

# The Role of Judicial Creativity and Equity in the Developments of Turkish Law and Its Covert Hybridity

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## I. INTRODUCTION

We know that the Turkish legal system is not a mix of civil law and common law and that Turkey is not a mixed jurisdiction in the classical sense. Legal evolution in the Turkish Republic, following the collapse of the Ottoman Empire, was instigated through a strong desire to become western, contemporary and secular, and today rapid law reforms are still being made in order to fulfil the requirements of the European Union *acquis communautaire* in the hope of joining the European Union. Rather than being homegrown, this evolution has been through a succession of receptions from the civilian world. In appearance the legal system, which is completely codified, belongs to the civilian tradition and is regarded as a subgroup of the Germanic legal tradition. Its ingredients have been borrowed from Switzerland, Germany, Italy and France. Its major inheritance from the Ottoman Empire, Islamic law, has been first suffocated and then discarded by the legislator.

Directly derived from the above developments, the legal system is a reconstructed synthetic and eclectic one. It is interesting to observe how this amalgam with most of its parts hailed from Roman law, a source totally alien to the endogenous traditions, works. In order to melt down the laws in the Turkish pot, and to cater for the lives of a people and meet their actual needs, which sometimes clash with the received laws, not

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only do the laws have to be blended, but gaps need to be filled. This function falls to the creativity of the judges, and in the process of developing the law, a new hybridity, though covert, was and is being created.<sup>1</sup> Nevertheless, though covertly mixed, the legal system is overtly civilian.

In spite of the fact that theory tells us that in the civilian tradition judges do not on the whole perform a creative role and that equity is not a separate source of law, all Turkish courts and especially the Court of Last Instance, the Court of Cassation (the *Yargıtay*), were enabled to make adjustments to the law by the flexible rules present in the 1926 Civil Code (and now the 2002 Civil Code) articles 1, 2, 3 and 4, which correspond *verbatim* to articles 1, 2, 3 and 4 of the source Swiss Civil Code. These are general rules on judge's role and discretion, justice and equity, and objective good faith and abuse of rights. For our purposes, the most important of these articles are articles 1 and 4. For the development of the Turkish law and legal system, and the fitting of the frame to the demands of the people, these articles still serve a vital role. The pivotal article 1 reads:

The law [the Civil Code] must be applied in all cases that come within the letter and the spirit of its provisions. If no relevant provision can be found in the statute, the judge shall decide in accordance with existing customary law and, in its absence, in accordance with the rule that he would lay down, were he the legislator. When deciding, the judge must be guided by accepted legal doctrine and case law.<sup>2</sup>

Article 4 supplementing article 1, and as significant as it, if not more, states, 'In those cases where the law gives the judge discretion, or where he has to decide according to the circumstances, or where there is just cause, he must decide according to justice and equity.'

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1. In our case, the values of the majority reflect a different socio-culture related to one past element of the legal system, that of the Ottoman Empire—all its laws erased by the Turkish Republic—significantly different to the socio-cultures represented by the incoming laws. It is this unique composite that makes it possible to consider the Turkish legal system as a 'covert' mix, a novel hybrid. This issue was discussed by me in the WSMJJ conference in Malta in 2012: 'Turkey's Synthetic Civilian Tradition in a 'Covert' Mix with Islam as tradition: A New Hybridity?' (forthcoming).

2. It is important to note that the clauses are not at all direct imperatives: the second sentence is rather in the form of advice to the judge. This article, defining how the judge is to exercise these powers and from which sources of law he is to draw in coming to a decision, provides guidance. This first article of the Code also can be taken to mean to be an indication of what are to be the sources of the law within the Code and in private law at large. Also note that custom is 'existing custom' rather than 'ancient custom' as one of the fundamentals of the law reform of 1926 was to abrogate old law.

The less relevant articles for our purposes, though important for the decision making process of the judge, are articles 2 and 3. Article 2 states, ‘Everyone must use their rights and perform their obligations in good faith. The law does not protect the manifest abuse of a right’. Article 3 stipulates, ‘Where the law demands good faith for the birth of a right, its existence is assumed. Anyone who does not show the care expected of him in the circumstances, cannot claim to be in good faith’.<sup>3</sup> All the four articles above are applicable, where appropriate, in all branches of private law (article 5).<sup>4</sup> In fact, they play a leading role and help the judges in matters of public law also. However, note that in none of the above articles is there reference to natural law and natural reason.

In addition, it is significant that 1982 Constitution article 36 states, ‘No court can abstain from hearing a case within its jurisdiction’, and article 573/6 of the Code of Civil Procedure on the responsibility of judges stipulates, ‘An action for damages may be brought against a judge or the president of an office of execution for the following reasons: . . . Denial of justice’. Denial of justice is ‘the unjustified rejection of a petition legally acceptable’ or ‘the failure to proceed with a case because of bad faith, giving an immaterial excuse’ (article 574 of the Code of Civil Procedure). What comes to the foreground here, more than equity in interpretation and discretion, is equity as a gap-filling devise—a gap to be understood as accidental gap.

In this Article I would like first to analyse what articles 1 and 4 mean for the Turkish judges and academics and their connection to other provisions and to equity. Then I will look at some cases in a number of selected areas, such as contract law, commercial law and family law, where these articles have been at work and used by the courts to reach innovative solutions.<sup>5</sup> In fact, even some Islamic institutions and demands based on them, though not officially recognised by the legal framework, are also being accommodated under the name of tradition, as long as they are not related to the public law sphere and can be reinterpreted as compatible with the Constitution and the legal framework. Such developments by the courts have made it possible not only to ‘fit’

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3. Articles 2 and 3 indicate that the source Swiss Code (and therefore the Turkish Civil Code) goes further than may other systems in its protective and humanitarian tendency, as rights will be protected with proper consideration of the rights of others. For further appraisal of these articles, see E. ADAL, *FUNDAMENTALS OF TURKISH PRIVATE LAW* 50-52 (Betaş: Istanbul, 5th ed. 1996).

4. In more specific terms, the 2011 Commercial Code article 1/1 states that the Commercial Code is part and parcel of the Civil Code.

5. For more information in specific areas of private law where these articles are used, see ADAL, *supra* note 3, at 49-71.

the system to its social environment but also provide for equity to work in the filling of the gaps as well as interpretation by the judges, thus aiding also the hybridity that we observe developing in this otherwise codified civilian legal system, as tradition bubbles through the underlay and erupts to the surface of the civilian overlay. The Turkish pot is boiling, and these bubbles may prophesize further need to increase the use of judicial creativity, of discretion and equitable considerations.

Next, I will also consider some developments in public law. Turkish administrative law is a derivative of the French, and following cases emanating from the French *Conseil d'Etat* and French legal doctrine, the Turkish *Conseil d'Etat* (the *Danıştay*) uses equitable considerations and discretion, where allowed, to develop innovative solutions.<sup>6</sup>

## II. INSTANCES OF JUDICIAL CREATIVITY AND EQUITY IN THE AREA OF PRIVATE LAW

First a few words on equity as understood and used in this legal system. By legislative acknowledgement of justice, equity, objective good faith and abuse of rights to be utilized as tools by the courts, the courts have been given freedom to use discretion and decide in equity. This shows that the codification itself has enumerated and allowed the use of such conceptual tools. Where there are no explicit provisions in the statute, gaps are to be filled by the judge using these tools. However, though a hierarchy is established in the use of sources, the existence of gaps is not a precondition of equitable activity, to be seen below, for instance, in adapting the contract to changed circumstances.

Here equity is '*aequitas*', that is, not a separate institution, but a method of handling sources and of itself a secondary source of principles, a conceptual instrument, a facility allowing and encouraging judges to have a wider say in developing the law. In its popular sense, equity is synonymous with fairness and justice. If we regard the meaning of equity in common law as predominantly procedural and technical, then equity in the civilian sense is conceptual. Its logic is the manifestation of the civilian principle that a judge must decide and resolve disputes in front of him whether there is a provision in the legislation or not. Thus, equity is the product of a mode of thought reflecting an approach to the problems of life and provides a satisfactory response to men's conscience. In this meaning, equity is a *sine qua non*

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6. See E. Öricü, *Conseil d'Etat: The French Layer of Turkish Administrative Law*, 49 INT'L & COMP. L.Q. 679-700 (2000); E. Öricü, *The Turkish Conseil d'Etat and Privatisation, Public Service Concession Contract and International Arbitration*, 6 EUR. PUB. L. 345-54 (2000).

of any just and fair society and legal culture. In interpretation and construction, every judge can resort to this use of equitable considerations with a degree of discretion. Equity can mean good faith in contractual obligations, interpretation regarding intention rather than form, not being unjustly enriched to the detriment of another, not being allowed to deny one's own act and not being able to improve one's position by one's own wrong doing. Equity as an integral part of law indicates two aspects of justice: justice as equality and justice as fairness.

This we see very clearly in article 4 of the Turkish Civil Code where it is overtly stipulated that the judge must decide according to justice and equity where the law gives him discretion, or where he has to decide according to the circumstances, or, more importantly, where there is just cause. In Turkish private law, justice and equity have a great significance in a number of areas, and the use of articles 1 to 4 by the judges is widely encountered. By giving the judge the discretion to decide in justice and equity, the Civil Code article 4 provides one way of guaranteeing that the Code lives beyond its times and can cater for all eventualities covered, if not by its words, then its spirit. With the assistance of article 1, the judge applies the Code, existing custom and can also find a third source of law in his quasi-legislative capacity: finding and creating his own law. His guide will be approved legal textbooks and prior judicial decisions from which he will seek inspiration, and they will prevent him coming to arbitrary judgments and enable him to put into effect the spirit of the legislation. It must be remembered that in Turkey, certain precedents (unification of decisions by the *Yargıtay* that emanate from the General Assembly of Joints Chambers) are binding and have to be followed by the lower courts and by the *Yargıtay* itself, and therefore must be taken into consideration in addition to statutes. Among the sources a judge can consult is also foreign law, and we see extensive use being made of Swiss jurisprudence and legal doctrine. The judge can complete the work of the legislator in establishing order and justice.

To illustrate the use of the above possibilities, I will first consider a number of cases emanating from the *Yargıtay*,<sup>7</sup> which deal with 'force majeure', 'the collapse of the foundation of the contract', 'the intervention of the judge to the contract' and 'adapting the contract to changing conditions'. Though principles of good faith, *pacta sunt servanda*, *clausula rebus sic stantibus* and *imprévision* appear in legal vocabulary, both judicial and academic, in fact, there was only one article

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7. All the cases are in Turkish and have been translated by this author.

in the Code of Obligations (article 117, now 2011 Code articles 136, 137 and 138) talking of ‘impossibility’. This terminated obligations, and therefore the judges resort to and made good use of articles 1, 2 and 4 of the Civil Code. In one decision, the *Yargıtay* extensively discussed all the above concepts in a doctrinal manner. Having established the fact that Turkish contract law rests on the principle of ‘*pacta sunt servanda*’ and freedom of contract, and yet there is a requirement that there should be equality between the parties, the Court stated:<sup>8</sup>

In synallagmatic contracts there is a balance between obligations while the contract is being formed which must be upheld at the time of performance. However, this balance might be unacceptably upset for one of the parties as a result of objective and extraordinary events such as war, economic crises of vast proportions, extreme increases in inflation, shock devaluation and substantial falls in the value of money. In such a case there will be a conflict between the duty to uphold the contract and contractual justice. This conflict is to be resolved by the application of the principles of ‘the supervening circumstances’ clause, ‘*clausula rebus sic stantibus*’ and ‘adapting the contract to changing conditions’. . . . In such a case the judge will make use of the articles 1, 2 and 4 of the Civil Code and decide, according to the facts of the specific case, either to increase the obligation of the creditor in the interests of the debtor, or release the creditor totally or partially from his obligation in his own interest. In this, the Court relies on justice, equity and objective good faith. In the instant case there is a ‘real property sales contract by instalments’ with payments to be made in DM. The DM has gained excessive value against the Turkish lira. Performance has become unbearable and the court has been asked to intervene and adapt the contract to changing circumstances. What should the court do? In the light of the above exposition, through the expert evidence of an accountant and an economist, it must determine the normal value the foreign currency should have reached taking into consideration the country’s economic conditions; accept this value in the interest of the seller; then determine the shock increase. . . . If the conclusion reached is that the basis of the contract has collapsed and the equilibrium of interests has deteriorated unbearably to the detriment of the plaintiff, the court must determine for what percentage of the selling price the buyer should be liable and adapt the selling price within the contract in keeping with the intention of the parties, according to the principles of justice, equity and good faith (articles 1, 2 and 4) as far as possible and again in foreign currency.

The *Yargıtay* was very clear in its statement that ‘*pacta sunt servanda*’ is limited by other principles of private law. The court referred to legal

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8. 13HD, 1995/145; 1995/3339; 6/4/1995, (1995) 21 YARGITAY KARARLARI DERGISI 911-19.

doctrine to further justify its position and views on the doctrine of 'contractual adaptation'. According to the Court, insistence on strict performance of contractual terms may lead to a violation of article 2/2 of the Civil Code, that is, it could be considered as an act of bad faith. 'To accept that a seller can be unjustifiably enriched outside the contract terms within a day cannot be accepted. The courts can create rules for the case using their powers arising from article 1.' The Court pointed out that when conditions change and if the parties have not inserted '*force majeure*' clauses into the contract, gaps appear in the contract which must be filled by the courts through interpretation in keeping with the aim of the contract and the intention of the parties. In this the judge relies on his powers arising from article 1/1 of the Civil Code, thus creating rules for the facts before him to fill the gaps in the contract. This is the correction or modification of the contract through interpretation. The Court stressed the fact that this possibility is exceptional and secondary: the events arising after the formation of the contract must be extraordinary and objective, the balance between the obligations must be seriously distorted, the plaintiff asking for adaptation must be without fault in the occurrence of the events, the events must be totally unforeseeable or the seriousness of their consequences must be unknown, and the contract should generally be a long-term contract and synallagmatic.

The Court's intervention in the above case was based on supervening circumstances and an assessment of the events. The economic pressures that concerned the *Yargıtay* were the high inflation rate and the drastic economic conditions prevailing in the free-market economy in Turkey in 1994. These conditions led the Court to become actively involved in redressing balances and the equilibrium in the name of equity and use the powers granted to it by the Civil Code to creatively fill in the gaps. As seen, the Court felt that it must redress the balance and introduced even administrative law measures and remedies into civil law for considerations of justice, equity and good faith. It talked of such principles as *clausula rebus sic stantibus* and *imprévision* as if they were always and already well-established principles of private contract law. In doing so, the *Yargıtay* also referred to a Swiss Federal Court decision. Nevertheless, the Court is keen to differentiate between 'great difficulties' and 'impossibility of performance' in the application of both

*imprévision* and *clausula rebus sic stantibus*, applying these principles only where an impossibility exists.<sup>9</sup>

A similar situation arose again, where the *Yargıtay*, after stressing that freedom of contract and *pacta sunt servanda* were in the essence of the law, pointed out that the State has the constitutional duty to secure the proper working of the money, credit, capital, good and services markets and thus to protect the consumer. According to the Court, when credit is obtained from the banks indexed to foreign currency and the conditions have changed, the courts can assess the circumstances and ‘adapt’ the contract if need be, within the possibilities provided by article 4 of the Civil Code. In the instant case, both articles 2 and 4 were used, as the issues of justice, equity, integrity and objective good faith were deemed to be at the root of the case.<sup>10</sup> Again there was extensive discussion of the ‘*imprévision*’ theory and ‘*clausula rebus sic stantibus*’ and the fact that today in Swiss-Turkish law ‘objective good faith’ was used in such circumstances. Three earlier *Yargıtay* cases and eight academic writers were referred to, to justify this stance. According to the Court, what is important here is to determine the assumed will of the parties, that is, what one can assume the parties would have willed, if they were contracting under these new circumstances.<sup>11</sup> Expert opinion is also called for.

There are also a number of cases where the *Yargıtay* intervened when rents were put up beyond equitable levels, again making use of articles 1, 2 and 4 of the Civil Code, demonstrating its creativity in filling the gaps for reasons of equity. In one of these cases, the *Yargıtay* pointed out that in the year when this lease contract was drawn up, in spite of the fact that the parties knew of the high inflation rate, it was agreed that every year there would be an increase of 40% in the rent to be paid. The lawsuit brought by the leaseholder was one demanding ‘contractual adaptation’ as the inflation rose to extraordinary levels. The Court opined that if conditions change beyond expectations, the parties cannot be expected to be held to the contract, and in keeping with article 2 of the Civil Code, the possibility arises to reconsider the contract. Among events negatively affecting the balance between the obligations of the parties are war, economic crises and extreme inflation. Once the judge accepts that the contract has collapsed, he adapts the contract to the new

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9. See, e.g., 13HD. 1996/3653; 1996/3920; 16.4.1996, (1996) 22 YARGITAY KARARLARI DERGISI 1086-90. There are many recent similar cases.

10. HGK, 1996/11-762; 1997/77; 19.2.1997, (1997) 23 YARGITAY KARARLARI DERGISI 679-85.

11. *Id.* at 683.

circumstances.<sup>12</sup> This is made possible by articles 1, 2 and 4 of the Civil Code. ‘The arising gap is to be filled by interpretation in keeping with the principle of good faith. To insist that the contract should apply without “adaptation” would be tantamount to bad faith covered by article 2/2.’ The *Yargıtay* then went on to elaborate the kind of factors the judge should consider when reaching such a decision and the methods he can employ to fulfil the requirements of articles 2, 4 and eventually 1. There are a number of similar decisions between 1995 and 1999 when inflation peaked in Turkey.

We can see another creative effort shown by the same Court in making use of article 1 of the Civil Code. In a case arising under the Commercial Code and related to liability insurance for goods sent from abroad which were burnt in the vehicle during transport, the *Yargıtay* recognized the fact that in essence a contract is binding between the parties to it and that third parties do not have rights arising out of that contract. Yet, in the instant case, the plaintiff who did not receive the goods was a third party to the contract for liability insurance. The Court analyzed the purpose of the liability insurance, the doctrine that was not decisive on the rights of the third parties, and then article 1/1 of the Civil Code. It went on to say that according to article 1/1, the Court had to apply the words of the statute, but in the absence of such, had to look at other relevant provisions, in this case in the Commercial Code. According to two articles of that Code (articles 1309, 1310), third parties who suffered damages could apply directly to the insurer. It is not right to say, as the lower court had said, that there was a gap in the law because there was no applicable provision. Using analogy, and making use of the two articles in the Commercial Code as a starting point, the contract should be adapted to the circumstances and the third party’s right should be accepted. According to the *Yargıtay*, although in disputes arising out of contracts, only the parties to the contract could bring a lawsuit to the courts, the fact that there are special provisions—the intention of the parties, the acceptance of the existence of the facts and the contract—the right of the third party to bring a lawsuit should be accepted when in keeping with usage and custom.<sup>13</sup>

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12. 13HD, 1999/22; 1999/524; 4.2.1999, (1999) 25 YARGITAY KARARLARI DERGISI 807-12.

13. HGK, 1995/11-980; 1996/18; 31.1.1996, (1996) 22 YARGITAY KARARLARI DERGISI 946-52. It is important to note here that article 1/2 of the 2011 Commercial Code states that when there are no commercial provisions, the court must decide according to commercial custom and tradition, and in their absence, according to general principles. Article 2 stipulates that, unless otherwise stated in the commercial custom and tradition, specific custom and usage is to be preferred over general custom.

On the issue of moral damages arising from medical negligence, the *Yargıtay* resorted again to article 4 to decide on a just and equitable compensation for moral damages, taking into consideration the events that led to the damages and the pain and sorrow suffered by the patient, because the doctor concerned had not shown the duty of care expected from an average medical doctor.<sup>14</sup> The relationship between the patient and the doctor was characterized as an agency agreement, and, according to the Court, even minor negligence would lead to moral compensation to be determined by considerations of justice and equity.

When personality rights are attacked by the press, the moral compensation must be determined according to the specific circumstances, changeable for each case, which will influence the judge's discretion. The judge must indicate for each case the actual reasons influencing the use of his discretion in that specific way. While the judge determines the amount of compensation, he must consider the degree of fault of each party, their social status and position and their economic circumstances. According to the *Yargıtay*, the compensation must give rise to moral peace for the victim and be proportionate to the 'satisfaction' desired. When the judge has discretion, he must use this in keeping with justice and equity according to article 4.<sup>15</sup>

When a life insurance policy was taken out for the benefit of a 'blood brother', a customary relationship to which official law makes no reference, the *Yargıtay* said that according to Turkish folklore and customs, this institution is valued as a 'private pact' and creates a relationship like brotherhood. According to the Court, the 'blood brother' should be considered to have a moral interest in the continuation of the life of the other and therefore should be accepted as the beneficiary.<sup>16</sup>

As to cases in family law, the first three examples illustrate how the *Yargıtay* considers justice, fairness and equity in divorces, claims of compensation and matrimonial property. The first is a divorce suit, where there was evidence showing that the husband was the faulty party. The wife asked for material and moral damages, and the Court, after considering the parties' social and economic positions, their respective fault and equity (article 4), decided that the husband should compensate the wife.<sup>17</sup> In another divorce suit, the *Yargıtay* stated that in accordance

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14. 13HD, 2000/8590; 2000/9569; 6.11.2000, (2001) 27 YARGITAY KARARLARI DERGISI 547-49.

15. 2009/3446; 2010/788; 3.2.2010.

16. 1995/3856; 95/4829; 9.6.1995, (1995) 21 YARGITAY KARARLARI DERGISI 1412, 1414.

17. 2HD 2007/70; 2008/5663; 21.4.2008.

with article 4, the judge must assess the economic conditions and the social and economic positions of the parties in using his discretion in determining also the destitution alimony.<sup>18</sup> In yet another divorce suit, the wife asked for her contribution to the matrimonial regime of participation to be paid back to her. This claim was brought to court after one year from the final decision of divorce. The husband claimed lapse of time. The *Yargıtay* opined that because the 2002 Civil Code did not mention prescription in such cases and as according to article 5 of the Civil Code, where appropriate the general provisions of the Code of Obligations could be applied also to all relevant cases, the Code of Obligations could be consulted, where this period was ten years. According to the Court, equity demanded this.<sup>19</sup>

There have been some interesting developments in the field of family law, where we know that only civil marriages give rise to legal consequences in Turkey. In its effort to tune the law to the needs of society, and obviously with considerations of ‘doing justice’ in mind, in recent years the *Yargıtay* has taken a milder position when the claims by the unofficial wife are based on private law but not on rights arising out of public law. For instance, compensation can be awarded to a woman whose partner in a ‘religious marriage’ alone, dies. This could either be compensation for pecuniary or nonpecuniary damages (*maddi ve manevi tazminat*) on the basis of articles 43 and 44 of the Code of Obligations (now articles 35 and 36),<sup>20</sup> or compensation for lack of financial support following a death (*destekten yoksun kalma tazminatı*), on the basis of article 45 of the Code of Obligations (now article 37). This means that courts, using their discretion and with the support of the *Yargıtay*, can award a surviving partner compensation on the general principles of civil liability, but never grant such partners survivor’s pension or social security benefits, arising from public law, based on the deceased partner’s entitlements. It appears that, progressively, the *Yargıtay* can accommodate ‘marriages’ not accepted by the official system when the matter at hand is not related to giving effect to the marriage but, for instance, to the law of obligations where the Court does not have to go into the issue of discussing whether a religious marriage is a marriage in the official sense. Thus in a case related to the return of jewelry given at

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18. HGK 2009/2-500; 2009/557; 25.11.2009, (2010) 34 YARGITAY KARARLARI DERGISI 2041-44.

19. 2HD. 2006/9383; 2007/1228; 5.2.2007, (2007) 33 YARGITAY KARARLARI DERGISI 1066-64.

20. The Turkish Code of Obligations, annexed to the Civil Code, was translated and received from the Swiss Code of Obligations in 1926. The new Code of Obligations is of 2011.

such a ‘wedding’, the Court referred to the female partner as the ‘unofficial partner’ (*gayriresmi eş*) and accepted the claim for compensation because the jewelry was no longer available for return.<sup>21</sup>

Because neither the legal framework nor the courts regard couples living without an official secular marriage as being in a relationship to be protected by law, decisions of courts in this area, converting illegality into legality, are of the utmost importance for such couples and especially women. This development is radical and crucial.<sup>22</sup>

Another example of the *Yargıtay*’s creative role in helping the evolution from religion to tradition and therefore from illegality and unacceptability to legality and acceptability is the *başlık*<sup>23</sup> (bride price) cases. The paying of *başlık* was once banned but is now regarded as traditional gifts by the *Yargıtay*, by giving it a neutral name: *hediye* (gift). A number of *Yargıtay* decisions up to the 1980s regarded moneys paid by the groom to the father of the girl to be against morality and therefore not to be returned upon the breaking up of the engagement.<sup>24</sup> In 1986 however, the *Yargıtay* first pronounced the banning by a local administration of the payment of money by a bridegroom to the bride’s father (*başlık parası*) to be illegal and, therefore, not obeying the ban not to be an offence, saying that an administration could not ban a tradition or convert it into an offence. The Court held, ‘This centuries old tradition is a fact; the practice can only be banned by the legislator if regarded as against public policy.’<sup>25</sup> The Court added that in any event, to eradicate such a tradition should be a matter of education and not of law.

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21. 2002/1153; 2003/2380; 6.3.2003, (2003) 29 YARGITAY KARARLARI DERGISI 1044.

22. In 2007, the *Yargıtay* quashed a first instance judgment on the ground that a woman married in accordance with religious rites should be paid compensation under articles 43 and 44 of the Code of Obligations following the death of her partner in a work-related accident; 2007/289; 2007/8718; 28.5.2007. We can say that now this is the established approach of the *Yargıtay*.

23. *Başlık* is money given by the man to the father of the girl to secure the engagement and thereby the marriage.

24. See judgments of the 2nd and the 11th Divisions of the *Yargıtay*: For instance, in a judgment 2771/1858; 7/7/1949, the 2nd Division held: ‘[T]o give moneys and goods under the name of *başlık* is against public policy and morality. The claim for repayment of such, given to secure an illegal cause cannot be upheld.’ Again, in the judgment 1980—620/620; 11/2/1880, the 11th Division held: ‘[T]he moneys and goods taken by the father of the girl, under the name of *başlık*, in order to agree to the engagement, . . . is illegal and therefore any such undertaking is not binding’. However, some judgments regarded the repayment of *başlık* possible, relying on ‘unjustified enrichment’ of the Code of Obligations (art. 61).

25. 1986/2-584; 1986/299; 26.5.1986, (1986) 12 YARGITAY KARARLARI DERGISI 1689.

Moneys and goods, given under the name of *kahn*, *ağırhk*<sup>26</sup> or *başlık*, are now consistently considered by the courts as gifts, and their return can also be demanded, since, when the engagement comes to an end, among the gifts to be returned—either given to the parties or their families or those acting as such—are those whose value is out of the ordinary,<sup>27</sup> that is, things of great value. The practice of making such payments continues, especially in rural areas, and is considered a compensation for the loss of unpaid labour in the household for domestic chores. Official state law did not succeed in eradicating this practice, and the *Yargıtay* has been creative in this field, using considerations of equity.

Then there is my often used, and by now infamous, case that serves as an example of interlocking of the social, religious and legal cultures, and the official and unofficial legalities, by the innovative dexterity of the *Yargıtay*. This decision of the *Yargıtay*, reached in 1979,<sup>28</sup> is a perfect illustration of not only the inherent covert mixed nature of this legal system and how Islam can be subsumed under the guise of custom and tradition, but also how the *Yargıtay* can creatively fit the law to social needs by filling the gaps in the name of equity using articles 1 and 4 of the Civil Code. The case concerned the sexual involvement of an underage village boy with a neighbour's cow. The owner of the cow, rather than suing for bestiality under the Criminal Code, sued to recover damages from the father of the boy under the Civil Code. He claimed that according to religious sources, which he cited, his cow had become untouchable and could not be sold or its meat and milk consumed. The case was dismissed by the lower court for lack of legal ground, as religious law is not a recognized source of Turkish law. The owner of the cow appealed. The *Yargıtay* overturned the decision of the lower court, completely relied on articles 1 and 4, and stated:

Although religious rules or sentiments could not form the basis of any claim, if the complainant could prove by expert evidence, that there were local religious or moral beliefs or customs to the effect that the meat and the milk of such an animal could not be consumed, then the animal would be considered to have lost its market value, in which case, by the application of the '*noxal*' rule of Roman law, the cow should be given to

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26. *Kahn* is money or goods given by the man to the girl to enable her to prepare her dowry. *Ağırhk* is the goods given by the man to the father of the girl to secure the engagement and thereby the marriage.

27. Section 122 of the 2002 Civil Code.

28. 79/1644; 79/14383; 21.12.1979, (1980) 6 YARGITAY KARARLARI DERGISI 1216-18. I have used this example on many occasions in my work, such as *Judicial Navigation as Official Law Meets Culture in Turkey*, 4 INT'L J. L. CONTEXT 35, 52-53 (2008).

the father of the boy and the claimant should be given the market value of the cow by the boy's father.<sup>29</sup>

There was a second very similar case in 1998, where the lower court decided that the pursuer had no case, because there was no 'medical objection' to the utilization of the meat and the milk of such an animal. The *Yargıtay* overturning the decision, declared that when there is no codal provision applicable to a matter then, according to article 1 of the Civil Code, tradition and custom are to be resorted to, and that,

[s]ince facts are not in dispute in this case, tradition and custom have to be investigated in line with the claim, and if custom, tradition, religious and moral beliefs and conceptions are in line with the claim, then the existence of damages cannot be questioned. The pursuer should be asked whether he wishes to surrender the animal to the defendant in return for the market price, and if not, then reasonable compensation must be decided upon.<sup>30</sup>

The formula is a fine example of how the *Yargıtay* resolves disputes within the formal legal system, without openly facing an unofficial legality, which, in this case, is based on religious belief. Through the use of articles 1, 2 and 4 of the Civil Code, the Court can creatively develop the law in the name of equity, fill the gaps and cater to the needs of the people it serves.

Beyond the possibilities afforded by articles 1 to 4 of the Civil Code, there are also other instances where individual provisions of the Civil Code, the Commercial Code and the Code of Obligations enable judges to use discretion to reach equitable decisions. Contracts, apportionment of shared water resources on agricultural land, the special protection afforded to minors, small claims, judicial evaluation of evidence, cautionary obligations, mortgages, salvage, equitable and moral compensation, and arbitration are some areas where discretion and equitable considerations play a role.

For instance, examples from the Civil Code show that wide discretionary powers are given to the courts in deciding whether a person should be placed under guardianship; in deciding whether proper reasons have been shown for divorce or judicial separation; in opting for separation when asked to grant divorce; and in deciding in the best

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29. The principle has been crystallized by a local evaluation of legal concerns. However, in the use of the Roman law principle, the *Yargıtay* seems to have inverted the rule to fit the situation. Understood and applied in its original form, it should have been the boy who, as the offending object, should have been returned to the owner of the cow and not the cow to the boy's father!

30. 98/2632; 98/3249; 24.3.1998, (1998) 24 YARGITAY KARARLARI DERGISI 834. I have come upon only these two cases on this subject!

interests of the child in custody cases, where the judge is free to act as he thinks best. The Code of Obligations provides that parties to a contract can fix their own penalties arising from breach of contract, but the judge can reduce the penalties that he considers excessive (article 161, now 182). Again in the same Code, it is stated that a person claiming compensation has to prove the damage. However, damage not ascertainable by calculation is to be determined by the judge at his discretion, taking into consideration the ordinary course of events (article 42/2, now 50).

### III. INSTANCES OF JUDICIAL CREATIVITY AND EQUITY IN THE AREA OF PUBLIC LAW

As pointed out above, Turkish administrative law is on the whole a derivative of the French one. Following the developments in French administrative law, the conceptual tool of equity has been utilized by the Turkish *Damştay* in its innovative, though be it mostly derived, jurisprudence.<sup>31</sup> Among the theories developed in equity, the most significant ones are *imprévision* and the ‘no-fault’ risk theories. The *imprévision* theory appeared in France in 1916 in the case *Campagne générale d’éclairage de Bordeaux*, where the Conseil d’Etat decided that the company that provided gas to the city had a concession and continued to supply gas during the war though the price increases were extraordinary and, therefore, was entitled to compensation. This was a manifestation of the principle of equity at work. The basis of this theory was unpredictability of the situation, and the compensation was exceptional and temporary. The *Damştay* followed this theory in many of its cases and, as seen above, the *Yargıtay* also made use of it in adaptation of private law contracts.

The risk theory, which is even older, was formulated by the French Conseil d’Etat in 1895 in the *Cames* decision, where the State, though not at fault, was held to be responsible for the injuries suffered by a worker in an arsenal. The compensation was granted on the grounds of equity. In time, the theory was extended also to cover ‘social risk’. Similar developments can be seen in the decisions of the *Damştay*. A well-known journalist died when a bomb attached to his car exploded. He was already under threat, so when his heirs sued the Ministry of the Interior for material and moral damages for not having taken any precautions, the *Damştay* decided that the basis of the case was *faute de*

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31. For a comprehensive comparison of the French and the Turkish courts and their historical relationship throughout the Ottoman Empire and the Turkish Republic, see Örüçü, *supra* note 6.

*service*. Article 20 of Law No. 3713 on Combating Terrorism provided that the State must take measures to protect those who become open targets for terrorist organizations and who ask for protection. The rapporteur for the case was of the opinion that, as the journalist had asked for no such protection, there could not be a basis in *faute de service*, but as a result of collective responsibility and strict liability, it was possible to use the theory of ‘social risk’ in order to decide that the administration was liable to pay damages. This entitlement to damages arose out of membership of society where damage must be shared by all and therefore compensated. The *Danıştay* still decided on the basis of *faute de service*, although possibly, the French preference would have been the ‘risk theory’.<sup>32</sup> In another case, the *Danıştay* granted the claim for damages by the family of a teacher who was killed during terrorist action in an area of Turkey regarded as dangerous by the Court, the decision being based this time on the ‘social risk’ theory as the State could not prevent the social unrest.<sup>33</sup>

Turkish law texts and court decisions make use of and elaborate and develop the meanings of a number of concepts born in France, adapting these to Turkish circumstances and to changing demands. Among these can be cited *service public*, *acte administratif*, *contract administratif*, *exces de pouvoir*, *faute de service*, *risque sociale*, *fait du prince*, *imprévision*, *domaine public* and *puissance public* as translated into Turkish.

It is accepted that there is administrative discretion in cases where the administration has a choice as to whether to undertake an act or action and as to when to act or which act to prefer. In cases of such discretion, judicial review is limited to seeing whether the discretionary powers are used to ensure ‘public interest’ and are in keeping with the ‘requirements of public services’ and ‘the principle of equality’. The necessity for the administration to act in keeping with the requirements of public services and with public interest indicate that there is no absolute discretion in a State based on the rule of law. Discretion exists normally in the elements of ‘reasoning or cause’ and the ‘object’. In these cases, the administrative courts can look into whether the ‘cause’ is present and whether it is commensurate with the administrative act (object) taken. Administrative discretion is limited by public interest, the requirements of public services, and the principles of equality, proportionality and equity. The *Danıştay* is regarded as the ‘insurance of

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32. 10 D. 1997/10292; 1998/1190; 18.3.1998, (1999) 98 DANIŞTAY DERGISİ 678-83.

33. 10 D 1996/10146; 1998/2344; 28.5.1998, (1999) 98 DANIŞTAY DERGISİ 62-65.

public interest' and insurance for the governance of Turkey. Neither the individual's interest in financial gain or assertion of private rights as against societal rights as a whole, nor the party political and/or financial interest of the legislative and the executive bodies are seen as paramount; it is the public interest that has to be protected from both the individual and the State.

The Constitutional Court (the *Anayasa Mahkemesi*) held that the purpose of judicial review of administrative acts and actions is to keep the administration within the boundaries of the law and to ensure that it does not act *ultra vires* and abuse its competence and does not act in repugnance to the law and legislation. This control is to be achieved by the *Danıştay*, by annulling such acts on the grounds of lack of competence and form, subject, object and purpose.<sup>34</sup>

Although powers of the *Danıştay* were somewhat curbed regarding the review of the 'merits' of an administrative decision in 1982, and again in 1999, by amending article 125 of the Constitution and article 2 of Law No. 2577, and thus the *Danıştay* can neither replace the administration nor look into the 'merits' of the case, nevertheless the Court takes a rather general view of its position. A number of decisions of the Regional Administrative Courts (Bölge İdare Mahkemeleri) and of the *Danıştay* itself show how effectively the courts restrict their limitations. For instance, in spite of article 129/111 of the Constitution, which states that the decisions of the Court of Accounts (the *Sayıştay*) cannot be annulled by administrative courts, the Ankara Regional Administrative Court decided that this article was a violation of the ECHR and that since the norms of the ECHR are higher norms, the court had to prefer them over and above constitutional norms and review *Sayıştay* decisions accordingly.<sup>35</sup>

The most frequently cited criteria used by administrative courts, even in preference to the principle of 'administrative certainty and continuity' are 'public interest', 'public order/public policy' and 'public service'. Such decisions can be seen related to social values and needs; economic considerations; human rights and freedoms; public service concession contracts; privatization; liability of administration; and town and country planning.<sup>36</sup>

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34. 1976/1; 1976/28; 25.5.1976, *Resmi Gazete* (Official Gazette) No: 15679, 16.8.1976.

35. Quoted in P. BILGEN, İDARE HUKUKU DERSLERİ: İDARE HUKUKUNA GİRİŞ 286 (1996).

36. For cases, see Örucü, *supra* note 6, at 687-96.

## IV. CONCLUDING REMARKS

We can say with confidence that Turkish courts do have wide discretionary powers which they can use creatively and take equity into consideration and that they have been granted such powers legislatively. Most poignantly this has been done through articles 1 to 4 of both the 1926 and the 2002 Civil Codes. In addition, there are various instances in a number of statutes, which also grant them discretion.

One of the important gains of the reception of the Swiss Civil Code is the possibilities afforded to the judge by articles 1 and 4 with two vital consequences: to help realize the ‘fit’ of the received law to the actual needs of the people and to enable the creation of the ‘covert’ hybridity.

In the case of public law, we see the possibilities for the courts to control discretionary powers of the executive. Interpreting acts and actions of the administration is one way for courts to intervene. The Constitutional Court interprets the provisions of the Constitution and juxtaposes legislation to their understanding of these provisions and thus creatively develops the law.

As with everything in life however, there are also limits to how far courts can go in the name of equity or use their creative abilities to develop the law. One of these limits was pronounced by the *Yargıtay* itself in a case related to freedom of expression being limited by the Constitutional provision on laicism. To incite people to hatred and animosity based on religious and racial differences was a punishable offence in the 1926 Criminal Code articles 312 and 59.<sup>37</sup> Article 312 was also resorted to when the offence was committed by the press. Thus, in a case where laicism was attacked and living under Islamic *shari’a* law was promoted, the *Yargıtay* relied on the Constitution, saying that though article 24 guarantees freedom of religion and conscience, article 14 states that this freedom cannot be used with the aim of creating discrimination based on language, race, religion and sect. The Court stated that the Constitution accepts ‘the laicist Republic’ as the sine qua non of democracy and that democratic regimes have the right to protect themselves. The *Yargıtay* then went on to say, however, that although section 312 may be seen as being antidemocratic, judges do not have the competence to differentiate between legislation on the criterion of ‘good law’ and ‘bad law’, as only ‘the Constitutional authorities can resolve such political discussions’, the ultimate limitation for judges.<sup>38</sup>

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37. This is still an offence in the 2005 Criminal Code.

38. 2002/9667; 2002/10406; 7.11.2002, (2003) 29 YARGITAY KARARLARI DERGISI 634.