REAL PROPERTY, MORTGAGE AND WAKF, ACCORDING TO OTTOMAN LAW

Published @ 2017 Trieste Publishing Pty Ltd

ISBN 9780649024346

Real Property, Mortgage and Wakf, According to Ottoman Law by D. Gatteschi

Except for use in any review, the reproduction or utilisation of this work in whole or in part in any form by any electronic, mechanical or other means, now known or hereafter invented, including xerography, photocopying and recording, or in any information storage or retrieval system, is forbidden without the permission of the publisher, Trieste Publishing Pty Ltd, PO Box 1576 Collingwood, Victoria 3066 Australia.

All rights reserved.

Edited by Trieste Publishing Pty Ltd.
Cover @ 2017

This book is sold subject to the condition that it shall not, by way of trade or otherwise, be lent, re-sold, hired out, or otherwise circulated without the publisher's prior consent in any form or binding or cover other than that in which it is published and without a similar condition including this condition being imposed on the subsequent purchaser.

www.triestepublishing.com

D. GATTESCHI

REAL PROPERTY, MORTGAGE AND WAKF, ACCORDING TO OTTOMAN LAW

Trieste

REAL PROPERTY,

MORTGAGE AND WAKF

ACCORDING TO OTTOMAN LAW.

By Dr. D. GATTESCHI.

Translated from the Original Italian, published in 1869.

By EDWARD A. VAN DYCK,
ALEXANDRIA.

LONDON:
WYMAN & SONS, 74-76, GREAT QUEEN STREET,
LINCOLN'S-INN FIELDS, W.C.
1884.

O.F.

YORK
BRARY
339041
TOR, LENOX AND
DATIONS.

WYMAN AND SONS, PRINTERS,
GREAT QUEEN STREET, LINCOLN'S-INN FIELDS,
LONDON, W.C.

TABLE OF CONTENTS.

REAL PROPERTY,

MORTGAGE AND WAKF ACCORDING TO OTTOMAN LAW.

§ I.—*Of Ottoman Laws in General.*

1. In the study of Ottoman legislation it is indispensable to bear in mind the fundamental distinction that exists between the law, properly and truly so called, —that is, the Moslem *Shara*,—and the ordinances of the rulers, which constitute the *Kânoun*.

2. Moslems believe, in fact, that for them there is but one law, and that this law is immutable and invariable, to wit, the religious law (*El Sharaa*) that is found written in the Korân and in the Mahomedan traditions (*Sunnah*), and that contains the private civil law also.*

3. The rulers cannot make the least alteration in this law; and, therefore, they have, strictly speaking, no legislative power.† They can, at most, interpret it, and even in this they are not free, but are bound to take the opinion of the law doctors,—*i.e.*, the *Muftis*, at the head of whom stands the *Sheikh-ul-Islâm* of Constantinople,—and obtain their "parere," or *fatwa*.‡

4. This is the reason why Moslem law has not hitherto

* Miltitz, *Manuel des Consuls*, tome i. Appendix VIII.

† True, Moslem jurists hold that the sovereign has the fulness of legislative power, but only as to that which is not regulated by the religious law nor contrary to it.—Miltitz, *loc. cit.*

‡ Miltitz, *loc. cit.*

progressed. And if, in very recent times, attempts have been made to improve it, they have encountered the greatest obstacles; indeed, it can be said of the new principles, established by the more recent Imperial ordinances, that they have not at all penetrated into the habits and convictions of the people.

5. Thus, the new Constitution of the Ottoman Empire, contained in the Hatti-Sharîf of 1839, and in the Hatti-Humayoun of 1856, was not published until it had been sanctioned, so to speak, by the *fatwas* of the Moslem *Ulema*, who declared that the principles contained in those two Charters were in conformity with the *Sharaa*, or religious law. In reality, however, they are not in conformity with it, but may rather be considered as an attempt made by the Sultan to modify and correct the Moslem law in its most intolerant and impracticable parts; and therefore it is that these charters are but little respected. By good Moslems they are regarded as nothing else than a violation of the *Sharaa;* and the religious courts, that is to say, the *mahkamahs*, presided over by the *Câdis*, in no way respect or observe them.

6. Equal progress has been also made by Ottoman law in the matter of commercial legislation. Of the latter it can be said, without fear of erring, that there are no traces of it in Moslem law. This was a very great void, and one which the Sultans have thought that it behoved them to fill up. And to do so, they could not but recur to the commercial legislation of Europe, which has been accepted by the world at large. Moreover, Turkey could no longer do without it after that she had entered into the European political concert, and had promised to adopt the best out of that which European civilisation has produced. Indeed, the Sublime Porte adopted the French code of commerce, copying it almost literally. But how was it to be adopted, if the Sultan has no true legislative power? Recourse could not be had to the ulemas, or law-doctors, because certainly the principles of European commercial law could in no way have been found either in the Korân or in the Sunnah. And, so far as we are aware, the Sultan did not recur to that

body of men; he simply published the code of commerce *motu proprio*, and in the exercise of his autocratic power.

7. But who would have applied it? Certainly not the Moslem courts of law. Let any one present himself, if possible, at the *Mahkamah* and quote the Ottoman code of commerce to the judge. The *Câdi* would deem himself insulted, and would reply that that code is not law, and that he does not know it. Let any one go to the *Mahkamah*, and ask the *Câdi* to recognise a commercial company as a juridical entity capable of holding property, and hence request him to register a house or a parcel of land in its name, he will answer that the *Sharaa* does not recognise it as such, and that, the code of commerce published by the Sultan to the contrary notwithstanding, he cannot comply. His refusal will be even more emphatic if he be asked to condemn any one to the payment of legal interest, which is admitted by the Ottoman commercial code, and also by other Imperial ordinances, but which the *Sharaa* most strictly forbids.*

8. Hence, in order to be able to apply the commercial code, the Porte had to institute suitable tribunals, wherein the religious element does not at all enter, and entrust them with its application. Any tribunal other than these could not have done it.†

9. The same had to be done in order to obtain the application of the imperial ordinances that have civil causes for their subject-matter. Councils, or *Madjlises*, have been instituted in every chief provincial city, and to them has been entrusted the administration of justice in accordance with the new Imperial ordinances. Without such courts the latter would have remained wholly a dead letter, which they are even now in part, by reason of the bad organisation of these tribunals.‡

* Ordinance of 1852 relating to the uniform rate of interest, and Appendix to the Code of Com. Title III. of interest.

† As to the Tribunals of Commerce, see the Ottoman Code of Commerce and the *Règlement* for Egypt in Gatteschi's *Manuale di Diritto pubblico e privato Ottomano*, pp. 341 and 546.

‡ As to the organisation of such Tribunals, see vol. i. of the *Bollettino*, p. 8, *et seq.*