17TH INTERNATIONAL ARCHITECTURE EXHIBITION
LA BIENNALE DI VENEZIA
PAVILION OF TURKEY

↳ ON LAW:

Conversations 4

A CONVERSATION WITH

ALİ CEM BUDAK

Architecture 12 as 2 Measure 7
Ölçü 4 Olarak 6 Mimarlık 8

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ON LAW:
A Conversation with Ali Cem Budak

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Keywords:
LAW, INVENTED TERMINOLOGY, SUBJECTIVITY

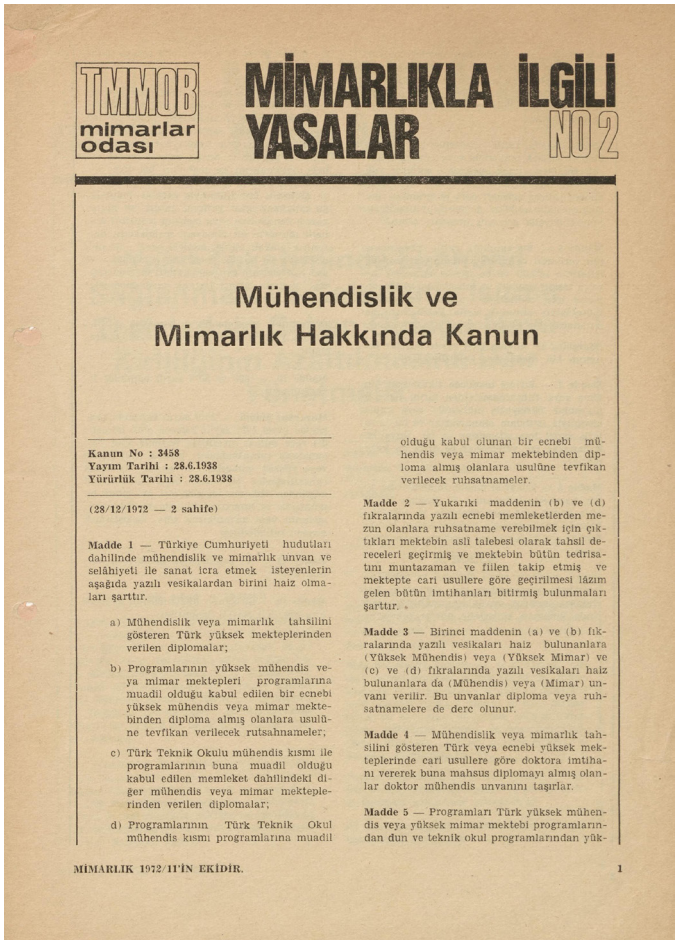
Samet Mor:

Law is one of the fields which comes to the forefront in the context of our exhibition's main question, "how does architecture become a measure?" In that light, we see that the legislation on construction matters in Turkey is divided into many different laws: Civil Law, Bankruptcy and Enforcement Law, Law on Cooperatives, etc. In your opinion, does this dispersion stem from having a property-based social structure? Are all our social relations—whether person-to-person, institution-to-person, or state-individual relations—measured by "ownership?"

Ali Cem Budak:

Here, two separate questions need to be addressed. The first question is that the legal provisions concerning both buildings and public works are dispersed through various rules and regulations; the second is the arrangement of our social relations through property. We can say that the answer to the first is more or less a matter of legislative technique. The codification movement in Europe—collecting laws into larger codes—continued from the beginning of the 19th century to the beginning of the 20th century. In parallel with this, in Turkey, Mecelle (civil code of the Ottoman Empire) came into force in the middle of the 19th century. Afterward, we adopted the Civil Code following Switzerland at the beginning of the 20th century. This issue is not just particular to us; other European states went through similar processes during this period.

We can say that all codes are made more or less in different styles. For example, the German Civil Code is very detailed and easily adapted to incorporate new things. The Turkish Civil Code, which was adopted from Switzerland, includes the rights regarding property, rights on real estate, and also provisions regarding buildings following this sequence. However, compared to others, the Turkish Civil Code is a brief and concise text. It is not suitable for incorporating numerous new things. Therefore, rather than installing new articles into the law, complementary laws have been made alongside it as needed. For example, very recently, the Tenant Law was incorporated into the Law of Obligations in Turkey. Before that, we had a separate Tenant Law. Similarly, there is a Cooperatives Law separate from Commercial Law. There are many more examples. In other words, rather than expanding the laws, we have decided to make additional laws that complement such laws. For this reason, there is an excess of rules and regulations in our law.



TMMOB mimarlar odası

MİMARLIKLA İLGİLİ YASALAR NO 2

Mühendislik ve Mimarlık Hakkında Kanun

Kanun No : 3458
Yayım Tarihi : 28.6.1938
Yürürlük Tarihi : 28.6.1938

(28/12/1972 — 2 sahife)

Madde 1 — Türkiye Cumhuriyeti hudutları dahilinde mühendislik ve mimarlık unvan ve selâhiyeti ile sanat icra etmek isteyenlerin aşağıda yazılı vesikalardan birini haiz olmaları şarttır.

a) Mühendislik veya mimarlık tahsilini gösteren Türk yüksek mekteplerinden verilen diplomalar;

b) Programlarının yüksek mühendis veya mimar mektepleri programlarına muadil olduğu kabul edilen bir ecnebi yüksek mühendis veya mimar mektebinden diploma almış olanlara usulüne tevfikan verilecek rutsahnameler;

c) Türk Teknik Okulu mühendis kısmı ile programlarının buna muadil olduğu kabul edilen memleket dahilindeki diğer mühendis veya mimar mekteplerinden verilen diplomalar;

d) Programlarının Türk Teknik Okul mühendis kısmı programlarına muadil olduğu kabul olunan bir ecnebi mühendis veya mimar mektebinden diploma almış olanlara usulüne tevfikan verilecek ruhsatnameler.

Madde 2 — Yukarıki maddenin (b) ve (d) fıkralarında yazılı ecnebi memleketlerden mezun olanlara ruhsatname verebilmek için çıktıkları mektebin asli talebesi olarak tahsil dereceleri geçirmiş ve mektebin bütün tedrisatını muntazaman ve fiilen takip etmiş ve mektepte cari usullere göre geçirilmesi lâzım gelen bütün imtihanları bitirmiş bulunmaları şarttır.

Madde 3 — Birinci maddenin (a) ve (b) fıkralarında yazılı vesikaları haiz bulunanlara (Yüksek Mühendis) veya (Yüksek Mimar) ve (c) ve (d) fıkralarında yazılı vesikaları haiz bulunanlara da (Mühendis) veya (Mimar) unvanı verilir. Bu unvanlar diploma veya ruhsatnamelere de derc olunur.

Madde 4 — Mühendislik veya mimarlık tahsilini gösteren Türk veya ecnebi yüksek mekteplerinde cari usullere göre doktora imtihanı vererek buna mahsus diplomayı almış olanlar doktor mühendis unvanını taşırlar.

Madde 5 — Programları Türk yüksek mühendis veya yüksek mimar mektebi programlarından dun ve teknik okul programlarından yük-

MİMARLIK 1972/II'İN EKİDİR. 1

"Mimarlıkla ilgili Yasalar 2: Mühendislik ve Mimarlık Hakkında Kanun," [Codes on Architecture 2: Laws on Engineering and Architecture] Mimarlık 109, no.11 (1972). Samet Mor archive.

S.M.:

To address the second part of the question, do you think the situation related to construction and the issue of ownership in Turkey shape the majority of our social relations?

A.C.B.:

Perhaps it can be said that we are the least ingrained European country with the concept of property. Ziya Umur, a professor of Roman Law, whose classes I have attended, used to state in his lectures that "We do not have property and inheritance, and we never have." It would not be wrong to say that private property took up only a limited place in our law until recently. Land tenure, which constituted the core of the economy in the classical Ottoman period, was not regulated as private property. The operating rights of state-owned lands were granted to locals, both farmers and soldiers, in exchange for providing for a certain number of soldiers. We call this the fief system (tımar) in classical law. The first modern regulation on this subject is the Land Code, dated as late as the middle of the 19th century. We see the extension of the right of disposition on agricultural lands for the first time during this period. Issues regarding rights of disposition such as acquisition, transfer, inheritance, and loans (by using it as collateral only) become possible after this date. The land survey of our country has just finished. Its renewal with modern methods continues. Therefore, we have just been able to solve the issue of which part of the land belongs to whom. As such, property is a relatively new concept for us.

S.M.:

Do you find the legal language concerning construction to be insufficient? As you know, since Turgut Özal's presidency in the 1980s, construction has become an essential component of state-capital relations. The

state has even been nicknamed “the contractor state.” From this perspective, how much do you think “subjectivity” has influenced our laws?

A.C.B.:

Özal had stated that Turkey is a large construction site. The first question is whether the legislator discriminates between various social classes, for example, whether it supports capital interests or labor interests. The second question is whether the principle of “generality” of laws has been abandoned, emphasizing subjectivity. In this context, we need to distinguish two things: regulatory judgment and its implementation. First of all, one should note that we are under the influence of comparative law in terms of making laws. When it comes to labor law, we strive for a regulation close to ILO (International Labor Organization) standards. When it comes to competition law, we have a modern anti-cartel law. There are many such examples throughout the law. Therefore, it cannot be said that we are far behind in terms of legislation, but rather that subjectivity—as you call it—comes up too often in the enforcement of laws.

S.M.:

As an architect, I find that our law is dominated by a language that could be described as invented or made up. Phrases, such as zoning peace (imar barışı), suitable house (hâline münasip ev), unjust-excessive construction (haksız-taşkın yapı) are constantly coined to suit new situations. Can you tell us the story behind this invented terminology?

A.C.B.:

The same flexibility exists in foreign languages. For example, in German, there is a term called Begriffsbildung, which means “conceptualization.” Conceptualization in law was a serious endeavor of 20th-century legislators while grand laws were being made. For example, we use the terms borrowing and lending in daily language, but we have other concepts in law. For example, we have a concept called obligation. It is precisely at this point where conceptualization constitutes one of the main topics of jurisprudence. Because as time passes and conditions change, we need new concepts. The opposite is also possible. As an example, less advantageous groups are now mentioned in our laws. Consumers and the environment are mentioned. When the environment was mentioned in law in 1920, it clearly wasn’t what we conceive of today. Only 30 years ago, the word “cartel” was not comprehended in Turkey, and it didn’t make any sense to the people. In short, as new needs arise, new concepts emerge. However, how new needs arise and how they are addressed is another matter. The second is regarding implementation, and the legal policy choices of the legislator are becoming critical at this point.

S.M.:

For instance, we have an aberration of zoning on our hands, and the question of what to do with it stands before us. In response, we choose to introduce zoning amnesty, call it “making peace” (through zoning peace) and as a consequence, a huge new messy concept is born.

A.C.B.:

Evolving conditions trigger the emergence of new concepts. This is a necessary and healthy process. However, the political tendencies of legislators are directly reflected in these concepts. How on earth is such a thing as “tax peace” possible? I’ve been paying my taxes for years, and nobody asks me if we are making peace when I am buying gasoline. However, the state says that incoming foreign money will be exempt from a tax investigation. This situation

has nothing to do with "peace" per se, and the same can be said for the phrase "zoning peace."

In the framework that architecture is a measure in terms of conceptualization, we can give the example of the suitable house (hâline münasip ev). The term belongs to Enforcement and Bankruptcy Law. To describe it very briefly, if the debtor does not pay their debt, the creditor may apply for enforcement. In this case, one of the things that the debt collection office will do is to seize and liquidate the debtor's assets. However, as anyone can guess, not every property of the debtor can be confiscated. For example, a part of their assets has to be set aside for essential needs. Also, it may be a property that is not subject to foreclosure because it has no financial value. Even if it has financial value, it cannot be seized if it is a tool used by the debtor to perform their profession, like a tailor's sewing machine. Similarly, a person's primary residence cannot be foreclosed upon. But there is a limit to this. The law says it should be "suitable" for the debtor. In other words, if the house is larger and more luxurious than necessary, it can be foreclosed upon. However, this can be done on the condition that the debtor is left with money to buy a "modest" house large enough to meet their needs. To explain step by step: first of all, the house is converted to cash, then an amount to buy a house "enough" for his needs is presented to the debtor, and from the remaining amount, the creditor is recompensated as much as possible. This is how the system works. However, there is another issue to be considered here. When interpreting the term suitable, the court precedents state the following: Not only the physical data—as in the number of family members—but their social status should also be taken into account [1] I wonder whether it is "appropriate" for a debtor to live in Nişantaşı (a luxurious neighborhood in Istanbul) or not. Here is conceptualization and its interpretation at work!

S.M.:

One of the difficulties we face—sometimes in contracts and sometimes in legal matters—is the contradiction between the use of some words in legal language and daily life. Air rights (hava hakkı) and air money (hava parası) are amongst the examples, which are particularly interesting for architects. These terms constitute the premise of the Condominium Ownership Law but are understood very differently today in everyday language. Could you comment on this terminology?

A.C.B.:

I assume the concept of key money derives from the concept of air rights. In fact, there may be joint ownership, that is, property rights of more than one person on the land or the plot of land. Our law allows us the right of ownership in this way. In fact, this right is divided into categories: ownership by cooperation, shared ownership, etc.

But here, it is necessary to draw attention to an issue. The shares of those who own land together are understood so that they have ownership of each stone, every piece of dirt on that plot of land. In other words, it is not as if half of the building is yours and the other half is mine, or the north is yours and the south is mine, but the parties have mutual ownership over every point. Following the old tradition from Roman Law, when a structure is built on the land, the ownership of the building becomes subject to the ownership of the land. Therefore, a partnership is established on each brick of the building. In other words, flats do not belong to individuals.

However, with the proliferation of multi-story buildings and the pressure of urban architecture, something had to be done to ease this rule. In Istanbul, the need to build a concept for multi-story buildings arose. For instance, in mansions, the concept of air rights was relevant for the first time. For example, if

1 "İcra ve İflas Kanunu 1262-1 12" [Enforcement and Bankcrupty Law 1262-1 12], T.C. Resmî Gazete [Official Gazette of the Republic of Turkey], no.2004, June 1932. https://www.mevzuat.gov.tr/MevzuatMetin/1.3.2004.pdf

the ground floor of the mansion belongs to the younger sibling and the second floor belongs to the middle sibling, then the middle sibling will have a right over the air gap. That's what we call air rights. This air right is also transferred to the land registry during the subsequent survey. However, when the Property Ownership Law entered into force, a temporary article is added; and this right is withdrawn from those who do not apply within a certain period of time. Later, based on the air rights, another term called air money has emerged. This means that the tenant receives financial compensation when transferring the rental property to someone else. In other words, ownership severs its relationship with the land and rises in the air. You see, these are all products of the need to build concepts in search of creating flexibility around arising needs, which is exactly what we've been talking about from the very beginning.

I'd like to talk about TOKI (Housing Development Agency of Turkey) at this point. An architectural interview is not complete without mentioning TOKI. It is such an institution that there are exclusive legal provisions about it. What's more, it's in a surprising place that you'd never guess it would be. For example, in Article 45 of our Enforcement and Bankruptcy Law. To explain further, if the creditor has secured his receivable with a loan, the pledged property is foreclosed and converted to cash. However, if the creditor does not receive his full due from the foreclosed property, only then are they able to confiscate the debtor's other assets. This is an agreement made between the creditor and the debtor from the very beginning. In other words, the debtor agrees that the creditor will first procure their due from the pledged property; if they cannot, only then can they foreclosure on the home. However, the law makes certain exceptions to this. Interestingly, one of these exceptions is regarding TOKI: if the creditor is TOKI, it is not subject to this rule on converting the pledged property to cash first.

There are such exceptions in laws; this is what we call privilege. However, there must always be a legitimate goal behind them. For example, when a person goes bankrupt, all of their properties are liquidated, and the money obtained is distributed among the workers so that they receive all of their compensation. But the commercial claimants may only get 10 percent of their due. So, such privileges must have an explanation. It is not easy to find an explanation in the case of TOKI. There are more privileges provided to TOKI in other articles of the Execution and Bankruptcy Law. In short, there are special regulations for situations where TOKI is the creditor. Such privileges are also given to banks as they provide financing, which is more understandable, but the reason behind granting them to TOKI is not so clear.

Another topic is the tax issue on luxury residences. This is definitely a bad example of conceptualization or made-up terminology.

S.M.:

Something is out of place there. We have a definition for "luxury residence" in zoning regulations. If your home is included in the definition of "luxury residence," you are already subject to some additional fees and taxes. However, there is an attempt to build a "valuable housing tax" on top of this.

A.C.B.:

In this case, a new concept called valuable housing was introduced. As lawyers, we cannot operate without these concepts, but sometimes, as in this example, concepts can be created in a way that cannot be seen as legitimate in terms of legal policy, and sometimes even unconstitutional.

S.M.:

So, about your statement that we disregard property rights, one of the clearest expressions of our repudiation of property rights is in our law about unjust construction. Not only does it find an expression, but this finds definition with a very subjective—one could even say "magical"—concept called "goodwill,"

that justifies the person who seizes someone else's property, rather than the owner of the land.

A.C.B.:

You are right, but I would like to support the Turkish Civil Code to some extent about unjust construction. Unjust construction isn't something we invented; it's a classical institution. It is also due to our inability to understand the Turkish Civil Code—similar to how we do not always understand a drug package insert.

In Turkish, "goodwill" is used in several senses. The meaning here is not to know or not be obliged to know a legal obstacle. So, here it describes being wrong for a justified reason while doing the construction. In the book of the late Kemal Oğuzman, goodwill is described as follows: "The owner of the material should not know and should not be obliged to know that the material was used unfairly by the landowner, and when they do learn about it, they must have tried to prevent this action. If the owner of the material does not object, despite knowing that their material was used unfairly, it cannot be considered good-willed."[2] Now, this is not a situation that we would frequently encounter in buildings constructed in the city, its main use is, for example, someone cutting wood from my private woodland and using it to build in the countryside, and it is necessary to keep these kinds of examples in mind while evaluating "good-willed." Goodwill, defined by the law, is such a concept. The interest protected here is economic. This is also a choice of legal policy. In other words, you cannot say, "you used my property unfairly, now hand over the ownership of the land." It is absolutely not what the law describes.

To go back to your original question about how our laws view real estate, when it comes to assets, we separate them as movable and immovable (real estate). When we say real estate, land comes to mind; and when we say land, the building comes to mind. Movable and immovable—this is the basic distinction in our law. But this has not been the case throughout history. Even the distinction between movables and immovables has lost some of its importance today. It stands before us as a distinction that does not respond to the current need. This distinction was also different in the past. The Romans subjected their assets according to another classification: Res mancipi and res nec mancipi. The land within the Roman lands, slaves, and four-legged livestock were called res mancipi, while everything else was called res nec mancipi. These are the basic concepts of Roman Law, as the economic value of assets has special importance. For example, Roman Law describes how the ownership of these properties will change hands, and there are special provisions on this subject. However, when looking at the acquisition, exchange, and protection of wealth today, the richest people are not those with the largest lands. That is why Roman Law and even current concepts are not enough, because today wealth often travels in the sky. In other words, with the help of capital market instruments, the cash flow expectation of a company turns into stocks, and these can be bought and sold virtually in computer environments. Data regarding all these can also be stored in a "cloud." For this reason, today, we should not view the distinction between movable and immovable assets as they used to be and accept it as a fundamental distinction. Perhaps, just as we don't use Roman concepts today, the generations after us will not use today's distinctions and will make the necessary transformation.

S.M.:

So, you suggest keeping making up new concepts.

A.C.B.:

Exactly.

2 M. Kemal Oğuzman, Seliçi Özer ve Özdemir Saibe Oktay, Eşya Hukuku: Zilyetlik - Tapu Sicili, Taşınmaz ve Taşınır Mülkiyeti, Kat Mülkiyeti, Sınırlı Ayni Haklar (İstanbul: Filiz Kitabevi, 2009).

About the author

Prof. Dr. Ali Cem Budak graduated from the Istanbul University Faculty of Law in 1986. He received M.A., LL.M., and doctorate (summa cum laude) degrees from Istanbul University, University of London, and the University of Bremen in 1990, 1991 and 1997. He currently teaches at the Istanbul Commerce University Law School. He is the editor of *Journal for Civil Procedure and Insolvency*.