

## RECENT DEVELOPMENTS IN TURKISH FAMILY LAW

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### 1 Introduction

Turkish Family Law was reshaped and secularised in 1926 with the adoption of a Civil Code adapted from the Swiss. The desire of the ‘elite dirigeante’ of the Turkish Republic to westernise and modernise the society, and secularism and legalism transformed family law totally.<sup>1</sup> However, certain characteristics of the law still reflected the special Turkish blend. In addition, though the concept of equality between the spouses was a fundamental principle of the Code, ‘some were more equal than others’ as seen in some Code provisions such as those stating that the husband was the head of the family and chose the abode and that the wife carried his surname and had no say in decisions concerning the home and the children. If there was a divorce, she was only entitled to property legally registered under her name. Nevertheless, the 1926 Code was considered revolutionary both at home and abroad when it was adopted in a country of Muslims. Yet it failed to keep up with the times. Moreover, until the 1961 Constitution there was no higher law demanding total equality between the sexes.

Both the 1961 Constitution and the present 1982 Constitution contain articles which make sex equality a constitutional principle, but in Family Law most provisions of the Civil Code remained unchanged. A few were amended by the legislator: legitimate and illegitimate children gained equal status (1990); the wife could retain her own surname (1997); and, in 1990, by annulling the relevant article of the Code, the *Anayasa Mahkemesi* (the Constitutional Court)<sup>2</sup> enabled the wife to work outside the home without her husband’s permission.

In October 2001, a package of Constitutional amendments was introduced in an effort to further harmonise Turkish laws with the European Union *acquis*, the European Convention on Human Rights and the laws of the European Union member states. In addition to the already existing provision in Article 10 on ‘equality before the law’, which states that: “All individuals are equal before the

law without any discrimination, irrespective of language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such consideration”, in the area of family law, an additional clause was introduced into the framework Article 41 on the family.<sup>3</sup> Article 41 on ‘the protection of the family’ now has a first paragraph which reads: “The family is the foundation of Turkish society and is based on the equality between the spouses.”

Efforts to update the Civil Code had been going on for a number of decades unsuccessfully, but now with this added impetus for change, the Civil Code was extensively revised on 22 November 2001 and the new Civil Code came into force on 1 January 2002.

Most of the changes are related to the modernisation of the language used, but many of its fundamental tenets have not changed. Many of the old provisions are the same apart from their numbering and modernising of the language. Therefore, this is not a brand new Civil Code, but an amended one.

In the field of Family Law however, there are extensive amendments, the most important being related to equality. Family Law is now regulated in the Second Book of the Civil Code between Articles 118 and 494 (previously Articles 82–438), and Succession in the Third Book between Articles 495 and 682 (previously Articles 439–617). The most significant changes will be reviewed below.

## 2 Major changes which took effect on 1 January 2002<sup>4</sup>

### 2.1 Marriage

Though the age of majority was 18, previously there was possibility of marriage at 17 for men and 15 for women. Any person of 17 can now marry (Article 124). In addition, in exceptional circumstances, the judge can allow marriage at the age of 16 for both sexes. Previously this provision said 15 for men and 14 for women, and conditional on the approval of the parents. Now the judge will hear the parents, if possible. It is important to note here however, that the age of majority is 18 in Turkish law and anyone below that age is considered a child for the purposes of International Conventions.

Before the amendments, application for marriage was made to the marriage registrar’s office of the would-be husband’s abode. Now it can be to the office at the abode of either spouse.<sup>5</sup>

Previously the only place where a marriage ceremony could take place was the registrar’s office, unless circumstances did not permit this. However, there was wide disregard of this provision, ceremonies being held in hotels and clubs. Now, marriage can take place in a registrar’s office or any other place regarded

as appropriate (Article 141).<sup>6</sup> The new possibility reflects social preferences and practice.

Marriage is concluded upon the oral response of the two parties (Article 142). Then, a marriage certificate is given. Without this certificate a religious ceremony cannot take place. A religious ceremony however, is not needed for the marriage to be regarded as binding (Article 143). This has been reiterated in the new Civil Code to indicate the secular nature of marriage in Turkey. A recently published decision of the *Anayasa Mahkemesi*, which gives an authoritative answer to any question related to the acceptability of religious *nikah* as an alternative to civil marriage, must be mentioned here.<sup>7</sup>

When Article 237/4 of the Penal Code, criminalising religious *nikah* entered into without civil marriage, and imposing a prison sentence of from two to six months on both the man and the woman,<sup>8</sup> was challenged as violating several Articles of the Constitution: Article 2 (the principle of secularism), Article 10 (equality), Article 12 (the character and the scope of fundamental rights and freedoms) and Article 24 (freedom to conduct religious services and ceremonies), the Constitutional Court, referring to Article 13 of the Constitution on the limitation of rights and freedoms, stated that Article 237 had been inserted into the Penal Code in 1936 to give support to civil marriage, that without this Article, polygamous marriages become possible and that, though such marriages have no legal consequence, they pose a threat to the concept of family, such unions being detrimental to the social order.<sup>9</sup> The Court stated that if couples enter such illegal unions, women cannot use their rights arising from marriage, children are illegitimate and lose their inheritance rights; civil marriage must be strengthened to protect the family and the rights of women and children. The Court then went on to say that there is no violation of the principle of equality here between those who live together with no marriage of any kind and those with only a religious ‘marriage’ as was claimed, since the first group do not wish their unions to be regarded as marriage. Equality before the law does not mean that everyone must be treated alike, differentiation based on Article 13 is not unconstitutional. The Court saw the Civil Code as a fundamental building block in the structure of the bridge to a contemporary and secular legal system for the Turkish Republic, said that civil marriage, being in the essence of that block, is also specifically protected by Article 174 of the Constitution and that to keep law and religion separate is the most important function of secularism. As a religious ceremony following the civil marriage is not banned, the Court saw no violation of secularism or any fundamental right and decided unanimously that Article 237/4 did not violate the Constitution.

The above decision sets the scene for Turkish secular Family Law.

## 2.2 Rights and Duties of Marriage

A number of consequences flow from the fact that there is no longer a head of the family. Spouses work together for the happiness of the marriage union and the care and education of the children; they live together, show fidelity and help each other (Article 185). The home is chosen together; the union is managed together, the spouses contribute to the expenses in proportion to their abilities through their work and possessions (Article 186). In the calculation of contributions, house-work, care of the children, and work in the other spouse's business without pay, are to be considered (Article 196). This is a new and most welcome development. If demanded, the judge can determine the amount of contributions for each spouse. That the woman's work at home is to be regarded as a contribution to expenses is a new and significant development. Another significant change is the removal of a clause from the old Article 153 (now 187), which stated that "the wife is her husband's helper in the maintenance of common happiness and she looks after the home." Whether and how far these improvements will have an impact in practice will be seen in the coming years.

The woman still acquires the surname of her husband upon marriage; but, she can add her surname before that of her husband's surname upon written request to the marriage registrar at the time of marriage, or subsequently to the administration for personal status, (Article 187). As stated above, this was already possible as a result of a legislative amendment in 1997.<sup>10</sup> However, the feminist camp regards this as an archaic clause not reflecting the modern trends in an otherwise modern Civil Code. Nevertheless, here I would like to mention a recent decision of the *Anayasa Mahkemesi* to illustrate the general attitude to equality between the spouses in Turkey. In this decision,<sup>11</sup> only published four years after it was delivered, the Court did not find the then Article 153 (now Article 187) of the Civil Code to be unconstitutional. The case arose when a married woman wanted to use her maiden name only and objected to Article 153. The challenge was that this provision violated Articles 10, 12, and 17 of the Constitution related to equality, fundamental rights and freedoms, personality rights and rights to development of personality. Following a very conservative interpretation of the family and the place of the woman in it, and referring to long established traditions, the *Anayasa Mahkemesi* saw no violation of any of the Articles mentioned. However, in the dissenting opinion, three judges saw a violation of Article 10, 13 and 17 and the Convention on the Elimination of All Forms of Discrimination Against Women, which Turkey ratified in 1985. They stated that the Constitution should be read in the light of International Conventions and contemporary developments. Making reference to the German Family Law amendments of 1976 and a decision of the German Constitutional Court in 1991, indicating that the spouses should be able to choose either of the sur-

names, these judges observed that it might be extremely important for the development of a spouse's personality and identity, to carry the surname acquired at birth. Obviously, the fact that it took four years to publish its decision indicates how even the *Anayasa Mahkemesi* finds it extremely difficult to pass judgement in cases related to equality of the sexes in Turkey.

Either spouse can represent the marriage union for everyday needs. For major needs, one of the spouses represents the union if the other spouse or the judge has empowered him/her to do so, or if the consent of the other cannot be obtained for reasons cited (Article 188). This is a new possibility, another being that liability to third parties is joint and several (Article 189).

Both spouses may choose and perform a job or profession; they do not need the other's permission (Article 192). As pointed out above, the husband's right to veto the wife's working outside the home had already been annulled by the *Anayasa Mahkemesi* in 1990.<sup>12</sup> However, Article 192 now has an added clause, which, though addressed to both spouses, can create problems for the wife who wants to work outside the home. This reads: "But the well-being and interest of the marriage union has to be considered in the choice and performance of a job or a profession." This echoes the reasoning of the 1990 decision and the concern felt that a working-woman might neglect her duties towards her husband and children. After a very thorough and progressive comparative survey and with full reference to contemporary foreign and international developments, the *Anayasa Mahkemesi* then felt that it should end its opinion with a statement reflecting a very traditional view. It said that this decision should not be taken to mean that the Court condoned a new life style for the family in which a working wife could neglect her family duties towards her husband and children; if she intended to work, the Court would like to see her making arrangements for these domestic duties to be performed by someone else.

A new concept is that of the matrimonial home or family home (Article 194). One spouse cannot end a lease contract, or transfer the home, or limit the rights on it without the overt consent of the other. The judge should be asked to intervene when consent cannot be obtained. The spouse who is not the owner can ask for an 'entry of interest' into the land register that the house be designated therein as a 'family home'. If the 'family home' is rented, this fact can be written into the lease contract. These are most important new developments. In this way a spouse who does not pay the rent, cannot cause the eviction of the other, as long as that other does pay the rent.

Secession of living together, and other measures are covered in Articles 197, 198 and 199. If life in common threatens personality rights, economic security or family peace, a spouse has the right to a separate life. If the reasons are legitimate, the judge decides on the financial contribution of the other spouse to the one who has gained the right to live separately. He also decides on the use of

furniture and managing property. If reasons are not legitimate, then the other spouse can demand the same. This is a new development. If one of the spouses does not fulfil his or her obligations of contributing, then the judge can decide that persons owing money to him or her pay their debts to the other spouse.

Thus the judge has considerable discretion in taking measures for the financial and economic protection of the family. The more vulnerable has gained more protection.

### 2.3 Matrimonial Property

Matrimonial property regime was previously one of the most serious problem areas of Family Law. The new codal regime is 'participation in acquisitions' (Article 202).<sup>13</sup> The other three regimes, separation of property (the previous codal regime), community property (in two forms: limited community and community of acquisitions), and shared separation can be opted for by contract. The contract to opt out can be drawn up by a notary before or after the marriage. The spouses can draw up the contract themselves and then have it authenticated by a notary, or they can decide and give a written request to the marriage registrar (Article 203). If there is no contract, 'participation in acquisitions' applies automatically.<sup>14</sup>

This regime covers all goods acquired during the marriage and the personal property of each spouse (Article 219). Article 219 also defines 'acquisitions': Acquisitions are goods acquired by either spouse for payment during marriage, including wages and salaries, social security and social benefit payments such as disability payments and unemployment benefits, income from personal property and goods replacing payment. This is a new regulation. If a house bought by one of the spouses with the money made through work during marriage is sold, then the payment received, or a replacement property, counts as acquisition. Personal property is goods for the sole personal use of one of the spouses such as jewellery and the like, goods belonging to one of the spouses before the marriage or acquired as a result of inheritance or without payment, compensation for moral damages and replacement goods for personal property (Article 220). The spouses may decide by contract, that income from personal property will not be part of the 'participation in acquisitions' regime. Each spouse has the right to manage, use, and benefit from acquisitions (Article 223). This also is a new but controversial provision.

As a wife's work at home is accepted as a contribution, a feeling of equality within the marriage union is created. In the event of the marriage coming to an end, the current market value of all acquisitions is added together, including the

value attributed to the wife's work in the home. The obligations to others are subtracted and the rest is divided equally.

On the whole these developments are positive. Unfortunately however, the gates are open to enable one spouse, usually the husband, to make the regime ineffective by contractual arrangement.

Upon the request of one of the spouses, the judge can decide on a return to 'separation of property' in exceptional circumstances (Article 206). This is new. Also, upon bankruptcy there is a return to 'separation of property' (Article 209). This is another development.

Article 221 regulates the status of professional property. Article 227, dealing with contribution to the increase in value, is also new. The non-owner spouse is entitled to half of any increased value, unless the union has ended in divorce for adultery or threat to life, whereupon the judge gains discretion (Article 236), another new provision.

After the death of one of the spouses, a surviving spouse can ask for the recognition of rights of occupation and *fructus* on the family home and furniture in return for the contribution percentage and, if not sufficient, for payment, in order to maintain his/her living standard (Article 240). The judge can recognise property rights instead, with the consent of the other heirs. This is a most significant innovation.

### 2.4 Children

The father of a child born into marriage or born within 300 days of the termination of marriage is presumed to be the husband (Article 285); this is the old provision with different numbering. An additional possibility now is that the mother can prove in court that the husband is not the father (Article 287). Before the amendment, only the husband had the right to bring a law suit to disown a child born into the marriage. Unless he did so, he would have continued to be regarded as the father of the child even after divorce and remarriage of the mother to the natural father of the child. This change is most welcome. Another development here is that if a child is born within 300 days of the termination of marriage and if the mother has married within that period, it is presumed that the new husband is the father of that child. This is however, a weak presumption in that it can be rebutted, in which case the father is presumed to be the husband from the previous marriage (Article 290).<sup>15</sup>

Though the concepts of legitimate and illegitimate child are no longer used in the new Civil Code, from the point of view of family ties, a legitimate child is the one born into a secular marriage. A child born out of marriage to an unmarried woman however, is a natural child and belongs to the mother by the act of

birth, though she does not have automatic parental authority. Family ties can be established between this child and the natural father by subsequent marriage of the parents (Article 292), by acknowledgement by the natural father (Article 295), or the recognition of the natural father's paternity by a court decision upon a claim brought to court either by the mother or the child (Article 301).

The natural father must make a formal unilateral acknowledgement by a written application either to the official in charge of the birth register or to a court, or by an official deed or by declaration in a will (Article 295). A child with prior family ties to another man cannot be acknowledged unless disowned by that other. The mother and the child, or upon the death of the child, his or her descendants, the Public Prosecutor for the Republic or the Treasury can sue against such acknowledgement (Article 298). The man who acknowledged a child can also sue for the annulment of that acknowledgement on the grounds of mistake, deceit or intimidation (Article 297). This is a new possibility.

A few developments prior to the new Civil Code coming into effect are worth mentioning here. First, in 1981 the *Anayasa Mahkemesi* found unconstitutional and annulled the then Article 310 of the Civil Code which stated that a judge could not declare paternity for a child whose father was already married to a woman other than the child's mother at the time of sexual intercourse.<sup>16</sup> In 1987, the same Court annulled Article 443 thus removing the distinction between legitimate and illegitimate children as far as succession is concerned and this Article was reworded in 1990 by the legislator thus equating legitimate and illegitimate relatives for the purposes of inheritance rights. In 1991, the then Article 292 which stated that a married man could not acknowledge his child from an adulterous or an incestual relationship was also found to be unconstitutional by the *Anayasa Mahkemesi* and annulled.<sup>17</sup> Following upon these decisions, in 1993 the *Yargıtay* (the Court of Cassation) reiterated that the existence of blood ties alone is not sufficient to create rights of succession and that the existence of such ties must be established by law, that is by birth within marriage, marriage of parents after birth, correction of legitimacy by a judge or through Amnesty Acts<sup>18</sup> in which the legitimacy of a child born into cohabitation not tied to a secular marriage contract is administratively corrected.<sup>19</sup> Finally in 1997 the *Yargıtay* took a Unification Decision in view of the contradictory decisions emanating from its Sections, and declared that an illegitimate child is one born out of wedlock and has either been acknowledged by the father or whose paternity, with whichever consequence,<sup>20</sup> has been determined by a court decision, and that this child has equal status to a legitimate child for inheritance purposes. These developments have all been in the interest of the child. This gradual change has now been distilled in the new Civil Code. The natural father can acknowledge any child of his born out of wedlock by following the procedure laid

down in Article 295, as noted above, without any additional conditions attached.<sup>21</sup>

Therefore, as will be referred to below, a child born into wedlock and a child born out of wedlock but whose family ties have been established by the acknowledgement of the natural father or a court decision, now have equal rights as far as inheritance is concerned (Article 498).<sup>22</sup> According to Article 284, the judge is competent to inquire into the facts in all cases concerning blood ties and assess the evidence himself without the parties bringing these to his attention. It is also imperative that parties abide by the decisions of the judge, such as decisions to carry out DNA testing for the establishment of paternity. If a party refuses, the judge can decide against him/her. This is another new and welcome development.

## 2.5 Adoption

This area has been thoroughly reconsidered. Adoption of minors is a new development in Turkish law, so is the fact that spouses with children can adopt (Article 307). The conditions for such adoptions are: the care for and education of the minor for one year and his/her interests, while not adversely effecting the rights of the other children of the adopter (Article 305). An unmarried person can adopt if 30 years of age or over, which is also new, but spouses can only adopt jointly (Article 306), although there are some exceptions (Article 307). The conditions are, to have been married for at least five years, and to be at least 30 years of age. If married for two years, with the condition of being 30 years old or more, one spouse can adopt the child of the other. This is another new development. The adoptee must be 18 years younger than the adopter. A discerning minor must consent to the adoption (Article 308). In addition, the parents of the minor must give their consent (Article 309).

A new provision states that adoption can take place six weeks after birth (Article 310).

Article 313 deals with the adoption of adults and wards, which was the only option previously. The new conditions are: the adopter should have no descendants, the ward must be in need of help and must have been looked after by the adopter for a minimum of five years. If there are other valid reasons and the adopter and the adoptee have been living together for at least five years, an adult can be adopted. These are amendments. A married adoptee can only be adopted with the consent of his/her spouse, as was also the case previously.

## 2.6 Grounds for Divorce

Divorce was previously covered by Articles 129-150 of the old Civil Code. These are now Articles 161 to 182. Grounds for divorce are largely unchanged except for their numberings. This area has not been modernised any further than it had been in 1988.<sup>23</sup> Therefore, a mixed-grounds divorce system with the element of fault is still present. The grounds are the old grounds: adultery<sup>24</sup> (Article 161 - old 129); threat to life, extreme cruelty and serious insult (Article 162 - old 130); committing a humiliating crime, leading a dishonourable life (Article 163 - old 131); desertion (Article 164 - old 132); incurable mental illness (Article 165 - old 133); and irretrievable breakdown (Article 166 – old 134).

However, there are a few developments here also: A new clause, 'serious insult', has been added to the ground 'threat to life and extreme cruelty'. In addition, the conditions for desertion have changed. Desertion should now last for 6 months rather than 3 months as formerly. After at least 4 months of desertion, the judge issues a call to return to the marital home within 2 months. The one who forces the other to leave or prohibits the other from returning home without good cause is also considered to have deserted. This is an improvement. In incurable mental illness there is no longer a requirement of duration as there was formerly.

The old article 134 (now 166) was already amended in 1988 and since then a marriage is regarded as broken down if after one year of marriage spouses apply for divorce together, or one applies and the other accepts. Either spouse can sue for divorce if the marriage union is irretrievably broken down and it cannot be expected that they live together. For this, the marriage must have lasted for at least a year, the judge must hear both parties himself and individually, be convinced that they express their will freely, and endorse as acceptable the document prepared by the spouses for the arrangement of financial consequences of divorce and the position of the children. These conditions have not changed and are regarded as part of public policy by the *Yargıtay*. Neither is this the sole ground of divorce as is the case with recent developments in other jurisdictions in Europe. Though the Turkish legislator regards Article 166 as the general ground, as stated in the general reasoning of the new Civil Code, it is of the opinion that the present situation has not given rise to any problems and that to remove especially 'adultery' from being a specific ground would lead to misunderstanding in Turkish society at large.

The *Yargıtay* has been extremely cautious in the application of divorce by mutual consent and tries to ensure that the above conditions of the provision are strictly met. Divorces apparently based upon mutual consent may not be so; women who are often the weaker partners in Turkish marriages, may be forced by their husbands to accept divorce under threat of, for example, taking the chil-

dren from them. Most important, according to the *Yargıtay*, these conditions must also be fulfilled in divorces obtained abroad. The conditions are regarded as so important that in divorces obtained abroad, the *Yargıtay* refrains from recognising a divorce decree if the foreign judge has not ensured the existence of these conditions.<sup>25</sup> The *Yargıtay* Public Prosecutor of the Republic is also extremely sensitive in this area and raises such issues using his power of *ex officio* objection.<sup>26</sup> Here we see the Court acting as the protector of women and the children. This is an indication that the *Yargıtay* takes into consideration the realities of Turkish society rather than, for example, religious feelings which demand that divorce should be as easy as possible for men. In addition, three years after an unsuccessful divorce case, divorce is granted upon the application of either spouse.

A spouse can ask for separation instead of divorce (Article 167) and at the end of the period one of the spouses can sue for divorce (Article 172). Separation can last for one to three years (Article 171). These articles are unchanged, except for their numbering.

## 2.7 Consequences of Divorce

One of the most important changes concerns the place where the divorce case is to be heard. Before the amendments a divorce suit had to be brought either to the court of the district where the couple had lived for the last six months or where the suing spouse lived. As the abode of the married woman was her husband's abode, this in fact was where the husband lived. Now, this court can be the court of the abode of the spouse bringing the suit. This change is in the interest of women.

The divorced wife takes back her old surname, but may continue to use her married surname by a court decision if she has an interest in doing so and there is no damage to the husband (Article 173).

All rights to a law-suit lapse after one year of a final divorce judgement (Article 178)<sup>27</sup> Material damages are awarded for existing or expected interest. Moral damages are awarded if the claiming spouse is faultless, less faulty or if personality rights are damaged (Article 174). If one of the divorced spouses falls destitute, alimony for an unlimited period can be granted, with the condition that he/she is not the more faulty party. This now applies equally to either spouse. Formerly, a husband could only ask for alimony from his wife if she had adequate means (Article 175). This is an important change. It does fulfil the requirements of equality but may work to the detriment of Turkish women, most of whom do not possess personal financial means.

Alimony ends upon death, marriage to another or living with another as if married, or leading a dishonourable life (Article 176). However if death occurs while the divorce suit is pending, the heirs to the pursuer can continue the suit and if they prove that the defendant was at fault, then the defendant cannot inherit from the deceased pursuer. Earlier, as the suit fell upon death, the defendant always inherited (Article 181/2) This is an important amendment and indicates a change in social policy.

If alimony is demanded after the divorce, the competent court is the court of the abode of the spouse demanding alimony (Article 177). When so demanded, yearly increases in the alimony can be determined at the outset by the court (Article 176). This facility is in the interest of women and these are all new and positive possibilities. The judge cannot decide on these issues directly.

Child custody is decided upon after the parents have been heard (Article 182). One spouse is given custody and relations with the other are determined in the best interest of the child, with health, education and moral welfare being considered. The spouse not granted custody has to contribute to the expenses of raising the child in proportion to his/ her means.

## 2.8 Parental Rights and Custody

While married, the spouses use parental rights together. If not married, the mother represents the child (Article 337).<sup>28</sup> Upon divorce, as stated above, one spouse gets the custody, the other, 'personal relationship', parallel with the Convention on the Rights of the Child, which Turkey signed and ratified in 1995 (Article 324). Personal relationship can be ended if the child's well-being is under threat, if the parents abuse this right, do not take an interest in the child or for other important reasons.<sup>29</sup> The mere existence of a blood tie will not give the right to abuse the rights of the child.<sup>30</sup> This is an appropriate development.

Article 340 deals with the duty of the parents for the education of the child in accordance with their means. They must provide and protect the physical, mental, spiritual, moral and social development of the child. Article 341 deals with religious education, the determination of which is the right of the parents. Article 347 regulates fostering.

## 2.9 Succession

Equivalent to the old regulation, Article 495 states that heirs of first degree are the descendants of the deceased, and all children receive equal shares. If there are no descendants, then ascendants, siblings, and grandparents inherit in turn.

The surviving spouse with children receives  $\frac{1}{4}$ , with parents  $\frac{1}{2}$ , with grandparents or their descendants  $\frac{3}{4}$ , and if with none, then the whole of the inheritance. However, with the new 'participation in acquisitions' regime, the picture is rather more complicated. The surviving spouse first receives half of the acquisitions once it has been divided. The remainder is then divided in fixed portions according to the rules of succession.

Another positive development comes in Article 240: in order to continue his/her existing life style, the surviving spouse can request either the right to live in, or the right to benefit from the fruits of, the 'family home' in which the couple were living before the death of the other spouse. The surviving spouse may have to make an additional payment if the value of the house is well beyond his/her contribution to acquisitions. The same applies to the ownership of the furniture. If there are legitimate reasons and agreement between the heirs, the surviving spouse can acquire ownership on the 'family home'. These are new developments and are in the interest of women.

It is important to note that all heirs to the father, whether established by birth into marriage, subsequent marriage, acknowledgement, determination of paternity by a court decision or Amnesty Act, are now equal as if all born into marriage (Article 498).<sup>31</sup> This includes the adoptee and his/her descendants (Article 500). The old fixed portions remain.

## 3 Assessment and Conclusions

The new Civil Code, by changing the article numbers totally, will have an impact on the practice of the law, existing judicial decisions and lawyers' practice being fundamentally altered.

True equality between the spouses has been partially achieved. For example, as observed above, the wife still takes the surname of the husband. However, if she wishes, she can use her maiden name before that of her husband's surname either upon her written request to the marriage registrar or subsequently to the administration for personal status. As Article 153 (new Article 187) was amended in 1997, this option already existed, though it was hardly ever used.

In the new Civil Code, a husband will also be able to ask for alimony from his wife regardless of her financial status. But, women in Turkey are financially weak and they should have been protected as they had been previously. In a similar vein, under previous provisions a woman could only become a guarantor for her husband's debts with the permission of the judge. This is no more. Under the previous law, the then article 169 was challenged as contrary to Articles 10 and 12 of the Constitution, and therefore, unconstitutional, in a case where the wife had become a guarantor to her husband and a debtor to third parties in the

husband's interest without asking permission from the judge. The claim was that this provision, which appears at first to be protecting the rights of a wife, actually treats her as a minor since the husband in the same position does not need permission; the insinuation being that she is a second class citizen. The *Anayasa Mahkemesi* said that,

“The aim of this provision is to protect the wife from entering under obligations unwittingly as she may not know the consequences, the scope and the aim of this debt. She may enter such an obligation under the husband's influence. This limitation is to protect the unity of the family and is in the public interest and therefore not unconstitutional.”<sup>32</sup>

The dissenting opinions observed:

“This unequal treatment of the woman violates the Convention on the Prevention of Discrimination Against Women, any discrimination based on sex is illegal; national provisions should be viewed in the light of this Convention, not just the Turkish Constitution. Our Civil Code is based on the Swiss Code of 1907 (in effect in 1912) and it may have been meant to protect the wife; but in our day this is not acceptable. This protection presumes that the woman is less intelligent and less capable; and her legal capacity has been limited by this provision. It assumes that she cannot foresee the consequences of her actions. This cannot be acceptable. Our view is supported by draft Civil Codes prepared since 1982, none of which have this provision. In addition this provision was removed from the Swiss Code in 1984; now a ratification of such a contract is demanded in relation to either party.”

On the one hand the approach in the new Civil Code is a welcome development, which puts men and women on an equal footing, but on the other hand, it is an unfortunate development in a society where most wives live under the serious pressure of their husbands and are not financially independent. Though the source Swiss Civil Code was amended in 1984, this was in a different direction, which the Turkish legislator did not consider.

The spouses' right to work outside the home is tied to the condition of not adversely affecting the well-being of the family. This means that there may still be pressure on a wife not to work.

The new Civil Code does not mention current issues of Family Law such as surrogacy, homosexual marriage and adoption by homosexuals, though it allows

transsexuals to change their civil status. In this predominantly Muslim society, where unmarried couples living together are frowned upon, the Code makes no provisions for cohabiting couples. However, this issue actually has an added poignancy, as noted above. Therefore, decisions of courts in this area are of the utmost importance for couples living together without an official secular marriage. In fact, as pointed out earlier, neither the legal framework nor the *Yargıtay* accept the fact that couples living out of wedlock can be regarded as in a relationship to be protected by law. Nevertheless, the *Yargıtay*, in its effort to tune the law to the needs of the society, has sometimes taken a milder position. For example, while considering compensation for death in work-related accidents, the *Yargıtay* extended the right to compensation to the unmarried cohabiting women (*nikahsız eş*), but on a different basis from that for married women. In one case, the childless surviving partner of an *imam nikahı* union asked for material and moral compensation arising from the death of her partner in a work-related accident. The lower court agreed but the insurance company objected. The *Yargıtay* regarding her chance of getting re-married to be much higher than that of a married woman decided on a percentage lower to that which would be the due of a married wife.<sup>33</sup> In a later case<sup>34</sup> when the insured died in a work-related accident, the partner, who was this time referred to by the *Yargıtay* as the 'cohabiting partner' was eighteen and had a child. According to the Court she had more than a 35% chance of getting re-married which is the accepted percentage for an official widow. The Court was of the opinion that:

“Her age, social status, position and family ties mean that she is not in the same position as a married woman who expects to live in the family home for an indefinite period and can expect support throughout her life. The compensation arising out of section 43 of the Code of Obligations therefore should be reduced in keeping with fairness and equity.”

This time there was a telling dissenting opinion by a female judge attached to this decision, critical of the differentiation drawn between the two women. The dissenting judge stated that:

“Here 'cohabiting couple' (*nikahsız eş*) refers to a traditional Anatolian relationship where couples have the intention of living together as husband and wife, with close family ties and children. Therefore, the presence or absence of official wedlock should not be the criterion on which to treat the two women differently. The Social Security Council will only give a pension to the officially married wife and this for life. This should be the only extra gain



for the married woman. The Anatolian woman is already oppressed and faces a risk in living officially unmarried since she cannot get married owing to tradition, and therefore should not be further weakened when facing the law. This situation would only lead to mistrust of justice. The present circumstance is the outcome of the social structure, and the social order cannot be changed by making a weak person even weaker. She also should be given equal compensation.”<sup>35</sup>

In another case, while the *Yargıtay* was determining what is an engagement’ in order to decide on whether gifts beyond the ordinary should be returned upon the breaking of the relationship, it was careful to differentiate between the breaking up of an engagement’, that is a promise to marry, in which case gifts beyond the ordinary would be returned, and of living together without a valid marriage act’, in which case they need not.<sup>36</sup> In the last instance, since both parties act outside legality, the law protects the possessor.

As far as the legal status of children is concerned, the system has been simplified and the concepts of legitimate and illegitimate children have been abandoned, instead the Code talks of children born into wedlock and out of wedlock. The word *nesev* (filiation or lineage) has been replaced by *soybağı* (family tie), a neutral concept.

The matrimonial regime of ‘participation in acquisitions’ is an extremely positive development, but it does not apply automatically to marriages existing before 1 January 2002. This means that the unfair and unsatisfactory regime of ‘separation of property’ of the past continues to apply to marriages concluded before 1 January 2002. The new arrangement for existing marriages will create some practical problems. Spouses of existing marriages could have drawn up a contract between the period of 1 January 2002 and 1 January 2003, and decided that ‘participation in acquisitions’ would apply to their property from the beginning of their marriage, regardless of when the marriage was contracted.<sup>37</sup> Otherwise the new regime would apply to them only from 1 January 2002, so that whatever they acquire after that date would fall into the new legal regime. This means that for spouses who have not by contract opted for the new regime, part of their goods will be subject to ‘separation of property’ and part, that is, those acquired after 1 January 2002, to ‘participation in acquisitions’. Upon death or divorce, this will create considerable problems. In the transitional period not only is there the old inequality between men and women, but also new inequalities created between women married before 2002 and women married after 2002. The same type of inequality is created for men. In addition, the work of some women in the home will be counted as a contribution to acquisitions only after 1 January 2002. It is also regrettable that it is extremely easy for spouses to

opt out of the legal regime, itself an achievement after long years of struggle by the feminist camp.

On many of the issues arising under the provisions of Family Law, the newly envisaged Family Courts will have competence, when they are set up.<sup>38</sup> Family Courts will deal mostly with protective, educational and social aspects of family life, above all considering “the protection of mutual love, respect and tolerance within the family, determining the problems spouses and children face with a view to resolving these by peaceful means and encouraging such resolution whenever necessary by expert advice.”<sup>39</sup>

The Turkish legal system was already in many ways quite similar to the Dutch and other continental legal systems, being the product of global receptions of civilian law (Swiss, German, French and Italian). This resemblance is now closer. Though Islamic law, the law of the Ottoman Empire, plays no part in the contemporary Turkish legal framework, the traditional and religious sentiments of the people do not always coincide with the formal legal system. It must also be remembered that Turkish nationals differ from each other in many ways, such as religion, race, language, tradition, geography, education and wealth. It is therefore interesting to observe how the Turkish legislature and the courts deal with such social problems as they appear. The picture becomes even more interesting after these amendments. The majority of women in Turkey regard themselves as subservient to their husbands and regard the husband as the head of the family; and men definitely do so. Unless accompanied by education, wide dissemination of information and a change in social norms, the new Civil Code will provide equality to enlightened families only. This existed even before the changes.

It must be remembered that rules that treat men and women as equals can only provide formal equality. This is more apparent in a society where women, especially in traditional families are not regarded as equal and do not have equal financial and professional status or means. The balance between the spouses, which in the Civil Code of 1926 was tilted in favour of the husband, is now based on equality, but context may demand that it should be tilted in favour of the wife in order to achieve real equality. Law assumes equality where it does not in fact exist. Equality and rights may oversimplify complex power relations. The exercising of rights in the private sphere has little to do with legal rights. Turkish law is an example of a top-down model and there is no official recognition of pluralism. Therefore the work done by the courts in everyday situations is of increased importance. The courts reformulating the law must tune the law to context to achieve the ‘best’ substantive result for spouses and children.

Nonetheless, the amendments and the new provisions of the new Civil Code do aim to bring Turkish Family Law into line with the laws of the member states of the European Union and give women the basic security of being able to rely

on a law which gives them equality. We can only hope that in time, what is provided for by law becomes internalised by both sexes and the society at large.

## NOTES

- 1 For general information on Turkish family law see the sources quoted on p. 27 footnote 1, and on divorce law in particular see pp. 27-34 of E. Örüçü, "Turkish Divorce law", *Migrantenrecht* 1996, p. 2.
- 2 It must be noted here that the decisions of the *Anayasa Mahkemesi* (the Constitutional Court) are binding for all, but apart from the 'unification of judgments' of the *Yargıtay* (the Court of Cassation), judicial decisions do not form binding precedents in the Turkish legal system.
- 3 The full Article now reads: "The family is the foundation of Turkish society and is based on the equality between the spouses. The state shall take the necessary measures and establish the necessary organisation to ensure the peace and welfare of the family, the protection of the mother and the children in particular, and for family planning education and practical application."
- 4 All translations from Turkish are the author's.
- 5 A new requirement is the submission of a medical report showing that the would-be spouses have no disease effecting marriage.
- 6 It will be interesting to see what is to be included in 'any other place' in practice.
- 7 1999/27; 1999/42; 24.11.1999; 2 May 2002; *Resmi Gazete*: 24743.
- 8 The same Article also criminalises and imposes a prison sentence on persons performing such religious ceremonies without seeing the official certificate of marriage.
- 9 Obviously, there are no official figures indicating the percentage of couples living together today within a religious union (*imam nikahı*) alone.
- 10 See for an analysis, E. Örüçü, "Improving the Lot of Women and Children", in A. Bainham (ed), *The International Survey of Family Law* 1997, 1999, 465, at pp. 470-471.
- 11 1997/61; 1998/59; 29/9/1998; 15 November 2002, *Resmi Gazete*: 24937. This decision is as relevant today for Art. 187 as then for Art. 153.
- 12 29/1/1990; 1990/30-31. See for an analysis, E. Örüçü, "Diverse Issues, Continuing Debates", in A. Bainham (ed.), *The International Survey of Family Law* 1994, 1996, 449, pp. 451-452.
- 13 Participation in acquisitions (*edinilmiş mallara katılma, Errungenschaftsbeteiligung*) has been accepted in Switzerland (the source legal system for Turkish Civil Law) on 1 January 1988 also as the codal regime.

- 14 See an assessment of the situation for marriages contracted before 1 January 2002 below under III.
- 15 The provision banning the wife from re-marriage within 300 days of the termination of the marriage has been replaced with this new provision in keeping with the Swiss developments.
- 16 *Anayasa Mahkemesi*; 81/29; 81/22; 21.5.1981.
- 17 *Anayasa Mahkemesi*; 90/15; 91/5; 28.2.1991.
- 18 Turkey passed its most recent Amnesty Act in 1991, the previous one being in 1981.
- 19 93/603; 93/4179; 26.4.1993.
- 20 The Article at that time made a distinction between 'paternity with all its consequences' and 'paternity for financial support', which distinction had given rise to a line of varying interpretations by different Sections of the *Yargıtay*. Now there are no longer two types of paternity suits. See for a thorough discussion, Örüçü, *supra* n. 10, pp. 473-479.
- 21 This development may be construed by some to mean that the legal system is condoning relationships outside marriage rather than being concerned solely with the interests of the child.
- 22 This was first established in 1987 by the annulment of the then Article 443 of the Civil Code by the *Anayasa Mahkemesi* (in effect from May 1988). Also see for a comprehensive discussion of various decisions by this Court, the *Yargıtay* and the doctrine on this issue Örüçü, *supra* n. 10, pp. 473-479.
- 23 See E. Örüçü, "A Review of Turkish Divorce Law", in: S.W.E. Rutten (ed.), *Recht van de Islam* 8, RIMO Maastricht 1991, pp. 47-62.
- 24 The *Anayasa Mahkemesi* annulled the articles of the Penal Code regarding adultery as a criminal offence for the husband and the wife in 1996 and 1999 respectively. Thus here too equality was achieved.
- 25 See for a discussion of problems arising from this stance, Örüçü, *supra* n. 1, pp. 32-34.
- 26 Procedure borrowed from the French procedural system, as pointed out in 1997/6-175; 1997/196; 14/10/1997; 24 *Yargıtay Kararlar Dergisi* 1998
- 27 Previously, apart from suits for moral damages, there was no time limit for bringing law suits following divorce.
- 28 However, the *Yargıtay* is of the opinion that in paternity suits the mother may not always act in the interests of the child and therefore upon such a suit immediately appoints a curator (*kayyim*). See *Yargıtay II. Hukuk Dairesi*, 2001/17671; 2002/781; 29/1/2002 (2002) 28 28 *Yargıtay Kararlar Dergisi*, p. 851-852.
- 29 The *Yargıtay* alters the arrangements for custody when the child's relationship with the other parent is hampered, or his/her family ties or men-

- tal development are adversely affected. See Yargıtay II. Hukuk Dairesi 2002/3930; 2002/4731; 4/4/2002, (2003) 29 *Yargıtay Kararlar Dergisi*, pp. 356.
- 30 If parents neglect their duties towards the child, the judge must decide on necessary measures for the protection of the child *ex officio*. See Yargıtay II. Hukuk Dairesi 2002/6834; 2002/7495; 4/6/2002 (2003) 29 *Yargıtay Kararlar Dergisi*, pp. 17-18
- 31 See the discussion above under Section II.4. Children.
- 32 1997/27; 1998/43; 30/6/1998 (*Resmi Gazete*: 23934; 15/1/2000); 1999/47; 1999/46; 28/12/1999 (*Resmi Gazete*: 23989; 10/3/2000).
- 33 96/1661; 21/3/1996, 22 *Yargıtay Kararlar Dergisi* 1996, 1291.
- 34 97/4819; 8/7/1997 23 *Yargıtay Kararlar Dergisi* 1997, 1785.
- 35 At p. 1786.
- 36 98/10173; 98/12105; 24/11/1998; 25 *Yargıtay Kararlar Dergisi* 1999, 170.
- 37 Article 10 of the Law No. 4722 of 3 December 2001 on the Coming into Force and the Implementation of the Turkish Civil Code (Türk Medeni Kanununun Yürürlüğü ve Uygulama Şekli Hakkında Kanun).
- 38 See Law No: 4787 of 9 January 2003 on the Establishment, Functions and Procedures of Family Courts (Aile Mahkemelerinin Kuruluş, Görev ve Yargılama Usullerine Dair Kanun) published on 18 January 2003 in *Resmi Gazete*: 24997.
- 39 *Ibid.* Art. 7.