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ISLAM AND INTERESTS. REMARKS ON TURKISH CIVIL LAW AND RECENT TURKISH MONETARY POLICY

Abstract

This article is intended to depict the historical approach to interests in Turkey and in the Ottoman Empire as well as to describe the current the Turkish interest-related legal framework and its historical changes. This is to verify whether the recent governmental rhetoric and turn to Islam anyhow affect the shape of the Turkish civil law. To do so, the article refers to the Swiss private law (as a “donor” legal system for Turkey) and the Ottoman laws and customs related to charging interests.

The reason for such examination is due to Turkey’s latest non-conventional monetary policy. Namely, despite high inflation, the central bank does not increase interest rates. At the same time, the Turkish President makes statements that any interests are not compliant with Islam and the holy texts ban making interest-bearing transactions. This context makes checking the shape of the Turkish private law particularly interesting for comparative private law researchers.

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KEYWORDS

Turkey, interests, Islam, interest rates, civil law, comparative law

SŁOWA KLUCZOWE

Turcja, odsetki, islam, stopy procentowe, prawo cywilne, prawo porównawcze

INTRODUCTION

The primary aim of this article is to examine the complicated relations between Islam, statute-based private law, and the needs of the current economic system. For this reason, I would like to take a closer look at the crucial – at least from the economic perspective – legal institution of law obligations, i.e. interests.

Charging interests has been problematic in the history of many societies since ancient times.¹ The problem of debts and accruing interests resulted in the Solon reforms in Athens. The writings of Aristotle explored the conception that money is merely a legal tender. Consequently, money is a sterile thing that cannot bear further money.² Thus, it is not surprising that three great monotheistic religions – Christianity, Judaism, and Islam refer to taking interests in their Holy Books and the problem of interests has been explored by scholars of those religions as well.³ As explained below, the discussion on charging interests is still of great significance in Islam.

This article's perspective is focused on Turkey. This choice is not accidental, as Turkey is one of the best examples of the complicated relations between state, society, law, and religion. Turkey is the country which experienced one of the most radical changes in its legal system, including the extraordinary changes

¹ Briefly in this regard see F. Alperen, *La Differentiation de L'Interet en Droit Turc et en Droit Suisse*, Lausanne 1947, pp. 8-13; also H. Elbir, *Fahiş faiz meselesi: (tarihte ve Türk hukukunda)*, "İstanbul Üniversitesi Hukuk Fakültesi mecmuası", Vol. 18, No. 3-4, 1952, pp. 855-859.

² For more on classic writings in this regard, see B. Dankowska-Prokop, *Pieniądz i procent w rozważaniach Przedstawicieli antycznej i średniowiecznej myśli ekonomicznej*, "Studia Ekonomiczne. Zeszyty Naukowe Uniwersytetu Ekonomicznego w Katowicach", No. 334, 2017, pp. 23-27; W. Visser, A. McIntosh, *A Short Review of the Historical Critique of Usury*, "Accounting, Business & Financial History", Vol. 8, No. 2, 1998, pp. 176-177.

³ On interests in Judaism, see e.g. A. Shaikh Mahmud, *Judaism and Interest*, "Islamic Studies" Vol. 20, No. 1, 1981, pp. 47-82; the comprehensive explanation of the phenomenon in Christianity, see e.g. J. T. Noonan (jr.) *The Scholastic Analysis of Usury*, Harvard 1957; J. Burke, *The Scholastic Analysis of ZIRP: Justice, Usury, and the Zero Interest Rate Policy*, "Journal of Markets & Morality", Vol. 17, No. 1 2014, pp. 105-124.

in the field of private law in the 1920s. The scope – and method – of changes have been so distinctive and irrespective of social factors (e.g. religion) that many scholars describe Turkey as one of the most distinctive examples of legal transplantations.⁴ On the other hand, the current political establishment in Turkey emphasizes Turkey's Islamic roots and openly admits that Islam should play a role in the decision-making process and legislation. As a confirmation of that, in recent months, we could see references to Islam in the process of implementing Turkish monetary policy.

Thus, to elaborate on relations between Islam, statute-based private law, and the needs of the current economic system, I would like to set up the following structure. In the first section, I will briefly present the latest economic difficulties of Turkey together with the narration on interest rates. The second section will elaborate on interests in Islam. In the third one, I will shortly discuss the Turkish and Ottoman legal history and the State-Islam relation as well as the approach to interests in the Ottoman period. The fourth section will be on interests in the current private law of the Turkish Republic. The last section will contain conclusions and other remarks.

1. TURKISH ECONOMY AND MONETARY POLICY

Recep Tayyip Erdoğan motivated the introduction of the presidential political system in Turkey by saying that it would allow him to revive the economy.⁵ However, for some time, Turkey has been experiencing severe economic difficulties, at least from the monetary perspective. As of January 2024, the official inflation rate (i.e. consumer price index – *Tüketici Fiyat Endeksi*) reached 64.86% year to year,⁶ but in the past, the numbers were even higher – e.g. in November 2022, the index was 85.51% year to year.⁷ Unofficial calculations provided by academics belonging to the Inflation Research Group (ENAGrup) are even worse as they

⁴ See e.g. A. Watson, *Legal Transplants and European Private Law*, Ius Commune Lectures on European Private Law, 2006, pp. 6-8, http://awf.ius.bg.ac.rs/legal_transplants.pdf (accessed 22 February 2024); A. Watson, *Legal Transplants. An Approach to Comparative Law*, Athens 1993, p. 98.

⁵ A. Spancerska, *Problemy gospodarcze Turcji a polityka zagraniczna*, “Biuletyn Polskiego Instytutu Spraw Międzynarodowych”, No. 149, 2022, <https://www.pism.pl/publikacje/problemy-gospodarcze-turcji-a-polityka-zagraniczna> (accessed 22 February 2024).

⁶ Data provided by the Turkish Institute of Statistics – <https://data.tuik.gov.tr/Bulten/Index?p=Tuketici-Fiyat-Endeksi-Ocak-2024-53622&dil=1> (accessed 22 February 2024).

⁷ Data provided by the Turkish Institute of Statistics – <https://data.tuik.gov.tr/Bulten/Index?p=Tuketici-Fiyat-Endeksi-Ekim-2022-45799> (accessed 22 February 2024).

indicate 129.11% (as of January 2024) year to year⁸ as a more probable inflation score. As of 27 November 2022, the Turkish currency (i.e. Turkish Lira) is at historically low levels – 1 EUR is worth 33.6058 and 1 USD is worth 30.977 (as of 22 February 2024).⁹ The unemployment rate and the export and gross domestic product growth indexes remain at moderate or positive levels, but still, the inflation rate increase and decline of the Turkish lira have been dramatic in recent years. The harsh inflation results in increasing numbers of young people wanting to settle abroad and in protests among workers.¹⁰

One can say that this could be just one – although quite extreme – of the cases of war- and Coronavirus-related economic turmoil the world has been experiencing since 2022. However, in the case of Turkey, the story is a bit different given that Turkey has been coping with the steady devaluation of the lira since at least 2012. The inflation rate was high in 2018 (reaching the peak of 25.24% in October), then it dropped to 10-20%, but since November 2022 the dynamic of increases has sky-rocketed (e.g. the index jumped from ca. 36% to ca. 49% between December 2021 and January 2022). Thus, the phenomenon is not new.

There are multiple macroeconomic factors that may be blamed for the above-described turmoil. However, one of the most exposed in media is the specific, “contrarian” Turkish monetary policy. The generally accepted approach among economists is that central bank interest rates should be increased in order to combat inflation by incentivizing trading participants to make savings.¹¹ However, the Turkish President, Recep Erdogan, has been expressing the opposite opinion and pushing to further lowering the Central Bank interest rate (at least till June 2023 when the rate started to rapidly go up). The resistance presented by the Central Bank policymakers, leaning towards the more conservative approach to interest rates, for a long time, was ineffective in blocking the “Erdoganomics”. Many of them have been dismissed in recent years – for example, Murat Çetinkaya in 2019¹² and Naci Agbal in 2021.¹³

There may be multiple reasons for keeping the interest rates low even despite very high inflation. Some may say that incentivizing exports and concentrating on the gross domestic product is just more important for the government than combating inflation. However, it seems that the “unorthodox” monetary policy may have also other roots – the Islamic belief that interests are forbidden in

⁸ ENAGrup Consumer Price Index (E-CPI) for January 2024 – see <https://enagrup.org/?hl=en> (accessed 22 February 2024).

⁹ Data provided by Yahoo Finance – <https://finance.yahoo.com/currencies/?tsrc=fin-srch> (accessed 22 February 2024).

¹⁰ A. Spancerska, *Problemy...*

¹¹ R. Scott, *Inflation Targeting Turns 20*, “Finance & Development”, 2010, pp. 46-49.

¹² <https://www.economist.com/finance-and-economics/2019/07/11/recep-tayyip-erdogan-sacks-the-head-of-turkeys-central-bank> (accessed 22 February 2024).

¹³ <https://www.cnbc.com/2021/03/22/turkeys-lira-plunges-after-erdogan-sacks-central-bank-chief.html> (accessed 22 February 2024).

the light of Islamic law (also known as *sharia*¹⁴). Indeed, in the speech made on 17 November 2021, we could hear Recep Erdogan say:

“I am saying clearly and openly, interest is the cause of inflation. I am saying to those who try to twist it into something different do not try in vain, we will release the back of this nation from the scourge of interest. [...] You are seeing what inflation has brought us here. What is happening to our friends. As long as I am in office, I will continue my struggle against interest until the end, and I will keep combating inflation. We must know that *nass* is in this topic. Since *nass* is there, what is up to you or me? Why don't we look at this thing from the perspective of the values of our lineage? We will look at this thing from this perspective and take our steps accordingly”.¹⁵

What is important, the cited passage makes a reference to *nass* which is the Arabic term translatable into “canonical, written text” appearing in the Quran or Sunnah¹⁶ as opposed to rules that are not canonical and unconfirmed in writing.¹⁷ As a side note, it is worth noting that a very similar message was delivered in December 2021 as well¹⁸ and a general anti-interest approach was taken even before.¹⁹ At that time, we could hear Erdogan saying “As a Muslim, I'll continue to do what is required by *nass*”.

¹⁴ In this manuscript, I understand *sharia* as an equivalent of “Islamic law”, even though from a linguistic perspective, *sharia* can have a broader meaning – for more details see: S. Vesey-Fitzgerald, *Nature and Sources of the Shari'a* (in:) M. Khadduri, H. Liebensky (eds.), *Law in the Middle East*, Washington 1955, pp. 85-112. Please also note that translation of Arabic terms into English and fitting them into the Western conceptual framework are always to some extent flawed; some interesting attempts to define “sharia”, “Islamic law”, “Islamic jurisprudence” see M. Sadowski, *Islam. Religia i prawo*, Warsaw 2017, p. 188.

¹⁵ *Açık ve net söylüyorum, faiz sebeptir, enflasyon neticedir. Bunu farklı yere çevirme gayretine diyorum ki, boşuna uğraşmayın, biz faiz belasını bu milletin sırtından kaldıracacağız. [...] Enflasyonun buralarda ne hale geldiğini görüyorsunuz. Bizim arkadaşlarımıza ne oluyor. Bunu görevde olduğum sürece faizle mücadelemi sonuna kadar sürdüreceğim, enflasyonla mücadelemi sürdüreceğim. Şunu bilmemiz lazım, bu konuda Nas ortada. Nas orda olduğuna göre sana bana ne oluyor. Biz değerler silsilemiz içinde olaya buradan niye bakmıyoruz? Olaya buradan bakacağız ve adımıza ona göre atacağız.* Cited from <https://www.karar.com/guncel-haberler/son-dakika-erdogandan-grup-toplantisinda-kritik-aciklamalar-1639765> (accessed 22 February 2024). All translations from Turkish are made by myself.

¹⁶ K. Vikor, *Between God and the Sultan. A History of Islamic Law*, New York 2005, pp. 53; J. Schacht, *An Introduction to Islamic Law*, Hong Kong 1982, p. 90. More on Sunnah and Quran as sources of Islamic law – see K. Vikor, *Between...*, pp. 53-88; B. Prochwicz-Studnicka, *Usul al-fiqh. Czym są klasyczne sunnickie „korzenie/podstawy wiedzy o prawie”?*, *Czasopismo Prawno-Historyczne*, Vol. 65, No. 1, 2013, pp. 11-51.

¹⁷ R. Peters, P. Bearman (eds.), *The Ashgate Research Companion to Islamic Law*, New York 2016, p. 14.

¹⁸ See <https://www.bloomberg.com/news/articles/2021-12-19/turkey-s-erdogan-says-islam-demands-lower-rates-and-so-does-he> (accessed 22 February 2024).

¹⁹ Briefly J. Lechner, A. Erdemir, *Conspiracy and cronyism: Turkey's economic spiral*, <https://www.lowyinstitute.org/the-interpreter/conspiracy-cronyism-turkey-s-economic-spiral> (accessed 22 February 2024).

By mentioning *nass*, Erdogan makes a clear reference to the rules of *sharia*. This is not very surprising given that Islam has been always in Erdogan and his mother party (AKP – Party of Justice and Progress) agenda. Both Erdogan and AKP acquired popularity in the 2000's as the opposition towards the more secularly oriented (and in some cases Kemalist) parties.

By using the *sharia*-based term Erdogan clearly refers to the Islamic ban on interests. Thus, I would like to elaborate shortly on this Islamic ban on interests.

2. INTERESTS IN ISLAM

Islam emphasizes the need to eradicate any discord and abuse between people,²⁰ so it is not surprising that the problem of interests closely connected to falling into debt was discussed from the beginning of this religion. That is why the issue of interests in Islam is deeply rooted in the Quran as well as in the Sunnah (i.e. the histories from the life of Muhammad and his companions).

For example in the Quran, we can read:

Those who consume interest will stand 'on Judgment Day' like those driven to madness by Satan's touch. That is because they say, "Trade is no different than interest (riba)." But Allah has permitted trading and forbidden interest (riba). Whoever refrains – after having received warning from their Lord – may keep their previous gains, and their case is left to Allah. As for those who persist, it is they who will be the residents of the Fire. They will be there forever.

Allah has made interest (riba) fruitless and charity fruitful. And Allah does not like any ungrateful evildoer. [...]

O believers! Fear Allah, and give up outstanding interest (riba) if you are 'true' believers. (2:275-279, the Cow²¹).

In Sunnah, there are some additional explanations to understand what is covered by the ban. For example, in one of the most popular collections of *hadiths*, the following words of the prophet are cited:

The Prophet said, "The selling of wheat for wheat is riba (usury) except if it is handed from hand to hand and equal in amount. Similarly, the selling of barley for barley is riba except if it is from hand to hand and equal in amount, and dates for dates is usury except if it is from hand to hand and equal in amount".²²

The English translation shows the main issue related to the interest ban – the meaning of the term *riba* strongly condemned in the sources above. Some

²⁰ H. Elbir, *Fahiş...*, p. 859.

²¹ Translation as provided at <https://quran.com/2> (accessed 22 February 2024).

²² Sahih al-Bukhari, book 34, hadith 121, translation as provided at <https://sunnah.com/bukhari> (accessed 22 February 2024).

authors tend to translate it into “usury” which in our everyday understanding means usually morally wrong loaning practices (i.e. taking too high interests). For other translators, *riba* is the equivalent of any type of interest, since the quoted *hadith* bans all transactions that result in receiving more commodity (wheat, silver, dates, etc.) upon some time than the commodity given. The discussions on what is and what is not *riba*, and whether it can be spread over other types of contractual exploitation are vast in the history of Islamic jurisprudence.²³ Thus, describing them in detail exceeds the framework of this manuscript. However, equating interest with *riba* seems to become the dominant opinion and is often described as the orthodox position.²⁴ As such, it was used to create the idea of Islamic economics allowing to defend Islamic civilization against foreign influences.²⁵ It later fueled the dynamic development (from the 1970s) of the industry of Islamic banking – the sector of entities providing interest-free financial services. The interests are replaced by traditional or new legal devices allowing to “replace” interests with other payments covering the gain of the financing entity. The whole structure is usually based on profit-loss sharing mechanisms (e.g. in the contract of specific partnerships – *mudarabah* and *musharaka*) or some types of leasing (e.g. *ijara* and *murabha*).

The orthodox approach was expressed for example in the well-known *riba* judgment of the Supreme Court of Pakistan issued in 2002.²⁶ A similar view can be seen in resolution No. 13 dated 16 October 1986²⁷ of the Council of the International Islamic Fiqh Academy (a subsidiary organ of the Organization of Islamic Cooperation).

Nevertheless, it is worth noting that many writers find the orthodox approach incorrect. Some of them say that the Quranic *riba* is related to specific practices of the pre-Islamic Arabia (i.e. doubling the debt of a borrower upon his default in repayments).²⁸ Thus, it has little in common with current financial services and

²³ Shortly in this regard see e.g. M. Farooq, *The Riba-Interest Equation and Islam: Reexamination of the Traditional Arguments*, “Global Journal of Finance and Economics”, Vol. 6, No. 2, 2009, pp. 99-111; B. Seniawski, *Riba today: Social Equity, the Economy, and doing Business under Islamic Law*, “Columbia Journal of Transnational Law”, Vol. 39, 2001, pp. 701-728, E. Richardson, *The Shari’ah Prohibition of Interest*, “Trinity College of Law Review”, Vol. 11, 2008; M. Noorzoy, *Islamic Laws on Riba (Interest) and Their Economic Implications*, “International Journal of Middle East Studies”, Vol. 14, No. 1, 1982, pp. 3-17.

²⁴ H. Sharawy, *Understanding the Islamic Prohibition Of Interest: A Guide To Aid Economic Cooperation Between The Islamic And Western Worlds*, “Georgia Journal of International and Comparative Law”, Vol. 29, 2000, p. 163, also M. Farooq, *The Riba-Interest...*, pp. 100-101.

²⁵ T. Kuran, *Islamic Economics and the Islamic Subeconomy*, “The Journal of Economic Perspectives”, Vol. 9, No. 4, 1995, p. 156.

²⁶ Part of this judgment is available in English in the journal: *Review Judgement on Ribā: The Supreme Court of Pakistan (Shari’at Appellate Bench)*, “Islamic Studies”, Vol. 41, No. 4, 2002, pp. 705-724.

²⁷ Available at <https://iifa-aifi.org/en/32245.html> (accessed 22 February 2024).

²⁸ See e.g. T. Kuran, *Islamic ...*, pp. 156-157.

products. Others also claim that the ban covers only excessive interests (*riba* = usury), so the reasonable ones are compliant with *sharia*.²⁹ Thus, modern bank rates and saving bonds are permitted by law (see, e.g. opinion of the rector of the al-Azhar University³⁰). For many also, the use of interests, even by a pious Muslim, can be justified by the principle of necessity because the interest-based system has now become a universal necessity and no country or person can live without it.

To sum up this section, the equation between *riba* and interests is the dominant opinion among Islamic jurists nowadays. This results in a ban on interests instead of their reduction in numbers. Nevertheless, as explained below, in the history of Islam, the orthodox approach was not commonly accepted and the practice of charging interests was popular. The history of the Ottoman Empire proves it clearly.

3. INTERESTS IN THE OTTOMAN TIMES

The predecessor of the Republic of Turkey was the Ottoman Empire. It was ruled by a sultan whose official titles included also *padishah*, *khan*, emperor and – the most distinctive one – *caliph*. Although the Ottomans' legal right to the title of *caliph* (the Ottomans had no set blood ties with former Arab *caliphs*) was controversial and, for a long time, not frequently used,³¹ its application tells us something about the nature of the Ottoman state. Whereas the title of *sultan* has always had a military- and power-rooted connotation, *caliph*, on the other hand, was understood as the leader of the Muslims. Thus, its use stressed the meaning of Islam in the Ottoman state. Indeed, the Ottoman Empire was the Islamic state in which Islamic law (*sharia*) played an important role among Islamic subjects.³² It regulated a great part of social interactions and in many aspects, *sharia* was directly applicable (e.g. in family law), since – as mentioned above – the scope of

²⁹ M. Farooq, *The Riba-Interest...*, pp. 100-103.

³⁰ N. Çağatay, *Ribā and Interest Concept and Banking in the Ottoman Empire*, "Studia Islamica", No. 32, 1970, p. 68.

³¹ C. Imber, *Imperium Osmańskie* [translated by P. Zarawska], Cracow 2018, p. 165. In fact, it was rediscovered in the 18th century when there was a political need to retain some type of formal but ineffective supervision over Crimean Tatars after the Russian conquest – see S. Shaw, *Historia Imperium Osmańskiego i Republiki Tureckiej. Vol. 1*, pp. 1280–1808 [translated by B. Świątlik], Warsaw 2016, p. 148.

³² Non-Muslims were grouped, according to their belief, in *millets* – communities governed by local religious authority and having wide autonomy (including their own legal system and judiciary). In addition, foreigners were often subject to capitulations – special privileges enabling foreign powers to execute jurisdiction over their subjects.

sharia is quite extensive and covers also matters that – from a Western perspective – seem loosely related to religion.

The modernizing reforms of the 19th century (known as the *tanzimat* reforms) did not change the landscape. Even though this period is marked by the wave of Western-inspired reforms (including the implementation of several legal codes), aiming at the creation of a modern nation-like Ottoman identity, the role of Islam was not changed significantly. This is clearly visible in the example of *Mecelle*. This the so-called “Ottoman civil code”,³³ which, in fact, was not a modern code (it regulated only some areas of law, mainly the law of obligations), in its first Article indicates that this act of lawmaking comes from God and is a kind of excerpt from works of Islamic jurisprudence (namely, Hanafi legal school).³⁴ This – rather conservative – method of reformation of civil law prevailed over the idea of the creation of a less religion-related and more “Western” civil code.

However, even though Islam set up the legal framework, the situation with charging interests was problematic. As sources show, charging interests was very common in the 17th century Ottoman towns,³⁵ even if it was primarily hidden under the application of *istiğlal*. This institution consisted of the sale of a given good by a “borrower” for a given sum (“borrowed sum”) to a “creditor”. Immediately after this, the good was rented, for example, for a year. The rent tranches were hiding the interests of the creditor, even though from the formal perspective this gain had a different legal title (i.e. paying rent). As mentioned above, the toleration for *hila* (traditional legal device) to conceal interest-bearing loans was met in *sharia* literature. However, their acceptance in the Ottoman society and among the Ottoman jurists was further-reaching. The Ottoman-time jurists in many contexts simply used names of classical institutions used to test the limits of interest ban as a substitute for simple interests.³⁶ The use of *istiğlal* was so common and

³³ In my opinion, when it comes to *Mecelle*, the term codification – in its proper meaning – should not be used. This is because *Mecelle* does not meet the criteria of codification as a legal act that attempts to be coherent, holistic (i.e. covering all aspects of a given branch of law) and put in systematic order. *Mecelle* lacks this systematic order and is not holistic. Nevertheless, *Mecelle* is commonly described as the “Ottoman civil code”. For more on codification criteria, see e.g. T. Giaro (in:) W. Dajczak, T. Giaro, F. Longchamps de Berier, *Prawo rzymskie. U podstaw prawa prywatnego*, Warsaw 2009, p. 81; J. Rudnicki, *Dekodyfikacja prawa cywilnego w Polsce*, Bielsko-Biała 2018, pp. 24-29.

³⁴ Article 1: *The science of Islamic jurisprudence consists of a knowledge of the precepts of the Divine Legislator in their relation to human affairs.[...] As regards the section dealing with civil obligations, the questions which are of the most frequent occurrence have been collected together from reliable works and set out in this Code in the form of Books [...] – cited from https://www.iiu.edu.my/deed/lawbase/al_majalle/al_majalleintro.html (accessed 22 February 2024).*

³⁵ H. Gerber, *State, Society, and Law in Islam*, Albany 1994, p. 100.

³⁶ H. Gerber, *State...*, p. 101.

the acceptance of interests was so wide that *murabha*, in its classical meaning³⁷ of the classical institution used to circumvent the interest ban, disappeared³⁸ in the Ottoman Empire and, instead, it was understood as the profit gained in an economic transaction, including the interest demanded in loan transactions.³⁹ Moreover, in more contemporary times, in the Turkish language, we can see the distinction between acceptable interests described by the word *faiz* in contrast to usury interests being *riba*.⁴⁰

What is more, the analysis of *fetvas* (i.e. legal opinions) shows that judges (*kadi*) and jurists (*mufti*) accepted the practice of lending money with *isirbah* (meaning “interests”).⁴¹ So, it becomes apparent that “interests”, despite the *sharia* ban, were becoming more and more tolerable both in commercial practice and in the reality of courts. What is more, *muftis*, in their legal opinions, sometimes even suggested that persons agitating against reasonable interests should be punished. It can be reasoned by the fear of rifts and commotion among the local population.

This admissibility may be also due to the fact that one of the previous *kanuns* and *firmons* (i.e. sultan legislation) accepted taking interests in the amount of max. 10% annually (max. 15%-20% for some commodities⁴²). The numbers were generally the same as the numbers accepted by *muftis*. Charging interests in the excess of 15% could have been punished – e.g. Sultan Ahmet (living between the 16th and 17th century) ordered such usurers to be sent to jail and to galleys.⁴³ Therefore, when comparing the Ottoman approach to interests with the approach of classical Islam, it appears that Ottoman society was much more accepting towards interests. The government itself took interest-bearing loans from Galata bankers.⁴⁴ This is well reflected in one of the works of Nabi, the 16th-17th century poet, who wrote: “To make a living in provinces, engage in commerce, agriculture or interests (*riba*)”.⁴⁵

³⁷ A contract used to create a financing structure in which the seller and buyer agree to the cost and markup of an asset. The markup takes place of interest that makes it an acceptable form of credit sale under Islamic law.

³⁸ H. Gerber, *State...*, p. 205.

³⁹ M. Berber, *From interest to usury: The transformation of murabaha in the Late Ottoman Empire*, 2014, <https://acikbilim.yok.gov.tr/handle/20.500.12812/632225> (accessed 22 February 2024), p. 1.

⁴⁰ N. Çağatay, *Ribā...*, p. 68.

⁴¹ N. Çağatay, *Ribā...*, pp. 61-64; H. Gerber, *State...*, pp. 105-106.

⁴² H. Inalcik, *Capital Formation in the Ottoman Empire*, “The Journal of Economic History”, Vol. 29, No. 1, 1969, p. 106, 139. Nevertheless, Çağatay is more strict and indicates that 15% was the absolute maximum of acceptable interests – see N. Çağatay, *Ribā...*, p. 64.

⁴³ N. Çağatay, *Ribā...*, p. 65.

⁴⁴ H. Elbir, *Fahiş...*, p. 866.

⁴⁵ Nâbî, *Hayriyye*, Ankara 2019, verse 416, p. 76.

In addition, in Ottoman towns, there were multiple Ottoman-specific⁴⁶ *waqfs* (i.e. pious foundations) devoted to supplying credit to the public; known also as cash *waqfs*. *Waqfs*' traditional function was to manage public utility areas and buildings (such as caravanserais or mosques) and accumulate resources for this purpose. The accumulation of resources was usually based on immovable endowment allowing to generate income.⁴⁷ However, the donation of cash to create a cash pool that could be utilized for providing credits for people was rather unusual from the perspective of tradition and classical Islam teachings on interests as well as on pious foundations. The existence and maintenance of cash *waqfs* was in practice impossible without generating income from its activity (i.e. charging interests on loans). Nevertheless, in the 16th century, the Ottoman *şeyhülislam* (the great *mufti*) without much hesitation confirmed that cash *waqfs*, despite some opinions against them, should be permitted due to their popularity and irrevocability among the population of the European part of the Ottoman Empire and due to the Hanafi acceptance of using some movables to establish *waqf*.⁴⁸ The scholars of that time also claimed that the admissibility of cash *waqfs* is better suited to the reality of contemporary society. After some time, the cash *waqfs* were fully legitimized by the legal and political system of the empire.⁴⁹

The acceptance of interest-rooted cash *waqfs* could have different reasons, but it is very likely that challenging this institution, due to its popularity, could have a dramatic negative impact on the socio-economic situation at that time. It could also depict the growing engagement of *muftis* in state administration and state affairs even if it came for the price of their decreasing freedom of opinion on religious matters.

Nonetheless, the cash *waqfs* were successful in the Ottoman Empire in a way that allowed them to survive its collapse. After the period of supervision by the Foundations Administrations in the Republican Turkey, they were organized in the *Vakıflar Bankası* (the Bank of Foundations). In this form, they have been operating since then. Today the bank remains one of the biggest financial institutions in Turkey.

It is worth noting that the *Mecelle* did not contain a single provision on interests,⁵⁰ although it regulated some institutions that if properly used in practice

⁴⁶ More on this institution and its reception in the Ottoman society – see J. Mandaville, *Usurious Piety: The Cash Waqf Controversy in the Ottoman Empire*, “International Journal of Middle East Studies”, Vol. 10, No. 3, 1979, pp. 289–308; M. Bulut, C. Korkut, *A Look at the Cash Waqfs as an Indicator of Ottoman Financial Mentality* “Vakıflar Dergisi”, 2019, pp. 116–32, also briefly - H. Inalcik, *Capital...*, pp. 134–135.

⁴⁷ That is the reason why many mosques, even today, are surrounded by bazaars.

⁴⁸ H. Gerber, *State...*, p. 103, J. Mandaville, *Usurious...*, pp. 298–300.

⁴⁹ On the process, see T. Özcan, *The Legitimization Process of Cash Foundations: An Analysis of the Application of Islamic Law of Waqf in the Ottoman Society*, “İstanbul Üniversitesi İlahiyat Fakültesi Dergisi”, Vol. 18, 2008, pp. 236–248.

⁵⁰ H. Elbir, *Fahiş...*, p. 866.

could replace interests.⁵¹ The reference to interests exists in the Commercial Code of 1850 since this law was to a great extent translated from the French Commercial Code of 1807. What is interesting, the Ottoman Commercial Code did not mention the interest cap of 12% present in the French version.⁵² Nevertheless, the main direction of legislation of *tanzimat* period aimed to restrict the interest rates and some types of unjust barter contracts instead of eliminating the interests completely; even though there was no linguistic difference between interests and usury at the beginning of this period.⁵³ The law of 1852 set the interest cap at 8%. The next regulation of 1864 stipulated a 12% ceiling for interests, but what is more important, it abandoned the Islam-related language and tried to separate the meaning of usury (*riba*) from the interests (*faiz*).⁵⁴ In 1885, the ordinance lowered the maximum interest rate at 9% and regulated some additional aspects such as a) imposing the time limitation of compound interest to the period of max. 3 years of accrual, b) allowing the judge to reduce usurious interests without invalidation of the whole contract, c) stating that the amount to repay could not be higher than the amount of the capital borrowed.⁵⁵ The legal framework did not change till the end of the Ottoman Empire's existence and the 1885 ordinance had a long-lasting impact also in the Republican times. I will discuss this point later.

However, the acceptive stance on interests could be the reason for the dynamic development of banking in the Ottoman Empire.⁵⁶ In 1838, the government issued the first gold-changeable banknotes. They were used as a currency in circulation and their bearers could demand to buy them back by the government after eight years upon payment of 8% interest. The ephemeral Bank of Constantinople was working for only a couple of years (1847-1852), but the Ottoman Bank (est. 1856 in London) and Agriculture Bank (est. 1863 as the "Fund for Public Improvement") appeared to be more successful. What is worth noting – those banks did not abstain from charging interest. They were acting as regular banks and were highly engaged in interest-bearing loans. It seems that the development of banking in the Ottoman Empire could have been less dynamic if there had been no historically acceptive approach to taking interests.

Nevertheless, to sum up this section, I would like to stress that Ottoman tradition was moderately approving of interest-bearing loans and other similar activities. That may be the reason why the Ottoman Empire, as observed by H. Gerber,⁵⁷ was less developed when it came to commerce and finance than the sys-

⁵¹ F. Alperen, *La Differenciation...*, p. 17.

⁵² M. Berber, *From interest...*, pp. 62-64.

⁵³ M. Berber, *From interest...*, p. 63.

⁵⁴ H. Elbir, *Fahiş...*, pp. 866-867.

⁵⁵ For Turkish language texts of these laws, see – M. Berber, *From interest...*, pp. 85-89; for more on the ordinance, see F. Alperen, *La Differenciation...*, pp. 23-25.

⁵⁶ Briefly see N. Çağatay, *Ribā...*, pp. 66-67.

⁵⁷ H. Gerber, *State...*, p. 107.

tem of classical Islam and the Arab Empire.⁵⁸ In the Ottoman Empire, there was just no need to develop sophisticated systems and complicated legal devices if the interest-bearing transactions were accepted to a reasonable extent.

As a side note, it is interesting that in both the history of Islam and Christianity, pious organizations were the entities that facilitated wider acceptance of interest-bearing loans. This is because Christian *montes pietatis* were the credit organizations whose practice was to provide the poor with cheap, but interest-bearing loans. Due to these interests, the activity of *montes pietatis* was challenged by some theologians and jurists. However, their activity was finally approved by the Fifth Lateran Council due to their role in easing the living conditions of the poor.⁵⁹

4. THE REPUBLIC OF TURKEY AND CHARGING INTERESTS

However, what makes Turkey exceptional from this perspective is the radical change it experienced after the I World War. The territorial, economic, and demographic losses combined with revolting minorities and occupation by Allied Forces brought the Ottoman Empire to collapse. It was replaced by the nation-state of the Turkish Republic factually led by Mustafa Kemal Pasha (later known as Atatürk). He, together with his political faction, pushed Turkey on a secularization path. Part of this change was the transplantation of several legal codes from different countries. For the purposes of this work, the most important law reform was the translation and implementation – with rather minor changes – of the Swiss Civil Code (ZGB) together with the Swiss Code of Obligations. Indeed, it was a revolution, given the previous experience with rather cautious civil law reforms (*Mecelle*) and given the completely different socio-economic background in Turkey and in Switzerland. In particular, family law stipulating non-religious monogamic marriages was a very big change.

Thus, when analyzing the approach to the interests of Turkish lawmakers and the potential impact of the Ottoman or Islamic tradition, it is worth taking a look at the regulation of interests in Turkish civil law now and in the past. The analysis should also depict whether private law is prone to the impact of external factors such as religion. In my opinion, the main focus should be on the general law of obligations instead of the commercial law (in Turkey, interest-bearing transac-

⁵⁸ Briefly on early devices to provide crediting without infringing interest ban, see e.g. A. Udovitch, *Credit as a Means of Investment in Medieval Islamic Trade*, “Journal of the American Oriental Society” Vol. 87, No. 3, 1967, pp. 260-264.

⁵⁹ See the resolution of 4 May 1515 (http://www.intratext.com/IXT/ENG0067/_PE.HTM) (accessed 22 February 2024); more on the controversy *re montes pietatis*, see e.g. J. Majka, *Encyklika ‘Vix pervenit’ i jej wpływ na rozwój katolickiej nauki o lichwie*, “Roczniki Teologiczne”, Vol. 6, No. 2, 1958, pp. 35-36.

tions for professionals are separately regulated in the law of commerce). This is because the Swiss roots of the general Turkish law of obligations provide a better basis for the analysis of the potential impact of non-legal factors than in the case of commercial law. In addition, the general law of obligations should be more susceptible to any such factors as it regulates also non-professional relations. The non-professional spheres, e.g. family law, are often indicated as the areas more prone to the impact of social factors.

The first Turkish Civil Code⁶⁰ and Code of Obligation⁶¹ were part of the above-mentioned revolution of laws and secularization. Their analysis allows us to understand whether Turkish authorities tried to somehow differ their regulation from the Swiss regulation in order, for example, to follow the regulation of interests in a way similar to the one taken in the Ottoman period (e.g. by imposing the same interest cap).

In the main sections of TCO 1926 covering interests, we can see the exact reflection of the regulation of the Article 73 of the Swiss Code of Obligation of 30 March 1911⁶² which recognizes both the right of parties to contractually determine the amount of interest rate and the impact of other factors (e.g. custom). Namely, in Article 72 of TCO 1926, we read as follows:

*If someone is obliged to pay interest, but the amount is not fixed either by contract or by law or custom, the interest shall be paid at the rate of five per cent per annum. (It does not prejudice public law measures preventing the abuse in the matter of contractual interest).*⁶³

It is worth noting that this five per cent default amount was drastically increased to 30% in 1984, with the option to be increased up to 80% upon the decision of the Council of Ministers, by the special law regulating statutory and default interests.⁶⁴ LSDI Article 1 indicated that in the case of a lack of contractual arrangements, the interest rate above should be applicable for both dealings under the TCO 1926 and the Turkish Commercial Code.

⁶⁰ Turkish Civil Code of 4 April 1926 (Tur. *Türk Kanunu Medenisi*) law no. 743, Official Journal: 04.04.1926/339; hereinafter referred to as “TCC 1926”.

⁶¹ Turkish Code of Obligation of 22 April 1926 (Tur. *Borçlar Kanunu*) law no. 818, Official Journal: 08.05.1926/366; hereinafter referred to as “TCO 1926”.

⁶² The Swiss Code of Obligations of 30 March 1911 (Ger: *Obligationenrecht*), the Swiss Official Compilation of Federal Legislation: no. 220; all translations of this code are semi-official as they come from the official Swiss governmental website: https://www.fedlex.admin.ch/eli/cc/27/317_321_377/en (accessed 22 February 2024).

⁶³ *Bir kimse faiz vermesine mecbur olupta miktarı ne mukavale ile ne de kanun veya örf ve adet ile muayyen değil ise bu faiz senevi yüzde beş hesabıyla tediye olunur. (Mukavele ile faiz meselesinde suiistimalin meni hukuku amme kanunlarına aittir.)*

⁶⁴ The Law on Statutory and Default Interests of 4 December 1984 (Tur. *Kanuni Faiz ve Temerrüt Faizine İlişkin Kanun*) law no. 3095, Official Journal: 19 December 1984/18610, hereinafter referred to as “LSDI”.

This change correlated with high inflation in Turkey in the 80s and was a result of the changing socio-economic circumstances.⁶⁵ The interesting aspect of this law is that it was passed at the time when Turgut Özal and his Motherland Party, both with moderately pro-Islam agenda, were in power.

A similar pattern can be seen with the regulation of default interests. The TCO 1926 original text (Article 103) reflected the Swiss one (Article 104) and stipulated the annual interest rate of 5% applicable even if parties agreed contractually on the lower interest rate. The wording was as follows:

A debtor who defaults in the payment of a sum of money shall be obliged to pay interest for the past days at the rate of five per cent per annum, even if a lesser interest rate is stipulated in the contract.

*If more than five per cent interest is stipulated in the contract, either directly or in the form of a commutation in instalments, this interest may also be demanded from the defaulting debtor.*⁶⁶

[...]⁶⁷

In this case, the LSDI not only increased the interest rate to 30% (with the option of an increase upon the decision of the Council of Ministers), but also implemented the mechanism of claiming higher interests depending on macro-economic interest rates. Namely, if the bank discount at the place of payment and at the time of payment was higher than 30%, even if there was no contract between parties, default interest could be demanded according to the rediscount interest rate stipulated by the Central Bank of the Republic of Turkey for short-term credits (Article 2 LSDI).⁶⁸

The other interesting point is that the LSDI Article 5 formally confirmed the non-applicability of the Ottoman interest laws (*Murabha Nizamanamesi*) of the late 19th century that have been briefly described above. This provision was necessary because of debate in the Turkish judiciary and jurisprudence over the legal

⁶⁵ As mentioned in the reasoning of the Court of Cassation judgement dated 23 February 1994 (judgment E: 1993/5-600, K: 1994/80); also cited in the European Court of Human Rights Judgment of 9 July 1997, *Akkus v. Turkey*. The economic factors are also referred to in the discussion paper related to one of the amendments of the LSDI – see <https://www5.tbmm.gov.tr/sirasayi/donem21/yil01/ss116m.htm> (accessed: 22 February 2024).

⁶⁶ *Bir miktar paranın tediyesinden temerrüt eden borçlu mukavele ile daha az bir faiz tayin edilmiş olsa bile geçmiş günler için senevi yüzde beş hesabiyle faiz tediyesine mecburdur. Akitte doğrudan doğruya veya taksite raptedilmiş komüsyon şeklinde yüzde beşten ziyade bir faiz şart edilmiş ise bu faizde temerrüt eden borçludan istenebilir.*

⁶⁷ The third paragraph containing the translation of the respective paragraph of the Swiss Code of Obligation and allowing to apply a default interest rate in business dealings higher than 5% per year if the normal bank discount rate at the place of payment is over 5% was deleted upon implementation of the Turkish Commercial Code in 1956.

⁶⁸ *Ödeme yerinde ve ödeme zamanındaki banka iskontosu yukarıda açıklanan miktardan fazla ise, arada sözleşme almasa bile, ticari lalenle temerrüt faizi, T.C. Merkez Bankasının kısa vadeli krediler için öngördüğü reeskont faiz oranına göre istenebilir.*

impact of the Ottoman laws, especially the Ordinance of 1885,⁶⁹ on any potential limitation of interest rate. As mentioned above, the TCO (Article 72) reserved the applicability of the special public law regulations preventing abuses in the matter of contracts, but there was no general cap on interest rate in the private law sphere. For this reason, the Turkish Court of Cassation in a couple of judgments in the 30s and 40s confirmed the applicability of the old ordinance to some extent.⁷⁰ The most important judgement was made in 1943 and stated that the restrictions of the ordinance of 1885 remain in force in non-commercial relationships except for the maximum interest rate which was lowered to 8.5%⁷¹ (instead of 9% arising from the ordinance) when it comes to the transactions covered by the 1933 Act on Money Lending.⁷²

Therefore, there are at least two observations regarding the older Turkish obligation law to be kept in mind for the purpose of further paragraphs.

Firstly, the Turkish law of that period, similarly to the Swiss regulations, as a principle, granted parties a high level of contractual freedom when establishing the interest rate. However, the recognized and judicially confirmed applicability of the Ottoman laws on the interests are important mitigants showing the more protective approach of Turkish law.

Secondly, when compared to the Swiss framework, the Turkish regulations were more changeable – there was the LSDI introduced as a special law dedicated to this issue and the interest rate was increased. Contrary to the Turkish code, the Swiss regulations on interests in the general law of obligations have been maintaining the 5% interest rate since the Code of Obligation came into force. The Swiss lawmakers seem to trust in general rules protecting parties against exploitation of straitened circumstances (Article 21 of the Swiss Code of Obligation) and relatively new special protection reserved for consumers only.⁷³ Namely, the Federal Law on Consumer Credit⁷⁴ (Article 14) stipulates – as a principle – the interest rate of 15% for consumer credits, but allows the Federal Council to indicate a different interest rate. The Council uses this power and established the rate at the level of 10 (or 12 in some cases) percentage points increased by the indices

⁶⁹ On this issue, see F. Alperen, *La Différenciation...*, p. 109 *et seq.*

⁷⁰ The applicability of some Ottoman laws should not be very surprising given the consensus that the Republic of Turkey is the continuation of the Ottoman Empire – see P. Dumberry, *The Consequences of Turkey Being the 'Continuing' State of the Ottoman Empire in Terms of International Responsibility for Internationally Wrongful Acts*, "International Criminal Law Review", Vol. 14, 2014, pp. 261-273.

⁷¹ F. Alperen, *La Différenciation...*, p. 112.

⁷² Act on Money Lending of 8 June 1933 (Tur. *Ödünç para verme işleri kanunu*) – law no. 2279 Official Journal: 18.06.1933/2430.

⁷³ P. Tercier, P. Pichonnaz, H. Develioğlu, *Borçlar Hukuku. Genel Hükümler*, İstanbul 2016, p. 347.

⁷⁴ The Federal Law on Consumer Credit (Ger. *Bundesgesetz über den Konsumkredit*) of 23 March 2001, the Swiss Official Compilation of Federal Legislation: no. 221.214.1.

3-month compounded Saron (Swiss reference rate – “Swiss Average Rate Overnight”). Thus, the issue of interests seems to be of more significance in the case of Turkey.

Nevertheless, there are no signs of the older Turkish law tending to eliminate or highly curb the interests.

The newer civil law regulations – i.e. the new Turkish Civil Code⁷⁵ and the new Code of Obligation⁷⁶ allow us to see whether the law has changed anyhow in order to e.g. address the current authorities’ negative opinion on charging interests. What is important, the LSDI remains in force although it has been subject to some non-revolutionary adjustments (e.g. in 1999, 2005 and 2018).

In Article 120 of the TCO 2011, we can see the following wording:

The annual default interest rate is stipulated by law binding in the moment when the obligation arises, unless parties agree otherwise.

The annual default rate agreed contractually cannot exceed the statutory rate, as regulated in the paragraph above, by more than 100%.⁷⁷ [...]

In Article 88 of the TCO 2011, addressing the interest rate for legal transactions, the wording is as follows:

The annual interest rate in the interest-bearing obligations should be set in line with the law applicable as of the day when the interest obligation arises; unless parties agree otherwise.

The contractually agreed interest rate cannot exceed the statutory interest rate, as laid down in the paragraph above, by more than 50%.⁷⁸

The “statutory interest rate” in the two Articles above relates to the modified mechanism provided by the current wording of the LSDI. Its Article 1 stipulates a 12% statutory annual interest rate for both interests arising from the TCO 2011 and the new Turkish Code of Commerce⁷⁹ if there is no contractual arrangement in this regard.⁸⁰ There is also an option to increase/lower or convert the interests into monthly ones upon the President’s – previously Council of Ministers’ – deci-

⁷⁵ Turkish Civil Code of 8 December 2001 (Tur. *Türk Medeni Kanunu*) law no. 4721, Official Journal: 08.12.2001/24607; hereinafter referred to as “TCC 2001”.

⁷⁶ Turkish Code of Obligation of 11 January 2011 (Tur. *Türk Borçlar Kanunu*) law no. 6098, Official Journal: 04.02.2011/27836; hereinafter referred to as “TCO 2011”.

⁷⁷ *Uygulanacak yıllık temerrüt faizi oranı, sözleşmede kararlaştırılmamışsa, faiz borcunun doğduğu tarihte yürürlükte olan mevzuat hükümlerine göre belirlenir. Sözleşme ile kararlaştırılacak yıllık temerrüt faizi oranı, birinci fıkra uyarınca belirlenen yıllık faiz oranının yüzde yüz fazlasını aşamaz.*

⁷⁸ *Faiz ödeme borcunda uygulanacak yıllık faiz oranı, sözleşmede kararlaştırılmamışsa faiz borcunun doğduğu tarihte yürürlükte olan mevzuat hükümlerine göre belirlenir. Sözleşme ile kararlaştırılacak yıllık faiz oranı, birinci fıkra uyarınca belirlenen yıllık faiz oranının yüzde elli fazlasını aşamaz.*

⁷⁹ I.e. Turkish Code of Commerce of 13 January 2011 (Tur. *Türk Ticaret Kanunu*) law no. 6102, Official Journal: 14.02.2011/27846; hereinafter referred to as: “TCoC”.

⁸⁰ *Borçlar Kanunu ve Türk Ticaret Kanununa göre faiz ödenmesi gereken hallerde, miktarı sözleşme ile tespit edilmemişse bu ödeme yıllık yüzde oniki oranı üzerinden yapılır.*

sion (Article 1 para. 2). Indeed, such a decision was taken in 2005 by the Cabinet of Recep Tayyip Erdoğan which established the interest rate at the level of 9%.⁸¹

Consequently, if there is no contractual determination of the interest rate, a 9% annual interest rate applies to both the default interest rate and interest rate for legal transactions. If there is an agreed interest rate, it is by law capped at 13.5% for interest-bearing transactions and 18% per year for default interests.

The LSDI (Article 3) contains specific rules for compound interests. As a principle, it is forbidden, but the applicability of respective regulations of TCoC is reserved. Indeed, the TCoC has a provision enabling limited compound interests (Article 8 para. 2) which can be perceived as a confirmation of the quite long-lasting accepting approach to applying anatocism.⁸² Apart from that, the TCoC general section on interests expresses the freedom of contracting when it comes to purely business-to-business relationships (Article 8 para. 1), but also refers to the application of special regulations related to statutory, capital and default interests (Article 9). This makes the LSDI applicable to business relationships and creates controversy whether the TCO 2011 applies to the business-related dealings. Nevertheless, it seems that the leading opinion is that this code is *lex specialis* towards the TCO 2011,⁸³ and thus it is not subject to the TCO 2011 limitations on the amount of interest rates (as described in the paragraph above). It is also worth noting that the TCoC contains some contract-specific regulations for interests (e.g. Article 1019 on interests in ship mortgage).

So, to summarize the regulation of interests in commercial relationships, the LSDI remains the prevailing legal act, but allows business dealings to take a more “lenient” position. Namely, it allows to apply compound interest and does not create an interest rate cap.

What is also worth emphasizing, current Turkish private law not only allows to charge interests. In some cases, it even obliges some entities to charge these. This can be seen in the example of Article 441 of TCC 2001 laying down the rules for the use of money of a person under guardianship:

Money that is not necessary for the needs of the person under guardianship or to manage his/her assets, in order to get gains from interests, should be placed on the domestic bank account indicated by the guardianship authority or used to buy State Treasury bonds.

⁸¹ More on that – see K. Yağcı, *Anapara faizi ve temerrüt faizine üst sınır getiren TBK m. 88 ve TBK m. 120 hükümlerinin ticari faizler (TTK m. 8 ve TTK m. 9) bakımından uygulanabilirliği*, “İstanbul Hukuk Mecmuası”, Vol. LXXI, No. 2, 2013, pp. 421-438.

⁸² See F. Alperen, *La Differentiation...*, p. 102 and Cassation Tribunal judgement of 1930 referred to there.

⁸³ K. Yağcı, *Anapara...*, pp. 431-435, P. Tercier, P. Pichonnaz, H. Develioğlu, *Borçlar Hukuku...*, pp. 348-349.

*The guardian stalling for a month to use money in this way is liable to cover the damages arising from the loss of interests.*⁸⁴

To sum up, in Turkey, the interests are more comprehensively regulated and more changing over time than in the case of the source legal system of Switzerland. In Turkey, there is a special law covering this subject (LSDI), and the tools to swiftly (i.e. without changing the law by parliament) affect the interest rates are more far-reaching (i.e. they are not limited to consumer loaning) than in Switzerland. In addition, the provisions on interests in the TCO 2011 are significantly longer than the regulation on interests in the Swiss Code of Obligations.

Moreover, the interest rates both in the case of default interests and interests in interest-bearing legal transactions (unless otherwise agreed) are higher than in the Swiss law of obligation. Even at the time of the revival of the Islamic agenda at the times of Turgut Özal, the interest rate in private transactions was increased, which was simply driven by economic factors. This is an additional argument that there are no signs of the influence of Islamic and governmental “anti-interest” narration in the field of private law.

If any influence or inspiration can be considered, one may claim that the fluctuation (9-12%) of the standard interest rate under the LSDI and TCO 2011 resembles the late Ottoman laws which had been in force until the promulgation of LSDI. So, even though there is no confirmation in any discussion papers/reports accompanying Turkish civil law legal acts, the Ottoman tradition in this regard seems to have some impact. Or at least it shows the traditionally acceptable number of interest rates.

There is, however, an important “anti-interest” innovation when comparing the TCO 1926 and the TCO 2011. The former did not impose the maximum interest rates (only the minimum one – in the case of default interests) and the function of capping the interests was on the above-mentioned Ottoman laws on interests (at least until their formal expiration). The change between the TCO 1926 and the TCO 2011 was implemented in order to protect debtors, since in practice too high interests had been imposed by lenders.⁸⁵ As far as we can see in the official act, there was no other reasoning (e.g. leaning towards interest-free Islamic economics) behind this mechanism than the general protection of debtors. Thus, it is hard to attach this change to any anti-interest policy of the Turkish lawmakers. This is demonstrated by a mention in the referred justification that says that there is a preference to not insert the exact amount of interest rates into the TCO 2011

⁸⁴ *Vesayet altındaki kişinin kendisi veya malvarlığının yönetimi için gerekli olmayan paralar, faiz getirmek üzere, vesayet makamı tarafından belirlenen millî bir bankaya yatırılır veya Hazine tarafından çıkarılan menkul kıymetlere çevrilir. Paranın yatırılmasını bir aydan fazla geciktiren vasi, faiz kaybını ödemekle yükümlüdür.*

⁸⁵ See the justification for the TCO 2011 as available at <https://www5.tbmm.gov.tr/sirasayi/donem23/yil01/ss321.pdf> (22 February 2024), pp. 60-61 (re: interest-bearing obligations), pp. 70-71 (re: default interests).

because this is a basic law and the number of due rates may be changed due to economic changes.

In addition, despite recent changes, both the TCO 2011 and LSDI as well as the TCC 2001 keep using the traditional Turkish (and Ottoman) term *faiz* instead of making any reference to the traditional Arab word of *riba*. As I have observed before on the example of the institution of betrothal,⁸⁶ sticking to the language of the code and previous regulations, instead of traditional, custom/religion-rooted vocabulary, is one of the distinctive features of the working legal transplants. Thus, the example of interest rates provides an additional argument that the Swiss legal transplant has been accepted by the “body” of the Turkish law.

CONCLUSIONS

The Turkish jurisprudence from the very beginning of the TCC 1926 life observed that there are two main approaches to the interest in law. The first approach is to emphasize the freedom of contracting (and thus a rather critical one towards any limitations of the interest rates). The opposite approach is accepting towards any top-down regulation of interest rates.⁸⁷ The analysis provided above – and, in particular, the fact of sticking to the Ottoman laws restricting applicable interest rates, shows that the Turkish law from the beginning has taken a more protective approach than the Swiss legal system.

However, there are no signs of any Islam-motivated changes – despite the orthodox-Islam-rooted speeches of the Turkish president. The body of the implemented private law seems to be invulnerable to the political agenda and impact of Islam. That is not surprising if we remember the discussions related to the concept of legal transplants. According to them, private law remains the field of legal scholars and professionals, not politicians. Consequently, private law can be quite invulnerable to many factors external to the law itself like the customs or religion of the local community. The history of interests (at least by now) has given additional arguments for the supporters of Watson.

Anyway, if we want to trace any signs of the impact of a given extra-legal tradition or social factors on law, it appears the Ottoman tradition was more relevant for shaping the law (e.g. the standard amount of interests) than the current Islamic teachings and Islamic tradition. Moreover, the analysis of historical reasonings behind some legal acts shows that in the Republic of Turkey, the biggest impact on interest-related laws was arising from economic rather than sociological fac-

⁸⁶ M. Tutaj, *Przeszczep prawny w działaniu – uwagi na przykładzie instytucji zaręczyn w prawie tureckim*, “Kwartalnik Prawa Prywatnego”, Vol. XXXI, No. 3, 2022, pp. 523-524.

⁸⁷ H. Elbir, *Fahiş...*, p. 854.

tors. That is an additional argument for those who believe that Islam has limited influence on private law.

Nevertheless, the issue of interests and their regulation in the private law regulations is worth attention. If they appear to be changed in the direction of limiting contractual freedom to determine interest amount or lowering the rates, this may mean that Islam-related agenda can start affecting private law. This is particularly likely given the far-reaching competences of the Turkish president (arising from the law of 2018) in private law.

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