>22</sup>. When both parties are Turkish nationals and seek to evade Turkish Law, then the practice of the High Court of invoking public policy can be condoned. But it is extremely difficult to prove this intention.

Another important consideration rendering a foreign judgment contrary to public policy, is when the foreign court has not decided the case according to the shared national law of the spouses (*lex nationalis* and

<sup>21</sup> However, this is not an established rule either. See for a contrary decision by 2 HD, 15/5/1985.

<sup>22</sup> Çelikel, op. cit., p. 156 and Nomer, E., *Devletler Hususi Hukuku*, Beta: Istanbul, 1988, 5th ed., p. 455.

therefore Turkish Law) or has not considered all the subtleties of the relevant provision of the national law. It is not enough for example, to prove that a foreign court has referred to Turkish Law; the law has to be actually applied (2 HD. 14/4/1987, 2561/3270). If very similar provisions exist in the laws of that foreign country, these too can be applied as long as there is the same type of interpretation and scrutiny.

So the rule is that Turkish nationals can petition for divorce in foreign courts but those courts should apply Turkish Law according to article 13 of Law 2675. For example, in 15/4/1985, 1560/3531, the Second Civil Division stated that "the Dutch court should have applied Turkish divorce law since this condition is related to the public policy element (Art. 38/c). Whereas the Dutch court, claiming that the spouses had lived and worked in the Netherlands since 1970, had accepted the Dutch way of life and the petitioner having claimed not to have any social ties with Turkey, applied Dutch Law. This is contrary to Art. 13/1 of Law 2675." Here it is possible that the Division also regarded it contrary to public policy to allow parties to evade the incidents of Turkish Law or attempt to by-pass Turkish Law.

Since foreign judgments cannot create legal consequences in Turkey unless they are recognised by Turkish courts, they cannot be used as evidence (2 HD. 18/3/1983, 640/2979). Recognition is the acceptance of the finality of the foreign judgment in Turkey. If recognition is petitioned for without a request for an exequatur decision, then that foreign judgment can be used as evidence and, upon recognition, the fact of divorce can be entered into the register of births, marriages and deaths. In the case of divorce between a Turk and a foreigner, the investigation is sometimes carried out on the file without a hearing. But even in these cases, doctrine supports the view that the parties should be intimated of the proceedings since they may wish to contest the petition<sup>23</sup>. For exequatur decisions this is in fact the established view of the High Court (2 HD. 7/5/1985, 2202/4401). Moreover, for the enforcement of custody, alimony or compensation decisions given by foreign courts, an exequatur decision is always necessary; and recognition alone would not achieve this result.

Finally it is interesting to note that the High Court accepts that spouses who have obtained a divorce decree abroad may want to petition for a new divorce suit in the Turkish courts instead of asking for enforcement. In the following case (14/1/1986, 11103/97), the first instance decision rejected such a petition not seeing itself jurisdictionally competent. The High Court, overturning the ruling, held that whatever the reason "a Turkish national cannot be hindered in the pursuance of his

<sup>23</sup> Çelikel, op. cit., p. 331.



rights from applying to Turkish courts; this would lead to limiting his Constitutional rights." However, if a Turk domiciled abroad obtains an overseas divorce but nonetheless brings another case to a Turkish court in respect of the same marriage, the respondent must be in a position to contest this relying on res judicata. This possibility is confined by the doctrine to Turks who do not have a domicile in Turkey<sup>24</sup>. In practice such a challenge would not achieve much, the reason being that without a Turkish court decision on recognition the foreign decree is not regarded as final and therefore the doctrine of res judicata would not apply.

In sum, in cases of status, the rule of Turkish conflict of laws indicates that national law should apply. When however, foreign courts apply foreign law, an exequatur decision will only be refused if the Turkish national contests the foreign judgment. The Turkish courts cannot look into this matter on their own initiative unless the consequences of the enforcement of the foreign judgment is regarded as manifestly contrary to Turkish public policy rules. As has been seen, there are many such cases.

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<sup>24</sup> Ibid., pp. 256-257.