18.11.2020

Turkish matrimonial property law

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Dear Prof. İbili, dear audience,

thank you very much for giving me the chance of presenting the results of the research for my doctoral thesis to such a qualified and interested audience.

I am a lawyer since 1976 and became engaged in migration and asylums cases of clients from Turkey, and I began to learn the language. Then in 1982 all of a sudden Turkey made possible the recognition of foreign divorce decisions. And it was by this that the jurisdiction on divorce cases for Turkish couples was opened in Germany.
Until the entree into force of the Rome-III-Regulation -that means for about 30 years- Turkish divorce law was applied to Turkish couples in Germany.

I began to work in this field, but still it took me 15 years until I wrote the first articles in the German family law review FamRZ on Turkish and international law.

When in 2001 the new Civil Code passed through parliament and Swiss matrimonial property rules were adopted by Turkey, Christian Rumpf asked me whether we should translate the new rules on family law into German language.

In order to understand the meaning of the matrimonial property regime of participation in the acquisition we had to look into the Swiss case law and literature.

So did the Turkish academics.
Fascinating for us in Germany was the fact that the Swiss and the German matrimonial property regimes are quite similar to each other in general and from the start, but can differ very much in the final steps for dissolution of the regime.

Many of the details of the new regulations you will find in my article in the book that Prof. Ibili ist going to publish.
In my todays speach I will try to explain to you one or two of the basic ideas.

Its is the first time that I talk in English on legal matters, I hope it helps you to understand, but you can see it as a political manifestation as well.

I think one of the main differences in matrimonial property law arise from point of whether the regime creates a section of common property. If a regime creates such a common property, there are great advantages especially for the weaker part. There is nothing of what we call the "decline in rem" (dingliches Gefälle). The position of the weaker part is quite valid from the start. He or she does not have to chase for the goods of the other part at the time of dissolution of the regime. And besides this the cyclical development of the values does not influence the dissolution at least not from the start.

To my opinion there are great disadvantages as well.
During a long lasting marriage there are normally many interferences between the various sections of assets of the spouses.

For example in many cases one spouse has a house with a mortgage on it in the beginning of the marriage or gets it during the time of marriage by way of succession- it thus belongs to the personal assets.
Then normally he or she will pay the monthly loan installment to the bank out of his or her current income. This contribution has to be compensated in the dissolution of the regime.
The other way round a sum of money acquired by way of inheritance may be used for repairs in a house in common matrimonial property. This has to be compensated as well.

If you are lucky to have all these contributions in the books then it may be possible to work out the amount of compensation for these contributions. But if all papers are lost, there is no chance to prove them.

But what about the cyclical increase or decrease in the value of the object of the contribution?
If we assume that the income during the time of marriage made a great contribution to the personal assets, which stay outside the common matrimonial property, and these assets happen to have a great increase in value may be long time after that, who will profit from this increase? Will it only be owner of the personal asset? Or will the common property profit as well?
The other way round you have the same problem with an increase of value of the house in common matrimonial property after a contribution from the personal assets.

These are the main problems we are confronted with in a different way, if we look the property regimes of Switzerland and Turkey.

The statutory regimes of Switzerland, Turkey and Germany though do not create a common property. During the time of marriage there is practically a kind of separation of property. Each spouse acts quite independently (Art. 223 Turkish

Civil Code). Of course there can be common property in rem just as you and me could have a house together. But this is widely regarded as half half personal property without special importance in the legal regulations of the regime.

This means that there is mainly and basically no dissolution of the regime in rem. The dissolution is mainly a matter of financial compensation.
The assets acquired during the time of marriage have to be evaluated for the dissolution. This evaluation is the basis for the sum of compensation that has to be paid as result of the dissolution of the regime.

For this purpose at the end of the regime (by divorce or death) according to Swiss and Turkish law all assets of each spouse are divided into two sections (Art. 218). The Turkish law uses the word of section (kesim), while in doctrine und case law they speak of groups of goods (mal grupları), in all three languages of Switzerland they talk of two masses of goods of each spouse.

One section of each spouse is the acquisition (Errungenschaft) as a singular in the Swiss German text or the acquisitions as a plural in the Swiss French and Italian text (les acqêts, gli acqisti). It is called the acquired goods (edinilmiş mallar) as a plural in the Turkish text (Art. 219). This section comprises the assets to be object of participation at the end. They have to evaluated.
The other section is called personal assets (Eigengut, kişisel mal) and it comprises anything the spouse had at the beginning of the marriage, whatever he got by succession, what was donated to him during time of marriage, what was paid to him as moral damages (manevi tazminat) and of course the assets that replaced all these (yerine geçen mallar) (Art. 220). These assets normally do not need to be evaluated because they are not subject to participation.

The matter of the separation into the two sections are all the assets that exist at the end of the regime (Art. 228). Whatever a spouse had at the beginning of the marriage, however good he can prove that he had it, it is of no use for him in the dissolution of the regime, if he cannot prove that these assets continue to exist in whatever form at the end of the regime.

In Germany a similar system was discussed in 1959. But Germany went the more generous and much easier way. The German system to me is difficult enough. But the Swiss and Turkish system is generally accepted to be far more difficult.

In the Swiss and Turkish regimes the separation of the maximum four sections of assets is the first step in the dissolution.
Then it comes to the interactions of these sections.
At first we equalize the contributions of one section of assets to the other section of the same spouse. These contributions take part in the increase or decrease of

the value of the object that profited from the contribution (Art. 230). For this purpose we have to evaluate this object with its value at the time of the contribution. This value is compared to the value of the contribution itself. The result is the contribution rate (katkı oranı). The section of assets that made the contribution takes part in the increase or decrease of the value of the goods that profited from the contribution according to the contribution rate. So it gets its fair share from a cyclical increase.

This is quite important in Turkey because of the high inflation.
Since each spouse has maximum two sections of assets there are maximum 4 types of contributions to be taken into account.
The amount of the compensation that results from the equalization of these contributions enlarge or diminish the acquisition.

In the next step we have to look at the contributions between the assets of each other spouse. (German: ehebedingte Zuwendung, Turkish: katkı) (Art. 227).
Again we see four sections of assets, two of each spouse.
As we have four sections there can be eight types of contributions, which have different effect on the final account of the surplus.
The contribution does not take part in a decrease, only in an increase in the Value of the profiting object It can be the cause of a separate action as well.

The final form of the acquisition is the surplus (Swiss: Vorschlag, artık deger) (Art. 231). If not otherwise agreed upon each spouse can claim the half of the surplus of the other spouse (Art. 236).The court can change this relation in case of divorce for reason of adultery or attempt to kill.

It is important to note that there is no negative surplus (Rückschlag). That means that a negative surplus is counted zero (Art. 231).

This is a very important aspect if we look at the case law of the Turkish Court of Cassation.

As we have seen the Swiss matrimonial property regime comprises the complete assets of each spouse. The aim is to define the total increase in the assets of the spouses produced during matrimonial life with disregard of the cyclical development of the personal assets and to share it equally among the former spouses.

It is a difficult but quite logical system.

Now we see that the Court of Cassations since eleven years is doing something far different.
As said before the Turkish Civil Code speaks about " acquired goods" in plural.

The Court of Cassation now reads this in the way, that every single good produces its own surplus.
So the dissolution is not the dissolution of the whole of the assets, it is the dissolution of the single good the claimant decides to make subject of this action. The dissolution is done good by good (mal mal tasfiyesi).

That means that the claimant will not make assets part of his action which are over-indebted. If he would, the surplus would be negative and counted zero anyhow.
He will not make independent debts part of his action. If he would there would be a negative surplus and counted zero anyhow.

Let us imagine a spouse that pays the loan installments for the family home from his or her income. But the income gets weak and he or she pays the cost of living from his or her credit card account.
Then divorce comes and the other spouse profits from the decreased mortgage but does not share the burden of the bad credit card account.

The eighth Chamber of the Court of Cassation is quite radical about that.
In the beginning since 2009 until 2015 they even changed the legal definition of the surplus by not speaking of "goods" but only of "one good".
Since the change in chairmanship in 2015 they use the legal definition ("goods") but they add an initial sentence which speaks of "one good".

The result is a catastrophe.
One spouse opened two cases for two different real estates in Antalya and in Kemer, one action at the court in Antalya, one to the court in Kemer. The Family Courts brought the actions together but the Court of Cassation splitted them up again.

As we see the effect of this case law on the proceedings is tremendous.
Lis pendens (derdestlik) is limited to the one asset that is cause of the action.
As well is the range of res iudicata (kesin hüküm).
As many goods one spouse has, as many actions can be filed against him or her - parallel or one after the other.

If there has been a court decision or an agreement on the matrimonial property after divorce, afterwards in a new case it will be discussed whether there was an asset that was not taken into account.

Imagine the consequence of this for a case before the court in the Netherlands or Germany.
The Turkish court will call for an official expert to examine the Dutch or German file to see whether this or that asset was taken into account or not.

And we must see that the limitation period is ten years. It is supposed to begin at the end of the divorce case.

In case of a foreign judgement the limitation period of ten years according to the Court of Cassation begins only with the recognition of the foreign decision in Turkey. (This is in open violation of the Turkish law on international private law.)
Instead of an end in horror we have horror without end.

Thanks again to
Prof. Fatih İbili