

The Role of Comparative Law: New International Model Rules vs. Time-Tested Local Practices

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I. Introduction

Conceptualizing general principles from each individual case (bottom-up approach) and establishing general principles fashioned by the legislative organs of a state (top-down approach) are the two main ways to make laws in a democratic legal system. While the courts’ approach in conceptualizing general principles derived from various cases enables established rules to continually evolve and extend to specific instances previously unconsidered by the legislature, rule-making by the legislature on the other hand is better able to solve general social dilemmas.¹ This second scenario is particularly true where, like in Turkey at the beginning of the

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¹ See Jeffrey J. Rachlinski, *Bottom-up versus Top-down Lawmaking*, 73 U. CHI. L. REV. 933, 964 (2006).

twentieth century, law was to be the instrument to bring about social change by trying to influence behavior, beliefs, and values ('social engineering through law').

In 1923, the Ottoman dynasty whose tale had lasted more than six centuries came to an end, and the Republic of Turkey was created.² The new leadership wished to adopt a new code that would promote traditional Western values.³ The accessibility of Swiss private law to ordinary citizens, its solutions—which are being pragmatic rather than conceptual—as well as additional historical facts and circumstances at that time, played a key role in the adoption by the Turkish legislature of the Swiss codes, namely the Civil Code and the Code of Obligations⁴ and, to some extent, the Swiss rules of international arbitration.⁵ Since the reception of the

² Mustafa Kemal Atatürk, (Jan. 12, 1994) <http://www.columbia.edu/~sss31/Turkiye/ata/hayati.html> [https://perma.cc/G3ZM-8P5X].

³ See generally *id.* (discussing the study of Western languages and Western music, how the “Islamic calendar gave way to the Western calendar,” and how a “vast transformation took place in the urban and rural life.”). See also Arzu Oguz, *The Role of Comparative Law in the Development of Turkish Civil Law*, 17 Pace Int'l L. Rev. 373, 373 (2005) (“Transition from Islamic law to secular law put the Turkish Civil Code (“Turkish Code” or “1926 Code”) on a westernized route.”).

⁴ The Justice Minister at the time of the codification of the civil law in Turkey, Mahmut Esat Bozkurt, wrote in Code Civil “Le Code Civil turc a été emprunté au Code Civil Suisse, le plus récent, le plus parfait et le plus démocratique, et . . . cette transformation brusque non seulement n’a mis en danger aucun intérêt vital des peuples, mais leur a procuré de grands bienfaits” *Droit Actuel, Recueil des cours*, at 183, 185 (1933); see GEORGES SAUSER-HALL, INTRODUCTION À L’ÉTUDE DU NOUVEAU DROIT CIVIL EN TURQUIE 4 (Istanbul, 1926); see LÉON OSTROROG, THE ANGORA REFORM 90 (London, 1927); see Hıfzı Veldet Velidedeoğlu, *İsviçre Medeni Kanunu Karşısında Türk Medeni Kanunu*, in MEDENİ KANUN’UN XV. YILDÖNÜMÜ İÇİN 339 (Istanbul, 1944); see Ziyaeddin Fahri Findıkoğlu, *Le point de vue d’un sociologue turc*, 1 BULL. INT’L DES SCI. SOC. 14 (1957); see Adnan Güriz, *The Turkish Civil Code*, in INTRODUCTION TO TURKISH LAW 10 (Tuğrul Ansay ed., 1966); see Ruth A. Miller, *The Ottoman and Islamic Substratum of Turkey’s Swiss Civil Code*, J. OF ISLAMIC STUD. 335, 335 (2000); see Bernard Lewis, THE EMERGENCE OF MODERN TURKEY 272 (3rd ed. 2002); see GAVIN D. BROCKETT, HOW HAPPY TO CALL ONESELF A TURK 47 (2011); see David Bradley, *Family Law*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 326 (Jan M. Smits ed., 2d ed. 2012); see ERDEM BÜYÜKSAGIS, LE NOUVEAU DROIT TURC DES OBLIGATIONS, PERSPECTIVE COMPARATIVE AVEC LES DROITS SUISSE ET EUROPÉEN 14 (2014).

⁵ See Erdem Büyüksagis, *Le Nouveau CO Turc est-il Toujours Attaché à Ses Racines Suisses? Analyse à la Lumière du Principe Européen d’Effectivité, une Réponse Particulièrement Intéressante en Matière de Prescription Extinctive*, RESPONSABILITÉ ET ASSURANCE (REAS/HAVE) 44, 44-50 (2012), https://www.researchgate.net/publication/259745132_Le_nouveau_CO_turc_est-il_toujours_attache_a_ses_racines_suissees_

Swiss private law in Turkey in 1926, cooperation between the two countries' academic institutions has been encouraged thanks to numerous projects to enhance dialog and mutual legal understanding between Switzerland and Turkey.⁶ Not only did the Turkish legal institutions adopt Swiss statutory rules but also the progressive academic opinions on their interpretation as well. Turkish judges have not hesitated to rely, among others, on the case law and academic experience of this country.⁷

In the comparative law literature, several scholars have used such outcomes resulting from the adoption of Swiss private law in Turkey as an argument against the significance of local beliefs, national values, and attitudes toward the perception of law and order. According to these researchers, the Swiss-Turkish experience could serve as a model for developing in the European Union ("EU") common principles of contract and tort law as a kind of restatement.⁸ To underlie the general trend of harmonisation in EU private law, Professor Jürgen Basedow, for instance, stipulates that, "in more recent years, the use of comparative law by national legislators for the purpose of legal reform clearly demonstrates that the general belief in the national character of national law is

Analyse_e_la_lumiere_du_principe_europeen_d%27effectivite_une_reponse_particuliere_rement_interessante_en_matiere_de_prescription_extinctiv [https://perma.cc/GQB6-W8D9].

⁶ For instance, the "Journées turco-suissees," organized every two years, gather Swiss and Turkish academics and practitioners interested in private law, and provide a forum for discussion, debate, and an opportunity to share various court applications and scholarly findings. See generally News, SWISS INSTITUTE OF COMPARATIVE LAW, <http://www.isdc.ch/en/news/events/journees-turco-suissees> (follow "News" hyperlink; then search for "Journées turco-suissees").

⁷ It is worth noting the Turkish Supreme Court's position on the use of foreign law—in particular, on Swiss law. See Yargıtay [Turkish Supreme Court] E. 1945/13, K. 1945/15 (YKD 1945) (stating "[w]hen interpreting our law, while we take into account our own texts, we cannot give up examining their origins since established doctrine is one of the sources of interpretation.").

⁸ For more on the 'Europeanization' of private law, see Christian Joerges, *The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline*, DUKE J. COMP. & INT'L L. 149 (2004); Franz Werro, *Comparative Studies in Private Law: Insights from a European Point of View*, in CAMBRIDGE COMPANION TO COMPARATIVE LAW 117 (Mauro Bussani & Ugo Mattei eds., 2012); Jürgen Basedow, *The Europeanization of Private Law: Its Progress and Its Significance for China*, CHIN. J. COMP. L. 1 (2013); GUIDO ALPA, *COMPETITION OF LEGAL SYSTEMS AND HARMONIZATION OF EUROPEAN PRIVATE LAW* (2013); *THE MAKING OF EUROPEAN PRIVATE LAW: WHY, HOW, WHAT, WHO* (Luigi Moccia ed, 2013).

receding.”⁹ He supports these views in reference to the Swiss-Turkish transplant: “In some countries, foreign codes have been more or less completely received as legal transplants; think of the Turkish civil code or the law of obligations imported from Switzerland”¹⁰

Based on the similarities of their texts, Professor Basedow was tempted to assert that Swiss and Turkish laws are very similar, but the case law would tell us a rather different story. I am of the opinion that his statement “emphasizing the law’s positive nature over and above its socio-cultural bases” neglects the role of the judiciary system and different views, customs, and traditions.¹¹ It seems that his argument also lacks content and becomes (at least partially) controversial when content is provided, both by factors underlying legal developments in Switzerland and Turkey and the application of similar statutory provisions in these respective countries. As I will attempt to demonstrate below, people—including judges—from different socio-economic, educational, religious, and ethnic backgrounds tend to comprehend and interpret similar statutory rules differently.

The article is structured as follows: to look beyond the positivist credo of merely explaining the promulgation of the Swiss Civil Code in Turkey as a complete success, I will adopt an interdisciplinary approach to Swiss-Turkish transplant. I will begin by explaining that different perceptions of law that lie beneath the words have in fact generated different legal developments in Switzerland and Turkey (II). I will then focus on the judiciaries’ role in Switzerland and Turkey to demonstrate the practical differences between these respective systems based on very similar statutory rules due to the adoption of Swiss private law in Turkey

⁹ See Jürgen Basedow, *Towards A Common Private Law in the European Union*, in *STRUCTURES OF CIVIL AND PROCEDURAL LAW IN SOUTH EASTERN EUROPEAN COUNTRIES 9* (Turğul Ansay & Jürgen Basedow eds., 2008).

¹⁰ *Id.* For a study on “legal transplants,” see John W. Cairns, *Watson, Walton, and the History of Legal Transplants*, 41 *Ga. J. Int’l. & Comp. L.* 637 (2013).

¹¹ See Eugen Bucher, *The Position of the Civil Law of Turkey in the Western Civilization*, *TURK. CIV. L. & WEST. CIV.* 217, 218 (1999) (explaining “[t]he evolution since the coming into existence of the great codes has shown that law is a phenomenon much more complex than what can be deduced from the texts of the existing legislation, the rules of the codes not offering more than general guidelines whilst all to numerous legal questions raised by daily life may be answered only on a higher level of law-understanding.”).

(III). This will permit me to contend that the similarity between the statutory provisions of different countries is not always enough to entail the similarity of their law to demonstrate the role of courts and comparative analysis in the law-making process (IV). While focusing not only on statutory rules, but also on their effects, I will then compare my key findings with the organic development of private law in the EU. Indeed, the role of courts and comparative law in the evolution of the Swiss-Turkish transplant may provide us with some useful insights regarding the future direction of European private law, particularly regarding the relevance of the possible methods aimed at harmonizing private law in the EU (V).

My analysis does not, nevertheless, purport to address the various complex aspects of harmonization. Instead, on the basis of the Swiss-Turkish experience, I aim to contribute to the current debate at the EU level and establish whether harmonization should be achieved by the mere drafting and enacting of ‘Model Rules’ (top-down approach) or by courts deciding in an organic way, while taking into account the socio-cultural background of the given legal system (bottom-up approach).¹² To this end, I employ the idea of comparative law with at least three different meanings: the study of the factors underlying legal development, the exercise of exploring similarities and differences between legal systems, and the use of foreign law by courts.

II. Factors Underlying Legal Development

The characteristics of Swiss culture, which differ significantly from what the vast majority of Turks were accustomed to in Anatolia, challenged the new rulers of Turkey to modernize the civil law system and consequentially the citizens, who were expected to transform in line with the new Code during the transition period from the empire to the nation-state.

For many academics—whether Turkish or not—despite the significant discrepancies between cultural sensibilities in Switzerland and the post-Ottoman era at the beginning of the twentieth century, the implementation of the Swiss Civil Code in

¹² See Reinhard Zimmermann, *The Present State of European Private Law*, 57 Am. J. Comp. L. 479, 479 (2009); see Mathias Reimann & Daniel Halberstam, *Top-Down or Bottom-Up? A Look at the Unification of Private Law in Federal Systems*, in THE FOUNDATIONS OF EUROPEAN PRIVATE LAW 363 (Roger Brownsword, Hans-W Micklitz, Leone Niglia & Stephen Weatherill eds., 2011); see Rachlinski, *supra* note 1, at 933.

Turkey was a success.¹³ Most important to the development of this viewpoint, at least in the light of Turkish secular ideology, was the fact that in Turkish business practices the westernization process began well before the adoption of the Swiss codes.¹⁴ Indeed, the transfer of some Western—mainly French—commercial rules 200 years before—during the Ottoman Empire era—and their implementation in the Ottoman judicial system in the mid-nineteenth century, created certain incentives for local businesses to change and smoothed the transition from a non-Western legal culture based on a divinely ordained system, to a Western legal culture based on rules of reason and evidence.¹⁵

While this observation might be accurate for commercial law and, to some extent, the law of obligations, I consider that, in more social and personal situations, the reason behind the ‘relative’ success of the reception of Swiss private law in Turkey is a different one: the Turkish Code was not a mere translation of the Swiss, but a somewhat flexible adaptation to the Turkish socio-legal environment.¹⁶ Even though the 1926 Turkish Civil Code prohibited polygamy, established a marital age restriction (seventeen for females and eighteen for men), offered women the right to civil divorce, terminated the Islamic freedom of unilateral divorce for men, and aligned the amount of inheritance amongst siblings regardless of gender, some Swiss statutory provisions governing personality, marriage, and divorce were deliberately altered. In the 1926 Turkish Civil Code, particularly the sections on the acts of the civil state with regard to personality, and moral personality, the celebration and publication of marriage, and the act of divorce differ from the Swiss model.¹⁷

While it altered certain abstracts and definitional concepts, the 1926 Code was drafted with the intention to align the legislation with the customary practices in Turkey to ensure that its

¹³ See *La réception du droit étranger en Turquie*, 9 BUL. INT'L. DES SCI. SOC. 34 (1957); see William M. Evan, SOCIAL STRUCTURE AND LAW 34 (1990); see Alan Watson, *Aspects of Reception of Law*, 44 AM. J. COMP. L. 335 (1996).

¹⁴ See GOTTFRIED PLAGEMANN, GESETZ UND GESETZGEBUNG IM OSMANISCHEN REICH UND DER REPUBLIK TÜRKEI 83 (2009).

¹⁵ See BERNARD LEWIS, THE EMERGENCE OF MODERN TURKEY 272 (Oxford Univ. Press, 2d ed. 1961).

¹⁶ See Ruth A. Miller, *The Ottoman and Islamic Substratum of Turkey's Swiss Civil Code*, 11 J. ISLAMIC STUD. 3, 335, 336 (2000).

¹⁷ *Id.* at 339.

introduction was not perceived as a foreign intrusion in the daily life of the populace.¹⁸ For instance, the drafters wished to introduce numerous new definitions and notions in the Turkish version of the Code particularly relating to the personality and the parameters of the relationship between the state and its citizens at a conceptual level even if, in practice, they desired such a relationship to be based to some extent on the Ottoman model in a way that a word for word translation of the Swiss Code would not have made possible.¹⁹ The drafters operated in the same way at the social level: while they introduced new Swiss-inspired abstract concepts defining marriage and divorce for example, they actually tried to interfere as little as possible in these two well-established procedures.²⁰

The values of Swiss culture, which vary significantly from what the vast majority of Turks were accustomed to, challenged not only the new rulers of Turkey to modernize the civil law but also some Turkish citizens, who could not adapt to new lifestyle imposed on them. The legal stigma attached to having children out of wedlock illustrates this phenomenon. According to the 1926 Civil Code, only children born in registered unions in the secular state system were considered legitimate.²¹ As a result, some parents, whether unaware of the law or unwilling to go to General Registrar Office to formalize their religious marriages,²² had children whom the state considered illegitimate. The numbers were so significant that the government regularly had to pass special laws to give these children legitimate legal status.²³ Between 1926 and the adoption of a special recognition law in 1960, the state granted a legitimate and legal

¹⁸ *Id.* at 354-355. See also Hilmar Krüger, *Fragen des Familienrechts: Osmanisch-islamische Tradition versus Zivilgesetzbuch*, 95 ZSR 300 (1976).

¹⁹ For examples, see Miller, *supra* note 16, at 339-354; Bülent Davran, *Bericht über die Änderungen im Türkischen ZGB gegenüber dem schweizerischen, verbunden mit einigen Bemerkungen über den Sinn der Rezeption*, 4 ANNALES DE LA FACULTÉ DE DROIT D'ISTANBUL 131 (1954).

²⁰ *Id.* at 354.

²¹ See Oguz, *supra* note 3, at 385 (“The status of children born into religious marriages became an issue, and the number of these children who were legitimate in the public sense but considered illegitimate by the 1926 Turkish Code increased.”).

²² For a study on these reasons, see Halil Cin, *İSLÂM VE OSMANLI HUKUKUNDA EVLENME [Marriage in Islamic and Ottoman Law]* 318 (1974).

²³ See Aydın Aybay, *Evlilik Dışında Doğan Çocuklar Sorunu [The Out of Wedlock Children Problem]*, 3 ANKARA BAROSU DERGISI 461, 466 (1969).

status to 7,724,919 such children (in 1960, Turkey had a population of 28 million).²⁴ In other words, large numbers of Turkish children had been born to unions that did not conform to Turkish Civil Code, even if special laws later recognized their legal status.

Numerous surveys prove that, in spite of various efforts and projects, Turkish society has never been totally secularized and that Islam has always played a role in people's individual, social, and public lives.²⁵ The Turkish legislature has closely followed the amendments in the Swiss Civil Code, which has undergone a number of revisions since its adoption in 1907.²⁶ By introducing major Swiss amendments, the legislature revised the 1926 Turkish Civil Code in 2002.²⁷ This new Civil Code significantly improved the position of married women and the legal status of children born out of wedlock.²⁸ The new regime, for instance, extended equal rights of inheritance to the latter.²⁹ However, the socio-cultural gap between some of the different strata of Turkish society is so wide that these punctual changes are far from reflecting different realities from around the country. For instance, just like Article 96 of the

²⁴ *Id.* at 466.

²⁵ See Mary Lou O'Neil & Sule Toktas, *Women's Property Rights in Turkey*, 15 J. TURK. STUD. 29, 34 (2014); see Ihsan Y Yılmaz, *Semi-official Turkish Muslim Legal Pluralism: Encounters Between Secular Official Law and Unofficial Shari'a*, in THE SOCIOLOGY OF SHARI'A: CASE STUDIES FROM AROUND THE WORLD 51, 63 (Adam Possamai, James T. Richardson & Bryan S. Turner eds., 2015).

²⁶ See Peter Breitschmid, *Die Fortentwicklung des Schweizerischen ZGB: Eigensändigkeit und Fremdeinflüsse*, 72 THE RABEL J. OF COMP. & INT'L. PRI. L. 686, 686 (2008) (analysing the amendments to the Swiss Civil Code); see also Bernhard Schnyder, *Schweizerisches Familienrecht im Wandel von 1968 bis 2002*, in RECHT IM UMBRUCH 59 (Luc Vollery, Pierre Corboz, Hugo Casanova & Denis Loertscher eds., 2002) (explaining amendments to the Swiss Civil Code involving family law).

²⁷ Seval Yildirim, *Aftermath of a Revolution: A Case Study of Turkish Family Law*, 17 PACE INT'L L. REV. 347, 350 (Sept. 2005) (“[L]egislative attempts to reform the 1926 code, ultimately leading up to the realization of the new civil code, which took effect on January 1, 2002 The new code introduced significant changes towards gender equality in marriages . . .”).

²⁸ See *Inheritance Laws in the Nineteenth and Twentieth Centuries*, LAW LIBRARY OF CONGRESS 186, 192 (March 2014).

²⁹ The 2002 Civil Code does not differentiate between children born in and out of wedlock—a policy adopted by the Constitutional and Supreme Courts even before 2002. See AYM, E. 1987/1, K. 1987/18 (1987) [Resmi Gazete, 1988, No. 19679] [Turkish Official Gazette]; see YİBK, E. 1996/1, K. 1997/1 (1997); see also Tuba Kutoğlu, *Türk Mevzuatında ve İçtihatlarında Babalık Hükmü* [Paternity in Turkish Statutory and Case Law], DÜHFD 980, 981 (2012) (discussing the topic extensively in literature).

Swiss Civil Code, Article 130 of the 2002 Turkish Civil Code provides that a person wishing to remarry must prove that the preceding union has been annulled or dissolved.³⁰ The law banning polygamy has nevertheless failed to find any legal sustenance, particularly in Eastern Anatolia.³¹ A survey published in 1998 and including 599 women aged 14–75 years who lived in 19 settlements in Southeastern and Eastern Turkey revealed that whereas 89.4% women had monogamous unions, 10.6% were in polygamous marriages.³² According to a 2010 survey of 462 married women living in Van, an Eastern Anatolian province close to the border with Iran, 88.7% of them (410 of them) were in a monogamous marriage, while 11.3% of them (52) were living in polygamous partnerships.³³ This survey showed that literacy significantly contributes to the decline of polygamy: while 78.2% of women in polygamous marriages were illiterate, that number dropped to 57.3% for literate women.³⁴ In turn, this reveals that there is, in Turkey, a correlation between the degree of education and the perception of religion as well as understanding of law and order.

There are other surveys that support the opinions that the Turkish Code did fail to sweep away customary or Islamic law entirely. For instance, like the 1926 Civil Code, the 2002 Civil Code establishes an inheritance regime which is tied to bloodlines and gives priority to children through a system of protected shares (Articles 495 to 682).³⁵ Like the Swiss Civil Code, the Turkish Civil Code adopts a gender-neutral approach and provides that all those

³⁰ “A person wishing to remarry must prove that the preceding union has been dissolved.” TURK. CIVIL CODE, art. 130 (2002) (author’s translation). Article 96 of the Swiss Civil Code reads: “Toute personne qui veut se remarier doit établir que son précédent mariage a été annulé ou dissous.” SCHWEIZERISCHES ZIVILGESETZBUCH [ZGB], CODE CIVIL [CC], CODICE CIVILE [CC] [CIVIL CODE] Dec. 10, 1907, SR 210, RS 210, art. 96 (Switz.).

³¹ See generally SERIM TIMUR, TÜRKİYE’DE AİLE YAPISI [Family Structure in Turkey] (1972) (explaining a seminal study).

³² See Pınar İlkaracan, *Exploring the Context of Women’s Sexuality in Eastern Turkey*, 6 REPRODUCTIVE HEALTH MATTERS 66, 69 (1998).

³³ See Sebahat Gücük, Seçil Günher Arıca, Zafer Akan, Vefik Arıca & Servet Alkan, *Van İlindeki Çok Eşlilik Oranları ve Etkileyen Faktörler: Kesitsel Çalışma* [Polygamy Rates and the Affecting Factors in Van: A Cross-sectional Study], in KARTAL EĞİTİM VE ARAŞTIRMA HASTANESİ TIP DERGİSİ 127 (2010) (containing an empirical study).

³⁴ *Id.* at 130.

³⁵ SERIM TIMUR, TÜRKİYE’DE AİLE YAPISI [Family Structure in Turkey] (1972).

entitled to receive an inheritance can do so regardless of gender.³⁶ However, in Turkey, according to a nationwide survey of 12,791 women aged 15–59, 9% of women own some form of vacant land, and only 17% of women own part or all of at least one home.³⁷ The survey published in 2008 reveals that inheritance rights are often limited by traditional customs and norms of Islamic law, which give greater benefits to men.³⁸

The Turkish experience has made clear that foreign concepts cannot be transposed from one socio-cultural context to another without being readjusted.³⁹ Despite the fact that the Turkish legislature made some effort to adapt the Swiss law to the Turkish socio-cultural context, people with different socio-economic background have had different understandings of very similar rules. This in turn has created a hybrid system where different sources of law compete. This phenomenon emphasizes law's socio-cultural embeddedness over and above its positivist pedigree.⁴⁰ As I will try to demonstrate further below, my observations on the implication of judicial law making in Switzerland and Turkey reinforces this point.

III. Judicial Lawmaking

The introductory chapter of the Swiss and Turkish Civil Codes opens with a statement that, in cases where the Code does not provide applicable provisions, the judge should decide according to customary law, or, if there were no applicable customary law, according to the rule which he himself would formulate the legislature (Article 1(2) of the Civil Code).⁴¹ In the latter case the judge should follow established doctrine and case law (Article 1(3)).⁴²

³⁶ *Id.*

³⁷ See O'Neil & Toktas, *supra* note 25, at 39.

³⁸ *Id.*

³⁹ See Riva Kastoryano, *Introduction, in* TURKEY BETWEEN NATIONALISM AND GLOBALIZATION 8 (2013); see also Pierre Legrand, *The Impossibility of "Legal Transplants"*, MAASTRICHT J. EUR. COMP. L. 114 (1997) (providing more in this vein).

⁴⁰ See DANIEL AUGENSTEIN, *INTEGRATION THROUGH LAW REVISITED: THE MAKING OF THE EUROPEAN POLITY* 103 (2012).

⁴¹ See IVY WILLIAMS, *SWISS CIVIL CODE: SOURCES OF LAW* 54–60 (1923).

⁴² In Turkish law, see RONA SEROZAN, *MEDENI HUKUK, GENEL BÖLÜM* [Civil Law, General Provisions] 92 (2005); see AYDIN ZEVKLİLER, ŞEREF ERTAŞ, AYŞE HAVUTÇU & DAMLA GÜRPINAR, *MEDENI HUKUK, TEMEL BİLGİLER* [Civil Law, Basics] 10 (7th ed. 2012); see JALE AKİPEK, TURGUT AKINTÜRK & DERYA ATEŞ KARAMAN, *TÜRK MEDENİ*

According to this hierarchical structure, even if judges are not given the main task of creating the law, by way of interpreting existing statutory provisions they can, and do, find creative solutions to complex problems.⁴³ Indeed, Article 1 of the Swiss and Turkish Civil Codes offers the judge a democratic mandate to have the final say: a solution that found a positive echo even among American judges. Justice Benjamin Cardozo noted that “the tone and temper in which the modern judge should set about his task are well expressed in the first article of the Swiss Civil Code of 1907.”⁴⁴ In a dissenting opinion in *State Tax Commission v. Aldrich*, Justice Jackson referred to Article 1 as a ‘candid recognition of what necessarily is the practice’ of courts.⁴⁵

Despite the bewildering difference in the socio-legal and economic structures and dynamics of the Swiss and Turkish communities, as I have illustrated in the previous section,⁴⁶ an autonomous legal system whose administration does not rely on ideologically motivated privileged groups, but rather on professional lawyers working independently of the authority imposing the rule, facilitates the smooth enforcement of the newly adopted law.⁴⁷ The transplantation of the Swiss codes offered the Turkish judges tools allowing them certain flexibility in the intermediate period between the abandonment of the old Ottoman

HUKUKU, BAŞLANGIÇ HÜKÜMLERİ, KİŞİLER HUKUKU [Turkish Civil Law, Preliminary Provisions, Law of Persons] 77 (11th ed. 2014); see MUSTAFA DURAL & SUAT SARI, TÜRK ÖZEL HUKUKU, TEMEL KAVRAMLAR VE BAŞLANGIÇ HÜKÜMLERİ [Turkish Private Law, Basics and Preliminary Provisions] 96 (10th ed. 2015). In Swiss law, see Paul-Henri Steinauer, *Le Titre préliminaire du Code civil*, in TRAITÉ DE DROIT PRIVÉ SUISSE (Pierre Tercier ed., 2009); see Franz Werro, *Article 1 CC*, in COMMENTAIRE ROMAND, CODE CIVIL I 38 (Pascal Pichonnaz & Bénédicte Foëx eds., 2010).

⁴³ These issues have been exhaustively discussed in the Turkish legal literature. See SEROZAN, *supra* note 42, at 101; see ZEVLİLER, *supra* note 42, at 20–22, 32; see AKİPEK, *supra* note 42, at 120; see DURAL & SARI, *supra* note 42, at 125, 139. In the Swiss legal literature, see Werro, *supra* note 42, at 42; see Marc Amstutz, *Der Text des Gesetzes: Genealogie und Evolution von Art. 1 ZGB*, ZSR/RDS 252 (2007); see Peter Gauch, *Was zählt, ist einzig, was man gerade weiss*, in UNE EMPREINTE SUR LE CODE CIVIL: MELANGES EN L'HONNEUR DE PAUL-HENRI STEINAUER 15 (Alexandra Rumo-Jungo, Pascal Pichonnaz, Bettina Hürlimann-Kaup & Christiana Fountoulakis eds., 2013) [hereinafter UNE EMPREINTE SUR LE CODE CIVIL].

⁴⁴ See BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 140 (1921).

⁴⁵ *State Tax Comm'n v. Aldrich*, 316 U.S. 174 (1942).

⁴⁶ See *id.*

⁴⁷ See Watson, *supra* note 13, at 335 (noting that Alan Watson explains the success of legal transplants by a highly developed autonomy of the legal profession).

system and the establishment of the new one.⁴⁸ It gave them an opportunity to find new solutions corresponding to the needs of a rapidly evolving society.⁴⁹ Based on the Turkish version of Article 1, courts soften the legal consequences of possibly too rigid or simply unsatisfactory application of the statutory rules without waiting for a legislative intervention,⁵⁰ and find new solutions corresponding to the needs of a rapidly evolving society.⁵¹

A case deserves note in this vein.⁵² In the aftermath of the 1999 earthquake in Gölcük, people who had suffered personal injuries as well as economic harm as a result of the damaged properties claimed compensation from the builders.⁵³ Although most of the damaged buildings had been constructed before the 1980s, the Turkish Supreme Court accepted that there was no reason for the injured to bring an action at the time of the (faulty) construction, and held that the ten-year time limitation period commences upon discovery of the damage—in other words from the date of the earthquake.⁵⁴ The Court overruled the pleas of the statute of limitations filed by the contractors on the basis of contractual as well as extra-contractual time limits, which had both expired according to the first instance judgments.⁵⁵ The Supreme Court held that if the claims were not actionable, it would be unfair for the statute of limitation to commence from the date the act was committed.⁵⁶ Until the Supreme Court judgment the rule was in conformity with the wording of the Code of obligations, that the statute of limitation commenced when harmful conduct occurs, and

⁴⁸ Henry Williams, *Marriage and Divorce in the Legal Culture of the Old, the Ottoman, and the New Turks*, J. TUR. STUD. 181 (1981) (citing ŞERİF MARDİN, RELIGION, SOCIETY, AND MODERNITY IN TURKEY 266 (2006)).

⁴⁹ Erdem Büyüksagis, *supra* note 4, at 15.

⁵⁰ Esin Örüçü, *The Role of Judicial Creativity and Equity in the Developments of Turkish Law and Its Covert Hybridity*, 29 TUF. EUR. & CIV. L. J. 217, 217 (2014).

⁵¹ Oguz, *supra* note 3, at 380.

⁵² Y4.HD, 3.2.2005T, 2004/7039E, 2005/746K.

⁵³ *Id.*

⁵⁴ *Id.* See also Y4.HD, 30.6.2004T, 2004/2110E, 2004/8595K; YHGK, 4.6.2003T, 2003/4-400E, 2003/393K; Y4.HD, 18.12.2002T, 2002/13842E, 2002/14290K. For a similar approach in bodily injury cases, see Y4.HD, 30.01.2009T, 2008/5440E, 2009/1354K (stating that the time limit begins when the plaintiff is aware of his bodily injury and not when the traffic accident occurred).

⁵⁵ *Id.*

⁵⁶ *Id.*

not when the plaintiff discovers the damage suffered.⁵⁷

The Turkish Supreme Court's solution to latent damage cases indicates its ability to diverge from the Code's text to find new solutions to correspond to the needs of an evolving society, where—unlike in Switzerland—the compulsory insurance is yet to be developed. This solution has nevertheless been subject to criticism from the literature.⁵⁸ It has been contended that, according to Article 1 of the Civil Code, judicial interpretation should not be the primary vehicle for change.⁵⁹

Although Swiss judges sometimes adapt the law to the needs of new situations using notably the teleological method,⁶⁰ unlike their Turkish counterparts, they are, in general, reluctant to go beyond the solutions imposed by statutory provisions. There is another case with similar facts that raised similar issues before the Turkish Supreme Court.⁶¹ From 1965 to 1978, the plaintiff was exposed to asbestos dust in the course of his activities.⁶² In 2004, he was diagnosed with cancer caused by exposure to asbestos.⁶³ In 2005, he commenced proceedings seeking compensation from his employer in respect of pecuniary and non-pecuniary damages, claiming that his employer had failed in his obligations by failing to take necessary measures to protect his employees.⁶⁴ On the basis of

⁵⁷ *Id.*

⁵⁸ Veysel Başpınar and Mehmet Altunkaya, *Depremden Doğan Zararların Tazmininde Zamanaşımının Başlaması ve Süresi* [Commencement and Duration of Time Limitation for the Compensation for Loss Caused by Earthquake], 57 ANKARA ÜNİVERSİTESİ HUKUK FAKÜLTESİ DERGİSİ 95 (2008).

⁵⁹ *Id.* at 95.

⁶⁰ See THOMAS PROBST, *DIE ÄNDERUNG DER RECHTSPRECHUNG* 198 (1993); Marc Amstutz, *supra* note 43, at 259; KATHRIN KLETT, *DER EINFLUSS DES EUROPÄISCHEN RECHTS AUF DIE SCHWEIZERISCHE RECHTSPRECHUNG IM VERTRAGSRECHT*, 227, 234 (2008). See also Bundesgericht [BGer] [Federal Supreme Court] Apr. 25, 1995, 121 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 219, ¶ 1d.aa (Switz.), http://relevancy.bger.ch/php/clir/http/index.php?lang=de&zoom=&type=show_document&highlight_docid=atf%3A%2F%2F121-III-219%3Ade [https://perma.cc/PQ2K-DKD2].

⁶¹ See Bundesgericht [BGer] [Federal Supreme Court] Nov. 16, 2010, 137 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 16 (Switz.), http://relevancy.bger.ch/php/clir/http/index.php?lang=de&zoom=&type=show_document&highlight_docid=atf%3A%2F%2F137-III-16%3Ade [https://perma.cc/Y6BC-HZAJ].

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

the very same statutory test as in Turkey, unlike the Turkish Supreme Court, the Swiss Federal Supreme Court held in a judgment of 29 January 2010 that the plaintiff's claim had lapsed on the grounds that the absolute time limit of ten years from the date of the occurrence of the damage had expired.⁶⁵ The Swiss Federal Supreme Court found that the limitation period began from the date on which the damage was caused, irrespective of when it had become apparent.⁶⁶ Moreover, the Court denied the plaintiff's claim that such an interpretation would violate the European Convention on Human Rights, in particular Article 6(1), which protects the right to a fair trial.⁶⁷ This decision was then subject to review by the European Court of Human Rights ("ECtHR"), which, in its 11 March 2014 judgment, found that there had been a violation of the right of access to court.⁶⁸

In the light of these judgements, one might argue that, in general, Swiss judges prefer not to (or, for some may not) assume the responsibility of acting *modo legislatoris*.⁶⁹ However, this is debatable since there are also cases where Swiss judges seem willing to engage in developing substantive law according to the needs of the society.⁷⁰ For instance, before the 2011 amendment to

⁶⁵ *Id.* ¶ 2.4. (nothing that for a critical comment, see Benoît Chappuis and Franz Werro, *Délais de prescription et dommages différés: réflexions sur l'ATF 137 III 16 et la motion parlementaire 07.3763*, HAVE/REAS 139 (2011); Pierre Widmer, *Dies irae, dies illa: der dies a quo bei der (absoluten) Verjährung von Schadenersatzforderungen aus Delikt*, HAVE/REAS 92 (2012); Pascal Pichonnaz and Frédéric Krauskopf, *Pas de solution en vue pour la réparation des dommages tardifs*, PLAIDOYER 6 (2015), <https://www.plaidoyer.ch/article/f/pas-de-solution-en-vue-pour-la-reparation-des-dommages-tardifs/> [<https://perma.cc/Q388-BXQQ>]. A comparative analysis is offered by Erdem Büyüksagis, *Le nouveau CO turc est-il toujours attaché à ses racines suisse? Analyse à la lumière du principe européen d'effectivité, une réponse particulièrement intéressante en matière de prescription extinctive*, HAVE/REAS 44 (2012).

⁶⁶ Bundesgericht [BGer] [Federal Supreme Court] Nov. 16, 2010, 137 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 16 (Switz.).

⁶⁷ *Id.*

⁶⁸ Howald Moor and others v. Switzerland, App. No. 52067/10, 41072/11 Eur. Ct. H.R. para. 78 (2014), <https://cases.legal/en/act-echr1-141567.htm>, [<https://perma.cc/62QJ-Z35L>]. For commentary on this judgment, see Arnold F. Rusch, *Haftpflichtrecht – Wichtige Urteile*, in STRASSENVERKEHRSRECHTSTAGUNG 2014 222-3 (Thomas Probst & Franz Werro eds., 2014).

⁶⁹ Arthur Meier-Hayoz, *Der Richter als Gesetzgeber*, in FS MAX GULDENER 197 (Max Kummer & Hans U. Walder eds., 1973).

⁷⁰ Franz Werro, *supra* note 42, at no. 49 (citing Pierre Moor, *De la pratique du juriste à la théorie du droit*, PLAIDOYER 54 (Apr. 2007)).

the Swiss Unfair Competition Act,⁷¹ which aims to bring Swiss law in conformity with the Unfair Terms Directive (93/13/EEC), the Swiss Federal Supreme Court had already (in 2008) broadened the scope of the judicial control of standard terms (incorporation control) to include content verification of contractual clauses in a different way than the Turkish Supreme Court.⁷²

Accordingly, while one can notice a convergence between Swiss and Turkish law in many areas due to the adoption of the Swiss private law in Turkey,⁷³ the distinctive application of its various provisions, such as those governing statute of limitations or the judicial control of standard terms, reveals the fact that the similarity between their statutory rules do not entail a similarity between their laws. This should not come as a surprise. As the former President of the Austrian Supreme Court suggested, “[J]udges do not act in a vacuum; they do not live in an ivory tower; their thinking is shaped by their cultural environment and by their training, by their role models, be it at law school or at court.”⁷⁴ Although some scholars have overlooked this aspect,⁷⁵ this observation, which goes beyond the bounds of written rules set forth in a given time and under given circumstances, calls for a deeper consideration of the concrete claims judges have to deal with.⁷⁶

⁷¹ See Hubert Stöckli, *UWG 8: neues Recht gegen unfaire Verträge*, in SCHWEIZERISCHE BAURECHTSTAGUNG 171 (Fribourg, 2013).

⁷² Bundesgericht [BGer] [Federal Supreme Court] Oct. 28, 2008, 135 ENTSCHEIDUNGEN DES SCHWIZERISCHEN BUNDESGERICHTS [BGE] III 1, ¶ 2.2 (Switz.), http://relevancy.bger.ch/php/clir/http/index.php?lang=de&zoom=&type=show_document&highlight_docid=atf%3A%2F%2F135-III-1%3Ade [<https://perma.cc/5Q8D-YJKV>]; Thomas Koller, *Einmal mehr: das Bundesgericht und seine verdeckte AGB-Inhaltskontrolle*, AJP/PJA 943 (2008).

⁷³ See GÜLNİHAL BOZKURT, *BATI HUKUKUNUN TÜRKİYE’DE BENİMSENMESİ* [THE ADOPTION OF OCCIDENTAL LAW IN TURKEY] 190 (2nd ed. Ankara, 2010).

⁷⁴ Irmgard Griss, *How Judges Think: Judicial Reasoning in Tort Cases from a Comparative Perspective*, 4 J. OF EUR. TORT LAW 248 (2013) (citing in the same vein, see also AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 107 (Princeton, 2006)).

⁷⁵ See Basedow, *supra* note 9, at 9.

⁷⁶ Geoffrey Samuel, *Taking Methods Seriously (Part Two)*, 2 J. COMP. L. 229 (2007); Ole Lando, *Judicial Activism*, in *FESTSCHRIFT FÜR ULRICH MAGNUS ZUM 70. GEBURTSTAG* 693 (Peter Mankowski and Wolfgang Wurmnest eds., Munich, 2014), <http://www.peacepalacelibrary.nl/plinklet/index.php?ppn=401227316> [<https://perma.cc/EN38-FLTC>].

IV. The Role of Comparative Analysis

Within the factual approach described above, turning the whole process into an even more creative and dynamic enterprise, one more element plays a significant role in the law making process: comparative judicial analysis.⁷⁷ For the purpose of this article, it is particularly necessary to understand how cultural (A) as well as linguistic and educational context (B) are involved in the ways Swiss and Turkish courts look to foreign and international law sources for inspiration.

A. Cultural Context

Comparative judicial analysis has been gaining in importance, although its role remains controversial.⁷⁸ In the nineteenth and twentieth centuries, the function of comparative reasoning was reduced to mere ornament.⁷⁹ Indeed, in many judgments foreign laws were, at that time, used only as supporting material or, in learned articles, “to add a scholarly touch to footnotes.”⁸⁰ Today, the fundamental issues arising from the complex interplay between national and international law, as well as the duty to implement international norms and standards into national law (such as the European humanitarian law and the new European regulatory policies that tend to strengthen the role of [international] non-governmental actors), challenge traditional judicial approach.⁸¹ Elsewhere in the world too, evidence suggests that due to the growth of cross-border legal proceedings, the interaction between different

⁷⁷ On the increasing role of comparative law before courts, see *COMPARATIVE LAW BEFORE THE COURTS* (Guy Canivet, Mads Andenas & Duncan Fairgrieve eds., London, 2004); *ENGAGING WITH FOREIGN LAW* (Basil Markesinis & Jörg Fedtke eds., Oxford, 2009); MICHAL BOBEK, *COMPARATIVE REASONING IN EUROPEAN SUPREME COURTS* (Oxford, 2013); *COURTS AND COMPARATIVE LAW* (Mads Andenas & Duncan Fairgrieve eds. Oxford, 2015).

⁷⁸ Mads Andenas & Duncan Fairgrieve, “*There is A World Elsewhere*” – *Lord Bingham and Comparative Law*, in *TOM BINGHAM AND THE TRANSFORMATION OF THE LAW: A LIBER AMICORUM* 831 (Mads Andenas & Duncan Fairgrieve eds., Oxford, 2009).

⁷⁹ H. Patrick Glenn, *Com-paring*, in *COMPARATIVE LAW: A HANDBOOK* 91 (Esin Öricü & David Nelken eds., Oxford, 2007).

⁸⁰ John N. Hazard, *Comparative Law in Legal Education*, 18 U. CHI. L. REV. 264, 265 (1951).

⁸¹ Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1 (2002); ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 65 (Princeton, 2004); MALCOLM N. SHAW, *INTERNATIONAL LAW* 33–34 (7th ed. Cambridge, 2014).

systems is subtler and more complex than may have been assumed in the last century.⁸² When Supreme Court Justice Ginsburg was asked about the controversy based on the misunderstanding that citing a foreign precedent means the court considers itself bound by foreign law, as opposed to merely being influenced by such power as its reasoning holds,⁸³ during an interview with *The New York Times* in 2009, she defiantly replied: “Why shouldn’t we look to the wisdom of a judge from abroad with at least as much ease as we would read a law review article written by a professor?”⁸⁴

As Justice Ginsburg pointed out, there is an increased global need for more horizontal dialogue between courts, a dialogue that goes beyond the mere citation of foreign information.⁸⁵ The Swiss and Turkish jurisdictions are no exceptions. Judges in these countries are provided with effective tools to cite a foreign court’s decision when dealing with uncertainties in domestic law. As the Swiss⁸⁶ and Turkish Supreme Courts⁸⁷ made clear in their rulings,

⁸² Basil Markesinis & Jörg Fedtke, ‘The Judge as Comparatist’, 80 *TUL. L. REV.* 11 (Nov. 2005); BARAK, *supra* note 74, at 197; Joxerramon Bengoetxea, *The Eurocrises and What Socio-legal Studies Could Do about Them, or: Comparing European Pluralisms from Legal Cultural Approaches*, in *THE METHOD AND CULTURE OF COMPARATIVE LAW: ESSAYS IN HONOUR OF MARK VAN HOECKE* 266 (Maurice Adams & Dirk Heirbaut eds. Oxford, 2014).

⁸³ Adam M. Smith, *Making Itself a Home – Understanding Foreign Law in Domestic Jurisprudence: The Indian Case*, *BERKELEY J. INT’L. L.* 218, 219 (2006) (noting former congressman Tom Feeney, who asked: “Should Americans be governed by the laws of Jamaica, India, Zimbabwe, or the European Union?”).

⁸⁴ Adam Liptak, *Ginsburg Shares Views on Influence of Foreign Law on Her Court, and Vice Versa*, *N.Y. TIMES* (Apr. 11, 2009), <http://www.nytimes.com/2009/04/12/us/12ginsburg.html> [<https://perma.cc/XDP9-AXE3>]; For a similar view, see Stuart Taylor, *Let’s Look to Zimbabwe: Should the Supreme Court Consider Foreign Precedent to Interpret our Constitution?*, *LEGAL TIMES* 46 (Mar. 8, 2004).

⁸⁵ Vassilis Hatzopoulos, *Actively Taking to Each Other: The Court and the Political Institutions*, in *JUDICIAL ACTIVISM AT THE EUROPEAN COURT OF JUSTICE* 111 (Mark Dawson, Bruno De Witte and Elise Muir eds., Cheltenham, 2013).

⁸⁶ Bundesgericht [BGer] [Federal Supreme Court] Jan. 13, 1998, 124 *ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS* [BGE] III 266 S. 268, ¶ 4 (Switz.) (“bei der Auslegung [sind] alle herkömmlichen Auslegungselemente zu berücksichtigen . . . ; auch rechtsvergleichende.”); see also Eugen Bucher, *Rechtsüberlieferung und heutiges Recht*, *ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT* [ZEUP] 394, 486 (2000).

⁸⁷ YHGK, 15.1.2014T, 2013/11-1138E, 2014/16K. In this case, the owner of a registered trademark sued an Internet service provider for infringement based on the sale of products that contain unauthorized reproductions. The Turkish Supreme Court noted

Article 1 of their Civil Code, which itself found its roots in a foreign (French) source,⁸⁸ allows judges to turn to comparative law, as does the legislature when formulating a new statute.

However, that does not mean that the Swiss and Turkish courts use comparative law in the same manner. Their own cultural context inevitably provides distinctive canopy to their very similar statutory rules as well as their judicial judgments. Fons Trompenaars and Charles Hampden-Turner provide a general explanation for this consistently observed phenomenon:

Culture comes in layers, like an onion. To understand it you have to unpeel it layer by layer. On the outer layer are the products of culture, like the soaring skyscrapers of Manhattan, pillars of private power, with congested public streets between them. These are expressions of deeper values and norms in a society that are not directly visible The layers of values and norms are deeper within the 'onion', and are more difficult to identify.⁸⁹

This is exactly what studies conducted on national values in Turkey and Switzerland reveal.

Different sociological surveys aiming at providing information on Turkish values and norms show that Turkish culture gives a lot of importance to the group and tries to look for what is good for the group.⁹⁰ Such a collectivist culture places emphasis on working together, on harmony within the community and on presenting a positive image to the rest of the world. Swiss culture, being individualistic, is very different in that it emphasizes the individual and gives importance to his or her personal points of view, cares, and aims.⁹¹ That explains, to certain extent, the reasons behind the

that, if there is a gap in the statutory provisions, the lower court would be able to take foreign law into account.

⁸⁸ FRANÇOIS GÉNY, *MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF* 326 (2nd ed. Paris, 1919). Article 1 of the Swiss Civil Code of 1907 finds its roots in the first edition of this book published in 1889 and, for some authors, even in Aristotle's philosophical reflections (The Athenian Constitution, 9.2); see Henri Torrione, '*Les articles 1, 2 al. 2 et 4 du Titre préliminaire du Code civil, et la philosophie du droit*', in *UNE EMPREINTE SUR LE CODE CIVIL*, *supra* note 43, at 67; Werro, *supra* note 42.

⁸⁹ FONS TROMPENAARS & CHARLES HAMPDEN-TURNER, *RIDING THE WAVES OF CULTURE: UNDERSTANDING CULTURAL DIVERSITY IN BUSINESS* 6 (London, 1997).

⁹⁰ *Turkey*, THE HOFSTEDE CENTER, <http://geert-hofstede.com/turkey.html> [https://perma.cc/38MP-XRLM] (last visited March 22, 2016).

⁹¹ *Switzerland*, THE HOFSTEDE CENTER, <http://geert-hofstede.com/switzerland.html> [https://perma.cc/T874-P8X6] (last visited March 22, 2016).

differences between Swiss and Turkish case law being an expression of their values and norms.⁹²

As an example, Swiss case law on family issues demonstrates a high preference for the interest of individual freedom of action, whereas Turkish courts often take a conservative stance and put forward the collectivist view. “In its judgment of 20 December 2005, after stating that the recoverability of the financial damages of a healthy but unplanned child’s birth as a result of clinical negligence had not yet been discussed by the Swiss Federal Supreme Court, the latter first examined how German, Dutch, Austrian, and UK courts addressed the issue.”⁹³ “The Swiss High Court then criticized the position of the House of Lords in *Rees v Darlington Memorial Hospital NHS Trust*⁹⁴ as well as the 25 May 1999 ruling of the Austrian Supreme Court⁹⁵ as unconvincing.”⁹⁶ “Citing German⁹⁷ and Dutch⁹⁸ case law almost [twenty] times as substantive evidence along with the Swiss academic literature,⁹⁹ the Swiss High Court arrived at the conclusion that there is damage, as the parents’ legal duty to provide needed care to their children certainly reduces their financial assets.”¹⁰⁰ “[T]he use of the comparative method enabled Swiss judges, on the one hand, to gain inspiration from the German and Dutch case law in which a

⁹² Much of the rest of Section IV has been repeated from the author’s previous publication, Erdem Büyüksagis, *What Europeans Can Learn from an Untold Story of Transjudicial Communication*, in *COURTS AND COMPARATIVE LAW* 680, 690 (Mads Andenas & Duncan Fairgrieve eds., 2015) [hereinafter *Untold Story*].

⁹³ *Id.* at 687 (citing Bundesgericht [BGer] [Federal Supreme Court] Dec. 20, 2005, 132 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 359, ¶ 3.2 (Switz.)).

⁹⁴ *Rees v. Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, [2003] All ER 271.

⁹⁵ Oberster Gerichtshof [OGH] [Supreme Court] May 25, 1999, 121/1999, 593 (Austria).

⁹⁶ *Untold Story*, *supra* note 92, at 687 (citations omitted).

⁹⁷ Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 18 1980, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1450, 1980 (Ger.).

⁹⁸ HR 21 februari 1997, JZ 18/1997, 893 ((Neth.)).

⁹⁹ *See, e.g.*, Franz Werro, *Article 1 CC*, in *COMMENTAIRE ROMAND, CODE DES OBLIGATIONS I* 27 (Luc Thévenoz & Franz Werro eds., 2003).

¹⁰⁰ *Untold Story*, *supra* note 92, at 688. Bundesgericht [BGer] [Federal Supreme Court] Dec. 20, 2005, 132 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 359, ¶ 4 (Switz.). This judgment was cited by Oberster Gerichtshof [OGH] [Supreme Court] Dec. 11, 2007, 5 Ob 148/07m (Austria.).

seemingly satisfactory solution to the wrongful birth issue had been found and, on the other hand, to distance themselves from the Austrian and British judge-made law, which they found unpersuasive.”¹⁰¹ Yet the general view in Turkey is that if parents suffer any loss, this economic loss is outweighed by the ‘blessings’ of having a healthy child.¹⁰² Indeed, in Turkish culture, the benefits of having a (healthy) child are incalculable in monetary terms. That is why the Turkish Supreme Court has not gone so far as the Swiss High Court and avoided producing possibly ‘morally repugnant’ results in the eyes of most Turks.

“The 18 June 2011 ruling of the Turkish Supreme Court illustrates the” relatively collectivist and hierarchical profile of Turkey well.¹⁰³ “The plaintiff argued that the refusal by the lower courts to allow her to bear only her maiden name had unjustifiably interfered with her private life.”¹⁰⁴

In its judgment, the Turkish Supreme Court first cited a decision from the European Court of Human Rights [(“ECtHR”)], which had found that the obligation imposed on married women, in the interests of family unity, to bear their husband’s surname[—]even if they could put their maiden name in front of it[—]had no objective and reasonable justification.¹⁰⁵

“The Turkish High Court then saw an inconsistency between the ECtHR’s ruling and the Turkish law, stating that the existing domestic rules and principles governing this issue stem from a tradition designed to reflect family unity by having the same name.”¹⁰⁶

¹⁰¹ *Untold Story*, *supra* note 92, at 688 (“This aspect of the judgment undermines the argument that courts cite foreign systems only when and where this seems appropriate to promote the judge’s own cause (the cherry-picking argument)”).

¹⁰² ERDEM BÜYÜKSAGIS, MADDİ ZARAR KAVRAMI: YENİ SOSYO-EKONOMİK BOYUTUYLA 381 [The Concept of Damage in Its New Socio-Economic Dimension] (Istanbul, 2007).

¹⁰³ *Untold Story*, *supra* note 92 (citing YHGK, 18.6.2011T, 2011/7737E, 2012/16695K, YKD 2012, 1475).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* (citing Ünal Tekeli v. Turkey, 571 Eur. Ct. H.R. 1, ¶ 66 (2004)).

¹⁰⁶ *Id.* “However, in its judgment of 19 December 2013, based upon the legal doctrines developed by the ECtHR, the Turkish Constitutional Court allowed the plaintiff to bear only her maiden name.” AYM, 19.12.2013T, 2013/2187, Resmi Gazete [Turkish Official Gazette] 7 January 2014, No. 28875. However, this decision has not put an end to the debate. For an overview, see Sultan Tahmazoğlu-Üzeltürk, *Ad ve Soyada İlişkin Kararlar Bireyin Kimlik Hakkı* [Jurisprudence on Forename and Surname Right to Individual Identity], in 3 ANAYASA HUKUKU DERGİSİ [J. CONST. L.], no. 5, 2014, at 11, 26.

“Cases which demonstrate judges’ preferences in applying the existing domestic solution in contrast to foreign methods after discussing and comparing different options are of particular interest to academics, even though the reference to foreign sources is unproductive in the context of a courtroom.”¹⁰⁷ “As a recent empirical study has shown, the frequency with which a court cites foreign law is not necessarily evidence of the extent to which it actually considers foreign law.”¹⁰⁸ As the Supreme Court’s decision on maiden name change illustrates, in Turkey, “[p]articularly in public legal matters [as well as family law issues], courts seem less amenable to other perspectives or other methods of reasoning, albeit they [may sporadically] cite foreign law.”¹⁰⁹

In the traditional view, courts can more easily turn to foreign law materials in private contractual legal matters.¹¹⁰ Indeed, “in the relationships between individuals, the adaptation of the rigid statutory language to particular factual settings through the use of flexible foreign solutions often may not violate” national values and principles, depending on the linguistic and cultural background of the jurisdiction offering the panacea for addressing the problem.¹¹¹

B. Linguistic and Educational Context

Following the reception of Swiss private law in Turkey, a considerable number of young lawyers first learned French and/or German, and then conducted their doctoral research partially or entirely in Switzerland. Upon return some of them became prestigious law professors whose works were influenced by the Swiss tradition.¹¹² Since their students have followed in their steps and maintained a legal intellectual connection between Turkey and Switzerland, when filling gaps in private legal matters or interpreting the law, Turkish academics and courts still refer to

¹⁰⁷ *Untold Story*, *supra* note 92, at 688.

¹⁰⁸ *Id.* (citing David S. Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86 WASH. L. REV. 523 (2011)).

¹⁰⁹ *Id.* (citing Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974)). More recently, see Carlos F. Rosenkrantz, *Against Borrowing and Other Non-authoritative Uses of Foreign Law*, 1 INT’L. J. CON. L. 269, 282–83 (2003).

¹¹⁰ *Id.* at 689 (citing Michel Rosenfeld & András Sajó, *Introduction*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 2 (Michel Rosenfeld & András Sajó eds., Oxford, 2012)).

¹¹¹ *Id.*

¹¹² Professor Turhan Esener and Professor Haluk Tandoğan are certainly two of them.

Swiss judgments and academic literature approvingly.¹¹³

“Thus, for example, during the economic crisis at the beginning of the 1980s, the Turkish Supreme Court had to deal with the effects of fluctuation in the values of currencies in the circumstances that the parties could not reasonably have foreseen at the time of the conclusion of the contract.”¹¹⁴ “In general, the stability of contractual relationships requires that the judge not adjust or terminate the obligation if the debtor assumed the risk of the change of circumstances, or if the circumstances are such that the debtor can reasonably be regarded as having assumed the risk of the change.”¹¹⁵ After “taking into account Swiss judge-made law, in a 1982 decision” which became a significant precedent for subsequent legal decisions, “the Turkish Supreme Court set forth the conditions for a party to be released from its obligations by supervening events that make the performance much more onerous than anticipated.”¹¹⁶ “References to Swiss law by the Turkish Supreme Court can be found in tort law as well.”¹¹⁷ “An example is the Turkish Supreme Court’s 2002 ruling,¹¹⁸ where it referred to some decisions of the Swiss Federal Supreme Court¹¹⁹ in order to

¹¹³ Ergun Özsunay, *The Scope and Structure of Civil Codes: The Turkish Experience*, in *THE SCOPE AND STRUCTURE OF CIVIL CODES* 389 (Julio C. Rivera ed., Heidelberg, 2013).

¹¹⁴ *Untold Story*, *supra* note 92, at 689.

¹¹⁵ *Id.* See also FIKRET EREN, *BORÇLAR HUKUKU, GENEL HÜKÜMLER* [LAW OF OBLIGATIONS, GENERAL PROVISIONS] 48–82 (18th ed. Ankara, 2015); Rona Serozan, *General Report on the Effects of Financial Crises on the Binding Force of Contracts: Renegotiation, Rescission or Revision*, in *TURKISH REPORTS TO THE XIXTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW* 3–4 (Rona Serozan & Başak Başoğlu eds., Istanbul, 2015); İBRAHİM KAPLAN, *HAKIMİN SÖZLEŞMEYE MÜDAHALESİ* [JUDICIAL INTERVENTION IN CONTRACT] 104 (3rd ed. Ankara, 2013).

¹¹⁶ *Untold Story*, *supra* note 92, at 689 (citing Y13.HD, 26.11.1982T, 1982/6186E, 1982/7199K). It is worth noting that, unlike the previous Code, the new Turkish Code of Obligations, which entered into force in 2012, contains a specific statutory rule governing this issue (Art. 138). See Erdem Büyüksagis, *Turkish Contract Law Reform: Standard Terms, Unforeseen Circumstances, and Judicial Intervention*, 17 *EUR. BUS. ORG. L. REV.* 443, no. 3, 2016.

¹¹⁷ *Untold Story*, *supra* note 92, at 689.

¹¹⁸ *Id.* (citing YHGK, 13.2.2002T, 2002/4-114E, 2002/84K).

¹¹⁹ See *id.* (citing Bundesgericht [BGer] [Federal Supreme Court], 64 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] II 260 (Switz.); Bundesgericht [BGer] [Federal Supreme Court], 66 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] II 117 (Switz.); Bundesgericht [BGer] [Federal Supreme Court], 79 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] II 69 (Switz.); Bundesgericht [BGer] [Federal Supreme Court], 80

determine the legal grounds for an action to recover damages for injuries suffered by a third party as a result of a defective product.”

Without giving further examples, allow me to simply confirm that numerous other references to the EU and Swiss case law and academic literature can be found in Turkish case law.¹²⁰ Since there has never been a colonial relationship between Switzerland and Turkey—the adoption of Swiss private law in Turkey was based on the latter’s free will, while referring to Swiss law—or to another foreign law, Turkish judges have not feared stunting the nation-building process that started with the proclamation of the Republic.¹²¹

“There are instances that, from an academic point of view, are just as interesting as the previous judgments of the Turkish Supreme Court.”¹²² “[T]hese include cases where judges make use of the same foreign sources and then reach a different conclusion.”¹²³ For example, regarding an issue concerning a real estate transaction, “for which the law requires a strict adherence to certain forms, the majority judges of the Turkish Supreme Court cited Swiss law and refused to invalidate some transactions” because of the requirements on the form violations.¹²⁴ “They argued that, in some circumstances mentioned by the Swiss Supreme Court, the invalidation of a contract for the sale of the separate parts of a building would be against the principle of good faith.¹²⁵ “The dissenting judges cited the same Swiss law in their reasoning and arrived at an opposite conclusion.”¹²⁶ “Since judicial interpretation is a subjective science moulded by the personal discretion of judges, the reason for this difference is perhaps” due to “each judge relying on a different interpretation he finds persuasive” that provides sustenance to his reasoning.

“A comparison between Swiss and Turkish judge-made law will nevertheless reveal an asymmetrical pattern.”¹²⁷ “Any “reference to

ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 59 (Switz.).

¹²⁰ *Id.* at 690.

¹²¹ On the nation-building process, see LEWIS, *supra* note 15, at 256.

¹²² *Untold Story*, *supra* note 92, at 689.

¹²³ *Id.*

¹²⁴ *See id.* (citing YİBGK, 30.9.1988T, 1987/2E, 1988/2K).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 689–90.

Turkish case law and academic works in decisions by Swiss courts are extremely rare, if not absent.¹²⁸ This is mainly for the language barrier.¹²⁹ “However, this does not mean that the Swiss courts do not cite the case law of other jurisdictions.”¹³⁰ “First, in the absence of a statutory rule or a generally accepted principle, Article 7 of the Swiss Law on Maritime Navigation directs the judge to consider laws and customs, doctrines and case-laws of seafaring countries.”¹³¹ “Furthermore, Swiss courts apply the relevant *acquis* under bilateral and sectoral agreements concluded with the EU.”¹³² “Moreover, Swiss courts consider ECJ case law, particularly when interpreting a rule that purports to implement EU law.¹³³ Finally, the Swiss Federal Court makes use of judgments by other national courts, and quotes them explicitly.”¹³⁴ “Since the acknowledgement of comparative law sources requires a level of immersion in foreign law,¹³⁵ the overwhelming majority of them are derived from the continental European tradition and written in languages in which Swiss judges have competency.”¹³⁶

“Setting aside the references to the case law of the ECJ¹³⁷ and

¹²⁸ *Untold Story*, *supra* note 92, at 690.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* See also Jörg Schmid & Oliver Zbinden, *Rechtsvergleichung in der obligationenrechtlichen Rechtsprechung des schweizerischen Bundesgerichts*, in *DIE RECHTSVERGLEICHUNG IN DER RECHTSPRECHUNG* 76 (Jörg Schmid, Alexander H. E. Morawa & Lukas Heckendorn Urscheler eds., 2014).

¹³³ *Untold Story*, *supra* note 92, at 690 (citing Mar. 28, 2002, 128 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] I 295, ¶ 4c.bb (Switz.)).

¹³⁴ *Id.* (citing Bundesgericht [BGer] [Federal Supreme Court] Dec. 7, 1999, 126 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 129, ¶ 4 (Switz.)).

¹³⁵ *Id.* (citing Daniel Jutras, *Énoncer l'indicible: le droit entre langues et traditions*, *REVUE INTERNATIONALE DE DROIT COMPARÉ* [R.I.D.C.] 781 (2000) (Fr.)).

¹³⁶ *Id.* (citing Alexandra Gerber, *Der Einfluss des ausländischen Rechts in der Rechtsprechung des Bundesgerichts*, in *PERMÉABILITÉ DES ORDRES JURIDIQUES: RAPPORTS PRÉSENTÉS À L'OCCASION DU COLLOQUE-ANNIVERSAIRE DE L'INSTITUT SUISSE DE DROIT COMPARÉ* 141, 144 (1992) (Switz.) [hereinafter *INSTITUT SUISSE DE DROIT COMPARÉ*]). According to this study, 1,541 instances has shown that slightly more than 10 per cent of the decisions refer to foreign law (notably to German, but also to French, Austrian, Italian, and British law). According to a Swiss Federal Supreme Court judge, Kathrin Klett, English is not a linguistic barrier that would prevent judges from accessing foreign legal systems. See Kathrin Klett, *Diskussion*, in *DIE RECHTSVERGLEICHUNG IN DER RECHTSPRECHUNG*, *supra* note 132, at 115.

¹³⁷ *Untold Story*, *supra* note 92, at 691 (citing BGer 2C_628/2013 (concerning the

ECtHR,¹³⁸ whose numbers have seen an increase in recent years, German case law has developed into “the most important foreign source of the Swiss Supreme Court.”¹³⁹ “References to German judgments range from a mere citation as supporting information to a genuine attempt to take advantage of the German experience in order to [find and] implement the best possible solutions.”¹⁴⁰ Besides, in the absence of a ruling from the European Court of Justice (“ECJ”), the Swiss Supreme Court sometimes looks at German developments and interpretations of national laws adopted pursuant to EU directives.¹⁴¹ For instance, “the Swiss Product Liability Act is largely based on the Product Liability Directive (85/374/EEC), and just like the latter it fails to distinguish between different types of defects, with all types lumped together and defined in terms of the ‘consumer expectation test.’”¹⁴²

In a ground-breaking decision of 19 December 2006,¹⁴³ in order to define manufacturing defects, in addition to the Swiss literature,¹⁴⁴ the Swiss Supreme Court referred to the 9 May 1995

place of value added tax on services provided by the World Economic Forum) referring to C-155/12, [2013] All ER (D) 115 (Jul); Case C-218/10, 2012 E.C.R. I-0000; Case C-114/05, 2006 E.C.R. I-2427; Case C-452/03, 2005 E.C.R. I-3947; Case C-327/94, 1996 E.C.R. I-4595, and BGE 125 I 21 (concerning positive action in gender equality) referring to C-409/95, [1997] ECR I-6363. For more information, see Franz Werro and Thomas Probst, *La jurisprudence de la CJCE en matière de droit privé et son influence sur la pratique du droit suisse*, ANNUAIRE SUISSE DE DROIT EUROPÉEN, 453 (2005/2006)).

¹³⁸ *Untold Story*, *supra* note 92 (citing Hansjörg Seiler, *Einfluss des europäischen Rechts und der europäischen Rechtsprechung auf die schweizerische Rechtspflege*, ZBJV 2014, 348 (showing that approximately 11–13 percent of the decisions of the Swiss Federal Supreme Court refer to the ECtHR)).

¹³⁹ *Id.* at 691 (citing Lukas Heckendorn Urscheler, *Gedanken zur Methode der richterlichen Rechtsvergleichung im Bereich des Zivilrechts*, in *DIE RECHTSVERGLEICHUNG IN DER RECHTSPRECHUNG*, *supra* note 132, at 106).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* See HANS C. TASCHNER & EDWIN FRIETSCH, *PRODUKTHAFTUNGSGESETZ UND EG-PRODUKTHAFTUNGSRICHTLINIE 13* (2nd ed. 1990); see also Bundesgericht [BGer] [Federal Supreme Court] Dec. 19, 2006, 133 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHT [BGE] III 81 (Switz.); see also Bundesgerichtshof [BGH] [Federal Court of Justice] May 9, 1995, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1995, 2162 (Ger.) (using all three as examples).

¹⁴² *Untold Story*, *supra* note 92. See also HANS C. TASCHNER & EDWIN FRIETSCH, *PRODUKTHAFTUNGSGESETZ UND EG-PRODUKTHAFTUNGSRICHTLINIE 13* (2d ed. 1990).

¹⁴³ *Untold Story*, *supra* note 92 (citing Bundesgericht [BGer] [Federal Supreme Court] Dec. 19, 2006, 133 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHT [BGE] III 81 (Switz.)).

¹⁴⁴ *Id.*; See also Bundesgericht [BGer] [Federal Supreme Court] Dec. 19, 2006, 133

judgment of the German Supreme Court, which had distinguished between major product defect types,¹⁴⁵ to some extent, like the U.S. Restatement (Third) of Torts: Product Liability.¹⁴⁶

“Swiss judges also look at other foreign sources besides German law.”¹⁴⁷ In a judgment handed down on 28 November 2006, for instance, the Swiss Supreme Court,¹⁴⁸ citing French law, applied the “legal principles limiting the scope of damages for breach of contract.”¹⁴⁸ “According to Article 208 of the Swiss code of obligations, where a defect leads to the rescission of the sale, the purchaser is entitled to recovery of the contract price and to the payment of damages for all losses that have been *directly caused* as a result of the defective goods.”¹⁴⁹ “Fault is not required to establish the seller’s liability for such losses.”¹⁵⁰ In addition, the seller is liable for any *indirect loss* (e.g. lost profit) caused by the defective goods, unless he proves that he did not commit any fault.¹⁵¹ In order to draw a distinction between direct and indirect damage, the Swiss Supreme Court drew inspiration from Article 1150 of the French Civil Code as well as Pothier’s *Treatise on the Law Obligations*,¹⁵² which influenced the development of the English common law of

ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHT [BGE] III 81, ¶ 3.2 (Switz.).

¹⁴⁵ *Untold Story*, *supra* note 92, at 691 (citing Bundesgerichtshof [BGH] [Federal Court of Justice], May 9, 1995, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1995, 2162 (Ger.)). See also Gerhard Wagner, § 3 *ProdHaftG*, in MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH 29 (6th ed. 2013) (noting that, in German case law, the risk-utility test is used to determine whether a product’s design is defective, whereas this is not the case for manufacturing defects). *But see* Case C-503/13, C-504/13, *Boston Scientific Medizintechnik GmbH v. AOK Sachsen-Anhalt*, 2015 E.C.R. 148; 2015 O.J. (C 148) 1 (showing that the ECJ seems to have rejected this approach).

¹⁴⁶ DAVID OWEN, *PRODUCTS LIABILITY LAW*, ch. 7–9 (3rd ed. 2014).

¹⁴⁷ *Untold Story*, *supra* note 92, at 691.

¹⁴⁸ *Id.* (citing Bundesgericht [BGer] [Federal Supreme Court], Nov. 28, 2006, 133 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 257 (Switz.)). See also Pascal Pichonnaz, *Defective Goods and Consequential Loss*, RABELS 819 (2012) (Ger.).

¹⁴⁹ *Untold Story*, *supra* note 92, at 691 (citing Marie-Noël Zen-Ruffinen Silvio Venturi, *Article 208 CO*, COMMENTAIRE ROMAND, CODE DES OBLIGATIONS I (Luc Thévenoz & Franz Werro eds., 2nd ed. 2012)).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 692 (citing Bundesgericht [BGer] [Federal Supreme Court], Nov. 28, 2006, 133 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 257, ¶ 2.5.2 (Switz.)).

contract as well (see *Hadley v. Baxendale*¹⁵³)”.¹⁵⁴

“In Switzerland and Turkey, while some of the foreign references are used as ‘*garniture d’appoint*’, . . . others seek to enlarge the domestic interpretative options that courts have at their disposal.”¹⁵⁵ While “such [] transnational judicial interaction not only enables courts to overcome their relative institutional isolation while allowing them to benefit from better solutions, it also makes these solutions known to a broader audience.”¹⁵⁶

Besides, “accession negotiations with the EU made an important breakthrough in the use of comparative law by Turkish courts.”¹⁵⁷ In October 2005, negotiations started with the so-called screening process, which aims at determining to what extent Turkey meets the EU’s rules and regulations known as the *acquis communautaire*.¹⁵⁸ “The Turkish Supreme Court then started citing [ECJ] case law more frequently, while still referring to Swiss law.”¹⁵⁹

In a judgment handed down on 27 November 2012, to define the conditions for the transfer of an entity, and in particular to determine whether any direct contractual relationship between the transferor and the transferee is needed in certain labour-intensive sectors, the Turkish Supreme Court referred to the judgments of the ECJ¹⁶⁰ and in a more general way mentioned the position of the Swiss Supreme Court without expressly quoting any of its judgments.¹⁶¹

Hence, comparative law “is not a separate or ring-fenced area of legal studies.”¹⁶² “It is rather a dynamic practice, which is part of a

¹⁵³ *Id.* (citing *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854)).

¹⁵⁴ *Id.* (citing TOM BINGHAM, *WIDENING HORIZONS: THE INFLUENCE OF COMPARATIVE LAW AND INTERNATIONAL LAW ON DOMESTIC LAW* 5 (Cambridge U. Press, 2010)).

¹⁵⁵ *Untold Story*, *supra* note 92, at 692 (citing Franz Werro, *La jurisprudence et le droit comparé*, in INSTITUT SUISSE DE DROIT COMPARÉ, *supra* note 136, at 166); *see also* Peter V. Kunz, *Einführung zur Rechtsvergleichung in der Schweiz*, 24 RECHT 44 (2006).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 690.

¹⁵⁸ *Id.* For further information, see TURKEY’S INTEGRATION INTO THE EUROPEAN UNION (Belgin Akçay & Şebnem Akipek eds., 2013).

¹⁵⁹ *Untold Story*, *supra* note 92, at 690.

¹⁶⁰ *Id.* (citing Case C-13/95, *Ayşe Süzen v. Zehnacker Gebäudereinigung GmbH Krankenhausservice*, 1997 E.C.R. I-1259; Case C-24/85, *Jozef Maria Antonius Spijkers v. Gebroeders Benedik Abattoir CV & Alfred Benedik en Zonen BV*, 1986 E.C.R. 1124).

¹⁶¹ *Id.* (citing Y9.HD, 27.11.2012T, 2011/51419E, 2012/39553K).

¹⁶² *Id.* at 692 (citing Andenas & Fairgrieve, “*There is A World Elsewhere*” – Lord

deeper critique of law itself.”¹⁶³ “Indeed, judges keep an eye on what other legal systems are doing.”¹⁶⁴ Besides, they can and do go beyond that, using comparative arguments in their rulings.¹⁶⁵ A similar phenomenon can also be seen in the United States, where states maintain significant legal independence.¹⁶⁶ Although in the past they were reluctant to cite foreign laws, “the growth of interstate commerce and the rising power of the federal government forced this bias to dissipate.”¹⁶⁷ Today, state courts routinely refer to the law of sister states, advancing the process of “intellectual cross-fertilization.”¹⁶⁸ The fact that the states share the same language makes the courts’ task easier. Yet, when it comes to different countries, as the Swiss-Turkish example shows, linguistic barriers may prevent judges from accessing foreign legal systems.

V. The Perspective of ‘Ius Commune Europaeum’

It is appropriate to question the observations similar to those I have presented regarding the EU in spite of a clear coexistence of similar statutory provisions, as in the case of Switzerland and Turkey. Answering this question on the basis of the Swiss-Turkish experience would allow me to shed some light on the challenges of the “Europeanization” of private law (A), whose very existence is characterized by diversity in the practice of law despite the ECJ’s integrationist efforts (B).

Bingham and Comparative Law, in TOM BINGHAM AND THE TRANSFORMATION OF THE LAW: A LIBER AMICORUM, *supra* note 78, at 864).

¹⁶³ *Id.* (citing Marie-Claire Ponthoreau, *Le droit comparé en question(s) entre pragmatisme et outil épistémologique*, REVUE INTERNATIONALE DE DROIT COMPARÉ [R.I.D.C.] no. 1, 2005, at 7, 23; Peer C. Zumbansen, *Comparative Law’s Coming of Age? Twenty Years after Critical Comparisons*, in COMPARATIVE LAW AS TRANSNATIONAL LAW 124 (Russel A. Miller & Peer C. Zumbansen eds., 2012)).

¹⁶⁴ *Id.*

¹⁶⁵ *Untold Story*, *supra* note 92, at 692.

¹⁶⁶ U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

¹⁶⁷ Smith, *supra* note 83, at 269.

¹⁶⁸ See *State Law as “Other Law”: Our Fifty Sovereigns in the Federal Constitutional Canon*, 120 HARV. L. REV. 1670 (2007) (surveying how courts use other courts’ case law); see also Smith, *supra* note 83, at 269; see also Arianna Vidaschi, *Globalization of Human Rights and Mutual Influence between Courts: The Innovative Reverse Path of the Right to the Truth*, in THE CULTURE OF JUDICIAL INDEPENDENCE, RULE OF LAW AND WORLD PEACE 122 (Shimon Shetreet ed., 2014).

A. “Europeanization” of Private Law

EU competence to regulate private law essentially predicates on Art.114 of TFEU. This allows the EU legislature to harmonize national rules posing hindrance to the functioning of the internal market. Directives and regulations are the two types of legal instruments used to harmonize private law.¹⁶⁹ Directives aim at approximating national private law with the EU *acquis* without the need for the state to introduce new civil code.¹⁷⁰ Some directives such as those on package travel (1990)¹⁷¹ and unfair terms (1993)¹⁷² allow Member States to retain higher consumer protection standards.¹⁷³ Other directives such as those on product liability (1985),¹⁷⁴ unfair commercial practices (2005),¹⁷⁵ and consumer rights (2011)¹⁷⁶ are based on full harmonization, allowing no deviation from their standard of protection.¹⁷⁷

Unlike directives, regulations establish legal rules and, in general, replace existing national law in a given field. For instance, the EU has legislated private international law by way of regulations (e.g. Brussels I, Rome I, and Rome II). In the form of a *sui generis* regulation, the EU Commission has recently proposed to codify a

¹⁶⁹ See European Parliament, *Sources and Scope of European Union Law* (2017), www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.1.pdf [<https://perma.cc/3QT9-FZLW>].

¹⁷⁰ *Id.* at 3.

¹⁷¹ Council Directive 90/314 1990 O.J. (L 158) (EC); see also Directive 2015/2302, of the European Parliament and the Council of 25 November 2015 on Package Travel and Linked Travel Agreements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC, 2015 O.J. (L 326) 1 (repealing Council Directive 90/314/EEC).

¹⁷² Council Directive 93/13, 1993 O.J. (L 95) 29 (EC).

¹⁷³ These directives set out minimum legal requirements for Member States to follow.

¹⁷⁴ Council Directive 85/374, 1985 O.J. (L 210) 29 (EC).

¹⁷⁵ Directive 2005/29 of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the International Market and Amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, 2005 O.J. (L 149) 22.

¹⁷⁶ Directive 2011/83, of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, Amending Council Directive 93/12/EEC and Directive 1999/44/EC of the European Parliament and of the Council and Repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, 2011 O.J. (L 304) 64.

¹⁷⁷ These are maximum harmonization directives, which aim at limiting differences in implementation by Member States.

Common European Sales Law (“CESL”).¹⁷⁸ The CESL would constitute an optional set of rules existing parallel to national laws.¹⁷⁹ Since the CESL would neither harmonize nor replace the latter in cross-border sales contracts, in which at least the seller is a trader, parties would be able to opt for CESL to govern their contract, instead of national statutory rules.

In addition to the EU legislature, the ECJ has also played an important role in the “Europeanization” of private law, in particular when interpreting primary EU law.¹⁸⁰ For instance, the ECJ ruled that Article 101(2) TFEU, which provides that private contracts having a negative impact upon competition in the internal market shall be void, produces horizontal direct effect impacting upon national private law.¹⁸¹ The ECJ has also pushed forward the process of “Europeanization” by way of interpreting secondary EU law under the preliminary reference procedure.¹⁸² Regarding the traveler’s right to compensation in case of improper performance of a package travel contract, for example, the ECJ held that the compensation extends also to non-material damage resulting from loss of enjoyment of the holiday.¹⁸³ When interpreting the Directive on unfair terms, the ECJ has not only defined the broad standards such as “good faith” and “significant imbalance,”¹⁸⁴ but it has also

¹⁷⁸ *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, COM (2011) 635 final (Oct. 11, 2011). See *Der Entwurf für ein optionales europäisches Kaufrecht* (Hans Schulte-Nölke, Fryderyk Zoll, Nils Jansen & Reiner Schulze eds., 2012).

¹⁷⁹ Mario Monti, *A New Strategy for the Single Market: At the Service of Europe’s Economy and Society* (May 9, 2010), http://ec.europa.eu/internal_market/strategy/docs/monti_report_final_10_05_2010_en.pdf [<https://perma.cc/DWM6-W99L>] (last visited 20 Nov. 2016).

¹⁸⁰ See the most important cases like Cases C-46/93 & C-48/93, *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland* and *The Queen v Secretary of State for Transport, ex parte Factortame Ltd. and others*, 1996 E.C.R. I-01029 (State liability); Case C-52/00, *Commission v. France*, 2002 E.C.R. I-3856 (product liability); Case C-168/00, *Leitner v. TUI Deutschland GmbH & Co. KG*, 2002 E.C.R. I-2631 (non-pecuniary damages). See also Walter van Gerven, *The ECJ Case-law as a Means of Private Law Unification, in TOWARDS A EUROPEAN CIVIL CODE 101* (Arthur Hartkamp *et al.* eds., 3rd ed. 2004).

¹⁸¹ Case C-8/08, *T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit*, 2009 E.C.R. I-04529.

¹⁸² Van Gerven, *supra* note 176, at 101.

¹⁸³ Case C-168/00, *Simone Leitner v. TUI Deutschland GmbH & Co.*, 2002 E.C.R. I-2631.

¹⁸⁴ Case C-76/10, *Pohotovost’ s.r.o. v. Iveta Korčkovská*, 2010 E.C.R. I-11557; Case C-472/10, *Nemzeti Fogyasztóvédelmi Hatóság v. Invitel Távközlési Zrt.*, 2012 O.J. (C

further developed the brief rules on effects of unfairness.¹⁸⁵

These developments have encouraged several international commissions and groups of experts to explore the possibility of adopting a horizontal approach through a “European Civil Code.”¹⁸⁶ The task of drafting a European Civil Code actually assumed in 1980 by the Commission on European Contract Law (“CECL”) headed by Ole Lando (Denmark).¹⁸⁷ In two resolutions, 1989 and 1994, the EU Parliament explicitly requested the elaboration and adoption of such a Code.¹⁸⁸ Between 1998 and 2002, the Lando Commission published the outcome of its work as the Principles of European Contract Law (“PECL”) in several parts.¹⁸⁹

The PECL, in turn, became the point of departure for the Study Group on a European Civil Code headed by Christian von Bar (Germany).¹⁹⁰ The Study Group has been publishing the results of

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¹⁸⁵ Case C-243/08, *Pannon GSM Zrt. v. Erzsébet Sustikné Györfi*, 2009 E.C.R. I-04713; Case C-453/10, *Jana Pereničová & Vladislav Perenič v. SOS financ spol s.r.o.*, 2012 E.C.R. I; Case C-618/10, *Banco Español de Crédito SA v. Joaquín Calderón Camino*, 2012 E.C.R. I.

¹⁸⁶ See Claude Witz, *Plaidoyer pour un code européen des obligations*, 5 CHRONIQUE 79 (2000); Bénédicte Fauvarque-Cosson, *Faut-il un Code civil européen ?* 101 RTD civ. 463 (2002); THE COMMON CORE OF EUROPEAN PRIVATE LAW - ESSAYS ON THE PROJECT (Mauro Bussani and Ugo Mattei eds., 2002); Wolfgang Wurmnest, *Common Core, Grundregeln, Kodifikationsentwürfe, Acquis-Grundsätze - Ansätze internationaler Wissenschaftlergruppen zur Privatrechtsvereinheitlichung in Europa*, 11 ZEUP 714 (2003); GUIDO ALPA & MADS ANDENAS, GRUNDLAGEN DES EUROPÄISCHEN PRIVATRECHTS (2010); C.H. BECK et al., TOWARDS A EUROPEAN LEGAL CULTURE (Geneviève Helleringer & Kai Purnhagen eds., 2014).

¹⁸⁷ PRINCIPLES OF EUROPEAN CONTRACT LAW PARTS I AND II (Ole Lando & Hugh Beal eds., Kluwer 2000); see also PRINCIPLES OF EUROPEAN CONTRACT LAW PART III (Ole Lando, Eric Clive, André Prüm & Reinhard Zimmermann eds., Kluwer 2003); see also European Union, *The Principles of European Contract Law*, www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002/ [https://perma.cc/J5K2-KMKB] (last visited Oct. 13, 2016) (containing the text of the PECL).

¹⁸⁸ Parliament Resolution A2-157/89 of 26 May 1989 On Action to Bring into line the Private law of the Member States, 1989 O.J. (C 158) 400; Parliament Resolution A3-0329/94, of 6 May 1994 On the Harmonization of Certain Sectors of the Private law of the Member States, 1994 O.J. (C 205) 518. See also Guido Alpa, *European Community Resolutions and the Codification of “Private Law”*, 2 ERPL 321 (2000).

¹⁸⁹ See *supra* note 188 and accompanying text.

¹⁹⁰ See Christian von Bar, *The Study Group on a European Civil Code*, in FESTSCHRIFT FÜR DIETER HENRICH 1 (Erik Jayme, Dieter Schwab & Peter Gottwald eds., 2000).

its work in the form of “Principles of European Law.”¹⁹¹ Apart from general contract law, it has also drafted articles on non-contractual liability (e.g., torts, unjustified enrichment, managing another’s affairs), specific types of contracts, and certain aspects of property law.¹⁹² Before the publication of “Principles of European Law,” however, the idea of a “European Civil Code” was expressly dropped in a communication on the revision of the *acquis* (2004).¹⁹³ According to the EU Commission, scholarly works such as “Principles of European Law” should nevertheless be welcomed as a “toolbox . . . [w]here appropriate, when presenting proposals to improve the quality and coherence of the existing *acquis* and future legal instruments.”¹⁹⁴ Hence, the EU Commission does not aim at fully harmonizing all aspects of legislation on private law in the EU, but rather wants the ECJ to be more active in law-making. Indeed, the ECJ, through its case-law, makes a key contribution towards clarifying the scope of EU Directives and ensuring their correct implementation, although the diversity of the legal culture in Member States does not always permit them to be applied in an identical manner throughout the EU.¹⁹⁵

*B. Diversity in the Practice of Law Despite the ECJ’s
Integrationist Efforts*

Despite the tendency for English to become the *lingua franca* of the social sciences, there is no common language in the EU and no Supreme Court of private law that could adjudicate the uniform

¹⁹¹ See generally *Draft Articles*, EUR. L. STUD. INST. www.sgecc.net/pages/en/texts/index.draft_articles.htm [https://perma.cc/4B48-SJVV] (last accessed on 22 March 2016) (containing the publications from the results of the Study Group’s work).

¹⁹² *Id.*

¹⁹³ *Communication From the Commission to the European Parliament and the Council*, COM (2004) 651 final (OCT. 11, 2004), <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52004DC0651> [https://perma.cc/PA6W-4WKZ].

¹⁹⁴ *Id.* It is worth noting that one of these toolboxes is *Principes contractuels communs*, which have been drafted jointly by the Henri Capitant Association and the French Society for Comparative Legislation under the leadership of Bénédict Fauvarque-Cosson and Denis Mazeaud. *Id.*

¹⁹⁵ *Id.* at 8 (stating “[i]t is important to explain that it is neither the Commission’s intention to propose a ‘European civil code’ which would harmonize contract laws of Member States, nor should the reflections be seen as in any way calling into question the current approaches to promoting free circulation on the basis of flexible and efficient solutions.”).

application of a possible European Code or other form of legal integration.¹⁹⁶ The impracticality of such propositions were rationalized with the following words:

[h]armonization projects, like legal transplants, tend to focus principally on the ‘formal’ institutions of the law. They are, therefore, vulnerable to situations where informal institutions on which the formal institutions rely are missing in the receiving jurisdiction, and even more so to situations where the transplanted rule conflicts with informal institutions in the receiving jurisdiction.¹⁹⁷

Efforts to unify private law in the EU clearly fall within the ambit of this description. Even though, in many areas, the statutory provisions of the Member States seem almost identical, as a result of their duty to meticulously implement directives into national legislation, the degree of the actual convergence or divergence between these provisions depends on their judicial interpretation and application, just like the Swiss-Turkish experience has illustrated.¹⁹⁸

The scope of the judicial control over potentially unfair terms, for example, varies in different jurisdictions and reflects the divergence between various systems of contract law. For instance, at first glance the dispositions of the U.K. Unfair Terms in Consumer Contracts Regulations (1999) and §§305–310 of the German BGB seem rather similar: they both exclude individually negotiated terms from the fairness test.¹⁹⁹ However, closer judicial scrutiny of these statutes, which are both based on the EU Unfair Terms Directive (93/13/EEC), reveals a difference in their scopes,

¹⁹⁶ See Reinhard Zimmermann, *Codification: The Civilian Experience Reconsidered on the Eve of a Common European Sales Law*, MAX PLANCK INST. COMP. & INT’L. PRIV. L., 257, 396 (2012); see also Franz Werro, Speech Delivered to Commemorate the Ninth Anniversary of the Ankara University Faculty of Law, *European Private Law: Quo Vadis?* (Nov. 3, 2015). On the tendency for English to serve as a lingua franca, see MARIA GRAZIA GUIDO, *ENGLISH AS A LINGUA FRANCA IN CROSS-CULTURAL IMMIGRATION DOMAINS* (Bern, 2008).

¹⁹⁷ T.T. Arvind, *The “Transplant Effect” in Harmonization*, 59 INT’L & COMP. L.Q. 65, 79 (2010).

¹⁹⁸ See Lucinda Miller, *The Notion of a European Private Law and a Softer Side to Harmonisation*, in *THE IMPACT OF IDEAS ON LEGAL DEVELOPMENT* 270 (Michael Lobban & Julia Moses eds., 2012).

¹⁹⁹ For a comparative study, see Hugh Beale, Bénédicte Fauvarque-Cosson, Jacobien Rutgers, Denis Tallon & Stefan Vogenauer, *IUS COMMUNE CASEBOOKS ON THE COMMON LAW OF EUROPE* 786, 797 (2d ed. 2010).

and thus a difference in the degree of protection for weaker parties. According to the German *Bundesgerichtshof* (“BGH,” Federal Supreme Court), individual negotiation implies that the parties have been given a chance to influence the content of the terms.²⁰⁰ Yet, “individually negotiated” seems to have a narrower meaning in U.K. case law. In a decision rendered in February, 2010, *U.K. Housing Alliance Ltd. v. Francis*, the High Court of England and Wales stated that “the fact that a consumer or his legal representative has had the opportunity of considering the terms of an agreement does not mean that any individual term has been individually negotiated.”²⁰¹ The supplier must prove that the relevant term was individually negotiated.²⁰² So, identical or nearly identical provisions can be implemented in ways that cause diametrically opposed results where the burden of pleading and/or proof is allocated differently.²⁰³

The disharmony at EU level is even more pronounced in tort law.²⁰⁴ For example, since the adoption of the Product Liability Directive (85/374/EEC), which sought to harmonize a no-fault liability regime for defective products across the EU, different interpretations as to the meaning of some key notions have accumulated.²⁰⁵ In the so-called *Mineralwasser* case, which was cited by the Swiss Supreme Court as well,²⁰⁶ the German *Bundesgerichtshof* held that the development risks defense applies exclusively to design defects, but is not available for manufacturing defects.²⁰⁷ In the English *Blood Transfusion* case, the High Court

²⁰⁰ Bundesgerichtshof [BGH] [Federal Court of Justice] May 19, 2005, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2543, 2005 (Ger.).

²⁰¹ UK Housing Alliance (North West) Ltd. v. Francis [2010] All ER 283, (EWCA) 117 (Eng.).

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ For an illustration of such disharmony in tort law, see Franz Werro & Erdem Büyüksagis, *The Bounds between Negligence and Strict Liability*, COMPARATIVE TORT LAW: GLOBAL PERSPECTIVES 201–225 (Mauro Bussani & Anthony J. Sebok eds., 2015).

²⁰⁵ See Bundesgericht [BGer] [Federal Supreme Court] Dec. 19, 2006, 133 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 81 (Switz.); see also Bundesgerichtshof [BGH] [Federal Court of Justice] May 9, 1995, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2162, 1995 (Ger.); see also Joerges, *supra* note 8, at 193.

²⁰⁶ See Bundesgericht [BGer] [Federal Supreme Court] Dec. 19, 2006, 133 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 81 (Switz.).

²⁰⁷ See Bundesgerichtshof [BGH] [Federal Court of Justice] May 9, 1995, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2162, 1995 (Ger.).

of England and Wales considered the German solution and questioned whether the German Federal Supreme Court interpreted the Directive correctly and applied it appropriately. Unlike its German counterpart, the English Court then came to the conclusion that there is no need to adopt different approaches for different types of defects.²⁰⁸

The comparison of different cases draws attention to a crucial feature of the EU legislation, which is often the result of a compromise carrying some degree of ambiguity. The EU law simultaneously promotes convergence and divergence. Superficially similar terms have been, are currently, and will continue to be interpreted differently in different countries, because they are broad (vague) and therefore subject to manipulation (re-definition) by courts in different jurisdictions.²⁰⁹ Differences in the cultural values, legal needs, judicial organizations, and economic environments play a role in the judicial interpretation of abstract statutory rules, as well as of doctrinal notions, and, consequently, in the creation of legal meaning (*'juris-genesis'*).²¹⁰ Such interaction, resulting from diversity in unity and unity in diversity, creates an interdependence of all systems.²¹¹ Europeanization is not, in this sense, a one-way process of unification of legal rules in the EU.²¹² The common understandings in European legal culture give an opportunity for a trans-judicial dialogue between different local

²⁰⁸ See *A & others v. The National Blood Authority* [2001] 3 All ER 289 (UK); see, e.g., Duncan Fairgrieve, Geraint Howells & Marcus Pilgerstorfer, *The Product Liability Directive: Time to get Soft?*, EUR. J. TORT L. 1, 32 (2013).

²⁰⁹ See Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 10 (1983-1984); see also, Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 1, 27 (1991) (distinguishing between positive and normative functions of comparative law).

²¹⁰ See Joerges, *supra* note 8, at 196. The author is very explicit in addressing the problem of 'Europeanization': "Legal traditions, social expectations, political preferences, and administrative know-how differ widely between Sicily and Estonia, between Scotland and Greece. Europe can continue to initiate further changes and foster social learning at the same time. This is its mandate — the imposition of uniform regimes would be a nightmare." *Id.*

²¹¹ For a similar observation, see, e.g., H. Patrick Glenn, *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW* 376 (5th ed. 2014); Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409, 463 (2003).

²¹² See Brownsword, *supra* note 12, at 300 (citing Reiner Schulze's argument that "the dualism of supranational and national law not only requires that the European Union's own tasks . . . ; it also requires that respect is shown to the diversity of the national laws as the dualism's correlative other side.").

communities, despite the conceptual differences between their legal systems.²¹³ Yet, as illustrated by the Swiss-Turkish example, such dialogue is only possible thanks to that diversity.²¹⁴

At EU level, an international judicial interaction—which points at the importance of a legal system growing in an organic way—has recently obtained concrete results.²¹⁵ This, in turn, helps to create a common language in some areas step-by-step. Consider some of the most important cases like *Brasserie du Pêcheur v. Germany* in state liability,²¹⁶ *Commission v. France* in the area of product liability,²¹⁷ or *Leitner v. TUI Deutschland GmbH* in the field of non-pecuniary damages.²¹⁸ In *Leitner v. TUI Deutschland GmbH*, for example, the Landesgericht Linz had first studied German law, which requires compensation for loss of enjoyment of the holiday as a form of non-pecuniary damage.²¹⁹ The Austrian Court then requested that the ECJ provide clarification on the general concept of damages used in the Package Travel Directive (90/314/EEC).²²⁰ When the ECJ ruled on this issue, it referred to various national

²¹³ See Niilo Jääskinen, *Europeanisation of National Law: A Legal-Theoretical Analysis*, 5 EUR. L. REV. 667, 681 (2015).

²¹⁴ See Pierre Legrand, *Against a European Civil Code*, 60 MOD. L. REV. 44, 53 (1997).

²¹⁵ For a similar point, see Franz Werro, *European Private Law: Quo Vadis, Liber Amicorum – Hommage en l'honneur du Professeur Joël Monéger*, 812 LexisNexis (forthcoming 2017); PETER MANKOWSKI, RECHTSKULTUR 511 (Tübingen, 2016); Kadner Graziano & Thomas Michael, *Est-il légitime et utile pour le juge de comparer ?*, in OBLIGATIONS, PROCÈS ET DROIT SAVANT: MÉLANGES EN HOMMAGE DE JEAN BEAUCHARD 71, 77 (Marianne Faure-Abbad & Michel Boudot eds., 2013), <http://archive-ouverte.unige.ch/unige:44704> [<https://perma.cc/UR52-V5ZQ>]. Besides, the European Parliament and the Commission agree on the importance of supporting the improved availability of national databases on national court rulings concerning Community law. See Resolution on the Role of the National Judge in the European Judicial System, July 9, 2008, 2009 O.J. (C 294) 27.

²¹⁶ Cases C-46/93 & C-48/93, *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte Factortame Ltd. and others*, 1996 E.C.R. I-01029.

²¹⁷ Case C-52/00, *Commission v. France*, 2002 E.C.R. I-3856.

²¹⁸ Case C-168/00, *Leitner v. TUI Deutschland GmbH & Co. KG*, 2002 E.C.R. I-2631.

²¹⁹ *Id.* For a comment, see Franz Werro, *Comparative Studies in Private Law: A European Point of View*, THE CAMBRIDGE COMPANION TO COMP. L. 118, 126 (Mauro Bussani & Ugo Mattei eds., 2012).

²²⁰ See Case C-168/00, *Leitner v. TUI Deutschland GmbH & Co. KG*, 2002 E.C.R. I-2631 ¶ 14.

laws, which award damages to compensate the injured person for the frustration caused by “spoiled holidays.”²²¹ As such, this decision contributed to the gradual internalization of common values by the domestic legal systems. In light of the ECJ’s case law, one may conclude that its rulings play an important role in finding common ground between distinctive legal systems and thus favour a bottom-up approach towards legal harmonization, though some consider such activism as a rather deep intrusion by the Court into national legal systems.²²²

VI. Conclusion

In this article, I began by studying the legal developments in Switzerland and Turkey. My research led to three main observations. First, the Swiss and the Turks have different socio-cultural backgrounds, and therefore, they happen to have different understandings of the same or similar statutory rules. Second, it appears that—particularly in Turkey, but occasionally in Switzerland as well—through the application of Article 1 of the Civil Code, judges may, by way of mere interpretation, exceed their limitations past what the statutory provisions had initially envisioned. That is the main cause for some of the very same provisions being interpreted differently by Swiss and Turkish courts. Indeed, there is often more than a single meaning for a provision that operates simultaneously in two countries with different languages and cultural backgrounds. And finally, my analysis reveals that comparative reasoning plays a significant role in the judicial law-making process. When determining what a (new) statute actually entails,²²³ interpreting an existing statutory

²²¹ See *id.* ¶ 18.

²²² See, e.g., Renate Schaub, *Abschied vom nationalen Produkthaftungsrecht? Anspruch und Wirklichkeit der EG-Produkthaftung*, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT, *supra* note 86 (Notes Relating to the Decision C-52/00, C-154/00 & C-183/00); see also Joerges, *supra* note 8, at 172 (explaining similar viewpoints).

²²³ See Bundesgericht [BGer] [Federal Supreme Court] Dec. 19, 2006, 133 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHT [BGE] III 81 (Switz.).

provision,²²⁴ or filling in a legislative gap,²²⁵ Swiss and Turkish judges do not hesitate to seek guidance from foreign rules and judgments, provided that they are not hindered by a linguistic barrier.

Combining these observations, I conclude that black letter law reforms *per se* are not enough for legal harmonization. Indeed, legal development has never been entirely within the control of the legislature, and therefore, the mere reading of the codes and statutes is simply not sufficient to understand a legal system. Such a reading of the code must be made in tandem with many other discourses that are produced in and around the legal system being studied. In this context, particular attention should be paid to the case law surrounding the statutory rules.²²⁶ Indeed, law is the end product of the process of judicial reasoning, a process in which judges—particularly Supreme Court judges—are influenced by many variables. In today's legal environment, some of the most comprehensive and perceptible among them are the foreign sources. The Swiss-Turkish experience illustrates how comparative law in the courts is indeed an effective catalyst for possible innovation.

There are other examples that bear resemblance with the Swiss/Turkish experience. The American example reveals that the various states use the case law of other states as a point of reference. Likewise, comparative law could also play a role in judicial coordination in the EU, provided that judges are well-read on the utility of judgments from foreign courts. Upon satisfying this condition, comparative law would cease to be perceived as a mere academic exercise of exploring similarities and differences between legal systems; rather, it would be elevated to a legitimate source of law. As such, it would be considered alongside constitutions, laws, precedent, traditions, and policy, as a tool for determining the

²²⁴ See, e.g., Bundesgericht [BGer] [Federal Supreme Court] Dec. 20, 2005, 132 ENTSCHIEDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 359 (Switz.) (explaining the Swiss Supreme Court's holding with a wrongful birth); see also Bundesgericht [BGer] [Federal Supreme Court], Nov. 28, 2006, 133 ENTSCHIEDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] III 257 (Switz.) (explaining the distinction between direct and indirect damage).

²²⁵ See Y9.HD, 27.11.2012T, 2011/51419E, 2012/39553K (explaining the Turkish case concerning the transfer of an entity).

²²⁶ See Mitchel Lasser, *The Question of Understanding*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 203 (Pierre Legrand & Roderick Munday eds., 2003).

outcome of cases.

Despite the obstacles and difficulties in employing comparative law, the court's role in finding normative solutions when the authority points towards an answer that seems inappropriate or unclear has already gained significance.²²⁷ In a hotly debated article, a former president of Germany's highest appeals court, *Bundesgerichtshof*, wrote: "the judge is a pianist who interprets the compositions of the legislature with artistic freedom."²²⁸ My brief study of the case law of various countries, as well as that of the ECJ, goes even further and shows, first of all, that the judge should be seen as an active element in the decision-making process. Only then will it be appropriate to inquire into the pertinence of the ever-burgeoning "unification" advocated by Brussels, or through the principles, definitions, and model rules suggested by certain legal scholars—with little or no attention to case law. Indeed, the real world is too complex to be compressed into these principles, definitions, and model rules, which are based on the "pandectistic" approach of building up a unified system. The "efficiency" of new international rules is illusory, or at least minimal, in comparison to the lost value of local practices that have been distilled through hundreds of years of experience. Legal harmonization in the EU in some particular areas might, therefore, result in the emergence of a spontaneous order that does not have so much to do with model rules and idealized conceptions, but much more to do with the evolution of each given legal system's case law, which is based on its own cultural values, legal needs, judicial organizations, and economic environment.

²²⁷ See Thomas Lundmark, *Legal Science and European Harmonisation*, 130 L. Q. REV. 68, 71 (2014).

²²⁸ Günter Hirsch, *Zwischenruf: Der Richter wird's schon richten*, ZEITSCHRIFT FÜR RECHTSPOLITIK 161 (2006).