Chapter 1
Sources of Turkish Law

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I. INTRODUCTION

The law has evolved and continues to evolve from different sources or beginnings. These include historical and material sources such as religion, morality and old laws. The source of a current legal rule may be found in Roman law, or practices or moral laws applied in bygone ages. But 'sources of law' also refers to the collection of contemporary legal rules, the positive law, on which a judge bases a decision. The line between the different sources is sometimes difficult to draw and the exact content of each source, difficult to fix. After the triumph of the movement for codification in Europe in the last quarter of the eighteenth and in the beginning of the nineteenth century many continental countries codified much of their law, both public and private. On the other hand, in the Anglo-Saxon countries the notion of uncodified law prevailed and is still predominant, and the majority of legal rules are derived from customary principles and judicial precedents. Turkey has followed the continental pattern and with the reception and codification of many European laws, legislation has become the most important source of law. To a lesser extent, customary law and case law or judicial precedents are sources; finally books of authority or doctrine are a subsidiary source of Turkish law.

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Tuğrul Ansay & Don Wallace Jr, *Introduction to Turkish Law*, pp. 1–18.

We will examine custom first; although not as important as legislation, it may give us some insights into the development of law, as other rules have mainly developed from custom.

II. CUSTOMARY LAW (*Örf ve Adet Hukuku*)

A. Custom in Civil Law

In primitive communities customary observances supported by supernatural sanctions played an immensely important role in regulating social life. Fishing, hunting, family relations, even waging of war, were all regulated by customary rules sometimes down to the smallest detail. Custom constituted the generally and strictly observed course of conduct of the society.

With the evolution of primitive societies into modern societies and the development of legislatures, the importance of custom as a source of law has increasingly diminished.[1]

In the modern world, the legislature may, by statute, deprive a customary rule of its legal status making it a subordinate source of law.[2] This is especially true of Turkish law where legislation is consciously designed to change or restrain trends in the community's behaviour. In Turkey some laws are directly set against customs in order to develop and westernize the country according to European patterns.

For a custom to have legal validity in the Turkish system the following requirements must be satisfied.

1. Antiquity

As a rule, a custom must have existed for a long time and no living person should know the beginning of it. This principle was stated in Article 166 of the *Mecelle*, the collection of Islamic laws which was applied in Turkey between 1876 and 1925. However, it seems reasonable to make an exception for customs more recently established as a result of new inventions or patterns of trade. Thus, for example, it may not be possible to meet the condition of antiquity for a custom related to transactions concerning air navigation.

2. Continuity

A custom must be continuously observed. If it is abandoned or its practice is interrupted in favour of another custom, the requirement of continuity is not realized. Article 41 of the *Mecelle* clearly stated that there must be continuity for a custom to be valid. So too, a law of Süleyman the Magnificent asserted that in a certain district a custom with respect to cattle breeding which had been continuously

1. W.D. Smith, *Handbook of Elementary Law* (St Paul, MI, 1939), 5.
2. H.L.A. Hart, *The Concept of Law* (Oxford, 1961), 44.

observed should be considered binding and valid. Similarly, in laws passed during the fifteenth and sixteenth centuries in Turkey customary principles were clearly stated to be enforceable if continuously observed.[3] The condition of continuity is the material and objective factor applied to prove the validity of customary observance.

3. Popular Belief in the Rightness of a Custom

Custom must consciously or unconsciously be considered right by the members of the society. Roman jurists called this spiritual and subjective condition *opinio necessitatis* or *opinio juris*.[4] There should be a belief among the members of society about the rightness and binding force of a custom. If a custom is maintained only by force, it cannot be considered as valid. Therefore, a certain mode of conduct which is not voluntarily observed by the members of society but forced upon them by an external or internal power is not to be deemed as a custom.

4. State Sanction

Until the courts apply customs, giving them the sanction of state authority, they are not law. A customary rule receives legal recognition when it is enforced by court order, unlike a statute which is law even before it is enforced by a court.

Current Turkish statutes clearly state when customary rules are to be used by the courts. If no clear reference is made by statutory law, judges refrain from resorting to customary rules. In the first Article of the Turkish Civil Code the scope of the application of customary rules is stated:

> The law must be applied in all cases which come within the letter or spirit of any of its provisions. Where no provisions are applicable, the judge should decide according to existing customary law and in default thereof, according to the rules which he would lay down if he had himself to act as legislator. In this he must be guided by approved legal doctrine and case law.

Thus in cases under the Civil Code or the Code of Obligations, judges are allowed to apply customary principles when the statutes are silent. Examples of this are found in Article 686 of the Civil Code which states that the term 'non-essential parts' of a property is to be understood according to the local customary practice, and in the second paragraph of Article 270 of the Turkish Code of Obligations where it is provided that agricultural produce is to be divided between the tenant and landlord according to local customs.

It should be noted that judges will usually consult experts to ascertain the content of customary rules.

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3. In the Law of Bozok, Arts 9 and 10 express the application of custom even in criminal matters. Ömer Lütfi Barkan, *XV ve XVI. Asırlarda Osmanlı İmparatorluğu'nda Zirai Ekonominin Hukuki ve Mali Esasları* (İstanbul, 1943), 125.
4. N. Bilge, *Hukuk Başlangıcı* (Ankara, 2003), 33.

5. Agreement with Statutory Law

A custom contrary to statutory law will not be legally valid. It is axiomatic that statutory law is superior to custom and that judges are bound by statutes passed by the legislature, so long as they do not violate the Constitution. This is true even though the statute is not properly or regularly applied by courts. Thus when polygamy was abolished by law in Turkey, the religious custom justifying polygamy became null and void, although it may still have been followed by some at the time. Customs opposed to written law can never be considered as legally valid though some continue to be observed in the society.

B. The Function of Customary Rules in Other Branches of the Law

1. Criminal Rule

The principle of *nullum crimen nulla poena sine lege* (there is neither crime nor punishment without law) is stated both in the Turkish Constitution (Article 38) and the Turkish Penal Code (Article 2). Crimes and punishments cannot be established by customary law. The principle of written law for crimes and punishments is respected in Turkey as in other democratic countries as a safeguard of personal liberties. It is only in the field of criminal law that judges are not allowed to apply customary principles even when there is no provision in the code applicable to the case. This is done to guarantee personal freedom against arbitrary action by the judiciary and executive.

2. Commercial Law

Customs and usages relating to commerce are considered superior to the non-commercial provisions of the Turkish Civil Code and the Code of Obligations which might otherwise be applicable in the absence of an express provision in the Commercial Code (Article 1 II). A commercial custom, however, cannot alter the obligatory rules of the Commercial Code.

To be applied, a commercial custom or usage must be proven to be 'notorious', that is to say widely known. This is essential, so that it can be reasonably believed that both parties contracted in the light of the usage. A clearly and notoriously established commercial custom may be accepted as law even though it is not very old.

A custom will not be enforced if it tends to nullify or vary the express terms of a contract.[5]

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5. Under Art. 2 of the Commercial Code usages may be used to interpret the intentions of parties to a contract only where the contract is not explicit on a point. Commercial usages prevail over non-commercial usages. Local usages have priority over general usages. Usages are collected by the Chambers of Commerce and Industry.

3. International Law

Custom plays a more considerable role in public international law than in other branches of law. However, it is difficult to determine whether an international custom is or will actually be accepted as law or merely considered as part of the *comitas gentium*. The question as to which customs are law in the sphere of public international law may be established by decisions of international courts and by international treaties.

III. LEGISLATION

A. In General

In order to regulate the life of a society, general and legal rules are set down in written form by the highest legislative authority of a country. The Constitution designates such highest legislative authority and possibly authorities subordinate to the highest authority may also lay down subordinate written rules.

Acts of legislation are generally called a code, law or statute and are enacted to give a satisfactory answer, by means of a general rule, to the needs and requirements of society.

B. Legislation in the Turkish Legal System[6]

The Turkish Constitution provides that the Grand National Assembly has sole authority to enact laws for application throughout Turkey. Article 7 of the Turkish Constitution states that 'legislative power is vested in the Turkish Grand National Assembly. This power shall not be delegated.' The Grand National Assembly can only delegate the power of legislation to the Council of Ministers under certain terms.

C. The Main Characteristics of Legislation

Legislation permits both making new laws and abrogating old ones and is an essential instrument for the regulation of modern social life and the carrying out of reforms. It should be remembered that the reforms of *Atatürk* were introduced and realized through legislation. Ideally, legislation is passed only after extensive consideration and examination by experts and long parliamentary debate and therefore should be superior in quality to unwritten customary rules.

Legislation usually consists of rules of general application to many situations and cases and may be easily referred to. Being explicit and general, legislation can

6. For details *see* Ch. 2, III.

in theory be more easily understood than customary law even by laymen, justifying the proper enforcement of the principle that 'ignorance of penal laws is no excuse' (*Kanunu bilmemek mazeret sayılmaz, ignorantia legis neminem excusat*, Article 4 of the Penal Code).

D. The Hierarchy of Enacted or Written Laws

Written laws or rules may be classified into six categories of descending authority and importance. These categories, and some of their characteristics, are as follows.

1. The Constitution (*Anayasa*)[7]

In the hierarchy of enacted laws the Constitution occupies the first place. The Constitution is a kind of code defining the form and ideology of the state, the principle organs of government, the rights and duties of the individual and of the state to the individual citizen and of the legal relationship between the individual and the state. It contains the most general and abstract legal rules of the country. As it is the supreme law of the country, no law can be contrary to it.

The supremacy of the Constitution is expressed clearly in Article 11 of the Turkish Constitution which states that 'laws shall not be in conflict with the Constitution. The provisions of the Constitution shall be fundamental legal principles binding the legislative, executive and judicial organs, administrative authorities and individuals.' The Turkish Constitution of 1961 introduced the judicial control of legislative acts under the Constitution and a special Constitutional Court has been created to perform this function. The same principle was included in the Constitution of 1982 (Articles 146–153).

2. Codes and Statutes (*Kanunlar*)

Different codes and statutes, many of which are the subject of extensive discussion in this book, have different scopes and applications. The Civil Code and the Penal Code are applied in all parts of Turkey and all Turkish citizens and residents are subject to them. On the other hand, the labour law is drafted to regulate the economic relations of only certain classes of people, namely employers and employees. In a rare case, a law may apply only to a certain citizen. The surname *Atatürk* was given to the first president of Turkey by a special act of Parliament. Similarly, laws passed after an earthquake or other disasters to relieve the stricken population are exceptional, as they do not exhibit the main characteristics of written laws, namely generality and abstractness.

A law is applied until it is abrogated or changed by a new law. But there are some laws which are applied for a certain period of time. For example, budget laws are valid only for one year (Constitution (Cons.), Article 161).

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7. *See* Ch. 2 on the Constitutional Law.

3. International Treaties (*Milletlerarası Andlaşmalar*)

International treaties to which Turkey is a party are approved by the Turkish Grand National Assembly by enactment of a law. Technically, therefore, treaties are statutes, which like all other statutes become enforceable after their publication in the *Official Gazette* (*Resmi Gazete*). However, the constitutionality of treaties, unlike other statutes, may not be challenged. This is so that the other parties to the treaties may rely on their validity once they are passed into law (Cons., Article 90, paragraph 5).

Some treaties become binding without the official approval of the Turkish Parliament. According to the Turkish Constitution, 'treaties which regulate economic, commercial, and technical relations and which are not effective for a period longer than one year, may be put into effect through promulgation in the *Official Gazette* provided they do not entail a financial commitment of the state and provided they do not infringe upon the status of individuals or upon the right of ownership of Turkish citizens in foreign lands.' But such treaties are to be brought to the attention of the Turkish Parliament within two months following their promulgation. Similarly, economic, commercial and technical treaties concluded pursuant to the authority of parliamentary acts are not subject to the approval of the Grand National Assembly. However, such commercial and economic treaties or treaties affecting the rights of individuals shall not be put into effect unless promulgated.

International treaties ratified in the form of an enactment by the Grand National Assembly enjoy all the qualities of a law. In cases where a contradiction arises between a provision of an existing statute and a statute ratifying an international treaty the judge shall solve the conflict according to the general principles of law. In such cases the subsequently issued statute will prevail over the earlier one and a particular rule will prevail over the general rule, the assumed intention of the Grand National Assembly being taken into consideration. Exceptionally, under a new amendment brought to the Constitution, those treaties involving basic rights and freedoms shall prevail against internal statutes (Cons., Article 90, as it is amended on 7 May 2004). According to this amendment, 'In the case of a conflict between international agreements in the area of fundamental rights and freedoms duly put into effect and the domestic laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.'

4. Statutory Decrees (*Kanun Hükmünde Kararnameler*)

The Turkish Grand National Assembly can authorize the Council of Ministers, by special statute, to issue statutory decrees (decrees having the effect of law) on certain topics. In these special statutes the scope, principles and duration of the power to issue statutory decrees are clearly stated. Statutory decrees become enforceable on the day of their publication in the *Official Gazette*, and they are submitted for review and approval of the Grand National Assembly on the day of

their publication.[8] The Council of Ministers cannot issue statutory decrees concerning the fundamental liberties and political rights of individuals. The Constitutional Court is empowered to exercise judicial control over the constitutionality of statutory decrees, just as it is authorized to consider the constitutionality of the other statutes.[9] However, in cases of emergency and martial law, the Council of Ministers meeting under the chairmanship of the President of the Republic has the power to issue statutory decrees (Cons., Article 91). The constitutionality of statutory decrees issued in cases of emergency and martial law cannot be controlled and annulled by the Constitutional Court. However, these statutory decrees should be submitted to the Grand National Assembly on the day of their publication for approval.

5. Regulations (*Tüzükler = Nizamnameler*)[10]

Regulations governing the mode of enforcement of statutes, provided that they do not conflict with existing legislation, may be issued by the Council of Ministers. According to the Turkish Constitution, such regulations must have been examined by the Council of State,[11] signed by the President of the Republic, and promulgated in the same manner as statutes.[12]

Every valid regulation is dependent upon a statute. Since they are issued to govern the enforcement and application of statutes, they can only be issued if there is a clear reference in the statute to the promulgation of regulations.

Regulations cannot contain provisions contrary to statutes. In the hierarchy of laws, therefore, regulations come after statutes and contain more concrete and specific rules than statutes.[13]

Regulations containing provisions contrary to statutes will not be enforced by the courts. A suit of annulment against such regulations may be brought before the Council of State.[14] If the meaning of a regulation or one of its articles is not clear, it is to be interpreted by the courts or administrative authorities.

6. By-Laws (*Yönetmelikler = Talimatnameler*)

Article 124 of the Turkish Constitution provides that 'the Prime Ministry, the ministries and public corporate bodies may issue by-laws with the purpose of ensuring the enforcement of statutes and regulations related to their particular fields of operation and in conformity with such statutes and regulations.

8. Constitutional Law, Art. 91.
9. Constitutional Law, Art. 148.
10. *See* Ch. 3 on the Administrative Law.
11. *See* the Law of the Council of State, No. 2575 dated 20 Jan. 1982.
12. Published in the *Official Gazette* (Constitution (hereafter: Cons.), Art. 115). *See also* Ch. 3 on the Administrative Law.
13. Some examples of regulations: Commercial Registry Regulation (*Ticaret Sicili Nizamnamesi*), Land Registry Regulation (*Tapu Sicili Nizamnamesi*).
14. *See* the Law of Council of State, Law No. 2575, dated 20 Jan. 1982, Art. 24.

By-laws indicated by the special law shall be published in the *Official Gazette*' (*see* Law No. 3011, dated 1 June 1984).

The Prime Ministry, ministries, and other public organizations such as universities and municipalities may issue by-laws in conformity with statutes and regulations, in order to regulate their internal business or their relations with individuals. However, if this is provided for by statute, a by-law may be issued by the Council of Ministers.[15] By-laws may not contain provisions contrary to statutes or regulations.

If a by-law is issued by a ministry and applied throughout the country, the Council of State is empowered to declare it or any of its provisions null and void if it is contrary to a statute or regulation. By-laws issued by other corporate bodies not applied throughout the country might be invalidated by lower administrative courts.[16]

E. Codes in Turkey

After the proclamation of the Edict of Reorganization of 1839 (*Tanzimat Fermanı*), Ottoman rulers aimed at renewing the social and the political structure of Turkey along western lines, and some European codes of law were adopted. In 1856 another Edict confirmed the principles of the Edict of 1839. The reforms introduced after 1839 were not radical in nature and old institutions were preserved while new ones were introduced. In the period between 1839 and 1923, though some modern western statutes were adopted from Europe, the old Islamic laws and institutions were also maintained.[17]

After the establishment of the Turkish Republic in 1923, radical reforms were introduced in legal matters as in other spheres of social life. The adoption of the Swiss Civil Code of 1907 and Code of Obligations of 1911 in 1926 with minor alterations, which contain the law of persons, family law, succession, property, contracts, torts and unjust enrichment, represented a profound change in the social life of Turkey. The Swiss lawyer and scholar Sauser Hall, referring to the adoption of the Swiss Civil Code by Turkey says that 'such a radical and rapid change is unknown to history'.[18] Meanwhile the Turkish Civil Code has been changed as of 1 January 2002. However, the fundamental principles of the previous Code have been retained.

The Turkish Code of Execution and Bankruptcy was adopted in 1929, based on the Swiss Federal Code of 1889. It was replaced in 1965 by a new Code to satisfy the changing requirements of Turkish economic and commercial life.[19]

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15. The Law of State Personnel, No. 657, dated 23 Jul. 1965.
16. *See* the Law of Council of State, Art. 24.
17. For the history of this period *see* Okandan, *Amme Hukukumuzun Ana Hatları*, Kitap I (İstanbul, 1957) and Ch. 2 on the Constitutional Law.
18. In Bilge, *Hukuk Başlangıcı* (Ankara, 2003), 93.
19. 4 May 1929, Law No. 1424; subsequently Law of 9 Jun. 1932, Law No. 2004 as amended on 6 Mar. 1965. The Code of Civil Procedure of 5 Oct. 1927 is taken from the law of the Swiss

Not only in the field of private law but also in the sphere of public law, western codes were received. The Penal Code was adopted in 1926,[20] based on the Italian Criminal Code of 1889. Though it has been modified several times to adapt it to the conditions of the country, its essence has been preserved. Codes of administrative law were mainly adopted from France as a result of the strong French influence on the administrative system of Turkey which began just after the reform of 1839.[21]

F. The Problem of Interpretation

1. In General

Statutes are usually framed in more or less general terms, and in order to apply these general terms to particular cases interpretation becomes necessary. Not only the famous Byzantine Emperor Justinian, but also the framers of the Prussian and Napoleonic Codes attempted to take away this power of interpretation from the judiciary. But these efforts and similar ones all failed because interpretation is unavoidable whenever a written formula has to be applied to a particular case.

When interpreting the meaning of a legal rule, first the judge has to discover the true facts of the case before him and second he has to find out what the legislator intended him to do under the existing circumstances.

Before we examine the methods of interpretation it should be noted that interpretation of laws by the legislature is forbidden by the Turkish Constitutions of 1961 and 1982. The retroactive interpretation of laws by the Parliament was practised and sometimes abused between 1924 and 1961. Today only judicial and administrative organs are allowed to interpret laws.

2. Methods of Interpretation

a. Grammatical Interpretation

In this method of interpretation the judge is bound by the very words of the provisions which he interprets. In interpreting any provision, if the grammatical meaning of the words is clear, the judge is bound to give effect to them and he cannot look further. Whether the provision is ethically unsound or unreasonable is immaterial; he has to construe and apply it word by word. This method gives expression to the formula 'the statute speaks for itself'.

Canton Neuchatel (*see below* Ch. 11, Part 2 on the Law of Procedure). The Commercial Code of 1 Jan. 1957 contains many provisions which are partly taken from German and Swiss law.

20. Law of 9 Mar. 1926 (*see* Ch. 10 on the Criminal Law). The Turkish Code of Criminal Procedure of 4 Apr. 1929 was taken from German law (*see below* Ch. 11, Part 3 on the Law of Procedure).
21. *See below* Ch. 3 on the Administrative Law.

b. *Logical Interpretation*

Here the judge goes a step further in interpreting the law. In construing a statute obvious grammatical and verbal errors are to be corrected. Similarly, if a provision of the law is incomplete the gap is to be filled by way of logical interpretation. Moreover, the judge has to take into consideration the spirit of the code when interpreting the meaning of a particular article.

If grammatical interpretation points to ambiguous language the statute will be evaluated by the method of logical interpretation.

If there is an inconsistency between two articles of a code, both applicable to the same case, the judge will again determine which provision is to be applied to the case by the method of logical interpretation.

In some cases there may not be any provision of customary rule directly applicable to the question in hand. In this case the judge will decide by using the methods of *analogy* and *argument*, a contrario based on the logic of the legal system. However, both analogy and argument, a contrario, are to be used only in exceptional situations. As a matter of principle, both in criminal law and tax law logical interpretation is permissible only when favourable to the accused or tax payer.

c. *Historical Interpretation*

This method of interpretation essentially seeks to discover the intention of the legislator when the words of the statute do not reveal it by the methods discussed in *a* and *b* above. The judge takes into consideration all the circumstances surrounding the passing of a statute. Drafts of the code, work of parliamentary commissions, parliamentary debates, covering memorandums, are all examined to discover the real intention of the law-maker. This method of interpretation gives a high value to the conscious intentions of the law-makers. However, laws are usually passed by a crowded Parliament. Therefore it is often quite difficult to understand what the real intention of the law-maker was. Moreover, it should be borne in mind that parliamentary documents and proceedings concerning a code relate to the past and indicate circumstances prevailing in the past. But as law is made for the future and its innumerable and unpredictable cases, the knowledge gained from the past may be misleading. For construing recent legislation the historical method of interpretation may prove useful. However, as time passes, it becomes less useful to apply the statute in the light of the intent of the original legislator without reference to new needs and conditions.

d. *Teleological Interpretation*

This method of interpretation aims at extending the application of statutes to situations beyond the scope of legislative intent. This method is the opposite of the historical interpretation. In historical interpretation a statute is construed according to its original purpose. Teleological interpretation, on the other hand,

implies the construing of a statute only in view of its present purpose. When the judge applies this method, he considers the realities of social life and interpretation as a creative activity. Of course the judge may benefit from the notions of justice, social justice and social utility in this difficult task. The French Civil Code dated 1804, which is still applied, owes its vitality to the unending efforts of the French judges who have mainly preferred the method of teleological interpretation.

G. Retroactivity of Laws (*Kanunların Geçmişe Yürümesi*)

In the Turkish legal system, as in other legal systems, the non-retroactivity of laws is accepted as a general principle. If a statute can change rules applicable to past events, the confidence of the citizen in law can be shaken, as no one can know the content of laws which will be passed in the future. The principle of non-retroactivity is a safeguard of democracy and personal freedom against the arbitrary interference of the state. In the past, *ex post facto* laws were condemned both by the Greeks and Romans. The *corpus juris civilis* strongly rejected the retroactive application of laws. Later, retroactive legislation was forbidden by the Declaration of Human Rights and by Constitutions put into force in the eighteenth century.

In the Turkish Constitution the non-retroactivity of criminal codes is clearly expressed. Article 38 says that 'no person shall be punishable for an act which is not considered an offence under the law in force at the time the act was committed.' The same principle is also stated in Article 7 of the Turkish Penal Code.[22] Moreover, in the Statute Regulating the Application of the Turkish Civil Code the non-retroactivity of the Civil Code is also stressed. A similar provision was introduced in the first Article of the Statute Concerning the Application of the Turkish Commercial Code of 1957.

However, the non-retroactivity of laws is not an absolute principle applicable to all cases. Certain types of retroactive laws are favoured, or at least tolerated, by the Turkish system of law. Thus, the principle of non-retroactivity is usually not applied to laws of a procedural character, whether civil or criminal, in the belief that the subsequent procedural rules will govern the case better than the previous rules.

H. Enforcement of Statutes

Statutes are published in the *Official Gazette*[23] after their promulgation by the President of the Republic. Usually the effective date of a statute is specified in

22. 'If the provisions of the law in force at the time of the commission of a felony or misdemeanour differ from the provisions of a law enacted after its commission, the law in favour of the accused shall be applied and executed.'

23. The *Official Gazette* (*Resmi Gazete*) which is published in Ankara daily, except on holidays, includes not only the statutes, but also regulations, by-laws, decrees, some decisions of the courts and official announcements. The official texts of statutes may also be found in a

the statute itself, by some phrases such as 'this statute becomes effective on the date of its publication in the *Official Gazette*', or 'this statute becomes effective six months after its publication date'. A special law has been passed to solve problems concerning the publication and effectiveness of statutes where the statute in question is not clear. According to this law,[24] if there is no provision in the statute itself governing the date of validity, it becomes effective forty-five days after its publication in the *Official Gazette*.

Generally, Turkish statutes are applied within the frontiers of Turkey to every individual, Turk or foreigner. This principle is not absolute; in some cases, foreign laws may be applied to foreigners living in Turkey. For example, in an action of divorce between a German wife and German husband living in Turkey, German law will be applied to them if they accept the jurisdiction of Turkish courts. To cases concerning personality and family matters of foreigners their national laws are applied, provided that these laws are not contrary to Turkish public order and morals. Similarly foreigners living in Turkey are not allowed to vote in political elections in Turkey. On the other hand, Turkish statutes may be applied to some cases which take place in foreign lands. Certain crimes are tried and punished in Turkey even if they are committed in foreign lands and might be tried by the foreign court. Many of these problems are the subject of that branch of the law called private international law, or the rules of conflicts of law, which is beyond the scope of this book.

I. Repeal of Statutes

It is not always easy to determine when a statute is annulled. Generally a new law contains an article nullifying the previous law on the subject. For example, in the Statute Concerning the Application of the Civil Code of 1926, in Article 43, it was clearly stated that the '*Mecelle* has been repealed'. In this case one law has explicitly been annulled by another law. But in some other cases such a clear reference to a previous law may not be found. Instead, a general provision may state that 'articles of other statutes contrary to this statute are repealed'. In this case the judge has to decide which articles of the previous statutes are annulled by the new statute. In some cases no article can be found in the new statute nullifying a previous statute.

In relating different statutes, inconsistencies should be settled by the judge according to certain general principles of law. Thus, if there is a contradiction between the articles of two laws of equal rank (e.g., both statutes) the latter will prevail over the former. In some cases there may be a conflict between the provisions of a general code and a particular code. In that case, the judge will assume that an earlier general rule is replaced by the more recent particular rule. If there is a

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publication called *Düstur*, published by the Prime Ministry, which is issued annually. The statutes may be found under <http://rega.basbakanlik.gov.tr>.

24. Law No. 1322, dated 28 May 1928.

conflict between a prior particular rule and a later general rule the conflict is to be resolved by the judge according to the 'assumed intention of the legislature'.

IV. COURT DECISIONS

A. General Considerations

In most countries the decisions of superior courts are treated with respect by inferior courts which will follow them when they are called upon to decide similar cases. The question arises whether such decisions can be considered precedents, that is, 'a judgment or decision of a court of law cited as authority for deciding a similar set of facts'.[25]

In determining uncertain points of law judges will necessarily tend to decide in accordance with the pattern of previously decided cases. The reasons for this development are several. From the psychological point of view anyone who is going to decide a dispute likes to justify his decision by referring to a past decision. Moreover it is highly desirable that court decisions should be uniform. If there is no uniformity among court decisions, the principal aim of justice to promote security in society may not be realized. Contrarily, if the decisions of courts in similar cases are similar, the faith of the people in the system of justice is maintained.

Contrary to the Anglo-American legal system,[26] in Continental countries judicial precedents are not in theory regarded as a source of law, due to the view that the legislature is the sole source of new law, and the only law-maker as such. According to this prevailing point of view, although prior decisions may assist a judge in arriving at a conclusion, they are not binding upon him and he must decide a case as he himself thinks right. Notwithstanding this theory, in practice it is generally accepted on the Continent that to secure certainty and uniformity, as suggested above, among court decisions the previous decisions of superior courts, especially of a country's supreme court, are to be as binding as statutory law.

B. Precedents in Turkey

Turkish courts are bound to make their decisions in conformity with the statutory law, the function of the judiciary being to interpret and apply the law.

Where no statutory rule fits a civil law case before him, a Turkish judge is also authorized to decide according to customary law as discussed above. If there is no applicable customary rule, then the Turkish judge should act as a law-maker and

25. James S. Philip, *Introduction to English Law* (London, 1955), 10.
26. The role of judicial decisions and precedents in Anglo-American law is discussed in the following works: Dias and Hughes, *Jurisprudence* (London, 1957), 52 ff.; A. Ross, *On Law and Justice* (London, 1958), 84 ff.; W.D. Smith, *Handbook of Elementary Law* (St Paul, Minn., 1939), 87 ff.

lay down a new rule within the framework of the general principles of law, benefiting from precedent and doctrine, i.e., books of authority. By authorizing the judge to act as law-maker in these exceptional cases the first Article of the Turkish Civil Code has set down an important and revolutionary principle.

In Turkey certain precedents are followed. Thus the decisions of the Constitutional Court, which are officially published, are binding (Cons., Article 153). Inferior civil and criminal courts are bound by some decisions of the Court of Cassation and the Court of Cassation in turn is bound by some of its own decisions. Similarly in administrative cases the decisions of the Council of State are also authoritative and binding for inferior administrative courts, including the Court of Accounts. Binding and authoritative decisions of the higher courts, i.e., the Court of Cassation, the Council of State, the Military Court of Cassation and the High Military Administrative Court[27] are as binding and authoritative on the courts and agencies within their jurisdictions as the rules of a statute.

Therefore, by interpreting and applying the law, superior courts enjoy the privilege of laying down rules as effective as the rules of a statute.

C. Court of Cassation (*Yargıtay, Temyiz Mahkemesi*)[28]

Not all decisions of the Court of Cassation enjoy the prestige and authority of precedent. As a principle the decisions of the General Assembly of all chambers of the Court of Cassation are binding. If there is a contradiction between the decisions of a chamber of the Court of Cassation or between two chambers or if it is necessary to alter established precedent, the General Assembly on the Unification of Judgments makes a unifying decision (*İçtihadı Birleştirme Kurulu Kararı*) which binds all other courts and the Court of Cassation itself.[29] The other decisions of the Court of Cassation, including the decisions made by the Assembly of Civil or Criminal Chambers are not made legally binding upon the inferior courts. However, though these decisions are not considered legally binding, inferior courts generally pay attention to them. This is partly due to the fact that judges of inferior courts respect decisions made by the Court of Cassation. Besides, the decisions of the judges of the inferior courts are evaluated by the Court of Cassation in considering their professional advancement. The decisions of the Court of Cassation are regularly published by the Directory of Publications of the Court of Cassation and by some private institutions.

In conclusion, it should be borne in mind that, notwithstanding all these practical developments, in Turkey there has never been an important body of judge-made law as exists in the Anglo-American countries.

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27. *See* paras D, E and F below. On the Constitutional Court *see* Ch. 2, para. V B on the Constitutional Law.
28. On the structure of the Court of Cassation *see below* Ch. 11, Part 2, IV on the Law of Procedure.
29. Law of the Court of Cassation, No. 2797, dated 8 Feb. 1983, Arts 15, 16 and 45.

D. The Council of State (*Danıştay, Devlet Şurası*)[30]

The Council of State settles administrative conflicts, expresses opinions on draft laws submitted by the Council of Ministers, examines draft regulations and concession contracts, acts as the court of appeal in administrative cases and discharges other duties prescribed by the law.

Three-fourths of its members are elected by the High Council of Judges and Public Prosecutors, one-fourth of its members are appointed by the President of the Republic.

The Council of State is composed of twelve chambers, ten of which function as judicial chambers and two of which function as administrative chambers. The duties of the administrative chambers are to express opinions on draft laws, to examine draft regulations and concession contracts, and to give opinions on other matters referred to them by the office of the Prime Minister.

The judicial function of the Administrative Council of State is extremely important both as a safeguard of the individual against the interference of the state and as an arbiter between the state and the individual. Thus Article 125 of the Constitution states that no act or procedure of the administration shall be immune from the review of law-enforcing courts. However, judicial power cannot be used to limit the exercise of administrative (executive) power in accordance with laws. No judicial decision can replace an administrative act or procedure. In court actions instituted as a result of administrative acts, the statute of limitations shall start from the date of written notification. The administration is liable for the damages resulting from its acts and operations.

Unifying decisions made by the General Assembly on the Unification of Judgments bind all inferior administrative courts and the Council of State itself. When there is a conflict between the decisions of different judicial chambers or different decisions of the General Assembly of Judicial Chambers, the First President of the Council of State, concerned judicial chambers, or the Chief Prosecutor of the Council of State may require the General Assembly on the Unification of Judgments to make a unifying decision.[31]

The High Military Administrative Court (*Askeri Yüksek İdare Mahkemesi*), established in 1972, is authorized to exercise judicial control over the acts and procedures of the administration related to military personnel. A special law has been passed by the Grand National Assembly establishing the composition and the rights and duties of this court. It is the final decision-making body in administrative cases concerning military personnel and its decisions cannot be examined or reversed by either the Council of State or the Military Court of Cassation.

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30. Law of the Council of State, No. 2575, dated 20 Jan. 1982. *See* Ch. 3 on the Administrative Law.
31. *See* Law of the Council of State, Arts 39 and 40.

E. The Court of Accounts (*Sayıştay*)

This Court is in charge of auditing on behalf of the Turkish Grand National Assembly the revenues, expenditures and property of the government and its agencies, deriving from general and annexed budgets (Cons., Article 160). The Court of Accounts also makes decisions regarding the accounts and operations of responsible government officials. The decisions of the Court can be either decisions of a chamber, decisions of the General Assembly of the Chambers, or decisions of the General Assembly of Appeal. If there is a conflict between the decisions of the Council of State and the Court of Accounts, the decisions of the Council of State are considered superior (Cons., Article 160 II).

F. The Military Court of Cassation (*Askeri Yargıtay*)

The Military Court of Cassation (Cons., Article 156) is the court of last instance in military cases. It is composed of five chambers; each has a chairman and seven members. In addition to the five chambers there is a first President, a second President and a Military Chief Public Prosecutor. The members are selected by the President of the Republic from among candidates nominated by the General Assembly of the Military Court of Cassation.

All decisions made by the General Assembly on the Unification of Judgments and the General Assembly of the Chambers bind all inferior military courts and the Military Court of Cassation itself.

G. Court of Conflicts (*Uyuşmazlık Mahkemesi*)

The Court of Conflicts is empowered to deliver final judgments on disputes between courts of justice and administrative and military courts concerning their jurisdiction and decisions.

The organization of the Court of Conflicts, the qualification of its members and the procedure for their election and its functioning is regulated by statute. The office of president of this Court shall be held by a member assigned by the Constitutional Court from among its own members.

V. DOCTRINE (Books of Authority)

The task of the legal writer, or jurist, is to discover by logical analysis the several possible interpretations of laws and to indicate their practical consequences. However, it should be remembered that the function of the jurist is not only to construe the existing positive law, but also to make recommendations about changes in and additions to the existing law which ought to be enacted in the future. Along with the dynamic evolution of the community its ideological basis

also changes. This development exercises a strong influence upon the legal system of the community. Jurists not only guide the authorities administering the law that is judges and administrators, but also the legislator.

In accordance with the Roman law tradition on the Continent the writings of legal authors form a source of law. The writings may not be binding on judges, but they are often highly persuasive.

Juristic works are not an independent 'source of law', although in some cases juristic opinion leads to the formation of law. Especially where the positive law is silent, juristic opinion may be resorted to. Though the views of academicians are rarely quoted by the Turkish courts, nevertheless, it may confidently be stated that professional opinion is going to play an increasingly important role in the Turkish legal system.

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